BETWEEN COMPETITION AND COOPERATION

THE BENEFIT CORPORATION AS AN OPPORTUNITY TO RETHINK ANTITRUST APPROACHES TOWARDS COOPERATION AND PUBLIC POLICY BALANCING

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ABSTRACT

What role should companies play in society? Is competition the best governing practice for how companies should interact? Based on the studies of Varieties of Capitalism, these unsolved and long-lasting questions are analysed in relation to the Benefit Corporation phenomenon. With origins in the USA, the Benefit Corporation has now arrived in Europe and might revolutionise both corporate objectives and relationships between enterprises. However, recent developments in European Union competition law might undermine the change. By detailing the role of cooperation and competition in the current economic system, this study proposes some possible transformations in antitrust law, which could foster collaboration among enterprises for the achievement of public benefits.

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INTRODUCTION

> "*The Benefit-Corporation is an experiment, and it is too soon to know how it will fare. My guess is that it will be a big success, because it can inspire loyalty, cooperation and real purpose, which helps to create profits, too*."[1]
>
> [Robert Shiller, 2013 Economics Nobel Prize Winner]

In 2010, Maryland became the first state to adopt Benefit Corporation legislation. By the end of 2016, the majority of US states will have followed the example and the idea is now spreading in Europe as well. Benefit Corporation is a revolution in the corporate law panorama, since it overturns some of its essential principles. Companies that adopt Benefit Corporation model do not operate solely for their profit; they are seen as important actors in society that pursue and achieve public objectives. The phenomenon is also based on the assumption that, in order to achieve the public benefit, cooperation among companies might be preferable to exclusively competition. On the basis of research on Varieties of Capitalism, Chapter 1 tries to highlight a correlation between corporate governance and competition law. Coordinated Market Economies, which opt for a stakeholder model of corporate governance, tend to rely more on coordination than Liberal Market Economies, where companies adopt a shareholder model and operate in a highly competitive context. Recent studies have argued that the shift, undertaken by the European Commission, from an ordoliberal tradition to a Chicago School conception of antitrust, might undermine some of the fundamental characteristics of Coordinated Market Economies. Developing this idea, Chapter 2, after having introduced the concept of social entrepreneurship and explained in details the Benefit Corporation one, tries to illustrate the consequences that the latter might have on society. Subsequently, Chapter 3 criticises the recent transformation that has occurred in European Union competition law, as an obstacle to the diffusion of Benefit Corporations and mainly in the achievement of the public benefits. Finally, in order to foster a more social role of enterprises, and to benefit from the positive outcomes of cooperation, the research proposes some changes that might be carried out within the boundaries of the existing law, and others that require a legislative process.

[1] Robert J Shiller, 'Donors Give More When They Have a Sense of Belonging' *New York Times* (New York, 5 July 2014) <http://www.nytimes.com/2014/07/06/upshot/donors-give-more-when-they-have-a-sense-of-belonging.html> accessed 30 June 2016.

CHAPTER 1 – CORPORATE GOVERNANCE AND COMPETITION LAW IN A VARIETIES OF CAPITALISM APPROACH

1.1 - OVERVIEW OF VARIETIES OF CAPITALISM

The theory of Varieties of Capitalism (VoC), developed by the political economists Peter A. Hall and David Soskice, tries to explain how capitalism has developed differently in various states.[2] The theory proposes a framework to analyse how companies, crucial actors in capitalistic economies, solve their coordination problems.

By analysing companies' conduct in various fields, called spheres (for instance the financial sector, corporate governance, vocational training and inter-firm relations), the VoC research has individualised two main groups of countries with similar features.

On one side of the spectrum there are Liberal Market Economies (LME), in which undertakings "coordinate their activities primarily via hierarchies and competitive market arrangements."[3] These are for instance the US, taken as a model of LME, the UK, Canada, Australia, New Zealand and Ireland. Generally, in these countries, companies operate in a context of competition, on the basis of formal contracts and arm's length relationships.[4]

On the other side of the spectrum, the study situates Coordinated Market Economies (CME) that rely mainly on non-market relationships in a more collaborative than competitive environment. Countries such as Germany, taken as the model of CME, Austria, Belgium, Denmark, Netherlands, Norway, Sweden and Switzerland usually fall in this category.[5]

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[2] Peter A Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (OUP Oxford 2001).

[3] ibid 8.

[4] ibid.

[5] Michel Albert, *Capitalism vs. Capitalism* (Four Walls Eight Windows 1993), 18.

It is important to bear in mind that the framework stereotypes two extremes. Many countries do not satisfy either all the conditions of one model or of the other. Even among the countries, which are deemed to be part of one of the two categories, there are important differences. Other states, such as France, Italy, Spain, Portugal and Greece, are considered sort of "hybrid countries" with a history of considerable state intervention in the economy, an important agricultural sector and some features of CME (for instance, corporate finance or inter-firm relations) and others of LME (as labour relations or corporate governance).[6]

This study is focused exclusively on the corporate governance aspect and the inter-firm relations (namely competition law). Section 1.2 analyses the dissimilarities between the shareholder and stakeholder model of corporate governance. Section 1.3 firstly explains the ordoliberal theory, secondly the Chicago School one and finally shows how the recent developments in EU competition law entails the estrangement from the ordoliberal tradition. In the end, the conclusion tries to highlight a possible correlation between the two concepts (Section 1.4).

1.2 - CORPORATE GOVERNANCE

In this study, corporate governance is intended in its broad meaning; hence it encompasses not only the set of rules and mechanisms employed in order to run a company, but also the relationships between the firm and its stakeholders and its role in society.[7]

The model of corporate governance adopted depends also on the objective that one wants to pursue through the mean of a corporation.[8] For this reason, it is essential to understand and identify firstly the corporate objective. This will not only shape the structure of the corporation itself, but it will be the guidance for directors when

[6] ibid, 21; Mark Thatcher, 'Varieties of Capitalism in an Internationalized World Domestic Institutional Change in European Telecommunications' (2004) 37 Comparative Political Studies 751, 752.

[7] Andrew Keay, 'Ascertaining The Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) 71 The Modern Law Review 663.

[8] ibid, 665.

carrying out their functions.[9] Moreover, it will enable the assessment of their results[10] and, last but not least, it influences the society in which we live.[11]

Thanks to the study of VoC it is possible to identify two different conceptions of corporate governance that entail two diverse types of companies. In LME the shareholder model is dominant, whereas in CME the most common is the stakeholder one.[12]

1.2.1 - SHAREHOLDER MODEL

In LME the shareholder primacy thinking has established itself as the dominant theory for corporate governance after a considerable period of discussion. Taking the USA as an example, the first academic debate dates back to the 1930s, when the Harvard Law Review published a dispute between two leading experts in Corporate Law: Adolph Berle and Merrick Dodd. The former supported the shareholder theory, maintaining that "all powers granted to a corporation or to the management of the corporation [are] at all times exercisable only for the ratable benefit of the shareholders."[13] On the contrary, Dodd thought that the purpose of a company was not only making money for stockowners, but also providing jobs for employees, good products for consumers and contributing to society.[14]

The academic dispute was solved in favour of the shareholder theory during the 1970s with the rise of the Chicago School of free market economists. With the publications of the Nobel Prize winner Milton Friedman,[15] and the studies of Michael Jensen and

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[9] ibid.

[10] ibid.

[11] Michael Jensen, 'Value Maximisation, Stakeholder Theory, and the Corporate Objective Function' (2001) 7 European Financial Management 297.

[12] Carsten Gerner-Beuerle, Philipp Paech and Edmund Philipp Schuster, 'Study on Directors' Duties and Liability', 4-7, <http://ec.europa.eu/internal_market/company/docs/board/2013-study-analysis_en.pdf>.

[13] Adolf A Berle, 'Corporate Powers as Powers in Trust' (1931) 44 Harvard Law Review 1049.

[14] E Merrick Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45 Harvard Law Review 1145; Lynn A Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler Publishers 2012).

[15] Milton Friedman, 'The Social Responsibility of Business Is to Increase Its Profits' *The New York Times Magazine* (New York, 13 September 1970).

William Meckling,[16] the Chicago School backed the stockowner maximisation theory by wrapping it up with attractive economic analysis, able to measure the corporate performance with "scientific rigor."[17]

According to the stockholder model, the objective of a company is to maximise shareholder wealth.[18] This is justified by the fact that shareholders are considered the owners of the company[19] and they are the ones with the greatest stake in the firm.[20] Shareholders have an interest in every decision taken by the firm, since they profit if the company fortune increases, but lose if the company encounters financial difficulties.[21]

The idea of a single and clear objective is supported by other arguments. For instance, a quite influential one argues that a single objective enhances efficiency in three ways. Firstly, since stockholders have the objective to maximize their profits, they will encourage directors to take decisions that enhance economic efficiency.[22] Secondly, the shareowner maximisation principle pushes directors to manage the company at the lowest cost.[23] Thirdly, the single objective allows directors to work more efficiently because they have to focus only on one kind of interest.[24]

Another one supports the single objective of shareholder value on the basis that taking account of all various interests would make impossible to run a company.[25] Linked to

[16] Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305.

[17] Stout (n 14), 18.

[18] Jonathan R Macey, 'Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties, An' (1991) 21 Stetson Law Review 23.

[19] Robert Hessen, 'A New Concept of Corporations: A Contractual and Private Property Model' (1978) 30 Hastings Law Journal 1327, 1330.

[20] Mark E Van der Weide, 'Against Fiduciary Duties to Corporate Stakeholders' (1996) 21 Delaware Journal of Corporate Law 27, 57.

[21] Jonathan R Macey and Geoffrey P Miller, 'Corporate Stakeholders: A Contractual Perspective' (1993) 43 The University of Toronto Law Journal 401, 408.

[22] Keay (n 7), 668.

[23] Van der Weide (n 20), 56-57.

[24] Keay (n 7), 668.

[25] The Committee on Corporate Law, 'Other Constituencies Statutes: Potential for Confusion' (1990) 45 Business Law 2253, 2269.

this argument is the one of legal certainty: the single objective makes easier for Courts to review managerial decisions with a high degree of rationality.[26]

A fourth reasoning maintains that unlike other stakeholders, shareowners are not protected by contract law or regulatory law, and for this reason they are more vulnerable and need more powers to monitor directors' decisions.[27]

Finally, it is asserted that the single objective in the end will benefit society as a whole, since companies, by being more competitive and efficient, will create more wealth, which can be redistributed by other means.[28]

The theory of the objective of a corporation has deep influences on the structure of the company and on its decision-making mechanisms. The fact that shareholders occupy a preferential position in the corporate objective is mirrored by the structure itself. In LME companies usually adopt a single-board system.[29] In many of these countries, companies are obliged to do so, without having the possibility to choose the two-tier system.[30]

The difference between the one-tier and two-tiers system consists in the way in which the company is managed. In the one-tier model, the company is managed by the Board of Directors, composed by directors elected only by shareholders.[31] On the contrary, in the two-tier board, the management of a company is carried out by two different bodies: the Executive Board, which is composed by directors and manages

[26] Van der Weide (n 20), 69.

[27] Luigi Zingales, *Corporate Governance, in the New Palgrave Dictionary of Economics and the Law, P. Newman Ed* (Macmillan, New York, NY 1998), 501; Michael Michael Bradley, Cindy A Schipani, Anant K Sundaram and James P Walsh, 'The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads' (1999) 62 Law and Contemporary Problems 9, 24-29; Anant K Sundaram and Andrew C Inkpen, 'The Corporate Objective Revisited' (2004) 15 Organization Science 350, 355.

[28] Keay (n 7), 668.

[29] Gerner-Beuerle, Paech and Schuster (n 12), 4-7.

[30] ibid.

[31] David Block and Anne-Marie Gerstner, 'One-Tier vs. Two-Tier Board Structure: A Comparison Between the United States and Germany' <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1001&context=fisch_2016> accessed 16 July 2016.

the day-to-day decisions, and the Supervisory Board, generally composed both of stockholders and employees, that takes the most important decisions.[32]

In LME directors enjoys wide powers and have a strong link with shareholders. The latter have the power to remove them, often only with a simple majority.[33] This allows shareowners to closely monitor directors and dismiss them in the case they do not operate in their interest. On the contrary, employees are usually not represented on the board of companies,[34] and consequently they neither participate in the most important decisions nor in the nomination of the directors.[35]

1.2.2 - STAKEHOLDER MODEL

The stakeholder model relies on complete different premises. The objective of a corporation is trying to create "an optimal value for all social actors who might be regarded as parties affected by company decisions."[36] The diverse objective is supported by a different conception of the owners of the firm and the role that stakeholders play in the management of the company.

Firstly, it is argued that not only shareholders have a claim on the property of a company, but also other groups that contribute to its capital.[37] Stakeholders must be seen not as mean to an end, but as the end itself: the company must be run in their interest as well.[38]

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[32] Klaus J Hopt, 'The German Two-Tier Board (Aufsichtsrat): A German View on Corporate Governance'', *Comparative Corporate Governance: Essays and Materials, Walter de Gruyter, Berlin* (de Gruyter 1997).

[33] This is the case for instance of UK, Ireland. See Gerner-Beuerle, Paech and Schuster (n 12), 9.

[34] ibid, 8-12.

[35] Sigurt Vitols, 'Varieties of Corporate Governance: Comparing Germany and the UK' in Peter A Hall and David Soskice (eds), *Varieties of Capitalism: Institutional Foundations of Comparative Advantage* (Cambridge: Cambridge University Press 2001), 343.

[36] Keay (n 7), 674. See also R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman/Ballinger 1984); Max E Clarkson, 'A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance' (1995) 20 Academy of Management Review 92, 112.

[37] Roberta S Karmel, 'Implications of the Stakeholder Model' (1992) 61 The George Washington Law Review 1156, 1171.

[38] Freeman (n 36), 97.

The stakeholder approach refutes the efficiency arguments on the basis that no group has primacy over the others.[39] Each group of stakeholders merits consideration since corporate decisions affect their welfare.[40]

Finally, it is maintained that many stakeholders do not have any contractual protection and, in certain circumstances, they can lack a regulatory one as well.[41] If directors do not take into account their interests, these will be completely sacrificed.

The theoretical framework of a stakeholder approach finds partially[42] application in CME, where companies are usually obliged to adopt a two-tier board.[43] The Supervisory board, which takes the most important decisions, is also composed of employees' representatives.[44] Moreover, only the Supervisory Board can remove directors and, consequently, the vote of employees' representatives is needed too.[45]

1.3 - COMPETITION LAW

Competition among undertakings is recognised as a value of every capitalist society.[46] It is believed that competition tends to benefit society by lowering prices, enhancing innovation and products differentiation.[47] Competition law plays a fundamental role

[39] Thomas Donaldson and Lee E Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications' (1995) 20 Academy of Management Review 65, 66.

[40] Ronald K Mitchell, Bradley R Agle and Donna J Wood, 'Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts' (1997) 22 Academy of Management Review 853, 862.

[41] Freeman (n 36), 89; Keay (n 7), 673.

[42] Partially because, in CME, not every stakeholder enjoys a high level of protection or consideration.

[43] Gerner-Beuerle, Paech and Schuster (n 12), 4-8.

[44] For instance, in Germany, since 1972, in companies with more than 2000 employees, half of the supervisory board is composed of employees' representatives. See Vitols (n 35), 343; Gerner-Beuerle, Paech and Schuster (n 12), 8-12.

[45] Block and Gerstner (n 31), 24.

[46] Richard Whish and David Bailey, *Competition Law* (8 edition, OUP Oxford 2015), 1.

[47] ibid, 4-6.

in balancing the freedom enjoyed by market players with other interests of society, and in determining the permitted degree of coordination among undertakings. [48]

The way in which competition law is enforced and interpreted depends, to a great extent, on the political and philosophical paradigm followed in a specific period of time.[49] The studies on VoC give a framework to understand how competition law has been developed differently in LME and CME.[50] It is generally accepted that two schools of thought have inspired two different kinds of antitrust law and policy, with serious implication on their objective(s), enforcement methods and permitted practices.[51]

1.3.1 - THE ORDOLIBERAL THEORY

To be precise, Ordoliberalism[52] is more than a theory of competition law: "it is a overarching vision of the role that the economy should play in society."[53] The theory has been developed by the economist Walter Eucken and the lawyer Franz Böhm at the University of Freiburg during the 1930s. They shared the view with the classical liberal theory, that a competitive economic system and economic freedom were essential for economic prosperity.[54]

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[48] Angela Wigger and Andreas Nölke, 'Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: The Case of Antitrust Enforcement' (2007) 45 Journal of Common Market Studies 487, 490.

[49] ibid, 490; Wouter PJ Wils, 'The Judgment of the EU General Court in Intel and the so-Called "More Economic Approach" to Abuse of Dominance' (2014) 37 World Competition: Law and Economics Review 405, 412.

[50] Wigger and Nölke (n 48), 489.

[51] ibid, 490.

[52] For a full discussion and explaination of Ordoliberalism see David J Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42 The American Journal of Comparative Law 25; Razeen Sally, 'Ordoliberalism and the Social Market: Classical Political Economy from Germany' (1996) 1 New Political Economy 233; Oliver Budzinski, 'Monoculture versus Diversity in Competition Economics' (2008) 32 Cambridge Journal of Economics 295.

[53] Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2011), 11.

[54] Gerber (n 52), 36.

However, they also believed that capitalism needs to be organised and market power controlled.[55] Markets are not considered self-regulating, and market intervention is necessary, in the form of competition control, to preserve an open and free society and a pluralist democracy.[56] Market should be "embedded in a constitutional framework, which would serve to guard against competitive distortions [and] to ensure the equitable distribution of resources is society […]."[57] Competition enforcement is carried out also with the objective of protecting smaller competitors, in order to enhance diversity and entrepreneurial freedom of small and medium enterprises.[58]

According to the ordoliberal view, competition law should be part of the larger framework of the economic constitution.[59] It was believed that standing alone competition would have been of little or no value.[60] Ordoliberalism adopts the view that integration between policy areas is fundamental in a capitalistic society, in order to maintain a balanced approach and to weight the effects of a decision in one policy area on another one.[61] As argued by Suzanne Kingston, this holistic approach entails "the rejection of a narrow compartmentalisation between the aims and the decisions of competition policy and those of other policies in the broader economic order […]."[62]

Ordoliberalism has been an influential school of thought not only in Germany after the Second World War, but also for the development of the European Community, and, for what concerns this study, the theorization of EU competition law.[63] The

[55] Albert (n 5), 117-119; Wolfgang Streeck, 'German Capitalism: Does It Exist? Can It Survive?' in Colin Crouch and Wolfgang Streeck (eds), *Political Economy of Modern Capitalism: Mapping Convergence and Diversity* (Sage 1997), 37.

[56] Wigger and Nölke (n 48), 491.

[57] Kingston (n 53), 11.

[58] Albert (n 5), 119.

[59] Gerber (n 52), 57.

[60] ibid.

[61] Sally (n 52), 236; Kingston (n 53), 17.

[62] Kingston (n 53), 18.

[63] In this regard, it is important to bear in mind that, apart for the Merger Regulation, the substance of EU competition law has remained unchanged since 1957.

influence of Ordoliberalism in the drafting EU competition law is generally accepted among academics.[64]

Most of the leading German politicians, who participated in the creation and the development of the European Economic Community, were particularly close to ordoliberal ideas.[65] An example is Hans von der Groeben, who participated in the drafting of the so-called "Spaak Report" (the document on which the Treaty of Rome was based).[66] Other examples are Walter Hallstein, who was the first President of the European Commission,[67] and Hans von der Groeben, nominated first Commissioner for Competition Policy.[68] However, it is not necessary to go back to the beginning of the Economic Community to find influence of the Ordoliberalism thought on leading Community politicians. Karel van Miert, Competition Commissioner from 1994 to 1999, was definitely influenced by ordoliberal ideas and social market economy, as he declared in 1998.[69]

The idea that competition law was an interrelated aspect of the economic state and that it should not be interpreted in a sectorial way, influenced the application of competition law for the first forty years of the Union. For instance, it is generally accepted that, in the past, other public policies played a role in competition enforcement.[70]

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[64] For instance see Gerber (n 52), 71; Christian Joerges, 'What Is Left of the European Economic Constitution? A Melancholic Eulogy' (2005) European Law Review 461; Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules*, vol 39 (Kluwer law international 2009), 13; Kingston (n 53), 14. For a different opinion see Pinar Akman and Hussein Kassim, 'Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy' (2010) 48 Journal of Common Market Studies 111.

[65] Gerber (n 52), 71.

[66] ibid, 72.

[67] ibid, 71.

[68] ibid, 73.

[69] Karl van Miert (Member of the European Commission), 'The Future of European Competition Policy', europa.eu (17 September 1998) <http://ec.europa.eu/competition/speeches/text/sp1998_042_en.html> accessed 17 July 2016.

[70] Christopher Townley, 'Is Anything More Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community Lawyer' (2008) 10 Cambridge Yearbook of European Legal Studies 345. In the academic debates the terms public policy, non-competition concerns, non-economic elements are usually used interchangeably: they all mean public policy goals other than economic efficiency ones. In this study also the term public benefit is used as a synonym, since usually a public benefit is the result of a public policy activity.

In a limited, but nonetheless significant, number of cases, the Commission has taken public policy goals into account.[71] Although the Commission has never granted an exemption under Article 101(3)[72] of the Treaty on the Functioning of the European Union (TFEU) only on public policy grounds, there are several examples in which non-competition considerations have played an important role; think, for instance, of environmental objectives,[73] or employment ones.[74]

The European Court of Justice (ECJ) has generally endorsed the consideration of a wider range of interests in competition cases.[75] In 1986, for instance, the ECJ clearly held that:

> The powers conferred upon the Commission under article [101(3)] show that the requirements for the maintenance of workable competition *may be reconciled with the safeguarding of objectives of a different nature* and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market.[76]

In the case *Métropole television*, some years later, the General Court (GC)[77] stated that "in the context of an overall assessment, the Commission is entitled to base itself

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[71] For the most complete analysis on this topic see Christopher Townley, *Article 81 EC and Public Policy* (Bloomsbury Publishing 2009).

[72] Article 101 TFEU includes three provisions: its first paragraph contains a general prohibition of anticompetitive agreements. The second one states that these agreements shall be considered automatically void, unless they satisfy the four conditions provided for by the third paragraph.

[73] Commission, 25th Annual Report on Competition Policy, [1995], 82-85; *Philips/Osram*, (Case IV/34.252), Commission Decision 94/986/EC, [1994], OJ L378/37; *CECED,* (Case IV.F.1/36.718), Commission Decision 2000/475/EC, [2000], OJ L187/47. For a full discussion of the relationship between competition law and the environment see Hans Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability?* (Europa Law Pub 2003).

[74] *Ford/Volkswagen,* (Case IV/33.814), Commission Decision 93/49/EEC, [1994], OJ L131/15. See also Paul Jarman-Williams, 'Social and Economic Policy Objectives of the European Union and European Competition Law'' (2001) <http://www.scottishlaw.org.uk/journal/oct2001/pauleclaw.PDF> accessed 5 July 2016.

[75] Heike Schweitzer, 'Competition Law and Public Policy: Reconsidering an Uneasy Relationship: The Example of Art. 81' (2007), 7 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092883> accessed 5 July 2016; Anne C Witt, 'Public Policy Goals Under EU Competition Law—Now Is the Time to Set the House in Order' (2012) 8 European Competition Journal 443.

[76] Case 75/84 *Metro SB-Großmärkte v Commission (Metro II)* [1986] ECR 3021, para 20.

[77] At the time the Court of First Instance (emphasis added).

on considerations connected with the pursuit of the public interest in order to grant exemption under Article [101(3)] of the Treaty."[78]

To sum up, the words of the former Commissioner van Miert describes accurately the role and the scope of competition law:

> Competition policy can be seen rather as one instrument among others, which fosters the achievement of the Community's basic objectives. The Community's competition policy does not operate in a *vacuum*. It must take into account its effects on other areas of the Commission action such as industrial, regional, social and environmental policies. […] Competition policy, in turn, plays a role in the preparation and introduction of other policies.[79]

1.3.2 - THE CHICAGO SCHOOL

While in the UE Ordoliberalism has been important in drafting and interpreting competition law for the first decades, in the US antitrust law is older and it has been applied for many more years.[80] Although many theories have been important in the development of US antirust law,[81] this study focuses only on the theory of the Chicago School, because it is the one that has influenced most competition law in the US (and not only) since the end of the 1960s.[82]

The Chicago theory takes the name from the University where it was developed during the 1950s and 1960s.[83] It was firstly developed by Aaron Director,[84] and

[78] T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole télévision and others v Commission* [1996], ECR II-649, para 118.

[79] Karl van Miert, 'An Active Competition Policy for Economic Growth', Frontier Free Europe (Luxembourg, European Commission, 1995).

[80] The Scherman Act (the US equivalent for article 101 and 102 TFEU) was adopted at the end of the 19th century.

[81] For instance, the Classical Theory or the Harvard School. See Budzinski (n 52).

[82] Kingston (n 53), 23.

[83] Richard A Posner, 'The Chicago School of Antitrust Analysis' (1979) 127 University of Pennsylvania Law Review 925, 926.

[84] Aaron Director and Edward H Levi, 'Law and the Future: Trade Regulation' (1956) 51 Northwestern University Law Review 281.

subsequently elaborated by some of its students and colleagues as Robert Bork[85] and Richard Posner.[86]

The theory advocated was revolutionary, "rejecting much of the accepted wisdom in antitrust thinking up to that time."[87] It was mainly based on the idea that market is self-regulating and the state intervention has to be limited.[88] The role of the state is mainly setting the rules in which competition should take place.[89] Based on this assumption, the Chicago approach did two important things: firstly, it declared clearly what antitrust was about; secondly, it gave a new method of analysis for antitrust enforcement.[90]

The sole objective of antitrust is enhancing short-term consumer welfare (used as a synonym of efficiency).[91] This has series of implications for the way in which antitrust law is enforced. Indeed, competition law should be isolated from all ethical or non-economic concerns.[92] It was argued that, in this way, legal certainty would have been enhanced and companies would have been focused on efficiency, that in the end benefit final consumers.[93]

The idea of a single objective was supported by a new method of analysis, usually called "neo-classical economics".[94] In a nutshell, neo-classical economics is based on the assumptions that actors are rational and driven by the research of utility and profit.[95] By using complex economic models, this branch of economics tries to underpin the consumer welfare maximization objective.[96]

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[85] Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978).
[86] Richard A Posner, *Antitrust Law* (University of Chicago Press 1976).
[87] Kingston (n 53), 23.
[88] Bork (n 85), 309.
[89] ibid; Kingston (n 53), 26.
[90] Okeoghene Odudu, 'The Wider Concerns of Competition Law' (2010) Oxford Journal of Legal Studies 1, 3.
[91] Bork (n 85), 51.
[92] ibid, 429.
[93] ibid, 82; Odudu (n 90), 2.
[94] Eleanor Fox, 'Us and EU Competition Law: A Comparison', *Global Competition Policy* (Institute for International Economics 1997).
[95] Anton D Lowenberg, 'Neoclassical Economics as a Theory of Politics and Institutions' (1989) 9 Cato J. 619.
[96] Fox (n 94), 340.

Moreover, competition law should not protect smaller competitors, but the process itself, which leads to the survival of only the fittest, following an approach called "economic darwinism".[97]

1.3.3 - FROM FREIBURG TO CHICAGO: RECENT SHIFT IN EU COMPETITION LAW

As explained in Section 1.3.1, Ordoliberalism has played an important role in drafting and interpreting competition law in Europe, however in the last fifteen years important changes have occurred. Nonetheless the EU substantial competition provisions have remained unchanged since 1957, recently the Commission has started a process of "reinterpretation" of the law, entailing a shift from ordoliberal positions to Chicago ones.[98] The process started in 1999 with the publication of the White Paper on Modernisation of Article [101] and [102] TFEU,[99] which claimed the use of a "more economic approach" in competition cases.[100] The Commission undertook the task of freeing competition assessment from political considerations.[101] The idea was, and is, to "remodel [article 101] along the lines of US antitrust law […]."[102]

The opportunity to undertake the change occurred with the adoption of Regulation 1/2003.[103] The Regulation produced one of the biggest changes in EU competition law, since its creation with the Treaty of Rome.[104] Firstly, it diverted the way in which Article 101 TFEU, and especially its third paragraph, was applied. Competition enforcement moved from an ex ante control of the Commission on anticompetitive practices, to a self-assessment of companies, which cannot rely anymore on Commission's exemption.[105] Secondly, Regulation 1/2003 requires National Competition Authorities (NCAs) and National Courts (NCs) to enforce article 101

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[97] Hildebrand (n 64), 145.

[98] Wigger and Nölke (n 48), 490.

[99] Commission, White Paper on Modernisation of the Rules Implementing Articles 85 And 86 of the EC Treaty, Brussel 1999, (White Paper Modernisation).

[100] ibid, 80.

[101] ibid, 57.

[102] Schweitzer (n 75), 9.

[103] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1, (Regulation 1/2003).

[104] Claus Dieter Ehlermann, 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 Common Market Law Review 537.

[105] Wigger and Nölke (n 48), 496.

and 102 TFEU "in parallel to their national competition laws for all cases categorised under the rather elastic notions of affecting cross-border trade."[106] This entails a capillary application of EU competition law in the whole territory of the Union.[107]

Since EU competition law, after the adoption of Regulation 1/2003, is not applied only by the Commission and the EU Courts, but also by 28 NCAs and thousands of NCs, and moreover, companies are required to self-assess their own agreements, the Commission felt the necessity to clarify the meaning and the scope of the law. It did so by publishing several Guidelines,[108] which should outline the meaning of the law, according to the interpretation given by the ECJ.[109] However, it is interesting to note how these Guidelines detached not only from the previous Commission's practice,[110] but also from the case law of the ECJ,[111] trying to modernize "the substance of [EU] competition law […]."[112] For instance, Article [101(3)] Guidelines states that the only objective of article 101 is "to protect competition on the market as a means of enhancing consumer welfare […]."[113] This is not only in contrast with previous ECJ judgements, but also with recent ones.[114]

Moreover, the possibility of exempting an anticompetitive agreement under Article 101(3) TFEU has been narrowed: the requirement of "improvement of the production or distribution of goods, and the promotion of technical and economic progress" which, in the past, occasionally, has been interpreted widely in order to reconsider public policy objectives,[115] is now reduced only to efficiency considerations.[116] The change towards the use of public policy considerations can also be seen in the

[106] ibid.

[107] Whish and Bailey (n 46), 165.

[108] Commission, Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C101/97, (Article 81(3) Guidelines); Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, [2011] OJ C11/01, (Horizontal Cooperation Guidelines).

[109] Article 81(3) Guidelines (n 108), para 7.

[110] Townley (n 71), 141-164.

[111] Witt (n 75).

[112] Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39 Common Market Law Review 1057, 1091 noticing that the Commission does not have the power to do so.

[113] Article 81(3) Guidelines (n 108), para 13.

[114] For instance see joined Cases C-501, 513, 515, 519/06 P GlaxoSmithKline v Commission [2009] ECR I-9291, 63-64; Witt (n 75), 464.

[115] Saskia Lavrijssen, 'What Role for National Competition Authorities in Protecting Non-Competition Interests after Lisbon?' (2010) European Law Review 636, 642.

[116] Article 81(3) Guidelines (n 108), paras 33, 42, 48-72; Witt (n 75), 455.

transformation of the Guidelines on horizontal agreements.[117] The 2001 Guidelines on horizontal cooperation agreements contained a separate chapter on environmental benefits;[118] according to the Commission, environmental agreements were "a policy instrument to achieve the goals enshrined […] in the Treaty."[119] The 2001 Guidelines have been replaced in 2011, and the idea of environmental agreements as an instrument to achieve Union policy has been abandoned.[120]

The change undertaken by the Commission has drawn a significant number of criticisms[121] to the point that Anne Witt has supposed an incompatibility with the rule of law.[122]

1.4 - Conclusion: relationship between Corporate Governance and Competition Law

Despite the fact that studies of VoC do not prove a direct casual link between the form of corporate governance, adopted by the companies of a country, and the level of cooperation permitted by the theory of competition law advocated, they do highlight interesting correlations between the two concepts. In fact, countries in which companies are required to adopt a stakeholder model of corporate governance, generally, have a more lenient approach on inter-firm coordination.[123] In contrast, states that support a shareholder theory are also those nations that rely mainly on competition among undertakings, and incentivize arm's length relationships.[124] The studies on VoC try to explain how the various characteristics of a capitalistic model are fundamental for its creation and sustenance. If one of those characteristics dramatically changes, the model might change as well. For instance, Angela Wigger

[117] ibid, 458.

[118] Commission, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, [2001] C3/2, par 179-198.

[119] Ibid, par 192

[120] Horizontal Cooperation Guidelines (n 108). Cf Witt (n 75), 458.

[121] Monti (n 112); Wigger and Nölke (n 48); Lavrijssen (n 115); Townley (n 71); Anna Gerbrandy, 'Competition Law and Sustainable Development. An Inquiry by Legal Essay' (2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398962> accessed 5 July 2016.

[122] Witt (n 75), 445.

[123] Hall and Soskice (n 2), 7.

[124] ibid, 8.

and Andreas Nölke have analysed the effects of the recent change of paradigm in EU antitrust enforcement on CME.[125] In their opinion, both the 2003 Regulation, which created an ex post competition control and supported the use of private enforcement, and the shift towards an Anglo-Saxon theory of competition law, might "erode crucial elements of the Rhenish variety of economic organization"[126] such as the companies long-term strategies, the attention on stakeholders' interests and inter-firm collaboration.[127]

[125] Wigger and Nölke (n 48).
[126] ibid, 487.
[127] ibid, 500.

CHAPTER 2 - THE EMERGENCE OF A NEW PHENOMENON IN CORPORATE GOVERNANCE

The previous chapter has tried to highlight a sort of influence that competition law might have on the model of corporate governance adopted by companies. Chapter 2, starting from a criticism of the shareholder theory of corporate governance (Section 2.1), attempts to explain why it has not been, and still is not, able to accommodate a growing phenomenon, usually described as social entrepreneurship (Section 2.2). The chapter then explains the characteristics of a revolutionary model of corporate governance, namely Benefit Corporation, which has emerged in the US, and it is spreading in Europe (Section 2.3). Its concluding part (Section 2.4) dwells on the consequences of such change in the two continents and gives food for thought (developed in Chapter 3) as regard the implications for competition law and its role in supporting the change.

2.1 - A CRITIQUE OF THE SHAREHOLDER MODEL

Notwithstanding its increasingly global presence and consequent belief that it will prevail,[128] the stockholder theory has been heavily criticised on several grounds.

Firstly, the objective of the shareholder model is arguably unclear, because it does not specify whether the shareholder value has to be created in the long or short-term.[129] This substantial difference might undermine the idea that the shareholder model enhances guidance for directors[130] and legal certainty before the Courts.[131]

[128] Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2000) 89 Georgetown Law Journal 439.

[129] Herbert A Simon, 'Theories of Decision-Making in Economics and Behavioral Science' (1959) 49 The American Economic Review 253, 262.

[130] Eric W Orts, 'The Complexity and Legitimacy of Corporate Law' (1993) 50 Washington and Lee Law Review 1565, 1591.

[131] Einer Elhauge, 'Sacrificing Corporate Profits in the Public Interest' (2005) 80 New York University Law Review 733, 739.

Secondly, the idea that stockowners' interests are the only ones that merit consideration has been heavily contested.[132] In many circumstances, shareholders are not the ones most affected by company decisions,[133] and they might not have the instruments to protect themselves.[134]

Thirdly, the Anglo-Saxon model inadequately addresses social wealth.[135] By considering merely one set of interest, "a company might find that it is only able to enhance the benefits of shareholders through the transfer of value away from one or more stakeholders […]."[136] Moreover, the idea that social wealth can be enhanced by other means, in a second stage, is neither always true nor possible.[137]

Finally, and particularly important for the scope of this study, there is a growing consensus that the shareholder model is unable to accommodate and support a "new way of doing business", which is spreading worldwide and is widely referred to as social entrepreneurship.[138]

2.2 - INCOMPATIBILITY WITH SOCIAL ENTREPRENEURSHIP

Social entrepreneurship is a concept that encompasses various entities, ideas and legal forms. There is no agreement, neither in Europe nor internationally, on the exact

[132] Lawrence E Mitchell, 'Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes' (1991) 70 Texas Law Review 579, 640.

[133] Luigi Zingales, 'In Search of New Foundations' (2000) 55 The Journal of Finance 1623, 1632.

[134] Keay (n 7).

[135] Steven MH Wallman, 'The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties' (1991) 21 Stetson Law Review 163, 176-177; Orts (n 130).

[136] Keay (n 7), 671.

[137] Colin Donnaruma and Nicholas Partyka, 'Challenging the Presumption in Favor of Markets' (2012) 44 Review of Radical Political Economics 40.

[138] Alissa Mickels, 'Beyond Corporate Social Responsibility: Reconciling the Ideals of a for-Benefit Corporation with Director Fiduciary Duties in the US and Europe' (2009) 32 Hastings International and Comparative Law Review 271; William H Clark Jr and Elizabeth K Babson, 'How Benefit Corporations Are Redefining the Purpose of Business Corporations' (2011) 38 William Mitchell Law Review 817, 825; Steven Munch, 'Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form' (2012) 7 Northwestern Journal of Law & Social Policy 170; J Haskell Murray, 'Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes' (2012) 2 American University Business Law Review 1, 18; Janine S Hiller, 'The Benefit Corporation and Corporate Social Responsibility' (2013) 118 Journal of Business Ethics 287; Stout (n 14); Thomas Kelley, 'Law and Choice of Entity on the Social Enterprise Frontier' (2009) 84 Tulane Law Review 337.

content of the definition. For the purpose of this study it will be defined as an entity that tries to solve social or environmental problems, using market-based strategies.[139]

While it is not particularly novel for corporations to want to enhance societal wealth and alleviate social problems,[140] it has regained appeal in the recent years.

In order to understand the social entrepreneurship phenomenon, it is necessary to distinguish the European situation from the US one. Without the pretension of giving a complete overview of it, the next sections tries to briefly illustrate how the idea developed at different times and with different characteristics in the two continents.

2.2.1 - THE EUROPEAN CONTEXT

In Europe, the birth of social enterprises is usually linked with the "social co-operatives law", which the Italian Parliament adopted in 1991.[141] Since then, the phenomenon has increased, not only in Italy, where co-operatives are various and widespread, but in many EU countries as UK (Community Interest Company), France (Collective Interest Cooperative Society), Spain (Social Initiative Cooperative), Portugal (Social Solidarity Cooperative), Greece (Limited Liability Social Cooperative) and Belgium (Social Purpose Company).[142]

In each of these states, social enterprises are based on different rules and legal forms. However, they share similar objectives (mainly work integration for disadvantaged

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[139] It is not possible to insert in the definition the profit making, since many countries in Europe do not allow, or allow to a limited extent, the dividend distribution. See Jacques Defourny and Marthe Nyssens, 'Social Enterprise in Europe: Recent Trends and Developments' (2008) 4 Social Enterprise Journal 202; Kelley (n 138); Steven J Haymore, 'Public (ly Oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma' (2011) 64 Vanderbilt Law Review 1311, 1317.

[140] A surprising example of early social entrepreneurship is the case of the Italian entrepreneur Adriano Olivetti. Owner of the namesake firm, know worldwide for its typewriters, between the 1938 and 1960, he was able to create a successful enterprise and at the same time enrich the life and the culture of the employees working in his companies, always with a strong link with the territories in which these operated. For further information see Fondazione Adriano Olivetti, <http://www.fondazioneadrianolivetti.it/lafondazione.php?id_lafondazione=1> accessed 22 August 2016. A more recent example is the Nobel Prize Winner Muhammad Yunus, founder of the Grameen Bank. He has been the pioneer (1976) inthe realisation of projects of microfinance and microcredit. For further information see Grameen Bank, <http://www.grameen.com/index.php?option=com_content&task=view&id=16&Itemid=112> accessed 22 August 2016.

[141] Defourny and Nyssens (n 139), 206.

[142] ibid.

people) and have a general prohibition of profit distribution.[143] In Europe, social enterprises have occupied what is generally called the third-sector.[144] They are neither publicly owned, nor follow the same schemes of normal companies. Nonetheless, in certain circumstances, they operate on the market, offering goods and services.

2.2.2 - THE USA CONTEXT

In the USA, the phenomenon of social enterprises is more recent than the EU, and it has developed in a completely different way.[145] Although it is possible to find early examples of social enterprises during the 1980s and 1990s,[146] the phenomenon has drawn considerable attention in the last fifteen years.[147] Unlike the EU countries, in the US the concept of social enterprises includes "those organizations that fall along a continuum from profit-oriented businesses engaged in socially beneficial activities (corporate philanthropies or corporate social responsibility) to dual-purpose businesses that mediate profit goals with social objectives (hybrids) […]."[148]

The discussion on social entrepreneurship gives way to the more general one about corporate governance. As seen in Section 1.2.1, for long time it has been debated whether the objective of the corporation was only the maximisation of wealth, or also the interests of other stakeholders. Since the beginning of the US jurisprudence, Courts have favoured the shareholders, limiting the possibility of socially committed entrepreneurs to pursue their objectives.[149]

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[143] This is not valid for UK Community Interest Company and Belgian Social Purpose Company, which do not have a predetermined purpose and have a limited possibility of profit sharing.

[144] Carlo Borzaga and Jacques Defourny, *The Emergence of Social Enterprise* (Routledge 2004).

[145] Robert T Esposito, 'The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation' (2013) 4 William & Mary Business Law Review 639, 681.

[146] Jacques Defourny and Marthe Nyssens, 'Conceptions of Social Enterprise and Social Entrepreneurship in Europe and the United States: Convergences and Divergences' (2010) 1 Journal of Social Entrepreneurship 32.

[147] Haymore (n 139), 1318; Esposito (n 145), 642.

[148] Janelle A Kerlin, 'Social Enterprise in the United States and Europe: Understanding and Learning from the Differences' (2006) 17 Voluntas: International Journal of Voluntary and Nonprofit Organizations 246, 248.

[149] Clark Jr and Babson (n 138).

The first case that sustained this view dates back to the 1919. In *Dodge v. Ford* a controversy between Henry Ford and one of its shareholders, concerning the use of excess capital, was decided by the Michigan Supreme Court on these terms:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[150]

Even though the case is particularly old and has been heavily criticised,[151] it remains good law and it has been recently confirmed by other judgements, such as *eBay Domestic Holdings, Inc. v. Newmark.*[152] The case concerns a conflict between the original founders of Craigslist, a classified advertisement website, and eBay, the new investor. The conflict arose because of eBay's focus on profit, whereas the founders were more interested in the community created with the website.[153] As the conflict became more acute, the two founders adopted "a poison pill designed to preserve the corporate culture of Craigslist into future generations, and thwart the profit maximisation approach of stockholders, such as eBay."[154] The Delaware Court did not uphold the Craigslist's plan, holding that:

> Directors of a for-profit Delaware corporation cannot deploy a [policy] to defend a business strategy that openly eschews stockholder wealth maximization - at least not consistently with the directors' fiduciary duties under Delaware law.[155]

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[150] 170 N.W. 668, 684 (Mich. 1919).

[151] Among others see Lynn A Stout, 'Why We Should Stop Teaching Dodge v. Ford' (2008) 3 Virginia Law & Business Review 163.

[152] 16 A.3d 1 (Del. Ch. 2010).

[153] Clark Jr and Babson (n 138), 827.

[154] Hiller (n 138), 289.

[155] *eBay* (n 152), para 35.

Moreover, the Court maintained that "[h]aving chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties […] to promote the value of the corporation for the benefit of its stockholders."[156]

Cases such as *Ford* or *eBay* have led many US states to reconsider the shareholder model, envisaging a more balanced approach between profit and stakeholders' interests. The first attempt to blend the sharp statements of these kinds of cases has been the adoption of constituency statues.[157] They have been implemented in thirty-three US states, and save for acute differences, they all "allow directors, in the exercise of their fiduciary duties, to take into consideration broader interests than the merely profit maximisation for shareholders."[158]

Although the adoption of constituency statues has been welcomed with great emphasis, their impact has been particularly scarce.[159] One of the reasons for this failure is the fact that they were adopted mainly as a response for hostile takeover, and they revealed ill suited for day-by-day decisions.[160] Moreover, there is no guidance, neither in the statues nor in the case law, for directors to know to what extent they are allowed to consider stakeholders' interests.[161] This is also due to the fact that Delaware, the state where the majority of US publicly traded companies are incorporated,[162] has never adopted constituency statues. Courts of other states often look at Delaware case law to solve their cases, but since Delaware does not have a constituency statute, they cannot find any guidance.[163] Finally, but particularly important, constituency statues only create an option for directors to consider stakeholders' interests and not a duty.[164]

In addition to constituency statues, some US states, since 2008, have started adopting new forms of corporate governance in order to accommodate the growing

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[156] ibid, para 34.
[157] Mitchell (n 132).
[158] Hiller (n 138), 289.
[159] Clark Jr and Babson (n 138), 829.
[160] ibid.
[161] ibid, 831.
[162] State of Delaware, 'Division of Corporation' <http://corp.delaware.gov/aboutagency.shtml> accessed 30 August 2016.
[163] Clark Jr and Babson (n 138).
[164] ibid, 832; Hiller (n 138), 289.

phenomenon of social entrepreneurship.[165] A deep explanation of the various legal models is beyond the scope and the space of this study. For this reason, the next sections dwell only upon BC legislations. BC has been chosen for its rapid diffusion, the innovation brought in the corporate governance panorama, and for the deep consequences that it might bring about in society.

2.3 - Revolution in Corporate Governance: Benefit Corporation

A BC is a for-profit company, with corporate characteristics that is simultaneously tied, by its own articles of incorporation, to pursue a public benefit, while acting on the market.[166] BC can be considered a revolution in the corporate law panorama, since it overturns some of its fundamental principles. [167] It has been described as "the most ascendant social enterprise innovation […]."[168] The main objective of a BC is to conjugate the profit making aspects, typical of any company, with a general public objective. With the adoption of BC legislation a state recognizes the idea that a companies might be driven, not only by the axiom of maximization of wealth and dividends, but also by social and environmental concerns. Another important innovative aspect consists of allowing any kind of enterprise to adopt this new model, regardless of its main activity.

Starting from its origin, the following sections try to set out the main features and characteristics of this new phenomenon. With an eye both to the US and Italian legislation they show the similarities and the differences.

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[165] For instance, in 2008 Vermont and progressively other 8 states adopted a law recognising Low-Profit Limited Liability Company (L3Cs), Americans for Community Development, <http://americansforcommunitydevelopment.org/laws/>, accessed 21 August 2016. In 2011 California recognised the Flexible Purpose Corporation and in 2012 Washington did the same with the Social Purpose Corporation. For a full explanation of these models see Esposito (n 145), 682-694.

[166] Briana Cummings, 'Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest' (2012) Columbia Law Review 578, 580.

[167] Clark Jr and Babson (n 138), 817.

[168] Munch (n 138), 171.

2.3.1 - ORIGIN

The origins of the BC date back to 2006 when three former corporate executives founded B-Lab, a non-profit organization with the purpose to "help socially conscious corporations to actively pursue their dual missions within the constraints of state law".[169] The main activity of B-Lab is to provide certification for for-profit organizations that meet certain standards of sustainability, transparency, accountability, and whose main objectives are not only the maximization of wealth, but also creating a benefit for society (B-Corps).[170] At the same time B-Lab promoted the status of BC, by lobbing several US states.[171] The first state to adopt such legislation was Maryland in 2010, followed by Vermont the same year, and between 2011 and 2012 by New Jersey, Virginia, Hawaii, California and New York. At the time of writing, a BC legislation has been approved in thirty-one US states and it is pending in other seven.[172] In order to properly understand the BC phenomenon, it is necessary to clarify the distinction between B-Corps and BCs. Although the two concepts are quite similar in the purpose, they still have important differences. B-Corps are normal companies, which have received the certification from B-Lab, whereas BCs are recognized by law as a new category of companies that, while acting on a market for profit, are also interested in delivering a benefit for society. By becoming a BC, the company decides to modify its own articles of incorporation, binding itself in the long term to a master, which is not the mere profit.[173]

The phenomenon of B-Corp is already quite spread around the world with more than one thousand and seven hundred companies incorporated in more than fifty countries, and it is increasing daily.[174] In comparison BCs are only present in thirty-one US states and, since 2016, Italy; these are the only countries that, so far, have legally recognized the change. It is important to bear in mind that, it is not necessary to be certified by B-Lab to become a BC, and it is neither mandatory to become a BC when

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[169] ibid, 183.

[170] B Lab, About B Lab, <www.bcorporation.net/what-are-b-corps/about-b-lab> accessed 30 June 2016.

[171] Esposito (n 145), 695.

[172] Benefit Corporation , State by State Status of Legislation, <http://benefitcorp.net/policymakers/state-by-state-status> accessed 30 June 2016.

[173] Murray (n 138).

[174] Benefit Corporation, <www.bcorporation.net> accessed 30 June 2016.

certified as B-Corp. The two concepts remain separate, but the basic idea underlying the two phenomena is the same: it is possible to carry out a for-profit business, by delivering also a positive impact on society and the environment.

Although there are some differences in the laws approved by the various US states, for the purpose of this study, it will be assumed that all the US states have adopted a legislation corresponding to the Model Act (the draft law developed by B-Lab and used by all the states in the legislative process).[175]

Three main characteristics are shared by all the legislations (including the Italian one) that have recognized the BC status. Firstly, a BC, alongside the achievement of a profit, has "the corporate purpose to create a general public benefit."[176] Secondly, directors are required "to consider a broader spectrum of interests beyond shareholder profit".[177] Thirdly, the performance has to be assessed against a comprehensive, credible, independent and transparent third-party standard.[178]

2.3.2 - PUBLIC PURPOSE

The primary and focal change brought by BC statutes is the change in companies' responsibilities and objectives. By clearly distancing from Milton Friedman's idea that the only "social responsibility of business is to increase profit"[179] BCs try to conjugate a profit purpose with the commitment to deliver a positive impact on society and the environment.[180] Companies are obliged to change their articles of incorporation and insert the general public benefit as one of their purposes and objectives.[181] In this way, undertakings bind themselves in a long-term prospective, since the only possibility not to pursue the general public benefit is to change their by-laws.[182] The Model Act defines a general public purpose as "a material positive

[175] Benefit Corporation, Model legislation, <http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf> accessed 29 August 2016. For a comparison of the different US statutes see Hiller (n 138).
[176] Model Act § 201(a); Law 28 December 2015, no. 208, art 1, para 376, (Law 208/2015).
[177] Model Act § 301(a); Law 208/2015 (n 176), art 1, para 380. See also Hiller (n 138), 191.
[178] Model Act § 102; Law 208/2015 (n 176), art 1, para 382.
[179] Friedman (n 15).
[180] Esposito (n 145), 697.
[181] Model Act §103; Law 208/2015 (n 176), art 1, para 377.
[182] Hiller (n 138), 295.

impact on society and the environment",[183] whereas the Italian statute describes it as the creation of positive effects, or the reduction of negative impacts, on one or more stakeholders specified in the law.[184]

2.3.3 - DIRECTOR DUTIES

Changing the articles of incorporation is an important step, since it legally recognizes the idea that a for-profit company can have objectives beyond the mere shareholders' profit. However, such transformation would be ineffective without specific duties and levels of accountability for directors. In this regard, the core change is the imposition of a duty on directors "to consider the benefit purpose in the decision making."[185] The statutes require directors to consider the effects of any action or inaction upon: shareholders, employees, customers, community, and environment.[186] Both legislations pose an intense burden on directors, who must account for every single interest when taking a decision. However, the legislations also exonerate directors from "liability for considering non-shareholder interests."[187] This means that shareholders are incapable of taking action against directors if, following their decisions, the value of the shares is not increased or is diminished.[188]

For what concerns the breach of director duties, both the Model Act and the Italian law provide that directors might be liable, if they do not act in accordance with the objectives contained in the articles of the incorporation.[189] The Model Act in this regard has gone further than the Italian legislation by creating a new kind of proceeding called "Benefit Enforcement Proceeding (BEP)".[190] A BEP can be commenced by the BC itself or through a derivative suit by shareholders (at least 2% of shares), 5% equity owner of a parent company or other person indicated in the by-laws or in the articles of the incorporation.[191] In this regard, it has been argued that, if

[183] Model Act §102.
[184] Law 208/2015 (n 176), art 1, para 378(b).
[185] Hiller (n 138), 293.
[186] Model Act § 301(a); Law 208/2015 (n 176), art 1, para 380.
[187] Model Act § 301(b). See also Cummings (n 166), 590.
[188] Clark Jr and Babson (n 138), 848.
[189] Model Act § 305; Law 208/2015 (n 176), art 1, para 380.
[190] Model Act § 305(a). See also Murray (n 138), 35; Hiller (n 138), 294.
[191] ibid § 305(c).

the only ones able to commence an action are the shareholders, there is no control over whether the BC will actually pursue the benefit purpose.[192] However, it is understandable why the power is only granted to shareholders; granting *locus standi* to an undefined plurality of individuals would create an excessive risk for the company and, consequently, a disincentive in the transformation, especially at an early stage.[193] Moreover, the number of shares necessary to take a legal action (only 2%) guarantees a control also by minority shareholders.

The Italian legislation, on one hand, has not created a new kind of proceeding and refers to the general provisions for action taken against the directors for failure to respect their duties.[194] On the other hand, it has gone further than the US. Indeed it has empowered the Italian Competition Authority (ICA), which also exercises control on unfair commercial practices, to control whether the BC actually pursues the public purpose mentioned in the articles of incorporation.[195] In the event that the BC does not respect its commitments, the ICA has the power to fine it for unfair commercial practices, under the Italian law, transposing the EU Directive on Unfair Commercial Practice.[196]

While this provision might not seem particularly relevant, it could incite a massive transformation on how society and consumers react to socially and environmental commitments of companies. Studies show that a growing percentage of consumers and investors would consume or invest in a responsible way, but are refrained also by the concern that it is difficult to distinguish between companies really involved in CSR practices and companies that only "greenwash" their reputation for an advantage on the market.[197] If a company decides to adopt the form of a BC, which is a

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[192] Munch (n 138), 189; Murray (n 138), 33.

[193] Munch (n 138).

[194] Law 208/2015 (n 176), art 1, para 381.

[195] ibid, para 384.

[196] Codice del Consumo, art 27 (Decreto Legislativo 6 September 2005 n 206) transposing Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22.

[197] Michal J Carrington, Benjamin A Neville and Gregory J Whitwell, 'Why Ethical Consumers Don't Walk Their Talk: Towards a Framework for Understanding the Gap between the Ethical Purchase Intentions and Actual Buying Behaviour of Ethically Minded Consumers' (2010) 97 Journal

completely voluntary choice, consumers and investors could correctly presume that behind this decision there is a real commitment. However, in the event that the decision is not genuine, or that the company does not respect its own commitments in the long term, stakeholders will be able to complain to the ICA for a breach of unfair commercial practices legislation.[198] It is reasonable not to grant the *locus standi* to the varieties of stakeholders, since this could create an unpredictable number of suits and an impasse for the undertaking.[199] Granting such power to a public authority, which is able to balance the different interests at stake, seems a good solution to the problem of how to conjugate accountability of the company and the ability to exercise its activity.

2.3.4 - TRANSPARENCY

The third fundamental characteristic of a BC is its duty to prepare and publish an "annual benefit report".[200] The scope of the annual benefit report is to ensure accountability towards shareholder and the public.[201] An annual benefit report shall contain a "narrative description of the ways in which the benefit corporation pursued the general public interest during the year and the extent to which general public benefit was created."[202] Additionally, the company has to indicate any circumstances that have hindered the achievement of the general public benefit.[203] The report shall include an "assessment of the overall social and environmental performance of the BC against a third-party standard."[204] As correctly argued, the "independent standard plays an important role in adding legitimacy to the benefit corporation's stated purposes."[205] Both the US and the Italian legislation, carefully describe the

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of Business Ethics 139; Giana M Eckhardt, Russell Belk and Timothy M Devinney, 'Why Don't Consumers Consume Ethically?' (2010) 9 Journal of Consumer Behaviour 426.

[198] For a discussion of the use of Unfair Commercial Practice Legislation in regard to CSR practices see Anna Beckers, *Enforcing Corporate Social Responsibility Codes : On Global Self-Regulation and National Private Law* (Oxford ; Portland, Oregon : Hart Publishing 2015), 186; Andreas Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar Publishing 2015).

[199] Munch (n 138).

[200] Model Act § 401; Law 208/2015 (n 176), art 1, para 382.

[201] Munch (n 138), 186.

[202] Model Act § 401(a); Law 208/2015 (n 176), art 1, para 382(a).

[203] Model Act § 401(a); Law 208/2015 (n 176), art 1, para 382(a).

[204] Model Act § 401(a)(2); Law 208/2015 (n 176), art 1, para 382(b).

[205] Esposito (n 145), 701.

characteristics that a third-party standard must have.[206] Firstly, it must be independent from the BC, namely not having any material relationship with it or its subsidiary.[207] Secondly, it has to be comprehensive, i.e. able to describe the effects of the BC activities towards all the stakeholders.[208] Thirdly, the standard needs to be credible, that is to say the entity shall have the "expertise to assess the overall corporate social and environmental performance […]."[209] Finally, it shall be transparent in the sense that all the information regarding the criteria used for the assessment is publicly available.[210] Both jurisdictions oblige the BC to send the report to its shareholders and to publish it on the website.[211]

The obligation to use a third party standard gives a higher degree of certainty that the company is actually pursuing the public benefit, avoiding in this way "greenwashing" practices.[212] However, it is important to clarify that the company is obliged to use a third-party standard, but this does not mean that the measurement has to be carried out by a third-party; "companies are free to collect their own data and assess their own performance."[213] For this reason some commentators have criticized this aspect arguing that it might present "a clear opportunity for selective reporting, if not outright misconduct."[214] Robert Esposito, for instance, criticizes the fact that the statutes do not "prescribe any particular methodology […] against which a benefit corporation's social and environmental performance should be assessed."[215] To these criticisms, William Clark, one of the drafters of the Model Act, responds that: firstly, the decision not to mandate a verification of the annual benefit report, was followed in order not to impose an additional financial burden on BCs.[216] Secondly, "directors of benefit corporation are already subject to litigation for fraud if they report false or intentionally misleading information […], which serves as a sufficient incentive to

[206] Model Act § 102; Law 208/2015 (n 176), annex 4.
[207] For a definition of independence see Model Act § 102.
[208] Model Act § 102; Law 208/2015 (n 176), annex 4.
[209] ibid.
[210] ibid.
[211] Model Act § 402(a)(b); Law 208/2015, art 1, para 383.
[212] Munch (n 138), 187.
[213] Regina Robson, 'A New Look at Benefit Corporations: Game Theory and Game Changer' (2015) 52 American Business Law Journal 501, 523.
[214] Munch (n 138), 194; Cummings (n 166), 611.
[215] Esposito (n 145), 702.
[216] Clark Jr and Babson (n 138), 846.

provide complete and accurate benefit report."[217] Thirdly, he argued that for the moment a universal standard for measuring social and environmental performance does not exist.[218]

2.4 - CONCLUSION: CONSEQUENCES OF THE CHANGE

As explained in the previous sections, the adoption of BC legislation may represent a milestone in the transformation of corporate governance. A greater attention by enterprises to topics such as their impact on the community and the environment might entail a big change in the society. The contexts in which the Italian and US legislations have been adopted are different (Section 2.2); consequently some of the outcomes might diverge.

In Italy, where the social entrepreneurship has a history going back almost thirty years and is widely spread on its territory,[219] BCs could be the lever to overtake the dichotomy between for-profit and non-profit.[220] This division entails a legitimisation for businesses to concentrate only on productivity and profit, without considering the social and environmental implications of their actions. These are usually left to the activities of the third sector and the state. In this way, only some social actors work for the common good, whereas others feel, and to a certain extent are, legitimised to work only for their own narrow interest.

Speaking metaphorically, it is as if on a rowboat some of the rowers row in one direction and others in the opposite one. The boat will not move, or at best it will spin around. If everybody rows in the same direction, the destination could be more easily reached.

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[217] ibid, 847.

[218] ibid, 846.

[219] Eleven thousand Social Cooperatives spread all over the Italian territory. See ISTAT, Censimento dell'inustria e dei servizi 2011: istituzioni non profit, <http://www.istat.it/en/files/2013/07/05-Scheda-Non-Profit_DEF.pdf> accessed 23 August 2016.

[220] Domenico Siclari, 'Le Società Benefit Nell'ordinamento Italiano' (2016) Rivista Trimestrale di Diritto dell'Economia 36, 47; Beatrice Bertarini, 'La Società Benefit: Spunti Di Riflessione Sulle Nuove Prospettive Del Settore Non Profit' (2016) Diritto e Giustizia <http://www.dirittoegiustizia.it/allegati/PP_SOC_societabenefit_bertarini_n.pdf> accessed 30 August 2016.

The arrival of the BC in Europe has to be read also in the light of a background of growing interest towards Corporate Social Responsibility (CSR), both from corporations, [221] consumers, [222] investors [223] and European institutions. European institutions interest in CSR dates back to the beginning of the millennium, when the European Council incentivised companies to be more socially responsible by taking into consideration "lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development".[224] In 2006, the Commission remarked the importance of CSR practices by creating an Alliance for CSR, and by encouraging firms to take into consideration all stakeholders when making decisions.[225] Between 2011 and 2014, the Commission put in place many initiatives to foster CSR in Europe,[226] and right now is considered one of the key instruments to achieve the 2020 objectives.[227]

In the USA, the BC phenomenon plays a less important role for the distinction between for-profit and non-profit, but it has brought back the discussion about the corporate objectives. It is interesting to note how the BC concept emerged exactly in the symbolic country of LME, promoter of the shareholder model. If it will be able to spread, it might bring the corporate governance model far beyond the German stakeholder one.

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[221] Samuel O Idowu, René Schmidpeter and Matthias S Fifka (eds), *Corporate Social Responsibility in Europe* (Springer International Publishing 2015).

[222] Surveys show that up to 90% of consumers state they would take into account CSR when purchasing. See David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press 2007). Cf also Commission, How Companies influence our Society: Citizens' View, <http://ec.europa.eu/public_opinion/flash/fl_363_en.pdf> accessed 28 August 2016.

[223] Eurosif, European SRI Study, <http://www.eurosif.org/wp-content/uploads/2014/09/Eurosif-SRI-Study-20142.pdf> accessed 29 August 2016.

[224] Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility, at 3, COM (2001) 266 final (July 18, 2001).

[225] Communication from the Commission to the European Parliament, The Council and the European Economic and Social Committee Implementing the Partnership for Growth and Jobs Making Europe a Pole of Excellence on Corporate Social Responsibility, COM (2006) 136 final (March 22, 2006).

[226] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681 final (October 25, 2011).

[227] Communication from the Commission Europe 2020: A strategy for smart, sustainable and inclusive growth, COM (2010) 2020 final (March 3, 2010).

Finally, in both continents, BCs represent the spark for the realisation of a new way to do business and a new kind of society, less focused on profit and competition, but mainly on finding a balance between profit and social interests, in a context of cooperation.

CHAPTER 3 - BETWEEN COMPETITION AND COOPERATION: FINDING A NEW BALANCE?

In the previous chapter, BC has been analysed emphasizing the different corporate objective and directors' duties. However, the BC phenomenon can be seen as part of a bigger and wider idea of the role that businesses should play in society. Even though BC has not been created in the specific intent of revolutionising the competition aspect of our society, it is the result of a process that sees differently not only the scope of the corporations, but also the relationships between them and their competitors. In a recent conference regarding the adoption by Italy of BC legislation, one of the potentialities of the new type of company has been described as "the existing relationships between entrepreneurs, who works together and cooperate, even among different sectors, creating a sort of community."[228] Using the words of Patagonia, for the moment the most famous and biggest BC, in order to achieve the public benefit it "will share proprietary information and best practices with other businesses, including direct competitors […]."[229]

This chapter, after a preliminary analysis of the concepts of competition and cooperation and their role in the economic system (Section 3.1), emphasises the relationship between BC and competition law, highlighting the role that the latter could play in supporting the change (Section 3.2).

3.1 - A REVIEW OF THE ROLE OF COOPERATION AND COMPETITION IN THE CURRENT ECONOMIC SYSTEM

[228] Fondazione Eni Enrico Mattei (FEEM), Atti del Convegno 'Società Benefit: integrazione e valore condiviso' (Milan, 26 February 2016).

[229] Patagonia, Annual Benefit Corporation Report 2015, 5, <https://www.patagonia.com/static/on/demandware.static/-/Library-Sites-PatagoniaShared/default/dw388e98a1/PDF-US/2015_BCorp-AnnualReport-v6.pdf> accessed 24 August 2016.

In the last decades the concept of competition has received a support without precedents.[230] An increasing number of countries rely now on an economic system based on competition and free market.[231] The reasons for this surprising support are various and cannot be analysed completely in this study. Surely, a system based on competition has positive implications, usually described as a great ability in innovation, meeting consumers' preferences, motivating individuals, creating wealth and consequently reducing poverty.[232]

Although it does garner great support, competition is not exempted from criticisms. Competitive markets have been criticised as "inefficient" due to their production of negative externalities on large scale and for "underproduction" of public good.[233] Moreover, the general trust in competition is also based on the Adam Smith's assumption that by pursuing our own self-interest in a competitive market, society will benefit.[234] However, by doing so, individualism and self-interest are encouraged to the detriment of public benefit and cooperation.[235]

In the current competitive economic system, cooperation is usually regarded with suspicion.[236] Individuals are often deemed to be driven mainly by egoistic interests, and to cooperate to achieve an advantage over competitors and society.[237] Nonetheless this kind of detrimental cooperation is undeniable, it would be wrong to reduce the concept of cooperation, and the human soul itself, to this limited range of

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[230] Whish and Bailey (n 46), 1.

[231] Fraser Institute, Economic Freedom of the World: 2015 Annual Report, <http://www.freetheworld.com/2015/economic-freedom-of-the-world-2015.pdf> accessed 30 August 2016.

[232] Whish and Bailey (n 46); Donnaruma and Partyka (n 137), 43; Angela Wigger and Hubert Buch-Hansen, 'Competition, the Global Crisis, and Alternatives to Neoliberal Capitalism: A Critical Engagement with Anarchism' (2013) 35 New Political Science 604.

[233] Donnaruma and Partyka (n 137), 44-45; Wigger and Buch-Hansen (n 232), 607.

[234] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations: Inquiry into the Nature and Causes of the Wealth of Nations* (Abridged edition edition, Hackett Publishing Co, Inc 1993); Donnaruma and Partyka (n 137), 48.

[235] Donnaruma and Partyka (n 137), 48; Wigger and Buch-Hansen (n 232), 608; Robin Hahnel, *Economic Justice and Democracy: From Competition to Cooperation* (Routledge 2013), 178.

[236] Pieter Kalbfleisch, 'The Assessment of Interests in Competition Law: A Balancing Act' in Mario Monti, Nikolaus von und zu Liechtenstein, Bo Versterdorf , Jay Westbrook and Luzius Wildhaber (eds), *Economic Law and Justice in Times of Globalisation* (Nomos Verlagsgesellschaft mbH & Co KG 2007), 468. Cf also Horizontal Cooperation Guidelines (n 108), para 3.

[237] Smith (n 234).

flaws. There are many examples of cooperation employed for altruistic purposes and for the common good.[238]

If the economic system leverages on the negative aspects of human beings to achieve its objectives, it is not surprising that these are the ones that mainly emerge. However, if the economic system, and society in general, relied on different ones, it does not seem unreal that one could achieve different, if not opposite, results.

The line of reasoning, that this study is following, is far less abstract and utopic if one goes back to dwell on the BC phenomenon. The new form of corporate governance is born exactly to accommodate the needs of a kind of entrepreneurship tired of the sharp division between profit and common benefit. It is a strong example of how a process of transformation has already started.

It is true that the phenomenon could bring about tangible changes only if a considerable number of companies were to adopt the new model. On the other hand, it is also true that this model will have the possibility to spread, only if it is adequately publicized and supported by the institutions operating in the sector. Studies of VoC suggest that in CME, a stakeholder model of corporate governance does not stand alone in a *vacuum*, but it is part of a system that supports it.[239] Companies operating in a context characterised by LME dynamics find more complicated to change their way of doing business, both in regard to their corporate objective, and to the relationships with their competitors. As expressed by Colin Donnaruma and Nicholas Partyka, "one certainly can act in a solidaristic and cooperative manner within a competitive market system, but to do so often means having to go against the grain and place oneself at a competitive disadvantage."[240] Many sectors of the law could be affected by the phenomenon.[241] Their attitude towards it can considerably influence the change. The next section analyses which role competition law and policy can play in this process and which transformations are needed to support it.

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[238] Peter Kropotkin, *Mutual Aid: A Factor of Evolution* (Courier Corporation 2012).

[239] An example could be the financial sector. See Ch 1.1.

[240] Donnaruma and Partyka (n 137), 49.

[241] For instance, think about the tax one, or the recognition of BC legislation itself. Countries as the UK or Netherlands, which have already dozens of B-Corps, would take a significant step forward by recognising them legally.

3.2 - BENEFIT CORPORATION AND ANTITRUST: THE ROLE OF COMPETITION LAW IN SUPPORTING THE CHANGE

Section 1.3.3, after having explained the more influential theories of competition policy, have tried to highlight the recent transformation, occurred at EU level, in the interpretation and enforcement of EU antitrust law.

This new interpretation leaves little room to cooperation among firms. Cooperation is allowed only when either it has no effect on competition, or it enhances consumer welfare and innovation.[242] Cooperation among undertakings for the achievement of public benefit is generally discouraged on the basis that: firstly, it is not up to companies pursuing these objectives;[243] secondly, there is the risk, not unfounded, that behind such good intentions lie egoistic aims.[244]

In this way cooperation is discouraged and in a certain sense also demonized. This process has led to a situation of uncertainty over allowed and prohibited practices, which was further increased by the contrast between the ECJ case law and new Commission's approach.[245]

This entails that there is a necessity to define firstly the practices allowed and secondly to change the attitude towards cooperation. In the words of Anna Gerbrandy, regarding the possibility for firms to engage in sustainability practices:

> if the boundaries of competition law are too strict […] then these boundaries need to be reset. If the boundaries are unclear, because their interpretation is uncertain, the interpretation needs to be clarified. The problem, in both instances, is a limitation on initiatives – or at the very least, a higher burden for undertakings as they seek needed clarity.[246]

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[242] Horizontal Cooperation Guidelines (n. 108), para 2.

[243] Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (OUP Oxford 2006), 50.

[244] Kalbfleisch (n 236), 468.

[245] See Ch 1.3.3. Cf also Witt (n 75).

[246] Gerbrandy A, 'Competition Law and Sustainable Development. An Inquiry by Legal Essay', 10 (2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398962> accessed 5 July 2016.

Some changes could be carried out within the boundaries of the law in force. Others require the modification of the substantial law and the implementation of new procedural rules. For instance, in the opinion of Giorgio Monti, Article 101 should be redrafted, and a fourth paragraph should be created to authorise agreements between undertakings, which contribute to the promotion of Union objectives.[247]

3.2.1 - CHANGES WITHIN THE BOUNDARIES OF THE EXISTING LAW

Concerning the lack of legal certainty, at national level something has started to move. The Netherlands, for instance, has already undertaken this path. In 2014, the Minister of Economic Affairs adopted a decision concerning new policy rules for the Dutch Competition Authority (DCA), for the application of national competition provisions [248] towards anticompetitive agreements made for the purpose of sustainability. [249] Subsequently, the DCA implemented a Vision Document on Competition and Sustainability, in order to explain "to what degree sustainability initiatives of businesses are compatible with competition law."[250] By doing so, the Dutch government and the DCA have recognised two important things: firstly, the importance of cooperation among undertakings for the resolution of environmental problems. According to the Dutch Minister, cooperation has to be incentivised because "smaller market participants are not able to take such initiatives on their own […]" or because a firm, willing to limit negative externalities, may be dissuaded by the fact that "consumers are likely to switch to the non-sustainable variant if the firm includes the increased production costs in the prices of its products. This could lead to a loss of market share and profit."[251] Secondly, the initiative recognises the tight relationship between collaborative practices undertaken for the common good and

[247] Monti (n 112), 1097.

[248] It is important to note that these mirror perfectly EU ones.

[249] Minister of Economic Affair, Policy Rules on Competition and Sustainability, <https://www.acm.nl/en/download/attachment/?id=11880> accessed 25 August 2016 (Policy Rules on Competition and Sustainability).

[250] Authority for Consumers and Markets, Vision Document on Competition and Sustainability, <https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability/> accessed 25 August 2016.

[251] Policy Rules on Competition and Sustainability (n 249).

competition law.[252] The latter could represent an obstacle to the spread and the realisation of such practices, if not correctly applied.[253]

The minister's guidelines are currently under review, after being subject to considerable criticism. The proposal was, after all, unable to exempt sustainability initiatives like the closure of coal-fired power plants or the enhancement of animal welfare in abattoirs.[254] The draft of the new policy rules, which could be officially issued during 2016, contains substantial innovations such as the possibility to consider not only quantitative, but also qualitative improvements or the chance to exempt the agreement if it benefits society as a whole and not only a specific group of consumers.[255]

The Commission should follow the Dutch path by supporting cooperative agreements, which coincide with Union objectives. The Commission could rely not only on Guidelines, but also on another feature of Regulation 1/2003. Recital 38 states that, in order to enhance legal certainty for undertakings, the Commission might provide informal guidance in the event of "genuine uncertainty" caused by novel or unresolved questions about the application of antitrust rule.[256] Given the inconsistency between the recent Commission's practice and the case law of the EU Courts,[257] and given the vibrant academic debate,[258] it seems reasonable to consider this topic as controversial and unsolved.

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[252] Maarten Pieter Schinkel and Yossi Spiegel, 'Can Collusion Promote Sustainable Consumption and Production?' (2016) International Journal of Industrial Organization <http://www.sciencedirect.com/science/article/pii/S0167718716300327> accessed 30 August 2016; Maarten Pieter Schinkel and Lukáš Tóth, 'Balancing the Public Interest-Defense in Cartel Offenses' (2016) Amsterdam Law School Research Paper <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2723780> accessed 30 August 2016.

[253] Gerbrandy A, 'The Netherlands Move Ahead with Competition and Sustainability' <http://blog.renforce.eu/index.php/nl/2016/02/23/the-netherlands-move-ahead-with-competition-and-sustainability/> accessed 25 August 2016.

[254] Jordy de Meji, Minister of Economic Affairs published a draft policy rule on competition and sustainability for consultation, <http://www.stibbe.com/en/news/2016/january/minister-of-economic-affairs-published-a-draft-policy-rule-on-competition-for-consultation> accessed 25 August 2016.

[255] ibid.

[256] Regulation 1/2003 (n 103), Recital 38.

[257] See Ch 1.3.3. See also Witt (n 75).

[258] On a similar opinion about the inclusion of public policy in antitrust assessment see Monti (n 112); Wigger and Nölke (n 48); Townley (n 71); Lavrijssen (n 115); Townley (n 70); Witt (n 75); Gerbrandy (n 121); Wigger and Buch-Hansen (n 232); For a different opinion see Odudu (n 243); Whish and Bailey (n 46).

However, the transformation of competition law should not be limited to the clarification of the already existing rules, even though this is a fundamental first step. Competition law, and more precisely who enforces it, should take the lead to make a clear distinction between detrimental and positive cooperation practices. The former, such as cartels, have to be prosecuted and sanctioned, whereas the latter needs to be authorised and incentivised, even when they might entail a restriction of competition.

Exactly those institutions that work closely with businesses and know the markets in which these operate could have the capabilities to balance a restriction of competition against the achievement of a public benefit. For what concerns the Commission, this task could be carried out, to a certain extent, with the current powers. In the past it has already taken public policy considerations into account;[259] it seems reasonable that it could do so now as well, especially after the adoption of the Treaties of Lisbon, and the improvements of the policy-linking clauses.[260]

The idea might be implemented, for example, through Article 10 of Regulation 1/2003.[261] This states the possibility for the Commission not to apply Article 101 TFEU when a Community public interest is concerned. The article has never been used so far, but it could represent a good starting point for a more active role of the Commission in supporting cooperation practices in the interest of the European Union.

In the case of NCAs the issue is more complicated, since it is believed that they lack legitimacy to undertake a process of balancing between competition restrictions and achievement of public interests.[262] However, some authors have already put forward possible solutions for the problem such as, for instance, the strengthening of democratic control.[263]

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[259] See Ch 1.3.1. See also Townley (n 71), 141-175.

[260] Giorgio Monti, 'EU Competition Law from Rome to Lisbon – Social Market Economy' in Caroline Heide-Jørgensen, Christian Bergqvist, Ulla Neergaard and Sune Troels Poulsen (eds), *Aims and Values in Competition Law* (Djoef Publishing 2013); Lavrijssen (n 115), 2; Gerbrandy (n 121), 12; Witt (n 75), 465.

[261] Regulation 1/2003 (n 103), Article 10.

[262] Schweitzer (n 75); Lavrijssen (n 115); Anna Gerbrandy, 'Addressing the Legitimacy Problem for Competition Authorities Taking into Account Non-Economic Values: The Position of the Dutch Competition Authority' (2015) 40 European Law Review 769.

[263] Gerbrandy (n 262), 779.

3.2.2 - CONCEIVING OTHER SOLUTIONS

The more active role should not only consist of clarifying the law or granting exemptions. Instead, these institutions should actively take part to the cooperation process among enterprises, for example, by facilitating meetings, participating to them, giving support (and not only legal one), and by contributing in the decision about the objectives that one wants to achieve through a cooperation scheme.

In this way, however, such institutions would not only have a proactive role, but also a fundamental one of control and political direction. By partaking so closely in the cooperation process, these institutions would have the capability to monitor the agreements and to steer them towards the desired objectives.

A suggestion of how the Commission could play this new role is based on the already existing possibility for the Commission to adopt commitment decisions. According to Article 9 of Regulation 1/2003,[264] "a commitment decision makes legally binding commitments offered by undertakings under investigation, and concludes that there are no longer grounds for action by the Commission."[265] Such possibility assumes that companies are already under investigation for an infringement of Article 101 or 102 TFEU. However, the Commission's concerns are balanced by the commitments offered by the companies. This is the feature that could inspire the creation of a new instrument able to back and supervise cooperation practices. In the event in which companies declared the intention of cooperate to achieve a public benefit, and substantial concerns were raised, the Commission or NCAs could use a similar power to ensure that the public benefit is actually pursued, or that this is pursued without an excessive or detrimental distortion of competition.

3.3 - CONCLUSION: GOING BACK TO FREIBURG OR TAKING A NEW PATH?

The proposed approach shares some important grounds with Ordoliberalism. For instance, the idea that competition is not a value itself, but an instrument for the

[264] Regulation 1/2003 (n 103), Article 9.

[265] Commission, Commitment Decisions: Frequently Asked Questions, <http://europa.eu/rapid/press-release_MEMO-13-189_en.htm> accessed 27 August 2016.

achievement of economic and social welfare. Or the idea that the state[266] has a fundamental role in limiting and steering the market, which is not self-correcting. Moreover, the conception of competition law as part of the founding economic constitution of a state, and not an isolated sector of the law.[267] Finally, the fact that certain forms of cooperation among firms are advantageous for society and need to be supported. However, it is not desirable to go back to the past. Instead, it is necessary to start an open debate about the objectives of competition law, and its approach both towards collaboration and different ways of doing business. As argued by Christopher Townley, a debate on the topic is overdue since, in Europe, there has never been one.[268]

[266] In this case also the EU.

[267] This is particularly true for what concerns the EU treaties. Competition provisions are part of the Treaties and need to be interpreted consistently with other provisions.

[268] Townley (n 70), 347.

CONCLUSION

Some key principles of the economic system have started to creak. The concept that enterprises should exclusively focus on their profit does not seem to produce the desired result of also improving social wealth. Even the business community has started to criticize the exclusion of stakeholders' interests from company management. Moreover, there is a decreasing confidence in the idea that competition between firms is always the best way to organize relationships among them. The benefits of competition do not seem to offset its negative consequences. That is why a more collaborative model is emerging both in corporate governance, and in inter-firm relations. In certain countries, company law has undertaken a path of innovation, questioning some of its core aspects. For instance, the adoption of BC legislations represents a remarkable change in corporate governance. On the contrary, competition law is considered to be a separate sector of the law, nearly down to an exact science, which should not be polluted by balancing public interests. Nonetheless, competition law plays a fundamental role in these changes. It could offer support as a pioneering agent of change, or it could undermine and consequently bury such progress. The contemporary debate about reconsidering some of these principles is long overdue, and important. This study has attempted to contribute to that debate.

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