



DEVELOPMENT AND HARMONISATION OF SOCIALLY RESPONSIBLE INVESTMENT IN THE EUROPEAN UNION



Socially Responsible Investing and Benefit Corporation

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Pisa, 3rd May 2017 - Stazione Leopolda

Increasing attention to the social and environmental issues in business

- Corporate social responsibility
 - Soft regulation
 - Self-regulation
 - External monitoring
 - Consumers activism
- Progressive corporate law
 - The State Legislation pays more attention to the stakeholders rights:
 - **Constituency statutes**
 - **Stakeholders statutes**
 - **Section 172 UK Companies Act**
 - **German Mitbestimmung**
- Social enterprise
 - (UK)
 - » for-profit social enterprise
 - » No-profit social enterprise
 - » CIC (Community Interest Company)
 - L3C (US) Low profit limited liability Corporation
 - (Canada) Community Contribution Company
 - (Italy) Social enterprise (d.lgs. 24 marzo 2006, n. 155) (no-profit)
- Italian Third Sector Reform

Section 172

UK Companies Act

(1) 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.

(2) Where 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.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company».

The US B-Corporations and the Italian *Società Benefit*

fit into this trend.

- Adoption of a purpose of general public benefit in the articles of incorporation
- Broaden the factors that directors must consider in executing their duties

Expected Advantages

- Easier identification of investment opportunities that promote social causes or
- temper corporate profit-maximization with concern for larger social consequences
- Enforcement of investors' social and public welfare concerns
- corporate form “tailored” to social investment

PROVISION	PBC LAW	MODEL (MBCL)	Italian Società benefit
Benefit Director	Optional; not mentioned	Mandatory for public companies	Not mentioned
Benefit Officer	Optional; not mentioned	Optional; expressly	Mandatory
Benefit Report Preparation	Biennially	Annually	Annually
Benefit Report Public Posting	Optional	Mandatory-post on website; if no website, provide for free on request	Mandatory if the company has a website
Identification of Specific Public Benefit Purpose(s)	Mandatory	Optional	Mandatory (Art. 377)
Minimum Ownership for Shareholder Standing in Derivative Lawsuits	2%; or if the PBC is publicly traded then the lesser of 2% and \$2 million in market value	2%	Not mentioned
Third-party Standard	Optional	Mandatory	Mandatory
Third-party Certification	Optional	Optional	
Dissenters' Rights	Provided	Not expressly provided	Not expressly provided
Election of Status	90% of shareholders	Two-thirds of shareholders	(Dipends on the company)
Termination of Status	Two-thirds of shareholders	Two-thirds of shareholders	(Dipends on the company)

**Original table: Murray, Social Enterprise Innovation: Delaware's Public Benefit Corporation Law, Harvard Business Law Review, 2014, 371*

Limits of a national benefit corporation legislation:

- Globalization of business enterprise
- need for standardisation
and for homogeneous parameters

TOWARDS A EUROPEAN BENEFIT CORPORATION?

Extension of the *Società Benefit* principles at European Level?

Possible scenario of a European Directive on a Benefit Corporation ...

... or of a European Company (SE)/ European Cooperative Society (SCE) as a Benefit corporation?

Would it be a suitable scenario?

Main criticisms of the (Italian) law on the “Società Benefit”

A) Risk of greenwashing

«disinformation disseminated by an organization so as to present an environmentally responsible public image»

B) Legal uncertainty

Ex.: exit right of the minority shareholders

C) Risk of takeover

Who benefits?

“provisions of the statute prevent the ... benefit corporation from effectively serving the needs of either

entrepreneurs

or

investors” [Houlian, 2013]

A) Risk of “greenwashing” and enforcement of the legislation

- **In the US regulation on benefit corporations**
- **In the Italian legislation on the “*Società benefit*”**

(Different solutions)

Consequences of the violation of the directors' duties in the US

- **The enforcement proceeding (MBCL)**
- **No control from an external authority**
- **Need for an increased oversight:
a Benefit Corporation Commission?**

Enforcement provision

- If the directors of a benefit corporation have **failed** in their duties to its general or specific public benefit purposes
- **No monetary damages**
- **Injunctions to force directors to reconsider actions** against public benefits

Enforcement provision

Provision that suits neither shareholders nor directors?

- disproportionate amount of control for any shareholder
- “a watchdog or activist unsatisfied with a benefit corporation’s efforts to further its public purpose would acquire a share of a publically-traded benefit corporation simply to bring an action”

The remedies according to the Italian *“Società benefit”* legislation

- lawsuits against directors (art. 2392 c.c. ff.)
- no injunction relief
- (main policy mechanism for the performance of directors: the rights of the shareholders to elect and remove the directors)
- Monitoring through the benefit report
- the Anti-Trust Authority:
 - Impartial
 - Professional competencies

B) Legal uncertainty: - the dissenters' right

- Partnerships: unanimity (art. 2258 c.c.)
- S.p.A.: art. 2437, co. 1: ... modification of the object's clause, when it leads to a relevant change in the activity ...
- S.r.l.:
 - Art. 2473 c.c.: modification of the object's clause

B) Legal uncertainty: - the primacy of the public benefit?

- In case of conflicts, which aim has the priority:

the shareholder value

Or

the public benefit?

Could the directors lose an economic opportunity (ex.: production of burkini) because the operation would be in conflict with a (specific or general) public benefit (i.e.: women discrimination)?

c) Risk of takeover

(Cases: Ben&Jerry's, Mark&Spencer)

- protection against takeover?

Final remarks - I

- Benefit corporations are not a complete alternative to the public social and environmental care

See:

- Trump's declaration on the abolition of the Environmental Protection Agency and to "balance the priorities of taking care of our environment with creating a strong business environment that encourages companies to flourish, grow and create new jobs";
- Sarkozy's declaration on the environmental care

Final remarks - II

- Società benefit/Benefit corporation
- Model suitable to identify *particularly* virtuous enterprises

Under the condition that:

- stricter enforcement regulation;
- Higher level of legal certainty
- standardisation of the parameters at international level