Benefit Corporations: Trends and Perspectives

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1 Looking Back to Move Forward

For those of us who, like Paul Valery, believe that, despite ourselves, *nous entrons dans l'avenir à reculons*, looking at the trends and prospective of a field of law (or even a simple legal phenomenon) means looking at its origins. In other words, we can only attempt to divine the future by contemplating and considering (in the etymological sense) the past and the present. This may be a short-sighted way of proceeding, but we see no alternative.

The paper is the result of the joint reflection of the three authors. More specifically, §§ 1, 4, 5 are attributable to Mario Stella Richter, § 2 is attributable to Cecilia Sertoli, and § 3 is attributable to Maria Lucia Passador. § 6 was written jointly.

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This chapter does not aim to discuss the legislative and non-legislative history of *benefit corporations*, *B-Corps*, *società benefit*, *sociedades de beneficio e interés colectivo* or ***sociétés à mission***,[1] whatever their national name and shades might be,[2] as each section of this book analytically sets them out already, and as the history of the various forms of **benefit corporations** is, in itself, still rather short.[3]

On the other hand, we deem it useful to frame the recent and lively progression of the "benefit corporation phenomenon"[4] (as we prefer to refer to it as a mere "phenomenon," given its different shades in different legal systems) within the broader context of the generally renewed awareness on ***corporate purpose*** (or *purpose of the company*),[5] *shareholder welfare*, *shareholder theory*, *enlightened shareholder value*,[6] on *corporate* (or *business*) *social*

[1] Article 176 of the loi PACTE (No 2019-468 of 22 May 2019) provides for the *société à mission*, as a result of which Article L210-106 of the Code de Commerce now reads as follows: "*Une société peut faire publiquement état de la qualité de société à mission lorsque les conditions suivantes sont respectées:*

1. *Ses statuts précisent une raison d'être, au sens de l'article 1835 du code civil;*
2. *Ses statutes précisent un ou plusieurs objectifs sociaux et environnementaux que la société se donne pour mission de poursuivre dans le cadre de son activité;*
3. *Ses statutes précisent les modalités du suivi de l'exécution de la mission mentionnée au 2°. Ces modalités prévoient qu'un comité de mission, distinct des organes sociaux prévus par le présent livre et devant comportant au moins un salarié, est chargé exclusivement de ce suivi et présente annuellement un rapport joint au rapport de gestion, mentionné à l'article L. 232-1 du présent code, à l'assemblée chargée de l'approbation des comptes de la société. Ce comité procède à toute vérification qu'il juge opportune et se fait communiquer tout document nécessaire au suivi de l'exécution de la mission;*
4. *L'exécution des objectifs sociaux et environnementaux mentionnés au 2° fait l'objet d'une vérification par un organisme tiers indépendant, selon des modalités et une publicité définies par décret en Conseil d'Etat. Cette vérification donne lieu à un avis joint au rapport mentionné au 3°;*
5. *La société déclare sa qualité de société à mission au greffier du tribunal de commerce, qui la publie, sous réserve de la conformité de ses statuts aux conditions mentionnées aux 1° à 3°, au registre du commerce et des sociétés, dans des conditions précisées par décret en Conseil d'Etat."*

[2] From now on, for the sake of simplicity, we shall refer to benefit corporations as all the companies that combine a profit-making purpose with the pursuit of any "altruistic" interest, i.e., to the benefit of certain groups of subjects other than share-/stake- holders only.

[3] Embid Irujo (2022), p. [•] (observing that the inclusion in some legal systems of express provisions on benefit corporations is still quite recent).

[4] The studies collected in this volume seem to also attest such an ongoing evolutionary framework well.

[5] See Stout (2013), p. 61 ff. and, by limiting the examination to the latest events, *cfr.* Lipton and Schwartz (2020) and Bebchuk and Tallarita (2020). See also Mayer (2021), p. 887 ff.

[6] It is widely held that the last four formulas constitute, together, the main responses to the *Friedman doctrine*. The *enlightened shareholder value* seems to have found acceptance in *Section 172 of the UK Companies Act 2006. Stakeholder theory*, and thus the inherent duty to consider all *stakeholders*, is already echoed in the various North American *constituency statutes* (see, for example, the Minnesota Constituency Statute according to which "[a] director *may*, in considering the best interests of the corporation, consider the interests of the corporation's employees, customers,

responsibility,[7] on the *raison d'être,* or on the *interest of the company* (or *corporate interest*), just to recall some of the most widely used slogans. Such timeless problems (related to those "watchwords" or "formulas") have recently returned to the heart of the debate, as we can observe even at a simple glance to the international literature.[8] Although they have never completely popped out of practitioners', and especially corporate law theorists', heads, previously, the debate related to them seemed somewhat dormant (or, at least, less lively).

Proceeding with a rough and reductive synthesis, we can state that, since the end of the last century the issues that used to be tackled (and to a large extent resolved) thanks to the classic instruments of law (state sovereignty; imperative norms of state law; possibly international treaties to be translated into internal norms; etc.) have turned out to be of such magnitude that they no longer seem likely to be settled alike. The global and planetary echo of both technology and economy, the affirmation of "super-capitalism," the emergence of global entrepreneurial entities (not simply multinationals), whose turnover exceeds the gross domestic product of most states, break the assumption on which the effective sovereignty of the 19th century state was based: the co-extension of politics, economics, and law. States lost the position gained (perhaps also thanks to Hegel), and other organizations are now bursting onto the stage of the world's destinies: corporations, whose ability to plan and dictate the rules of the game seems destined to make them become a great political player.[9]

Today, there is no longer one *corporate social responsibility* only, no longer a unique purpose to be pursued, and the *Friedman doctrine*—for which *business social responsibility* is just that of using the company's resources and engaging in activities designed to increase its profits while *respecting* the *rules of the game*[10]—is no longer applicable. This occurs not because of its lack of intrinsic logical soundness, but for the simple reason that the (existing) rules of the game imposed on corporations and their directors cannot ensure the protection of the fundamental

suppliers, and creditors, the economy of the state and nation, community and societal considerations, and the long-term as well as short-term interests of the corporation and its shareholders including the possibility that these interests might be best served by the continued independence of the corporation"). While the shareholder welfare theory is mainly due to Hart and Zingales (2017), p. 247 ff.: "It is too narrow to identify shareholder welfare with market value. The ultimate shareholders of a company (in the case of institutional investors, those who invest in the institutions) are ordinary people who in their daily lives are concerned about money, but not just about money. They have ethical and social concerns."

[7] See Crane et al. (2008).

[8] See Embid Irujo (2020) and related references.

[9] Benedetti (2014), p. 31, from which the previous quotation is also taken. For a broad overview of the state sovereignty crisis and the emergence of the so-called fourth sector, please refer (for further necessary references) to: Resta [and Sertoli] (2018), p. 457 ff.

[10] Friedman (1962), p. 133 ff.; later included in the conclusions of the famous *The Social Responsibility of Business is to Increase its Profits*, appeared in *The New York Times Magazine*, 13 September 1970. On the occasion of the 50th anniversary of its publication, several re-readings were published, as the ones by: Enriques (2020); Zingales (2020a); Kaplan (2020); Lipton (2020).

values and interests of whole society by themselves. Hence, in this situation, it seemed natural to restore corporate responsibility to pursue general, common, collective interests and values. In other words: if God does not exist, man should nevertheless live *veluti si Deus daretur*, as if God existed.

Thus, companies—especially large ones—are not only the instruments for carrying out business activities in the exclusive interest of those who participate in them and of the company itself, but also the guardians of common, general, and even public interest. This should bring the task of identifying, selecting, and weighing up all these interests back to the companies that are free to the most suitable way to concretely pursue them. Large shareholding companies can no longer be considered only as the main characters in the economic stage, but also as the leads of the political stage (with a series of inevitable consequences in terms of the democratic deficit of the decisions that do not fall within the scope of the present study).

Hence, directors now have conspicuous (and indeed substantially disproportionate) discretionary powers; to the extent that some scholars (correctly, in our opinion) stressed how promoting the centrality of ***corporate social responsibility***, reinforcing sustainability policies and making ESG (environmental, social, and governance) issues as overriding now represent a key concern for large companies' managers and directors. It is obvious that this also leads to a (not entirely unjustified) skepticism about the possibility of solving the dilemmas above by entirely relying on such figures.[11]

2 Techniques and Possible Reasons for an Explicit Recognition of Benefit Corporations

The aforementioned context resulted in the creation of benefit corporations, i.e., companies expressly characterized by the aim of pursuing a twofold order of interests, that also need to be properly balanced: on the one hand, the traditional profit-making shareholder interests and, on the other hand, the stakeholders' interests (e.g., that of employees, clients, suppliers, members of the local community in which the firm operates, but also public administration and society as a whole). Consequently, managers and directors of benefit corporations need to, above all, strike a balance between such interests.

There are two ways of achieving a recognition of the status of benefit corporations in the regulation:

(i) on the one hand, the identification of an ad hoc model, namely, of an **autonomous type of company**, alongside those already existing in the respective legal systems;

[11] See Angelici (2018a), p. 3 ff.; Id. (2020), p. 4 ff., at p. 23.

(ii) on the other hand, the possibility of qualifying any **type of company** in that system as a benefit corporation whenever it plans to pursue the abovementioned double purpose as a necessary one. In this case, the status of benefit corporations would not represent an (autonomous) ad hoc model, but a qualification to which all companies can aspire, provided they fulfil certain legal requirements.[12]

Still, in our view, the most important question is whether amending the regulation on this topic is necessary (or appropriate) and, if so, which is the most suitable direction.

Obviously, the reasons for a regulatory intervention are almost endless. For instance, a more favorable tax treatment—although we do not think this should happen, given that the choice of adopting the benefit corporation status should be taken regardless of its possible economic convenience—or any other incentive could be granted to benefit corporations to ultimately encourage the pursuit of common interest purposes.[13]

At the same time, from a logical point of view, another question comes first: is it actually necessary to provide benefit corporations with an ad hoc model to be able to lead both managers and directors to pursue such **dual purpose** (i.e., balancing shareholders' and third parties' interest)? This is a national-specific[14] matter of

[12] See, Embid Irujo (2022), p. [•].

[13] See, Stella Richter (2017b), p. 77; Marasà (2018), p. 51; Corso (2016), p. 1007, fn. 49; Prataviera (2018).

[14] If, to take the most straightforward case, a domestic company law provided (as, for example, *Section 172(1) of the Companies Act 2006* does in England) that "[a] director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,
(b) the interests of the company's employees,
(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company," well, if it were to provide all this with reference to all companies (therefore, without distinguishing between benefit and non-benefit), it would be very difficult to argue the need for an ad hoc legislative provision to allow the individual company to reconcile and pursue interests other than those of the shareholders.

Certainly, it could be argued that all the interests enumerated in the various letters [from *(a)* to *(f)*] of the cited provision are interests to be considered in determining what is the interest of the participants in the company as a whole—i.e., the *corporate purpose*—and only the pursuit of the latter would be the company's interest. Further, such reasoning would seem to find its best demonstration in the very next provision [and thus the cited Section 172(2)], where it is added that "[w]here or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes." Undoubtedly, this provision admits that the company's purpose may be something different or even something other than the "*benefit of its members as a whole*" with the consequence, then, that if it is not provided for,

law, and it is strictly connected to the notion of corporation that applies in any given system from time to time: for example, whenever this notion is causally neutral, there would obviously be no doubt of expressly providing for the category of benefit corporations; but, even where this notion is not entirely neutral from a causal (or, better, teleological) point of view, corporate case-law admits that directors enjoy sufficiently broad discretionary powers, such as to allow the consideration of a series of interests in the definition of strategic corporate objectives to be pursued in the interest of shareholders. Such ineliminable discretion is, in our opinion, linked to the fact that there is no monolithic and predetermined concept of corporate interest, and that the formulas for defining the social interest must necessarily be concretely adapted. So, the problems related to the definition of such interests lead to countless ways in which, at the discretion of directors, both order of interests can be pursued by the companies.

Therefore, even in those legal systems where the notion of company is not causally neutral and where there is no list of interests that directors have to consider when determining the company's interest, the reason traditionally put forward to justify an intervention in the field of benefit corporations seems disingenuous: to make what would otherwise have been precluded to companies possible and, therefore, to allow directors to pursue common benefit purposes in conjunction with the economic activity that constitutes their corporate purpose. In addition, we defined it as disingenuous because, even in those legal systems, directors had the power to consider "other" interests to a certain extent before the eventual introduction of benefit corporations.[15]

From a strictly logical point of view, the opposite is true, if anything. As the corrosion critique states explicitly providing for benefit corporations in a legal system can provide an argumentative basis for claiming that altruistic activities (which prior to the introduction of benefit corporations could be undoubtedly carried out by corporations, albeit as a tool in the pursuit of the *main corporate purpose*) are not (from that moment on) exercisable by benefit corporations.[16] Providing for benefit corporations in the legal system would, then, not allow them to do what (non-benefit) corporations previously could not (and did not) do, but preclude all the companies other than the benefit corporations from continuing to do what they actually did (or could have done) in the past. In short, it might be a tool to reduce the scope of discretion of non-benefit corporations' directors.[17]

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the company will have only one ultimate purpose: that of pursuing the interests of its members. Nevertheless, this depends on the fact that, in the Anglo-Saxon legal tradition, the company remains a causally neutral figure, thus, the problem of the expressly providing for benefit corporations in the regulation does not arise upstream.

[15] See Stella Richter (2017a), p. 960 ff.; Id. (2017c), p. 274 f.

[16] See McDonnell (2019), to whom we owe the expression, but which he himself qualifies in terms of a "mistaken impression." Instead, in the sense that the provision of the benefit corporation (in Italy) would no longer allow for common benefit activities by non-benefit corporations, see Denozza and Stabilini (2017) and Ferdinandi (2017), p. 541 ff.

[17] See, for instance, Denozza and Stabilini (2017).

The latter interpretation is appealing from a purely logical standpoint; however, it comes up against numerous obstacles that the law presents in those legal systems which provide for benefit corporations.[18] Above all, this reading fails to overcome the fact that pursuing interests other than those of the shareholders may lead, in any case, to an inevitable *"incidental by-product of the business judgment rule."*[19]

So far, discussions on the matter resulted in some major points that deserve to be recalled.

In ***legal systems*** *that do not expressly provide for benefit corporations*, nothing prevents directors from performing individual "altruistic" activities, if such activities are instrumental to the pursuit of the *corporate purpose*.[20] In the legal systems which, on the other hand, *provide* for benefit corporations, directors of non-benefit corporations are not precluded from carrying out altruistic activities, always provided that such activities are instrumental to the pursuit of the *corporate purpose*. In both cases, choices are backed by the *business judgment rule*.

Given such premise, we can try to delve into the real meaning of provisions requiring us to understand the difference between benefit and non-benefit corporations (precisely in those legal systems that provide benefit corporations with an ad hoc model). This is a matter that depends on the single national regulations; but, at least *de jure condendo*, it makes sense to resolve it as follows:

- in non-benefit corporations, the pursuit of altruistic purposes should be instrumental to the pursuit of the profit-making (or selfish) shareholders' purpose;[21]
- in benefit corporations, the pursuit of altruistic purposes should be raised to the same level as the selfish aim (namely, the traditional one for profit-making corporations), with the consequence that the former would not be the aim for the pursuit of the latter, but the corporation has to be managed trying to balance both.

[18] In the sense that even in non-benefit companies, according to Italian law, it is possible to carry out altruistic acts or activities favoring the general benefit (when it is believed that they can contribute to the pursuit of the interests of the shareholders, i.e., when they do not irremediably contrast with the selfish aims of the latter): see, for example: Marasà (2018), p. 53 f.; Montalenti (2018), p. 303 ff., at p. 318; Angelici (2018b), p. 26 ff.; Stella Richter (2017a), p. 962; Id. (2017b), p. 82 f.; Id. (2017c), p. 277 f.; Corso (2016), p. 1012 f.

[19] The expression is attributable to Bainbridge (1993), p. 1423 ff., at p. 1440 (also referred to in Angelici (2010), p. 45 ff., fn. 12 at p. 51).

[20] For the distinction between business purpose and corporate purpose, see, most recently, Rock (2020): "'Business purpose' should be understood to be a property of business enterprises, however they are organized. 'Corporate objective', by contrast, is best understood as a characteristic of a particular enterprise form (the general corporation) and not as a description of what actual businesses do on a day to day basis. Confusing these two concepts under the heading 'corporate purpose' limits our ability to understand what sort of organizational form is best suited to a particular enterprise, and leads to confusion in the management debates over how to build successful businesses and the political debates over the social role and obligations of large scale business enterprises."

[21] On the role of sustainability policies and environmental and social values as part of the general corporate purpose framework, for example, Mayer et al. (2020), who underline how EESG (Employee, Environmental, Social, and Governance) factors are the subject of legal obligations for all companies. See also Strine (2019), highlighting its usefulness especially post COVID-19.

Obviously, from a practical point of view, this conceptual contrast would lose much of its clarity. However, the two points above still make sense looking at the *duty* to carry out altruistic activities: while non-benefit corporations (which could well perform such activities) would not be strictly obliged to implement such policies, benefit corporations would.[22]

3 Corporations Between Doing Well and Doing Good: The State-of-the-Art of the International Debate

Given the renewed interest in the **corporate purpose** recalled at the beginning of this chapter,[23] an extensive debate developed on the usefulness of benefit corporations in the relations between *shareholders and stakeholders* at the international level. In other words, the question addressed was whether benefit corporations could be the right tool to achieve the social and environmental sustainability of business activities and, thus, follow up on the instances of *corporate social responsibility*, allow *socially responsible investing*, facilitate the creation of shared value, and strengthen the competitiveness of the company, while meeting the needs and the challenge of the communities in which it operates.[24]

As far as the possible reasons for the success of the benefit corporation in general are concerned, Dorff's analysis is particularly accurate.[25] He identifies eight orders of reasons for having recourse to a ***public benefit corporation***. Some of them are of a more practical order,[26] while others appear to be ideal;[27] but, in the author's

[22] But even here, perhaps, provided that certain assumptions are not exceeded, which would then act as a limitation: one might wonder whether directors are bound to engage in activities of common interest when these could jeopardize the continuity of the company.

[23] See above, para 1.

[24] Ex multis, The Yale Center for Business and the Environment, Patagonia, Inc., and Caprock (2018); Winston (2018), p. 1783 ff.; McDonnell (2017), p. 717 ff.; Goldschein and Miesing (2016), p. 109 ff.; Koehn (2016), p. 17 ff.; Porter and Kramer (2011), p. 62 ff.

In the sense (extreme, to some extent) of enhancing the instrument of the benefit corporation, particularly the Public Benefit Corporation (PBC), to the point of hypothesizing that all companies exceeding one billion dollars in revenues must be Public Benefit Corporations, as per the recent proposal formulated by Mayer et al. (2020).

[25] Dorff (2017), p. 77 ff.

[26] It would be advisable to opt for a *public benefit company* "in hopes that it will help the business appeal to an important group such as customers, employees, for-profit investors, foundations, or donors, or to signal a dual purpose for some other reason ("Brand") [. . .] because of its ability to distribute profits to owners ("Earn"), something a nonprofit cannot do; because of its regulatory simplicity as compared to a nonprofit ("Simplify"); because it might serve to push managers to adopt prosocial policies that will also help improve profitability ("Manage"); or because the hybrid form may provide greater protection against hostile acquisitions ("Keep")."

[27] In this sense, the use of a *public benefit company* would be welcome because "[f]ounders may believe that businesses have a moral obligation to aid their employees, communities, customers or

perspective, those are compatible and cumulative grounds that make benefit corporations a revolutionary tool, capable of overturning the principle of *shareholder wealth maximization*. Other scholars also recognize the coexistence, among these reasons for success, of practical reasons (particularly their ability to more effectively fight hostile operations undertaken by entities whose motivations of profit maximization threaten these companies) and of an ideal order (in terms of philanthropic endeavors).[28] They emphasize the need for a rigorous *mission accountability* of benefit corporations, given their intrinsic nature,[29] and, at times, places benefit corporations in a grey sector.[30]

On the contrary, those who support skeptic (or, at least, puzzled) positions highlight two main issues:[31] the degree of bindability and relevance of concepts as *shareholder primacy*, ***shareholder wealth maximization*** and *market value maximization*; the fear that this translates into the adoption of vacuous *corporate greenwashing* policies.

As for the former, some authors stress the need to preserve the spirit of capitalism in the pursuit of business activities,[32] other authors—especially in the light of the steps being taken at European level on the subject[33]—now believe that the company

other corporate constituencies [. . .] [and] may wish to adopt a business form that expresses these ideals and perhaps inspires others to follow their example ("Express")[,] [. . .] to shield themselves from liability for adopting prosocial policies that reduce earnings, thereby encouraging such policies ("Protect") or to ensure that the company continues to embody their values even after they lose control to their heirs or to eventual buyers ("Endure")."

[28] The expressions used here are borrowed from Neubauer (2016), p. 109 ff.

[29] Cummings (2012), p. 578 ff., underlining how, among the aspects characterizing the governance of PBCs, there is a "certification from an independent third party and annual reports to the public are ill-suited to the regulation of social welfare objectives" to protect the best interests of the community, through the instruments mentioned above. The latter can reinforce the intrinsic motivations they pursue, which is the distinctive feature of this type of company. Such accountability, as well as the related *reporting* and *fiduciary duties* of the directors, would become even more crucial should the *public benefit corporation* decide to undertake a listing process (on this point, Dulac (2015), p. 171 ff.).

[30] Andrè (2012), p. 133 ff. According to the author—although the opinion is shared—all this falls within the so-called fourth sector, to which "mission driven companies that reach across traditional sector boundaries and propose to serve multiple bottom lines, thus blurring the boundaries between the public and private sector" belong (p. 134). But her voice, offering extensive references to those who praise this "corporate genre," capable of "*mak*[ing] *the economy more just*" (Adams (2010); Tozzi (2009); van den Heuvel (2010); Weber (2010)), hints at cracking.

[31] In addition, some systemic observations consider the provision of an ad hoc "company type" unnecessary: see MacLeod Heminway (2018), p. 779 ff., at p. 800 f.; Molk (2018), p. 241 ff., at p. 244 (previously: Underberg (2012)).

[32] Zingales (2020a) (specifically holding that Mayer's "mantra," i.e., "companies should produce profitable solutions to the problems of people and planet, not profit from producing problems for people and planet," cannot be a *policy prescription* for corporations, given its unfeasibility and its obvious risks). Although acknowledging some positive aspects, see Hiller (2013), p. 287 ff. See also, on *state laws* and *statutory differences*, Loewenstein (2013), p. 1007 ff., spec. at p. 1020 ff.

[33] EU Commission-EY, *Study on directors' duties and sustainable corporate governance. Final report*, July 2020, available at https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en.

should be considered in the social context in which it operates, and some other authors, while contemplating the possibility (but not the need) to look at further and broader interests, believe that benefit companies are not a decisive tool,[34] since the same results can be achieved by reconsidering traditional *business practices* and, specifically, by implementing policies to eventually maximize profits which are also oriented towards the creation of value and not just profits.[35]

On the second problematic issue, certain scholars point to the lack of effective *accountability* and *oversight* systems in the current regulatory framework,[36] while others explicitly fear problems of *greenwashing*.[37] Consequently, the current provisions would not sufficiently protect shareholders, customers, or other stakeholders. Other academic exponents are more favorably disposed towards benefit corporations[38] and hope for the adoption of *guidelines* on the subject aimed at clarifying, on the one hand, the real meaning of *fiduciary duties* in the hands of directors and managers and, on the other hand, the stages of verification and certification, to avoid the possibility of the adoption of the benefit corporation *status* turns to a form of corporate greenwashing.

Ultimately, it is undeniable that benefit corporations had a profound impact on the general debate on *corporate purpose*, contributing to the maintenance of a *shareholder-value oriented* view of social interest by non-benefit corporations. The awareness of the importance of the "benefit issue" and the official recognition of the special institution by several parties has led some authors to believe that, at a closer inspection, a solution is already be available to us.[39] So, if the reflection on the very general themes of the role of companies in the pursuit of common and general interests has led to the creation of a special case (that of the benefit corporation), it is now the benefit corporation itself that influences the outcome of this general debate.

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[34] Greenfield (2015), p. 15 ff. ("[t]he problem. . . is not that managers are not permitted to act with an eye toward society. The problem is that they are not required to do so. Benefits corporation statutes do not solve this problem," p. 19) and Eldar (2020), p. 937 ff. (which underlines the need to verify the actual social impact of these business forms to avoid them focusing only on shareholder value, but not actually benefiting those individuals whom they are originally intended to protect). On the other hand, there are those who underline how "it is not fair to say that they also overcome shareholder primacy. Properly understood, benefit corporations are shareholder-centric: they exist to allow shareholders to pursue altruistic goals rather than to require them to do so" (Velasco (2020)).

[35] Porter and Kramer (2011), p. 62.

[36] Hacker (2016), p. 1747 ff. ("Although this legislation is a necessary and progressive evolution in corporate law, the current benefit corporation form [. . .] does little to deter bad actors from taking advantage of socially conscious consumers willing to pay a premium for ethically sourced goods and services by incorporating and operating sham benefit corporations").

[37] Dorff et al. (2020), p. 31 ff.; Diehl (2018); El Khatib (2015), p. 151 ff., p. 182 n.172; Pontefract (2017). While referring specifically to *charitable public benefit corporations*, see Plerhoples (2017), p. 525 ff., which also identifies the problems of so-called *market-based charity*, injecting individualistic and autocratic values into charitable activities.

[38] For all, see Stecker (2016), p. 373.

[39] Zingales (2020b).

4 The Problems of the Introduction of an Ad Hoc Regulation for Benefit Corporation

The previous paragraphs highlighted that the reasons for expressly recognizing the category of benefit corporations are probably not decisive. An express provision about the benefit corporations' **status** does not seem to have generated significant results in terms of legal certainty, nor does to increase corporate sustainability as a whole. Indeed, the provision of the legal status of benefit corporations inevitably poses additional problems.

On the one hand, the transition of existing companies to the benefit corporation model (i.e., achieving the relevant qualification *durante societate*) affects the functioning of the company. First, it must be approved by majority vote; second, it must protect dissenting shareholders with specific forms of withdrawal or exit.

On the other hand, as we have seen, the express provision of a benefit corporation model fails in reducing the scope of discretion of the non-benefit corporations' directors (and, generally, this is positive[40]). However, there is more, as it does not seem proper to reduce that of benefit corporations' directors either. In short, an express provision for benefit corporations in the regulation does not even seem to decrease the related agency costs in such latter cases for various reasons. On the one hand, company's bylaws could express the scope of the common beneficial interest to be pursued, as well as the ways in which (and the limits within which) it should be targeted. On the other hand, nonetheless—and beyond the fact that this normally almost never happens, and, at present, there would be no merit check on this point[41]—two factors cannot but increase directors' discretion in the performance of their duties.

(i) Directors are necessarily entrusted with the additional function of balancing the pursuit of this common-benefit purpose with that of traditional profit-making purpose, and this adjustment inevitably generates an additional room for choice.
(ii) On the flipside, any provision in the company's bylaws allowing to pursue a (hypothetically well-defined) common beneficial interest entails the recognition of a (further) area of discretion for directors.[42] In other words, the traditional

[40] Denozza and Stabilini (2017) (observing that the irrelevance of the common benefit may derive not only from its generality, but also from its excessive specificity, as both the indication of a too wide common good and that of a too narrow common good might turn out to be equally irrelevant.

[41] According to Mayer's theory, the introduction of a *mandatory social purpose* could also lead to a *mandatory screening* with respect to the perimeter of this corporate purpose and, consequently, to an effective monitoring of the actual pursuit of these purposes (Mayer (2020)).

[42] There still seems to be some persuasive force in the following Business Roundtable statement (dated September 1997, stating that "the principal objective of a business enterprise is to generate economic returns to its owners"): "The notion that the board must somehow balance the interests of stockholders against the interests of other stakeholders [. . .] it is [. . .] an unworkable notion because it would leave the board with no criterion for resolving conflicts between interests of stockholders and of other stakeholders or among different groups of stakeholders."

business judgment rule is accompanied, in the context of benefit corporations, by a so-called *benefit judgment rule.*[43] The result is that benefit corporation' directors can enjoy a wider (double) discretion; with the further consequence that they are less responsible for their choices towards shareholders than non-benefit corporation' directors are.[44]

5 The Challenges of the Regulatory Framework

Going back to history, it is acknowledged that benefit corporations are the product of the so-called fourth sector and, in this sense, they represent the result of discussions concerning ***corporate social responsibility***, *sustainability, stakeholder primacy*, etc.[45] They can be seen precisely as an attempt to overcome the most patently ambiguous aspects of the fourth sector.

Indeed, when it comes to corporate social responsibility, it has not yet been fully (and perhaps deliberately) clarified whether such responsibility is a legal responsibility or a merely ethical one.[46] Given that liability assumes a rule of conduct, one should in fact first establish what kind of rule underlies *corporate social responsibility*. If it were only an ethical rule, social responsibility would not be relevant; if, on the other hand, it were a rule of law, then we would be in the field of the legal responsibilities of directors and other corporate bodies, and it would be a matter of understanding how the social aims underlying corporate social responsibility can be reconciled with the profit-oriented aims that characterize corporations.

While there is no doubt that the pursuit of common benefit interests becomes the subject of a legal obligation in benefit corporations; it is less clear how corporate and social purposes are reconciled in practice and whether there is a real directors' liability for the failure to pursue wider interests.

Once again, there is no specific rule of law that helps us to solve the matter. Still, stakeholders do not enjoy any direct action against benefit corporations' directors, as non-managers and non-directors do not have any legitimacy to protect altruistic purposes.[47]

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[43] See [Resta and] Sertoli (2018), p. 474, and, later on, Stella Richter (2017a), p. 962; Id. (2017c), p. 278; Ventoruzzo (2020), p. 50; Massa (2019), p. 111.

[44] Vice-versa, in the case of non-benefit corporations, directors will have to choose only in the light of the ordinary business judgment rule: a socially responsible management approach that also works from an economic point of view won't generate any contradiction between the company's typical purpose and that of common benefit; but a socially useful management approach that does not work may constitute just cause for the removal of directors (without giving rise to liability, when in compliance with the business judgment rule.

[45] Strine (2018) ("Benefit corporation law is a tool for establishing such a system").

[46] The search for the legal foundations of corporate social responsibility is still at an early stage, as confirmed by Embid Irujo ([•]) and Embid Irujo and Del Vale Talens (2016).

[47] Burba (2017), p. 330 ff., p. 333 and Lacovara (2011), p. 815 ff., spec. p. 851 f.

Therefore, the development of a more precise regulation of the functions, powers and responsibilities of directors is the area in which the most significant progress can be made. Innovations in the regulation, as well as in the case law and, to a not negligible extent, in the practices of drafting corporate bylaws seem to be able to contribute to this result.

From this perspective, regulating benefit corporations without concurrently fine-tuning some key aspects of their rules seems to be the major shortcoming of this vast reform effort. The weakness that is generally evident in the benefit corporation phenomenon is, indeed, a lack of rules. What deserves to be first discussed and governed today is not just the possibility of pursuing non-profit interests through organizational forms with their own legal personality and full economic self-sufficiency (a possibility which it is very unlikely to be questioned), but rather the consequences of this choice. Until now, in fact, answers given to this latter point still appear to be inadequate in various legal systems.

What seems urgent, therefore, is to start providing less vague answers to questions that do not arise at a *factual* level, but at a *regulatory* level. In short, it is a matter of understanding whether and how the liability of benefit corporations' managers and directors is affected by such purpose, who has the right to take legal action to ascertain and compensate any failures (related to the pursuit of non-profit interests) of said directors, and to what extent directors enjoy an increased discretion related to both profit-making and altruistic purposes.

In our opinion, this is an unavoidable step to be taken, and it could make it possible to set a specific regulatory framework for benefit corporations, without getting to the point of hypothesizing, as it is already being done (albeit very questionably), new means for applying an allegedly sustainable corporate governance in a completely indiscriminate manner.

And, in this sense, the ***Model Business Corporation Act*** reform already seems like it was going in that direction, as the introduction of a new *Chapter 17*[48]—which aims to serve as a reference for those states that have not yet adopted ad hoc regulations on benefit corporations, as well as for those that have statutes based on versions previously proposed by the Model B-Lab or individual state regulations[49]—was discussed in Fall 2019.

[48] Corporate Laws Committee, ABA Business Law Section (2019).

[49] It also reflects many of the issues addressed by the American Bar Association (2013), which had already noted how the influence (and perhaps even interference) of B-Lab and its models had been decisive in shaping the relevant provisions, albeit not already included in the previous *Chapter 17* MBCA, but currently under reconsideration. The document, in its most recent formulation:

(i) eliminates the requirement to disclose in the name the status of a benefit corporation, while maintaining the need for this clarification in share certificates (or *information statements for uncertificated shares*);

(ii) lowers the *quorum* required to pass a resolution to change the *status* from a non-benefit corporation to a public benefit corporation or to amend the "*specific public benefit*";

6 Preliminary and Tentative Conclusions

The perspectives of benefit corporations (i.e., corporations whose bylaws requires the pursuit of a dual purpose, on the one hand, for profit and, on the other hand, for altruistic purposes,[50] regardless of any legislative qualification in this regard) appear interesting, and it is easy to foresee that these corporate genres will continue to enjoy a certain success as *promotional tools* for their respective *economic activities*. This success is likely to increase in the years to come as choosing them means (and will mean) enjoying an undeniable reputational value in the eyes of the public and of the whole market. This attitude favors the spread and the success of benefit corporations, and it depends on the general awareness of consumers and public investors to the main issues that typically underlie the altruistic activities carried out by benefit corporations (e.g., sustainable growth; fight against climate change or pollution; protection of common goods such as air, water, etc.; fight against poverty and social inequalities, etc.).

Obviously, a closer inspection of economic return's prospects from the use of the benefit corporation in terms of **propaganda**, promotion, marketing is impossible here (and in any case would presuppose business skills that are beyond the reach and scope of the authors). However, it should be noted that the adoption of the benefit corporation model is, in practice, still rather rare among large companies, especially when listed.[51] In this sense, the success of benefit corporations seems, at least up to

(iii) strengthens the duties of directors in the sense of providing for their duty to act in a responsible and sustainable manner and to consider the interests of shareholders as well as those of other *stakeholders*;

(iv) requires the drafting of an annual *benefit report*, to be made public and accompanied by a specific *judicial remedy* that shareholders who have not received such a report may activate;

(v) allows holders of at least five million $ stocks, in the case of listed companies, to bring a *derivative action* against benefit corporations for breach of their obligations, even if they do not own 5% of the outstanding shares;

(vi) provides for the introduction of clarifications with regard to withdrawal, which is also permitted in the event of "consummation of an action requiring the approval of shareholders pursuant to section 17.03(a)(1) or a transaction requiring the approval of shareholders pursuant to section 17.03(a)(2), except that appraisal rights shall not be available under this subsection (a)(9) to any shareholder of the corporation with respect to any class or series of shares that would not become, or be converted into or exchanged for the right to receive, shares of a benefit corporation or shares or interests in an entity subject to provisions of organic law analogous to those in chapter 17" (§13.02(a)(9)).

[50] In this sense, the "not-for-profit company" (carrying out activities with purely ideal, altruistic, social aims only) does not fall within the "notion" of a benefit corporation.

[51] In the U.S., as of July 2020, the only *Delaware Public Benefit Corporation* was Laureate Education (Posner (2020). In France, to the best of our knowledge, the listed multinational company Danone S.A. embraced the model at stake by an almost unanimous vote of the shareholders at the shareholders' meeting held on 26 June 2020, following the December 2019 example of a closed company in Brittany (Yves Rocher).

In Italy, we have about 1500 benefit companies at the end of 2021 (80% of which were incorporated as limited liability companies and only 7% as joint-stock companies), but just one was actually listed on AIM Italia (a non-regulated market): the pioneering experience of Vita

now, essentially reserved for the segment of small or medium-sized companies or, again, for subsidiaries belonging to larger groups.[52] In the latter hypothesis, benefit corporations stand as an entity of the group specifically dedicated to perform purposes to the benefit of the whole community, somehow replacing the presence of a foundation or a charity within the corporate group. Of course, this does not exclude a more extensive use of *B-Corps*, simply certified companies whose diffusion will reasonably increase in the years to come.[53]

Ultimately, as far as trends are concerned, our impression is that, besides cases in which benefit corporations contribute—in practice due to the evocative power and reputational potential of the formula—to creating shareholder wealth, it is difficult to imagine it being used to a quantitatively significant extent. However, it should be pointed out that some have recently proposed, even authoritatively, to have recourse to *Public Benefit Corporations*[54] as a *default* model for every *public company* with revenues in excess of one billion dollars.[55] Now, regardless of the clamor that such an extreme (and at the same time substantially unfeasible) proposal would cause, due to its numerous potential shortcomings,[56] it is clear that generalized regulatory

Società Editoriale s.p.a. (2016) was recently followed by Reti s.p.a. (2020), operating in the IT consulting sector. For a more accurate elaboration of the empirical relevance of benefit corporations in Italy, see Bianchini and Sertoli (2018), p. 201 ff.

[52] Most recently, we would like to recall the Italian experience of Arbolia, a benefit company established by the *joint venture* between Snam and Cassa Depositi e Prestiti, aimed at promoting the planting of 3 million trees by 2030 to absorb 200,000 tons per year of carbon dioxide and support national forestation (https://www.snam.it/it/media/comunicati-stampa/2020/CDP_Snam_societa_benefit_per_il_rimboschimento.html, November 2020).

[53] Existing *B-Corps* are registered, without distinction of the place of incorporation, available at https://bcorporation.net/directory. In addition to the aforementioned Danone, which acquired its own B-Corp certification when it became a *société à mission*, we can recall the Italian case of Banca Prossima, from May 2019 belonging to the Intesa Sanpaolo Group and dedicated to secular and religious non-profits, B-Corp certified since 2016, the first among companies in the credit sector (as specified in the press release available at https://group.intesasanpaolo.com/it/sala-stampa/comunicati-stampa/2016/12/CNT-05-00000004C7C50). However, it does not represent a *unicum* in the global context, where there is no lack of examples of *B-Corps* also in the investment services, financial and banking landscape, which would seem prima facie less close to the issues at stake [specifically, 70 *investment advisors*, 30 *equity investors in developed markets*, 3 *equity investors in emerging markets*, 14 banks, from Bank Australia to DUCA Financial Services Credit Union (Toronto), from Raifeissen Bank (Switzerland) to Tomorrow GmbH (Hamburg)]. On this topic, see also Sears (2019)).

Also in Italy, listed companies were recently awarded with B-Corp certifications: this is the case of Sesa s.p.a., listed in the STAR segment.

[54] See supra, fn. 22.

[55] The size threshold is the same as the one envisioned in Democratic Senator Elizabeth Warren's *Accountable Capitalism Act* proposal back in the summer of 2018 (Warren (2018)), analyzed in Passador (2019), p. 192 ff.

[56] Such a rule would be effective if it were adopted by all jurisdictions, or at least by a significant part of them; but it is difficult to imagine that such a reform movement could have a large following, if any at all. Moreover, if the rule were to be adopted by only one or a few jurisdictions, it would disadvantage companies subject to that jurisdiction vis-à-vis potential investors (at least as often as

interventions of this kind would, if ever adopted, end up substantially modifying the fate of the benefit corporation model.

Nevertheless, some problems remain as to the role, powers, and duties of directors and as to the safeguarding of the public's trust with respect to the pursuit of broader objectives. On the one hand, benefit corporations' directors appear, in line with the trend, to be endowed with such a wide discretionary power as to increase agency costs beyond tolerable limits. On the other hand, the legal instruments to make the pursuit of common benefit purposes effective are still far too weak. In this sense, an ad hoc intervention in the regulation should first take on the task of reducing ambiguity, especially taking the opportunity to frame the role of benefit corporations' directors in the most detailed and suitable manner.

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the pursuit of the common benefit would be expected to be detrimental to the interest of shareholders). Furthermore, it would have to establish the effect and consequences of such a provision on already established companies (without the purpose of common benefit): how would it be possible to transform their purpose and nature (from non-benefit corporation to benefit corporation), without granting the possibility of withdrawal to the shareholders? And if such a right of exit were recognised, would this be sustainable for the companies?

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