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B corporations and corporate social sustainability: Notes about the impact on the purpose and management balances of the profit's company

Empresas B e sustentabilidade social corporative: notas sobre o impacto no propósito e nos equilíbrios de gestão da empresa com fins lucrativos

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Abstract

This paper aims to develop a reflection on the changing of the governance balances observed in a profit-making benefit corporation that also seeks to improve the socio-economic and environmental rights of the stakeholders under the ESG factors. This will be considered with particular regard to the impact of the common benefit purpose on the company's purpose and corporate object, and on the managerial liability profiles of its directors within the italian legal framework and his implementation.

Keywords: benefit corporations; corporate social sustainability; impact; purpose company; hybridization of the corporate model; management balances; director's duties.

Resumo

Este artigo tem como objetivo desenvolver uma reflexão sobre a mudança nos equilíbrios de governança observada em empresas de benefício social com fins lucrativos que buscam também aprimorar os direitos socioeconômicos e ambientais das partes interessadas sob a perspectiva dos fatores ESG. Essa reflexão será feita com especial atenção ao impacto do propósito de benefício comum sobre o objetivo e objeto social da empresa, bem como sobre os perfis de responsabilidade gerencial de seus diretores dentro do arcabouço legal

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italiano e sua implementação.

Palavras-chave: sociedades de benefício (ou empresas B); sustentabilidade social corporativa; impacto; propósito corporativo; hibridização do modelo societário; equilíbrios gestórios; deveres dos administradores.

Introduction

The social, economic, and legal issues related to business activities have taken on a cross-cutting significance concerning entrepreneurial entities in contemporary economic systems.

Environmental, Social, and Governance (ESG) factors, as intercepted by complex human systems, have transcended state and public boundaries over recent decades. These factors have increasingly influenced for-profit corporations, private associative structures traditionally conceived as closed entities dedicated to strictly egoistic purposes. Consequently, such entities have been drawn out of their "hedonistic isolation", a process furthered by emphasizing the neutrality or elasticity of their *causa* (legal purpose).

The process of hybridizing both economic and legal models, as well as their respective underlying purposes, is well-exemplified within Italian legal scholarship by the 'Benefit Corporation' (*Società Benefit*). This entity is governed in Italy by Article 1, paragraphs 376 to 384, of Law No. 208 of 28 December 2015.

The Benefit Corporation—formally a for-profit entity, yet concurrently oriented towards the pursuit of a 'common benefit'—represents an effective private-law instrument for achieving environmental, social, and governance (ESG) sustainability goals within the framework of *homo economicus*. By directing corporate activity towards improving the living conditions of customers and consumers—identified as primary stakeholders and the intended recipients of the company's positive social impact—this model also serves as a value-based benchmark for measuring the effectiveness and efficiency of the directors' management activities.

This paper aims to develop a reflection on the changing governance balances observed in a profit-making benefit company that also seeks to improve the socio-economic and environmental conditions of stakeholders and the protection of their essential rights. This will be considered with particular regard to the impact of the common benefit purpose on the company's purpose and corporate object, and on the managerial liability profiles of its directors.

Intangibility of the corporate type and the pursuit of goals beyond the corporate purpose: the hybridization of the corporate model

As is well known, the 2016 Italian Stability Law[2] introduced "benefit corporations" into the

[2] Law no. 208 of 28 December 2015, published in G.U. no. 302 of 30 December 2015, s.o. no. 70; the provisions on "benefit corporations" are contained in paragraphs 376 to 384 of Article 1.

Italian legal system. These are defined as companies that "while engaged in economic activity, in addition to the purpose of distributing profits, pursue one or more common benefit purposes and operate responsibly, sustainably, and transparently towards individuals, communities, territories and the environment, cultural and social assets and activities, entities and associations, and other stakeholders"[3]. The Explanatory Report to the draft law clarifies that the provision aims to "allow for the spread in our legal system of companies that, in carrying out their economic activity, also have the objective of improving the natural and social environment in which they operate, by reducing or eliminating negative externalities or by better utilizing practices, production processes, and goods capable of producing positive externalities." It further specifies that in these companies, shareholders do not "exclusively evaluate economic-financial performance," but "also qualitative performance and the achievement of declared common benefit objectives."

Roughly ten years after the aforementioned amendment, the socio-political, economic, and environmental context has undergone rapid and profound changes due to exceptional events such as the pandemic, the exacerbation of extreme climatic phenomena and global warming, increasing pollution, and the loss of biodiversity. These, combined with conflicts and humanitarian crises, have intensified socio-economic inequalities and thereby highlighting the increasing urgency of environmental sustainability even within for-profit activities. From a traditional reluctance towards limitations stemming from environmental and social protection needs – traditionally considered a public matter – company law in the third millennium has come to assume a key role as an essential policy instrument to guide companies, both nationally and internationally, towards organizational models capable of contributing to the achievement of sustainable development goals and the common good.

In this process, the Benefit Corporation model can play a pivotal role[4], serving as a privileged instrument to reconcile the pursuit of economic and financial returns for shareholders and investors with the implementation of social and environmental sustainability policies for the benefit of stakeholders. It fosters forms of social and labor integration for migrants, reduces social and racial discrimination in the exercise of business activity, and ultimately combines the for-profit purpose with social inclusivity. It acts as a driving force for the implementation and stabilization of multicultural social and economic systems.

Indeed, the introduction of benefit companies does not appear attributable to the well-known tendency to regulate the so-called Third Sector[5], nor to the desire to identify an additional operator in this sector alongside non-profit organizations and social enterprises. This is despite the fact that Legislative Decree No. 112/2017, which reformed these entities,

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[3] See Article 1, paragraph 376, Law no. 208/15.

[4] On benefit companies in Italian and comparative law: Aa. Vv., 2020; Angelici, 2018; Id., 2017; Id., 2018; Assonime, 2016; Bartolacelli, 2017; Bianchini, 2018; Calagna, 2016; Corapi, 2018; Corso, 2016; De Donno, 2018; Id., 2020; Denozza and Stabilini, 2017a; Id., 2017b; Denozza, 2018; Frignani and Virano, 2017; Gallarati, 2018; Lenzi, 2016; Marasà, 2017; Id., 2018; Mosco, 2018; Id., 2017; Palmieri, 2017; Portale, 2018; Prataviera, 2018; Resta and Sertoli, 2018; Riolfo, 2016; Rossi, 2017; Siclari, 2016; Stanzione, 2018; Id., 2022; Stella Richter, 2017; Id., 2017; Id., 2018; Tombari, 2018; Ventura, 2016; Id., 2018; Id., 2018; Zoppini, 2017; Speranzin, 2022; Cian, 2021; Daccò, 2021.

[5] The term "third sector" was coined by Etzioni, 1973; Levitt, 1973; more recently, see also the considerations developed in the essay by Salamon, Anheier, 1997.

has led to a significant convergence of the organizational models of the former with those of the latter.

Instead, benefit companies appear to be clearly inspired by the American experience of Benefit Corporations. This is despite the fact that they can also be traced back to the new paradigm of smart, inclusive, and sustainable growth dictated by the European Union within the context of the Europe 2020 strategy[6], as well as the Church's social doctrine, with the promulgation of Pope Francis's Encyclical *Laudato si'*[7]. This phenomenon represents a progressive hybridization of models where the distinction between for-profit and non-profit blurs, and "new hybrid forms of business organization" emerge, characterized by the pursuit of social and environmental objectives alongside the profit motive[8]. This gives rise to a kind of conceptual (or causal, if one prefers) oxymoron, now expressed in terms of the elasticity or neutrality of the corporate purpose, inevitably leading to a finalistic compression of the goal of profit maximization[9].

In the United States, the proliferation of the benefit corporation was promoted by B Lab, the same non-profit organization that issues BCorp certification. In collaboration with the American Sustainable Business Council, B Lab prepared the Model Benefit Corporation Legislation. This Model Law inspired the legislation of numerous states, starting with Maryland in 2010. Shortly after, in 2013, the State of Delaware, confirming the specificities of its corporate law, introduced a partly different model with the Public Benefit Corporation Act of 2013, which saw more limited adoption. The distinctive feature of the benefit corporation lies in the inclusion in its articles of incorporation of an explicit reference to the pursuit of public benefit objectives alongside the traditional purposes of a business corporation. This choice inevitably impacts the entire corporate structure[10].

In the European context, following Italy, France has also developed a solution that combines for-profit management with benefit objectives. The *loi Pacte* of 2019 formulated the regulation of the *société à mission*, which differs in part from the Italian one[11]. More recently, Spain has also followed this trend with the introduction of *Sociedades de Beneficio e Interés Común* (SBIC) through the *Ley Crea y Crece* of 2022 which, after providing a definition, has delegated the detailed regulation to subsequent decrees, still in the drafting phase.

Beyond the United States and the EU, the benefit company model is rapidly spreading globally[12], especially across many Latin American countries. This expansion is once again

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[6] See EUROPEAN COMMISSION, *Results of the public consultation on the Europe 2020 strategy for smart, sustainable and inclusive growth* COM(2015) 100 final, Brussels, 2 March 2015.

[7] See Toffoletto, 2015.

[8] As indicated by the European Horizon 2020 program, of "creating value on the market and into society."

[9] See Robson, 2015, p. 501.

[10] For a precise analysis of the differential elements between the B corporation legislations of the various states of the United States, see Corso, 2016.

[11] On the *société à mission*: Branellec, Lee, 2015; Cohen, 2019; Laronze, 2019,

[12] Benefit Companies have been introduced in 38 states of the United States, in Italy (since 2016), Colombia (2018), Puerto Rico (2018), British Columbia (2019), Ecuador (2019), Peru (2020), Rwanda (2021), Spain (2022), Panama (2022), San Marino (2023); furthermore, the legislative process for the approval of an *ad hoc* law is underway in more than 10 other states (Uruguay, Argentina, Australia, Chile, Taiwan, Korea); on these aspects, cf. *Ricerca Nazionale sulle Società Benefit 2025*, available at https://www.societabenefit.net/ricerca-nazionale-sulle-societa-benefit/.

attributable to B Lab, which promotes both BCorp certification through its "Sistema B" and the *Sociedade de Beneficio e Interés Colectivo* (or *Sociedade BIC*) within the *Empresas B* movement. A comparison of these different experiences, which vary in their adherence to the American and Italian models, reveals a common focus on integrating the benefit purpose into a company's articles of incorporation, on the duties and responsibilities of directors, and on reporting and transparency obligations. Latin American countries, moreover, appear to reference the Italian model regarding the types of companies involved and the establishment of control systems[13].

Indeed, the hybridization of the corporate model observed across all Western legal systems is a phenomenon long present in our own jurisdiction. There has been a noted tendency to "promiscuously utilize the different structures available for carrying out associative activities"[14], reflecting the neutrality of organizational forms concerning the aims achievable through business activity[15].

The "hybridization" process has impacted both the for-profit and non-profit sectors, blurring the original distinction between their respective organizational models. As for the former, it has legitimized a fading of the profit motive traditionally associated with the corporate type[16], increasingly making space over the last decade for the emergence of approaches aimed at promoting "corporate social responsibility" (i.e., the voluntary integration of social and environmental concerns into companies' business activities and their relationships with other parties) [17]. Regarding the latter, it has led to the use of traditionally for-profit, predominantly corporate models for pursuing social and solidarity aims[18].

The phenomenon then found definitive consecration in the legislation on social enterprises,

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[13] Unlike the Italian approach, which is based on a specific statutory framework, Brazil opted for the U.S. model centered on the B Corp Certification issued by the non-profit organization B Lab. Although 'Sistema B' was officially launched in São Paulo in October 2013, its founding assembly and the formal establishment of Sistema B Brazil (Sistema B, 2020) did not take place until April 2016. As of 2020, approximately 146 companies in Brazil have been certified across five states: Goiás, Minas Gerais, São Paulo (where the majority are concentrated), Rio de Janeiro, Rio Grande do Norte, and Paraná.

[14] In this regard, see Marasà, 1984, pp. 103 and 166 ff., who notes how the functional criterion is not always "satisfying" in discriminating among different company types; Id., 2000, p. 44 ff. In more radical terms, see Santini, 1973, p. 154 ff.; Ferro Luzzi, 1971, p. 372; for a reference to the issue, see also Montalenti, 2014.

[15] On the relationship between functional scheme and organizational (sub)type in company law, see, for all, Spada, 1974, p. 76 ff., who emphasizes the neutrality of organizational types concerning the purpose achievable through them.

[16] On these topics, see Marasà, 2000, p. 171; Id., 2005, p. 201 ff.

[17] On the debate concerning corporate social responsibility and corporate compliance with ESG factors as enunciated in the 2030 Agenda, cf. *ex multis*, Montalenti, 2024, p. 1190 ff.; Id., 2022, p. 9 ff.; Abriani, 2022, p. 7 ff.; Denozza, 2021, 297 ff.; Id., 2022, p. 454 ff.; Enriques, 2022, p. 319 ff.; Libertini, 2022, p. 325; Tombari, 2022, p. 1 ff.; Barcellona, 2022; Ciocca, 2019, p. 77 ff. On the risks that the pursuit of sustainability objectives, however defined within the three macro-areas of environment, social, and governance, becomes merely a marketing strategy adopted by companies and their directors in order to display a label that does not correspond to any concrete action or managerial act in the direction of sustainability (the so-called greenwashing phenomenon), cfr. Angelici, 2018, p. 3 ff.; Cerrato, 2022, p. 72 ff., who recalls how widespread the phenomenon is, to the extent that a 2020 European Commission survey of a sample of environmental claims found that about 53% of them appear unreliable because they are inaccurate, opaque, ambiguous, or inconsistent, in addition to the distorting effects on competition resulting from false compliance certifications.

[18] Indeed, even before the introduction of the benefit company regulations, it was believed that elements aimed at promoting common benefit could be included in the corporate object of for-profit companies; in this sense, cfr. Libertini, 2009, p. 1 ff.; Costi, 2006, p. 83 ff.; Stella Richter Jr., 2004, p. 242 ff.

where the social nature of the activity and the solidarity purpose are appreciated not only in relation to the choice of certain sectors considered a priori to be of social utility but also in the exclusion of the subjective profit motive of the participants. These participants can nonetheless opt for any of the private organizational forms—corporate, associative, or foundation—considered equivalent for pursuing the entity's own objectives, including those of the third sector.

The central aspect of the Italian benefit corporation's regulation is the provision in paragraph 377[19] of article 1 of Law No. 208/2015, according to which common benefit purposes must be "specifically indicated in the corporate object of the benefit company and are pursued through management aimed at balancing the interests of shareholders with the interests of those upon whom the company's activity may have an impact."

The implementation of the "benefit" corporate model, through the conformation of the corporate object to common benefit purposes, as well as the indication of the balancing parameter between shareholders' interests and those of stakeholders impacted by the company's activity, along with the inclusion of the common benefit purpose alongside the for-profit objective of distributing profits (paragraph 376), led early interpreters to question the possible, albeit clumsy, introduction of a new company type, alongside those typified in the Italian Civil Code. However, the unanimous opinion holds that the benefit company does not identify a new corporate type[20], but rather a "qualification"[21] that all corporate types (both for-profit and mutual) can acquire. This is evidenced by its inclusion in the company's name, by adding the words "Società benefit" or the abbreviation "SB," subject to the necessary statutory adjustments.

It must also be observed that from a statutory perspective, and particularly regarding the content of the corporate object (but not concerning directors' obligations), there isn't much change for either benefit companies or non-benefit companies. Both, according to the aforementioned regulation, must specify the common benefit purposes they intend to pursue[22]. However, the choice to use the "benefit" regulatory label[23] amounts to a form of assumption of

[19] Paragraph 377 stipulates that «these purposes can be pursued by each of the companies referred to in Book V, Titles V and VI, of the Civil Code, in compliance with their respective regulations». Regarding the extension of the provisions also to cooperative companies, see, critically, Ventura, 2018, p. 1162 ff.; differently, Tombari, 2018, p. 23.
[20] In this regard, among the first commentaries, see Siclari, 2016, p. 36 ff.
[21] The MISE circular of 6 May 2016, no. 3689/C (concerning "New Instructions for filling out the forms of the Business Register and the REA"), also refers to benefit companies in terms of a "qualification," clarifying that it must be highlighted when completing the application form for registration with the business register; according to Donativi, 2016, this registration, moreover, does not constitute a new special case, but must certainly be traced back to ordinary registration; Cian, 2021, p. 475 ff., according to whom Law no. 208 of 28 December 2015 "is not, strictly speaking, truly institutive, in the sense that it does not introduce any new organizational model into the system"; similarly, in relation to social enterprises, Cian, 2016, p. 271.
[22] According to Speranzin, 2022, pp. 145 ff., specifically 147, according to whom «three scenarios can be envisaged under Italian law: (1) benefit legal entities, which have included the common benefit in their articles of association, must necessarily pursue it; (2) non-benefit corporations, which have included the common benefit in their articles of association, may plan to carry out activities in pursuit of the common benefit, but without an obligation to do so; (3) non-benefit corporations, which have not amended their articles of association, may realize individual common-benefit transaction».
[23] Especially considering that, pursuant to paragraph 379, companies can introduce, in their company name, the words "Società benefit" or "SB." On this topic, see Caterino, 2020, p. 795 ff.; Calagna, 2016, p. 724 ff.

responsibility, both towards the market regarding positive social effects and towards those stakeholders who can legitimately rely on the fulfillment of the common benefit purposes indicated by the benefit company in its corporate object.

On the other hand, according to the Article 1, paragraph 377, of law n. 208/2015, benefit companies must be established as one of the corporate types regulated in Book V, Titles V and VI of the Italian Civil Code. Consequently, the regulations of the chosen type will apply to them, supplemented by the specific provisions set forth therein. However, the integration of these regulations could sometimes prove problematic, as the functional neutrality of the corporate types does not correspond to the neutrality of the rules associated with the different types[24]. This is because the regulations are typically designed "with a view to the utilization of the type for its normal profit-making or mutualistic purpose." Therefore, when the type is employed for a partially different aim, the legal framework might prove unsuitable for the purpose, requiring, where possible, an intervention by the interpreter or by statutory autonomy.

It's clear then that the regulation on benefit companies impacts neuralgic aspects of the corporate paradigm, such as the corporate object, purpose, and social interest.

The exegetical problem stems from the incorporating law on benefit companies, which doesn't clarify the relationship between the profit motive (or mutualistic purpose), common benefit purposes[25], and stakeholder interests. At the same time, it mandates that the common benefit purpose must be explicitly stated in the company's corporate object, the section of the articles of incorporation usually dedicated to the detailed description of the planned activity[26].

Indeed, while paragraph 379, by stipulating that common benefit purposes “be specifically indicated in the corporate object of the benefit company,” suggests that the achievement of common benefit objectives should be placed at the level of the purpose-means and thus serve the for-profit objective, on the other hand, paragraph 377, by mandating the pursuit of common benefit purposes "through management aimed at balancing the interests of shareholders with the interests of those upon whom the company's activity may have an impact," and paragraph 376, by providing that the company operate "responsibly, sustainably, and transparently" towards stakeholders, would imply a necessary coexistence between these potentially conflicting interests.

The level of uncertainty for the interpreter becomes maximal due to paragraph 377, which, by referring to the aspect of management, seems to fully delegate to the administrative body the task of identifying a "balance" between the egoistic and altruistic interests pursued by the benefit company.

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[24] See Marasà, 2000, p. 174 ff.

[25] According to Sacchi, 2021, p. 596, the regulation of benefit companies is ambiguous, from which «non-univocal indications are drawn (despite the fragility, in this specific case, of the textual argument, given the low technical level of the benefit company regulation contained in Law 208/2015) both in relation to the degree of specificity in determining common benefit purposes, and on the relationship between profit motive and benefit purpose».

[26] See Rescio, 2022, p. 462 ff., for whom, assuming that «even when a different purpose [from the profit-making one] is pursued, e.g., mutualistic or consortial, the object-activity remains conceptually and legally distinct from the purpose-cause», in the regulation of benefit companies, and by virtue of the provision that common benefit purposes must be indicated in the corporate object, «it seems, therefore, that the essential element of the corporate object here is richer than it normally is or has been so far, because it includes both the economic activities to be carried out (purpose-means) and the purposes to be pursued with the activity (purpose-end)».

The inclusion of the common benefit purpose in the corporate object certainly has the effect of binding administrators to the pursuit of benefit aims throughout the company's life. Indeed, despite its merely internal relevance today as a limit to the powers of administrators, the corporate object still possesses an unquestionable organizational function[27].

However, the terminology used by the legislator does not appear entirely precise, as it stipulates the indication of one or more common benefit purposes rather than an activity characterized in the same terms, which would have been more consistent[28]. This is confirmed by reading the legislative text, which sometimes openly refers to "common benefit activity" instead of "purpose," as well as by examining the Explanatory Report, where a linguistic oscillation is observed from the level of purpose ("common benefit purposes") to the level of activities instrumental to pursuing that purpose.

The terminological issue is not trivial. The legislator's promiscuous use of the term "finalità" (purpose) to sometimes allude to a generic additional aim beyond the company's profit motive, and at other times, to a specific activity to be carried out within the corporate object, does not at all clarify the relationship between this "purpose/activity" and the profit motive inherent to the corporate type, which is not disregarded and therefore contributes to the definition of the social interest.

Indeed, the inclusion of common benefit purposes within the corporate object legitimizes an interpretation of their pursuit within the framework of the profit motive, and thus in a merely instrumental perspective relative to the objective of profit for shareholders[29]. This topic has long occupied legal doctrine, sparking a heated debate and a variety of polarized positions, as one might expect, depending on whether the common benefit purpose is considered to integrate the company's ultimate purpose (*scopo-fine*) or its instrumental purpose (*scopo-mezzo*), leaving the purely profit-making nature of the social purpose unaltered.

According to some opinions, common benefit purposes represent an integration of the company's ultimate purpose (*scopo-fine*)[30]. The relationship with the profit motive or mutualistic purpose can either be determined by statutory autonomy[31] or be understood in terms of equiparation, pursuant to the wording of paragraph 376, which does not establish any

[27] On the organizational relevance of the corporate object, there is broad convergence in doctrine, and see *ex multis*, Stella Richter Jr, 2004, p. 242 ff.; Notari, 2003, p. 6 ff.; Mucciarelli, 2007, p. 305 ff. With reference to benefit companies, it has been observed (see Assonime circular no. 19/16) that the indication of common benefit purposes in the corporate object allows for the "crystallization of the objectives pursued in the exercise of economic activity, making the commitment to achieving the common benefit inherent to the enterprise, regardless of the changes affecting shareholders and management" (p. 13).

[28] On the reconstruction of the notion of corporate object in terms of activity, see, among others, Stella Richter Jr., 2004, pp. 237 and 314 ff., with references to the debate preceding the reform of corporate law.

[29] It has long been argued that the corporate purpose possesses a certain "elasticity" and tolerates the inclusion of "secondary" purposes of a nature different from profit (thus Marasà, 2000, p. 123 ff., but already Vivante, 1923, p. 37, according to whom it is not necessary that "all profit be distributed among shareholders," as it can partly be consecrated to "more noble ends, as a contribution of the enterprise to those senses of social solidarity that facilitate its operation"). More recently, see Galletti, 2005, p. 2643, who draws a clear distinction, in this respect, between non-profit and for-profit enterprises, stating that while in the former "the production of positive externalities is the main purpose of the activity," in for-profit entities "this can only constitute an ancillary purpose, which must in any case remain consistent with the principal profit-making function."

[30] Thus, among the first, Corso, 2016, p. 1009 ff.

[31] Thus Marasà, 2000, p. 2; Id., 2022, p. 132 ff.; Id., 2019, p. 22.

hierarchy among these purposes[32].

Conversely, for another part of legal doctrine, common benefit purposes are extraneous to the ultimate purpose (*scopo-fine*), which would exclusively comprise the profit motive or mutualistic purpose, thereby relegating them to the instrumental purpose (*scopo-mezzo*) [33].

This latter position appears to be the preferable one, albeit in some respects conservative and reductive of the innovative scope of the incorporating law on benefit companies. Indeed, the pursuit of common benefit through functional business activities remains instrumental to the realization of the profit motive or mutualistic purpose. These are the only aims that truly represent the ultimate purpose (*scopo-fine*) even for benefit companies, with every other potential objective consequently subordinated to them[34]. This would only change with a legislative intervention impacting the causal aspect of the social contract (and thus the company's purpose), which would place common benefit purposes alongside the profit motive or mutualistic purpose, thereby giving benefit companies an autonomous causal element[35]. However, given the current literal wording of the norm, there seems to be no room for such an enrichment of the corporate causal connotation.

Paragraph 376 specifies that “common benefit purposes” must be pursued within the scope of “economic activity” and paragraph 377 stipulates that these must integrate the corporate object. This relates to the company's activity, not its ultimate purpose, thus reflecting solely on the instrumental purpose (*scopo-mezzo*) [36].

From this perspective, therefore, the common benefit purposes indicated in the corporate object don't appear to be part of the ultimate purpose (*scopo-fine*) to which benefit companies' activity must be directed. Instead, they seem to signify a *modality* through which the company's activity must necessarily be carried out[37] in pursuit of its *sole* ultimate purpose (whether profit-making or mutualistic), thereby particularly influencing the scope of administrators' obligations.

Furthermore, it's important to note that the inclusion of “benefit” purposes in the corporate object won't always coincide with a list of specific “additional” activities beyond those already contemplated. Instead, it might simply involve articulating a different mode of exercising the principal activity. This could, for instance, aim to reduce negative externalities generated by the activity, such as minimizing the environmental impact of the company's production processes, or to increase positive externalities, perhaps through philanthropic allocation of part of the

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[32] In this sense, among others, see Tombari, 2018, p. 25, according to whom «“common benefit” is – like the profit motive – part of the so-called ultimate purpose of the company»; Sanfilippo, 2022, p. 99; Portale, 2018, p. 606 ff.
[33] In this sense, see D’Alessandro, 2022, p. 409 ff.; Stanzione, 2022, p. 1034 ff.; Prataviera, 2018, p. 935 ff.; Palmieri, 2017, p. 212; Corso, 2016, p. 1009 ff. Expressly contrary to this approach, however, Rescio, 2022, p. 469, fn. 19.
[34] On the topic and with further comparative considerations, see Portale, 2022, p. 947 ff.; Capo, 2023, p. 95 ff., states that the company's ultimate purpose (*scopo-fine*) remains exclusively profit-making except «with regard to those particular models of entrepreneurial activity (e.g., social enterprises or benefit companies), for which the pursuit of aims “other” than profit constitutes an essential and qualifying element».
[35] See Tombari, 2023, p. 349, who, also with reference to the needs of pursuing so-called sustainable success, notes «the opportunity to make the joint-stock company itself a structure “functionally orientable” according to the statutory determinations deliberated by the shareholders»; see also Denozza, 2023, p. 308.
[36] In this sense, Palmieri, 2017, p. 212; Stanzione, 2022, p. 1034 ff.; Prataviera, 2018, p. 952 ff.
[37] In the same sense, D’Alessandro, 2022, p. 452.

profits or by facilitating employment for individuals facing social hardship or cultural/racial discrimination, even while initially enduring their lower levels of work efficiency, or by reducing the environmental impact of the production process, or improving working conditions and the voice of employees within the framework of corporate governance dynamics.

Based on what we've observed, it seems beneficial that the common benefit purposes of benefit companies aren't merely generically indicated and described in the corporate object. Instead, they require a high degree of detail and completeness in their description, given that these purposes, as discussed, relate to the economic activity to be performed and their instrumentality toward the profit-making or mutualistic goal.

This approach also satisfies the need to limit administrators' discretion. Because common benefit purposes are excluded from the ultimate purposes (*scopo-fine*), the scope of managerial discretion in a benefit company remains traditional focused on profit maximization. The choice regarding which common benefit objective to pursue, however, is then excluded from their discretion.

Integrating common benefit and social positivity for stakeholders within the framework of profit-making: in search of a difficult managerial balance

The choice to qualify as a benefit company, formalized through the integration of the corporate object and the optional inclusion of the company name, effectively represents a form of assumption of responsibility. This responsibility extends both to the market, due to the positive effects in terms of consumer perception, and to the stakeholders, who are identified as the primary beneficiaries of the common good pursued by the company. These stakeholders, therefore, appear to be legitimately entitled to rely on the realization of this benefit and the consequent satisfaction of interests "other" than the purely egoistic social ones.

A particularly delicate and understandable issue involves precisely identifying the stakeholders who are to benefit from the common good pursued. This is because the specific category of stakeholders determines the range of "other" interests the company can pursue, as well as the value parameters for evaluating the performance and results achieved.

While some argue that these stakeholders must be determinable *uti singuli* (as individuals) or at least determinable *ex ante* (in advance), to avoid the risk of *ex post* determination leading to substantial vagueness in the relevant statutory clause[38], others suggest identifying stakeholders as third parties with a specific social connection to the benefit company. This connection should be strong enough to qualify their position and justify their protection in case of the administrators' failure to achieve the common benefit as stipulated in the articles of incorporation[39].

Regardless, the undeniable fact is the unprecedented relevance now attributed to "other"

[38] See Daccò, 2021, p. 69.
[39] See Angelici, 2018, p. 12.

interests beyond the traditional ones in the dynamics of for-profit and mutualistic companies.

The importance assigned to these common benefit interests appears to have a twofold consequence: first, in terms of company management, as administrators might see their margin of discretion broadened; and second, in terms of their liability profiles, which could be further limited due to this increased discretion, reflecting an inversely proportional relationship.

Regardless of how common benefit purposes are specifically configured, a central issue remains the balancing of multiple interests. All these interests are equally attributable to the company and, by virtue of its benefit qualification, become worthy of consideration in the management of the enterprise[40].

Indeed, based on the literal wording of the regulations, administrators of benefit companies will be tasked with resolving potential conflicts between shareholders' interests and those of stakeholders. This will necessitate establishing a prioritization whenever joint realization of all interests isn't possible.

The regulatory framework establishes the logic of balancing as a distinguishing element of the benefit company's organizational model. This is evident in multiple instances where it asserts the necessity for common benefit purposes to be pursued by the benefit company "through management aimed at balancing the interests of shareholders with the interests of those upon whom the company's activity may have an impact." Similarly, it states that the benefit company must be managed "in such a way as to balance the interests of shareholders, the pursuit of common benefit purposes, and the interests of the categories indicated in paragraph 376" (i.e., "individuals, communities, territories and the environment, cultural and social assets and activities, entities and associations, and other stakeholders").

However, despite its consistent reference to the principle of balancing, the aforementioned regulatory framework is open to the objective criticism of failing to establish criteria according to which administrators should perform the desired balancing of interests belonging to the company's various stakeholders, as well as the more delicate balancing act between stakeholders and shareholders.

In particular, the absence of an "order of priority" for these interests, combined with the silence on criteria for resolving potential conflicts, ultimately leaves every decision to the mere discretion of the administrators. This carries the risk, on one hand, that directors might invoke stakeholder interests as a pretext to pursue what are in reality their own interests, and on the other hand, that once the interests of various stakeholders have been considered, they might decide to prioritize shareholders' interests.

At the same time, it's important to note the deficiency in enforcement mechanisms for common benefit purposes. These mechanisms are exclusively left to the initiative of shareholders, who are the only ones definitively legitimate to sue directors for liability. Meanwhile, the actual beneficiaries of the commitments made by the benefit company regarding its social policies would seemingly lack formal standing to act.

The impression is that the pursuit of public benefit ultimately relies on the discretionary

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[40] Within the real of Corporate Social Responsibility, the inescapable issue of balancing interests has long been highlighted by Denozza, 2005, p. 154; see also Montalenti, 2015, p. 172.

choices of administrators. These choices are mostly covered by the business judgment rule, which, in this context, could play an unprecedented role. It might allow a judge to deem operations aimed at achieving common benefit legitimate, even if they contradict the maximization of shareholder profit, thereby exempting administrators from liability. This is even more true when the common benefit objectives include the needs of migrants and migratory flows, that is, solidarity needs for the social and economic integration of disadvantaged individuals into the operational and labor dynamics of modern consumer economies, which seemingly poorly align with the corporate profit motive.

However, it seems that useful guidance for identifying at least a procedural criterion for administrators of benefit companies when balancing interests can be drawn from the existing system rules regarding the governance of joint-stock companies (*S.p.A.*) and corporate groups.

In fact, the regulations on corporate groups and, albeit not with exact coincidence, the rules concerning administrators' interests, impose a duty of transparency and motivation for decisions related to business management. This translates into an obligation to indicate the interests that influenced a decision and the reasons behind it[41].

A similar duty of disclosure can be hypothesized for benefit companies where administrators are legally required to balance multiple interests before making decisions. Therefore, they must first explicitly state which interests they've considered for the balancing act.

As is well known, Article 2391-bis of the Italian Civil Code requires the directors of a joint-stock company (*S.p.A.*) to disclose "any" interest they may hold, whether on their own behalf or on behalf of third parties, in a specific corporate transaction. Furthermore, it mandates that the Board of Directors, when called upon to resolve on the matter, must provide a reasoned statement regarding its "economic benefit" for the company, deliberating in accordance with a principle of expediency consistent with the company's profit-making purpose[42].

In theory, it doesn't seem that administrators of a benefit company should be excluded from the obligation to disclose any interests they hold "on behalf of" one of the stakeholder groups benefiting from the company's activities. However, relying on the principle of an operation's "economic convenience" as the sole criterion for resolving conflicting interests risks fundamentally frustrating the realization of stakeholder interests. These interests could be consistently sacrificed if "economic convenience" is interpreted purely through the lens of the company's profit motive.

Similarly, the theory of compensatory benefits, introduced by Article 2497 et seq. of the Italian Civil Code as a criterion for resolving intra-group conflicts, functions as an exclusively economic and financial benchmark for evaluating conflicting interests between various companies subject to a unified direction and coordination. This approach ultimately prioritizes financial aspects over social and solidarity concerns when prioritizing interests, including those

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[41] The need to adapt conflict of interest regulations to the reality of corporate groups is widely recognized in legal doctrine. See, *ex multis*, Scognamiglio, 2010, p. 128 ff.; Montalenti, 2015, p. 171 ff.; and also Guizzi, 2014, p. 123 ff., who express differing opinions on how to coordinate corporate group regulations with those concerning "interested" administration, as per Articles 2391 and 2391 bis of the Civil Code.

[42] On these topics, see, among many others, Corso, 2015, p. 61 ff.

of common benefit pursued by a benefit company. For this reason, the criterion for balancing and reconciling the various interests pursued by the administrators of a benefit company cannot, it seems, coincide with that of compensatory advantages without a necessary and appropriate adaptation of the inherent scale of financial values to solidarity and social values, such as inclusion and the enrichment of the social and cultural fabric, all of which fall under the broad and multifaceted concept of "common benefit."

In any case, to achieve the balancing of interests and ensure the desired intelligibility of managerial actions, administrators of a benefit company must explicitly state the order of priority assigned to different interests when joint realization isn't possible. They must justify this prioritization in light of the purposes enshrined in the corporate object and any strategic implementation plans. This justification should also be included in the annual report on the pursuit of the benefit purpose, which must contain a programmatic section illustrating the objectives the company intends to pursue in the subsequent financial year[43].

The common benefit purposes pursued and realized, as well as the positive impact on stakeholders achieved by the company's activities, will thus remain perceptible and assessable within the framework of the profit motive as the result of the "composition" (i.e., balancing) performed by the benefit company's administrators.

The social interest pursued will therefore be perceptible *a posteriori* as a result of the "composition" (i.e., balancing) carried out by the administrators. In the absence of a clear guiding criterion, the outcome will presumably also depend on the potential presence of stakeholder representatives within the administrative body, capable of engaging with members appointed by the shareholders[44].

Directors' duties and the business judgment rule in the framework of reconciling profit motives with social impact

This section delves into the critical, albeit complex, issue of liability for benefit companies and their administrators, particularly concerning the direct protection of stakeholders (or "beneficiaries" or "interest holders"). Due to its complexity, this topic will only be addressed in its structural and problematic aspects.

The question of balancing profit objectives with common benefit purposes, along with the criteria for circumscribing administrators' discretion in this regard, necessarily impacts the

[43] See on the content of the annual report Butturini, 2020, p. 572 ff.

[44] On the possibility of establishing a participatory logic that allows for the inclusion of representatives of stakeholder interests in the administration and control bodies, doctrinal opinions are not unanimous. See Sacconi, 2005, p. 132, who favors the involvement of independent directors, entrusted with the task of "impartially evaluating stakeholder interests"; also Denozza, 2015, p. 148, believes that the introduction of specific representations of stakeholder interests would be desirable; conversely, see Galletti, 2005, p. 2643, who appears skeptical about the efficiency of such a solution in for-profit companies, due to the increased burden on the decision-making process that would result. Indeed, the benefit company regulations do not mandate stakeholder representation in the administrative and control bodies, although Annex 5, in defining the areas for social impact assessment, requires consideration of "the level of involvement of stakeholders" in corporate governance.

liability profiles attributable to them for the failure to pursue the common benefit. These will be in addition to other liability scenarios already provided by general corporate law.

The Italian law on benefit companies contains rather laconic provisions in this regard. On one hand, it requires benefit companies to identify one or more “responsible persons to whom functions and tasks aimed at pursuing” common benefit purposes are entrusted. On the other hand, it states that non-compliance with obligations related to these purposes “may constitute non-fulfillment of duties imposed on administrators by law or by the articles of incorporation”, further stipulating that, in case of non-fulfillment, “the provisions of the Civil Code relating to each type of company regarding the liability of administrators shall apply”.

It is not certain that the designation of a “benefit director”, an administrator specifically appointed to promote common benefit purposes, entails a genuine delegation of authority from the administrative body to the designated individual. The legislator's mention of “functions and tasks” related to the pursuit of common benefit seems to evoke a transfer of powers and thus allude to a delegation phenomenon, with significant implications for conferred powers and associated responsibilities.

However, the broad and non-peremptory wording of the legal source does not exclude that functions related to pursuing the benefit purpose could be entrusted, outside a technical delegation mechanism, to an external entity (not part of the administrative body) tasked with compliance functions, similar to the supervisory body under Legislative Decree no. 231/01 or the internal control committee. In such a scenario, however, it does not seem possible to entrust the designated entity or body with powers of "supervision" over common benefit purposes, alongside powers to balance the multiple interests pursued by the benefit company. This is because the activity of reconciling potentially conflicting interests should instead fall to the collegiate administrative body, with the further need to specify in the articles of incorporation that this attribution always remains with the board, even if a specific administrator is delegated the pursuit of common benefit purposes.

As previously noted, the statutory commitment to pursuing the common benefit, as an additional purpose beyond the company's profit objective, has a twofold consequence for administrators: it broadens their margin of discretion and, conversely, limits their liability profiles in an inversely proportional relationship.

It should now be added that this inverse proportionality is amplified if common benefit interests are understood as part of the company's ultimate purpose (*scopo-fine*). In this case, regarding the liability of the benefit company's management body, it could be argued that the traditional business judgment rule might be complemented by a benefit judgment rule. Under such a rule, the unassailability of management choices and the exemption from any compensatory liability would extend to include the very choice of which among multiple ultimate purposes is most appropriate to pursue, as well as the choice of the right balance between managerial actions instrumental to achieving the profit-making or mutualistic ultimate purpose and the "additional" common benefit purpose. This is always provided that the choices are made diligently by the administrative body and without conflicts of interest (i.e., made in an informed manner, after considering all involved interests and with clear justification).

The conduct of benefit company administrators must therefore be evaluated according to the usual parameters of diligence, loyalty, and fairness, but interpreted in light of the unique duties assigned to them. Specifically, the obligation to balance the interests of the different categories of subjects affected by the benefit company's activity will require them to consider, during the preliminary phase preceding every decision, the interests of all stakeholders upon whom the decision is expected to have an impact.

In relation to private enforcement mechanisms that stakeholders can activate, these potential beneficiaries of the benefit purposes can be considered legitimate to take action against administrators through an individual liability action under Article 2395 or 2476, paragraph 6, of the Italian Civil Code, or through the general action under Article 2043 of the Italian Civil Code. This applies when administrators, through their negligent or willful act, have created a legitimate expectation regarding the company's fulfillment of the promised common benefit (including through the annual report attached to the financial statements), thereby inducing stakeholders to make decisions (e.g., in their contractual relationships with the company) that they otherwise would not have made.

The violation by administrators of obligations related to the realization of the common benefit could also be relevant as a company's breach of contract or an attributable offense, such as an unfair commercial practice or anti-competitive behavior.

Indeed, the aspect that seems to most concern the legislator is, so to speak, the promotional one: it's clear that claiming to be a "benefit" company without genuinely being one (or at least trying) can lead to competitive advantages through a kind of deception perpetrated against consumers, at least that segment more sensitive to environmental and social issues. This justifies the legislator's choice to identify public enforcement tools within competition and consumer protection law. From this perspective, rules on misleading advertising, unfair commercial practices, and unfair competition certainly remain applicable to benefit companies (even if the latter is not expressly contemplated by law, it is undoubtedly pertinent).

Furthermore, the legislator expressly states that a benefit company "that does not pursue common benefit purposes" is subject to the provisions on misleading advertising and the consumer code (paragraph 384, Article 1, Law no. 208/15), identifying the Italian Antitrust Authority (AGCM) as the body responsible for overseeing conduct and imposing administrative sanctions in the presence of illicit behavior. Moreover, against a benefit company that has falsely certified the achievement of promised objectives, a direct action to protect "the collective interests of consumers and users" could be hypothesized, possibly in the form of a class action, under articles 139 and 140 bis of Legislative Decree 6 September 2005, no. 206 (Consumer Code).

In conclusion, it must be remembered that the insurmountable limit in any type of business activity is long-term economic sustainability, i.e., business continuity. If the requirement of economic viability under Article 2082 of the Civil Code is not met, no business continuity can be found, and ultimately, no business activity can exist. In other words, it seems that one cannot be socially responsible or oriented towards pursuing the common good without first ensuring the economic-financial sustainability of the enterprise, which primarily remains an economic entity before being enriched with “additional” solidarity and philanthropic aims.

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