European Business Organization Law Review (2020) 21:279–317
https://doi.org/10.1007/s40804-019-00149-9

ARTICLE

The New Italian Benefit Corporation

Gianluca Riolfo[1]

Published online: 20 May 2019

Abstract
The object of this work is the study of a new model of company introduced in Italy with Law No. 208/2015, the Benefit Corporation, a form of undertaking with joint lucrative and altruistic purposes. The Italian legislator was inspired by the North American Benefit Corporation, which was introduced in many states beginning in 2010, but the Italian regulation is fairly generic and incomplete. Our preliminary task is to seek a systematic framework for this model of company, identifying its rightful place among the 'for-profit' and 'non-profit' business sector, while highlighting their similarities or differences with regard to the wider issue of corporate social responsibility. Next we must attempt to try to fill in, through interpretation, the many gaps and dysfunctions we find in the regulatory body that, if unresolved, would make the new company model unappealing. This reconstruction must be carried out with reference to the traditional concepts of Italian corporate law, depending on the type of corporation chosen and insofar as they are compatible with the new model. The work thus provides a rough comparison of the new Italian corporation model and some of the North American states' legal regulations on Benefit Corporations.

Keywords Benefit Corporation · Directors' fiduciary duties · Disclosure obligations · Common benefit purposes · Corporation governance · Misleading information

1 Introduction

The Italian lawmaker, continuing an ongoing journey, has added a further step to the broadest regulatory framework aimed at regulating the phenomenon of doing business in a 'social' and 'sustainable' way.[1] The forms through which a business

[1] This is an attempt to direct entrepreneurial activity towards pursuing not only (or not exclusively) the egoistic interest of the entrepreneur in maximizing profit but (solely or in addition to profit) also collective and public benefits.

✉ Gianluca Riolfo
gianluca.riolfo@univr.it

[1] Dipartimento di Scienze Giuridiche, Università di Verona, Verona, Italy

activity can be pursued for the benefit of the community may vary considerably. With the *Legge di Stabilità* of 2016 (Law No. 208 of 28 December 2015) the new 'Benefit Corporation' form (henceforth, BC) has found its way into the Italian legal system.

This is a 'hybrid' form of business[2] that is ideally located halfway between those in which profit (gains for shareholders) is the main, or the only, goal and those in which the search for profit is altogether lacking, while the activity pursued is aimed at achieving a social benefit in the broad sense (characteristic of the so-called third sector entities). In these latter forms of enterprise the law prevents the pursuit of profit.[3] In the first type, profit is the main objective that must guide the action of the directors. In BCs the directors are called upon to balance the interests (and expectations) of the members with the interests (and expectations) of individuals, entities and collectivities outside the corporate organization. Moreover, this balance may also result in the (at least in part) sacrifice of profit for the achievement of the general or special benefit objectives that the company has proposed to pursue.

This work aims to first describe this new collective business model of a social market enterprise, which was introduced in Italy with fairly scarce regulation. For this purpose, it may be useful to make a brief comparison with the legislation in some US states in which benefit corporations have already been regulated for some years.

At the end of the work we will attempt to draw some initial conclusions regarding the capacity of the new model of corporation in terms of effectively pursuing the social goals intended by the legislator. For now, however, we can say that the BC is a first experiment on the long road towards the 'socialization' of corporate business activity. It falls within the EU movement on 'corporate social responsibility', or CSR (promoting society's interests and sustainable growth),[4] and is part of the wider action plan to promote the growth of social enterprises and a social economy.[5]

The success of this model is linked to the different interest-balancing powers of the directors, the monitoring powers available to shareholders (and, most importantly, for beneficiary stakeholders), and a judicial enforcement mechanism for directors' duties that is available to third parties and interested beneficiaries.

The last aspect is probably the more important and, at the same time, the most critical. Italian corporation legislation has a rule regarding the responsibility of

[2] That concerns 'hybrid legal forms to meet the needs of […] hybrid business', McDonnel (2014), p 4.

[3] Or if the 'social' activity nevertheless provides profits, they cannot be distributed.

[4] Think about, for example, the Commission Communication 'A renewed EU strategy 2011–2014 for Corporate Social Responsibility', adopted on 25 October 2011, COM (2011) 681 final; or Directive 2014/95/EU of the European Parliament and the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1. Many initiatives have been adopted to promote CSR at the international level: the most relevant are undoubtedly the United Nations Global Compact (September 2000) and the OECD Guidelines for Multinational Enterprises.

[5] An example is the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Social Business Initiative. Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation', adopted on 25 October 2011, COM (2011) 682 final.

directors and managers towards single members of the corporation or interested third parties. If we can apply that rule to BC boards of directors (and it does seem to be possible), this model of corporation could play an important role in the development of corporate social responsibility and business sustainability.

Only a real change in the way of doing business (by entrepreneurs, undertakings and corporations),[6] in a sustainable way and that protects the interests and needs of particular categories of stakeholders, will help the diffusion of the BC model. Hence, we have to wait some years to see the results of the BC 'experiment'.

2 The Socio-Economic and Regulatory Framework

There is a chain linking BCs, social farming,[7] innovative start-ups with social vocation,[8] and social enterprises[9]: they are all forms of business ventures with the purpose of pursuing social goals and common benefits for the community.

This can be considered as an evolution of so-called 'corporate social responsibility',[10] according to which economic development should occur in a socially responsible manner, respectful of human rights, social instances and environmental concerns. The term 'corporate social responsibility', in the absence of a precise definition, represents a 'system of values able to qualify the actions of the company, to make corporate governance "ethically responsible" and […] to reinforce its credibility in the eyes of consumers and investors […], model of enlarged management that attempts the difficult balance between different opposing interests'.[11] It evolves into a 'complex system of regulations governing the various aspects of those business that affect the attitude of human society'.[12]

A distinguished Italian scholar,[13] in a recent contribution, argued that the social market economy which is the foundation for the Treaty on European Union[14] should be pursued without solely focusing on efficiency, instead considering the 'social implications of each choice'. The company becomes a 'fruitful cell of the economic

[6] A change due to a new sensibility concerning customers, consumers and investors that (in an ideal world), due to their choices, could affect entrepreneurial behaviour.

[7] Law No. 141 of 18 August 2015 ('Rules on social farming').

[8] Art. 25, para. 4, Decree Law No. 179 of 18 October 2012, converted into Law No. 221 of 17 December 2012.

[9] Legislative Decree No. 155 of 24 March 2006, now repealed by Legislative Decree No. 112 of 3 July 2017.

[10] Borgia (2010), pp 2 et seq.; Costi (2005), pp 417 et seq.; Denozza (2005), pp 143 et seq.; European Community Commission, 'Green Paper Promoting a European framework for Corporate Social Responsibility', COM (2001) 366 final, 18 July 2001. There are many works on CSR; see, for example, Bratton (2017), pp 10 et seq.; Macey (2014), *passim*; Bevivino (2014), *passim*; Cherry (2014), pp 281 et seq.; De Schutter (2008), pp 203 et seq.; Bainbridge (1992), pp 979 et seq.

[11] Borgia (2010), p 5.

[12] Borgia (2010), p 7.

[13] Toffoletto (2015), p 1203.

[14] In particular, Art. 3, paras. 3 and 5, emphasizes sustainable development, a balanced economic growth, the social market economy, and environmental protection.

system' if its objectives are not limited to profit, and the management modalities should take into account the company's effects and the related costs[15] on the economic and social system.

In the Italian legal system, the basic idea is that a private company is a contract by which two or more people join together to exercise a business. To do this they share goods and (sometimes) their work. The purpose of the members is normally to divide the gains of the entrepreneurial activity.[16] Directors and managers must do anything they think that is necessary for pursuing the corporate purposes.[17] These purposes are those set out by the partners in the bylaws (the so-called '*oggetto sociale*'). In other words, the directors must manage the corporation with the aim of the business activity achieving success (and this is their main objective).[18]

In the law we find a separation between undertakings pursuing a profit, the cooperative companies (with prevailing but non-exclusive mutual goals) and those companies that, being 'socially oriented', are prohibited from distributing gains derived from their activities.[19] For the first type the law does not prevent the pursuit of, in addition to the interests of shareholders, objectives and purposes that are extraneous to the narrow shareholding structure (e.g., the interests of workers, local authorities, and the environment). However, this must be done without detriment to the primary objective of the company, which is increasing its earnings. In other words, the pursuit of the interests of the so-called stakeholders is still aimed at improving profitability through the improvement of the company's image as being careful to the environment and respectful of workers, local communities and human rights.[20]

The novelty of the BC is precisely in the break-up of the dichotomy between 'for-profit' and 'non-profit' companies: it stands in the midst of the two opposing realities merging the social aims of the third-sector businesses with the profits that are

[15] Toffoletto (2015), pp 1207–1208.

[16] See Art. 2247 Civil Code: '*Con il contratto di società due o più persone conferiscono beni o servizi per l'esercizio in comune di una attività economica allo scopo di dividerne gli utili*'. Note that cooperative companies have different aims: they have to pursue mutual purposes, not the profit one (see Art. 2511 Civil Code). We have to take into account this important difference between corporations and mutual companies. And we also have to consider that the law recognizes two kinds of cooperatives: the so-called '*a mutualità prevalente*', in which gains are not distributable, and '*a mutualità non prevalente*' in which profits are partially distributable.

[17] See Art. 2380-*bis*, para. 1 Civil Code.

[18] Directors have to act within the perimeter determined by the '*oggetto sociale*', trying to attain the success of the business. But the success of the business indirectly implies gains for shareholders.

[19] An example of such an orientation was Art. 3 of Legislative Decree No. 155/06 regarding social enterprises (but the new Art. 3 of Legislative Decree No. 112/17 now admits a limited distribution of profits for social enterprises as well). The sector in which the social enterprise operates can be defined as 'non-profit'.

[20] In the Italian legal system, for many years, it has been clear that entrepreneurial activity is not the only type of business activity. Associations could also exercise a business, although they support ideal purposes. Further, cooperatives are a particular kind of company in which a mutual (hybrid) purpose replaces the singular quest for profit. The real question is: could the organizational form of a corporation be adopted to pursue aims other than profit? The response is probably 'yes': the corporate 'form' seems to be neutral and available for different aims or purposes. However, the problem we have to face is whether, for this 'free' use of the corporate form, it is necessary to have a legal provision that authorizes the change. For some reflections on these themes see Mosco (2017), pp 218 et seq.

typical of commercial enterprises. This gives rise to the notion, widely present in North American literature, of a corporation with a 'hybrid' objective.[21]

In Italy, the neutrality of the corporate scheme has long been discussed with respect to the goals pursued by the founders.[22] The Civil Code has always clearly distinguished between entrepreneurial activity (pursued by corporation forms) and 'ideal' or 'social' activity (pursued by associations or foundation forms). However, in recent years the law has authorized the use of the corporate form for pursuing aims that are different from profit. For example, consider corporations that are owned by the state or by other public entities, third-sector entities, social enterprises, and, at the end of the past year, non-professional sports clubs and 'cultural and creative enterprises'.[23]

Corporate purposes and the nature of corporations are questions that have long been debated among the academic community both within and outside of Italy. In the US and the UK these themes have received particular attention.[24]

In the US, since the 1930s, scholars have discussed whether directors should have duties only towards shareholders or whether their duties should extend to stakeholders. This question is closely linked to the one on the nature and purpose of a corporation. If corporations are the 'property' of stockholders (this is one position) managers have to maximize the shareholders' returns. If corporations are a 'nexus of contract' (the other position), in managing the company the board must consider the interests of all stakeholders (i.e. employees, consumers, the general public) and make decisions that yield benefits for all of them.[25]

The growth of the corporate social responsibility theory has fuelled this debate, but despite the increasing international recognition of new principles of governance,[26] state courts (especially in Delaware) are continuing to support shareholders' primacy and the maximization of value.[27]

Several states (but not Delaware) have adopted constituency statutes that allow directors to consider, in the decision-making process, the interests of a broad range of stakeholders (e.g., employees, customers, consumers, the local community).

[21] See again McDonnel (2014), pp 4 et seq.; Murray (2016), pp 543 et seq. (for an overview of different types of 'hybrid entities'); Pollman (2017), p 9 ('a specialized form is needed in order to bake the dual mission into the very organization').

[22] See, for example, Ferro-Luzzi (1971); Spada (1974); Santini (1973); Marasà (1984); Galgano (2007a), pp 62 et seq. The introduction of the BC seems to confirm the idea that only an explicit legislative derogation can allow a corporation not to pursue the aim (profit) that is typically inherent in the '*causa*' of the company contract.

[23] Law No. 205 of 27 December 2017 introduces the possibility for (non-professional) sports clubs and for entities that have a cultural mission to adopt the corporate form.

[24] It is impossible here to follow the development of the discussion. For some references see, for example, MacLeod Heminway (2017), pp 618 et seq.; Johnson (2013); Aguilera et al. (2006), pp 151 et seq.; Elhauge (2005), pp 733 et seq.; Bruno (2004), pp 897 et seq.; Wheeler (2002), *passim*; Dean (2001), pp 29 et seq.; Roach (2001), pp 12 et seq.; Kelly and Parkinson (1998), pp 174 et seq.

[25] For more insights, refer to the works contained in the previous note.

[26] The OECD Principles of Corporate Governance are an important example of this trend.

[27] Directors may take into consideration the interests of stakeholders but only if this is functional in order to benefit the welfare of shareholders.

However, these statutes have failed to substantially change the situation (and they have been seen as more of a new defensive tool in the event of hostile mergers).[28]

Probably, the intransigent position of the courts (and the pressures related to the new concepts of sustainable economy) has pushed the states' legislators to introduce specific mandatory rules on a new corporation model: the BC.[29]

Conversely, in the UK the reform of the Companies Act in 2006 resulted in an apparently new regulation for directors' duties (which is reflected in the nature of the corporation and its purposes). Section 172(a) states that, in acting 'to promote the success of the company', directors must 'have regard' to the interests not only of shareholders but also of stakeholders (the Act provides a list thereof). This is the so-called 'enlightened shareholder value' theory.

Divergent opinions have arisen, some of which are enthusiastic while others are highly critical.[30] The most likely assertions are from those who think that 'it would be erroneous to argue that the Companies Act has introduced a stakeholding public company model in UK because the enumerated factors are merely instrumental to the main purpose to be pursued by directors identified in the duty of ensuring that the company is successful for the benefit of its member as a whole'.[31] This means that directors are only 'free' to take into consideration the interests of other constituencies if, in this way, they can pursue their primary task, i.e., the maximization of the profit interest of the shareholders.

The Italian BC corporation model is different. As we will see, if one or more general benefit purposes are introduced in the bylaws, the directors must pursue them attempting to balance[32] (in the best way) the double aims of the corporation. If the directors do not properly fulfil this 'balancing' duty, they could be held responsible (also by the beneficiaries).

Meanwhile we cannot forget that the EU has adopted new rules regarding the disclosure of non-financial information (Directive 2014/95/EU[33]), which introduced

[28] See, for example, McDonnell (2004), pp 1228 et seq.; Springer (1999), pp 95 et seq.; Fort (1997), pp 183 et seq.; Orts (1993), pp 38 et seq.; Bainbridge (1992), pp 973 et seq.

[29] On the rise of BC in the US see the different opinions, among the many, of Neubauer (2016), pp 109 et seq.; Collart (2014), pp 1176 et seq.; Hasler (2014), pp 1279 et seq.; Grant (2013), pp 582 et seq.; Hiller (2013), pp 287 et seq.; Blount and Offei-Danso (2013), pp 617 et seq.; Haymore (2011), pp 1311 et seq.; Deskins (2011), pp 1047 et seq.

[30] See, for example, Ajibo (2014), pp 49 et seq.; Keay (2013), *passim*; Williams (2012), pp 363 et seq.; Keay and Zhang (2011), pp 446 et seq.; Harper Ho (2010), pp 62 et seq.; Mickels (2009), pp 273 et seq.; Cerioni (2008), pp 1 et seq.; Keay (2007b), pp 577 et seq.; Keay (2007a), pp 106 et seq.; Kiarie (2006), pp 329 et seq.; Williams and Conley (2005), pp 495 et seq.

[31] This is the position of Bruno (2017), p 314.

[32] Bruno (2017), p 313, has noted that 'the so-called "enlightened shareholder value" […] was preferred over the alternatively proposed "pluralist approach" that would have implied the duty for directors to balance different and conflicting interests resulting in wider discretion and specular narrower liabilities'.

[33] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1. See, for some remarks and for more references on this regulation, Szabó and Sørensen (2015), pp 307 et seq.; for the impact of the new regulation on the UK's Sec. 172(1) Companies Act 2006, see Bruno (2017), pp 321 et seq. Consider, anyway, that in October 2013 the Business Review provisions were amended and replaced by Sec. 414A et seq. of the Companies Act 2006. It introduced the Strategic Report (also called the ESG Report, or the 'Environmental, Social and

> a duty for larger undertakings to report on their business model, policy, principal risks and key performance indicators […] in relation to several matters in the ambit of corporate social responsibility […], including environmental, social and employee matters, respect of human rights, and anti-corruption and bribery matters, This information is to be reported in a 'non-financial statement', which should be included in the management report of the undertaking.[34]

We shall see later if and, eventually, how these European rules have an impact on the BC disclosure regulation.[35]

It is within this regulatory context that the Italian legislator has established the rules on the new BC model.

3 The Italian Legislation: Paragraphs 376 and Following of the *Legge di stabilità* 2016

Law No. 208 of 28 December 2015 (the so-called '*Legge di stabilità* 2016') introduced the BC in the Italian legal system. The discipline is contained in Article 1, paragraphs 376 et seq. of this Law. Already in 2015 a bill (No. 1882) was submitted to the Senate containing 'Provisions for the dissemination of companies that serve the dual purpose of profit and common benefit'. The bill consisted of six articles and two annexes (A and B) which have been transposed—without substantial changes—into Law No. 208/15.

The draft bill underlines the intention to overcome the 'classical' approach of doing business and a 'leap of quality' in the way of understanding the enterprise with a real change in the economic and entrepreneurial paradigm. The Italian lawmaker seemed to start from the idea that maximizing profits for the members is the first task of the directors of a corporation.[36] If this is so, an incompatibility could arise if the members introduce (voluntarily, in the bylaws) a social mission into the object of the company's activities. At the same time, a form of responsibility could arise for directors that pursue aims that are different from the maximization

Footnote 33 (continued)
Governance Report'): for each financial year the directors have to inform the members of the company how they have performed their duties under Sec. 172. Only for quoted companies must the Report provide information about environmental matters (including the impact of the business on the environment) and employees', social, community and human rights issues.

[34] Szabó and Sørensen (2015), p 308.

[35] In Italy the Directive 2014/95/EU was implemented by Legislative Decree No. 254 of 30 December 2016. Consob (the Italian Authority that governs the stock market) issued the regulation implementing Legislative Decree No. 254 (for quoted companies). The European Commission has adopted the 'Guidelines on non-financial reporting (methodology for reporting non-financial information)' with communication [2015] OJ C 215/1.

[36] In managing a traditional company, decisions made by directors are normally based on maximizing profits for the members, and they may be responsible for the way in which those decision-making processes are conceived and implemented.

of members' profits: social or environmental interests can only be pursued if they are linked with the improvement of the business performance of the corporation. More gains for shareholders or investors can justify the actions of directors, taking into consideration their different interests (the employees, the environment, the local community, social claims, and so on). Otherwise directors can be held responsible by the corporation and its members.[37]

Italian scholars have discussed the notion of 'corporate purposes'[38]: it has been acknowledged that a corporation may have ideals or social aims, but these must be functional in terms of pursuing the profit objectives of the corporation.[39] Hence, nobody doubts that a company may devote part of its earnings to the promotion of cultural or social activities, donations, or initiatives protecting the environment. However, profit (maybe in the long term) must remain the main target.

When the legislator wishes to bend the organizational forms of corporations for the pursuit of purposes other than profit, it establishes special rules.[40] The law regarding BCs is such a 'special regulation'.

The new provisions seek to allow the pursuit of an 'additional aim' beyond strict profit. They derogate from the general principles of company law to allow for the spreading[41] of a system of companies that, while carrying out an economic activity, can aim at improving the natural and social environment in which they exist and function.[42]

Italy is the first European country that has introduced specific legislation to expressly regulate this phenomenon.[43]

[37] As we have seen in the US and the UK neither the constituency statutes nor Sec. 172 of the Companies Act have brought a change of perspective: directors are liable when they fail to pursue the best interests of the corporation (and of its members), that is the maximization of profits. The North American states that introduced BC regulations specifically intended to allow directors to pursue (general or particular) benefit interests without management responsibilities. This was a way of supporting socially-oriented corporations.

[38] As we have seen, in Italy the neutrality of the corporate scheme has long been discussed with respect to the goals pursued by the founders: see n. 22.

[39] In the same way, it is acknowledged that associations or foundations could exercise a business activity but it must be functional for pursuing ideals or cultural or social aims, which remains the prevalent objective (in this sense this the consistent position of the Italian Supreme Court—*Corte di Cassazione*).

[40] Think about social enterprises, football clubs, state-owned corporations and so on.

[41] When a legislator states that the first aim of the new BC legislation is to encourage the 'spreading' of companies with a sustainable business activity it demonstrates that these types of undertakings are already present in the economic system, although they are not BCs. The BC model is a new tool for facilitating the further diffusion of this form of enterprise.

[42] By reducing or removing negative externalities or by using practices, production processes and goods that have positive externalities, and by allocating some of their resources to the pursuit of the well-being of people and communities, the preservation and the recovery of goods of artistic and archeological heritage, the diffusion and support of cultural and social activities, and so on.

[43] In other European jurisdictions, there are some forms of companies that may resemble the Italian BC, even if they are in part different phenomena. This is the case, for example, with the Belgian *Société à Finalité Sociale* or the British Community Interest Companies and Community Benefit Societies; for an overview see Doeringer (2010), p 291. In several North American states that have introduced BCs, in recent years there has been a proliferation of more or less hybrid corporate forms, similar to but not overlapping with the BCs. Examples include 'low profit limited liability Companies' (also called L3Cs), 'flexible purpose corporations', 'social purpose corporations'; for a quick review see McDonnel (2014), p 7.

The Italian rules contained in Law No. 208/2015 essentially regulate the ability of a 'for-profit' company to also pursue public benefit purposes, expressly tying them to the corporate purpose. Here we find the obligation of the directors to act in their management activities respecting both the profit purpose and the possible social purpose, thereby balancing these opposing interests. We also find advertising and transparency obligations related to pursuing (or even failing to pursue) public benefit objectives. There is a definition of external standards assessment. Finally the law determines the sanctions (for the directors and the company) arising from the (intentional) failure to pursue the declared public benefit purposes.

The considerations contained in the report for the submission of draft bill No. 1882/2015 help to better explain this phenomenon. The commitment and the authority of the directors in the management of a BC are the same as those of a traditional company. However, with respect to the latter, the members are called to evaluate not only the economic financial performance but also its quality and the achievement of the declared common benefit objectives. Thus, first of all, the same members must assess whether and how a company has achieved a positive and significant impact on given categories of stakeholders. The directors have a further responsibility linked to the consequences of their decisions (with respect to individuals, communities, territories and the environment, goods and cultural and social activities, organizations and associations and other stakeholders) and the burden of acting with transparency towards these third parties.[44]

4 Principal Aspects of the Positive Discipline: 'Hybridization' of the Social Objective (or maybe of the '*Causa*' of the Contract) and the Pursuit of a Dual Mission[45]

Article 1, paragraph 376, of Law No. 208/2015, provides that 'in the exercise of an economic activity, in addition to the aim of split profits', a company can pursue 'one or more objectives of common benefit' and operate in a 'responsible, sustainable and transparent way in respect of individuals, communities, territories and the environment, goods and cultural and social activities, organizations and associations and other stakeholders'. Such a company can then be called a 'benefit corporation' and the specific provisions laid down in the subsequent paragraphs apply to it.

The Italian lawmaker has not introduced a new 'type' of company but rather enables the existing types of companies to pursue, within the statutory corporate purposes, not only a lucrative purpose but also, jointly, some public benefit usefulness. The last part of paragraph 377 provides that the purposes of common benefit (which

[44] It is a specific duty for directors to prepare an annual report on the objectives pursued, which is accessible to the public and drawn up on the basis of external evaluation standards. This duty, in some respects, is similar to the one that applies to directors of larger undertakings based on Directive 2014/95/EU but it is not the same thing. We shall discuss these aspects later.

[45] In early comments on the BC discipline, divergent opinions are emerging, either regarding the usefulness or the lack of usefulness of the introduction of this model in Italian law, as well as on the actual and concrete use thereof. See Siclari (2016); Guida (2016); Bertarini (2016); Lenzi (2016); Calagna (2016); Lupoi (2016); Ventura (2016); Cocciolillo (2017); Salvatore (2017); Frignani and Virano (2017).

have to be specified in the bylaws as the object of the corporation) may be pursued 'by each of the companies referred to in Book V, Titles V and VI, of the Civil Code, respecting the relative discipline'.

The law refers to companies that in the exercise of an economic activity have the purpose of the division of profits (as stated in the opening part of paragraph 376). This seems to lead to the division between lucrative companies, that can become a 'benefit', and cooperatives (the purpose of which is, if not exclusively at least predominantly, mutuality) that cannot be a 'benefit'. However, cooperatives, even non-benefit ones, in addition to pursuing advantages for their members, may devote part of their resources to public utility purposes (we call this 'external mutuality'[46]). The eligibility of such activities can be deduced from a series of regulatory indexes (such as the obligation to allocate their assets, or a part thereof, to 'mutual funds' contained in Articles 2514, 2545-*quater* and 2545-*decies* Civil Code[47]). The inclusion of cooperatives among the types of companies that can adopt 'benefit' purposes could facilitate and implement the use of such practices.

Conversely paragraph 377, Law No. 208/2015, admits that BCs can be 'each' of the types of companies mentioned in Book V, Title V (*società semplice*, *in nome collettivo*, *in accomandita semplice*,[48] *società per azioni*, *a responsabilità limitata* and *accomandita per azioni*[49]) and VI (namely cooperatives). Paragraph 376 does not coordinate with paragraph 377. However, the exclusion of cooperatives from the ranks of authorized benefit organizations does not appear to be justified. Thus, the prediction of paragraph 377 may be regarded as absorbent with respect to the beginning of the previous paragraph 376.

The law then specifies that the corporate purpose of a BC, in addition to the division of profits (or mutual benefit), must indicate the pursuit of 'one or more purposes of common benefit'.[50] Furthermore, the activity of the corporate body must be 'responsible, sustainable, and transparent' towards communities, territories, and so on. Two requirements must therefore be jointly present: a common benefit to be pursued and a responsible, sustainable, and transparent way of operating. If a company, while operating in this way, fails to pursue a specific purpose of common benefit (as stated in the bylaws) it is not a BC. Meanwhile a company that has such a statutory

[46] Paolucci (2012), pp 9–10.

[47] With regard to people's banks and cooperative credit banks (which take the form of cooperative companies but have a special discipline allowing the exercise of credit activity), see the provisions of Art. 32, para. 2, and Art. 37, paras. 2 and 3, Banking Law (Legislative Decree No. 385/1993).

[48] In all of these types of companies, the members (or some of them) are personally responsible for the company's debts and obligations. They are comparable with the general partnership (while *società in accomandita semplice* is similar to a limited partnership).

[49] All of these types of companies are incorporated and their members have limited liability (with the exception of *società in accomandita per azioni* in which some members have unlimited liability).

[50] From the combined reading of paras. 376 and 379, Law No. 208/2015, the BC, to be such, must pursue one or more common benefits (para. 376). A company that opts for being (or becoming) a BC must, in its corporate purpose, describe the 'specific common benefit purposes' that it intends to pursue (para. 379).

purpose, even if it does not operate properly (in attempting to pursue the common benefit) will be sanctioned (see the provisions of paragraph 384,[51] Law No. 208).

These are two requirements that are not strictly bound, and they are certainly not superimposable. Rather, they complement each other. The reason for this can be found in the definition of a 'common benefit' provided by the same law (paragraph 378), which is based on the 'pursuit, in the exercise of economic activity […], of one or more positive effects, or the reduction of adverse effects' on the broad category of subjects mentioned in the previous paragraph 376. It seems almost logical that the reduction of 'negative externality' may result from a 'responsible' and 'sustainable' action.[52] The latter could also be the sole purpose of pursuing a common benefit by the corporation. At the same time, the specific positive effects to be pursued (for the benefit of the categories identified by the law) could not be achieved except through responsible and transparent action.

The two above-mentioned requirements are also applicable to different subjects: the identification of the purpose or purposes of a common benefit belongs to the members in the bylaws (at the time of the company's formation or during its life, through the amendment of the bylaws by the shareholders' meeting or the members[53]). In turn, acting responsibly, sustainably and transparently is related to the management activity, and therefore it is a task that is primarily the responsibility of the directors. If a company does not act in this way, the directors themselves will be called upon to respond, both towards the same members and, possibly, towards the beneficiaries of the benefit purposes whose expectations have not been met or prioritized.

Finally, the law identifies the potential beneficiaries of a BC's activity. Responsible, sustainable and transparent action is directed at 'people, communities, territories and the environment, cultural and social goods and activities, bodies and associations' and 'other stakeholders' (paragraph 376). The latter are defined in paragraph 378(b) as 'individuals or groups of persons directly or indirectly involved in the activity of the company in par. 376'. In particular, they are 'workers, customers, suppliers, lenders, creditors, public administration and civil society' (with an excerpted but not exhaustive list of 'other stakeholders'). The common benefit (whose definition is contained in paragraph 378(a)) must reverberate its effects on one of the categories of subjects, entities, and communities listed by the law.

The definition is prolific and, in some respects, repetitive.[54] Indeed, considering the categories of the subjects and goods listed, it is so wide that it essentially covers

[51] For misleading advertising, unfair commercial practices, and, perhaps, even unfair competition.

[52] The 'transparent' way of acting is linked to the information that the company declares (not only to the members but, above all, also to the market and hence to the beneficiaries of the altruistic activities of the company itself).

[53] In the so-called '*società di persone*' changes in the bylaws can be decided by the members without a formal meeting.

[54] However, workers and customers (at least) belong to the category named 'people'; in the category of 'entities', we find suppliers, lenders, creditors, and customers (where they are not natural persons).

all possible subjects and most of the goods[55] of a legal system. This wide scope is amplified by the fact that beneficiaries may only be 'indirectly' involved in the company's activity, and the common benefit is intended not only as the production of a 'positive effect' for beneficiaries but also as the reduction of 'negative effects' for them.

It is therefore essential for the members to identify and describe in the bylaws the common benefit that the company intends to pursue and, if it is not logically derived from it, the subjects that the corporation's action are intended to benefit. The law provides that the related aims must be described within the corporate purpose, stating that there must be a 'specific' indication of which scope (one or more) is intended to be pursued. Therefore, in the editing of the BC's object or finality, generic or indefinite formulas cannot be used, nor petitions of principle. To avoid a situation where the statutory requirements have no concrete bearing, the common benefit purposes cannot be so numerous and varied that they are not objectively achievable.[56]

A corporation may be established with the BC purpose or it can adopt it later. The law merely provides that 'companies other than the […] benefit, if they intend to pursue common benefit purposes, are also required to amend their articles of incorporation and their articles of association' (paragraph 379, first part, Law No. 208/2015). The constitution of a BC does not create particular problems; the founding members deliberately decide to engage in a mixed object activity. It is more problematic transforming from a profitable business undertaking to a benefit one. Not all members may be in favour of engaging in a mixed cause. The law does not determine that particular majorities have to decide on such a step (or, conversely, on whether to return to the form of a solely lucrative company), nor on special withdrawal rights or other mechanisms to protect dissenting members. According to the Italian legislator, the adoption of a mixed form is 'in compliance with the provisions governing the changes in the articles of association or the bylaws, which are relevant to each type of company'.

We should therefore refer to the Civil Code where it relates to changes in company contracts (for partnerships and similar types of companies) or to the articles of association and bylaws (for limited liability corporations and cooperatives), with any appropriate changes

[55] In fact the law seems to assume a responsible and transparent way of action towards both subjects and goods (territories, the environment) and activities (cultural and social). At the same time, the common benefit can refer to subjects, goods, and activities.

[56] It is doubtful whether the purposes of a common benefit must be linked to the company's own economic activity or whether the two may also not be linked (more or less closely). Pursuing environmental protection or the health of the local community in which the enterprise is rooted, with higher costs (thus making less profit) due to the adoption of eco-friendly production methods, or installing more efficient purification systems (in addition to those required by the law) or even using ecological materials are goals that bind each other. We can have further doubts in cases where the realization of the common benefit is completely disjointed from the company's productive activity: for example, the case of a company that devotes part of its profits to sustaining environmental protection projects or to supporting cultural goods or activities (financing a private art collection or building a museum).

decided by the members, where this is permitted by the law.[57] Qualified majority or special pre-assembly information duties could be included in the bylaws. Unlike the introduction (or the deletion) of common benefit objectives, they remain subject to the ordinary legal rules that have been established for changes to the bylaws. At the same time, there is no further provision to assist the dissenting shareholder: there are doubts as to whether one can uphold the applicability of the legal discipline of the withdrawal. The issue is complex, but the introduction of social goals in the bylaws may not be technically a 'change of object'[58] and, above all, it may not involve a 'significant change in the activity of the company'.[59] These are the only cases in which a member may legitimately exercise the right to withdraw.

Statutory amendments introducing (or suppressing) common-purpose benefits must be 'deposited, registered and published in accordance with the provisions for each type of company under Articles 2252, 2300 and 2436' of the Civil Code (paragraph 379, Law No. 208/2015). It is not clear why the Law refers to Article 2252 of the Civil Code; it does not regulate how to publicize bylaw changes but rather the (internal) method of determining the will of the members. Moreover, if the introduction or deletion of common benefit clauses constitutes (at least) a modification of the corporate purpose, the reference to Articles 2300[60] and 2436[61] of the Civil Code appears in any case to be superfluous.[62]

The company may (but is not obliged to) use, alongside the name of the company, the words 'benefit corporation' or the abbreviation 'BC' and use them 'in securities issued, in documentation and in communications with third parties'. Surprisingly, the law does not impose the adoption of the abbreviation 'BC' or the words 'benefit corporation' in the company name. It is indeed true that it should be in the interest of the company to provide such an indication but this is extremely important

[57] In comparing the legislation of the North American states where BCs are present, we notice that enforcing a qualified majority (e.g. 2/3 of the share capital) in order to introduce or remove the purpose of a common benefit could be a suitable solution. The application of ordinary corporation law in Italy implies that in partnerships (Art. 2252 Civil Code) the contract may only be amended with the consent of all of the members (a provision that can be derogated); in joint stock companies (Arts. 2368 and 2369 Civil Code), the constitutive and deliberative quorums of the extraordinary general meeting are lower than 2/3, although the bylaws may provide for an enhanced majority; the same applies to limited liability companies (Arts. 2479, 2479-*bis* and 2480 Civil Code), while for cooperatives (Art. 2358 Civil Code) the law refers to the majority set out in the bylaws (in the absence of a specific rule, if compatible, the discipline of the limited liability company or the joint stock company is applicable). The lack of a specific rule on qualified majorities can result in 'confusion' or, worst, a situation of abuse for shareholders and third parties. In the US, laws on BCs 'use labeling and voting requirements to protect initial and existing shareholders from confusion' (see Brakman Reiser 2011, p 596). Further: 'shareholders are also involved at the initial adoption of benefit corporation status and on any exit from the status' (Brakman Reiser 2011, p 612).

[58] This is a condition to be able to withdraw from the limited liability company under Art. 2473 Civil Code.

[59] According to Art. 2437, para. 1, Civil Code.

[60] This article applies to all partnerships registered in the Company Register.

[61] This article concerned the joint-stock company and explicitly referred to the limited liability company and the cooperative company.

[62] Unless this expressly refers to the necessary disclosure requirements, it is a way to emphasize the importance of such disclosure.

information (for creditors and investors) and so it would have been better if the legislator had mandated the use of these words for corporations that are (or will be) for 'benefit' purposes.[63]

With the new law on BCs, the Italian legislator, while referring to the corporate purpose (for example, describing the common benefit aims), seems to realize the 'hybridization' of the *causa* of the company contract.[64] However, this is an idea that has been criticized. Some scholars assume that in the past this *causa* was characterized by 'joint activity' and a 'lucrative purpose'. Now, however, the most important feature of the company contract is the 'activity' of the corporation. That is, the lucrative purpose is important not for defining the *causa* but for characterizing the activity of the undertaking.[65] Moreover, the activity of the BC is mixed: lucrative and at the same time of a common benefit.

If we follow the first position, we should admit that the lucrative purpose that qualifies the *causa* of every company contract cannot be amended by the members. When the 'company contract' is chosen, different purposes (ideal or benefit[66]) other than the lucrative one can only be pursued (through the organizational structure of the chosen company type) if they are secondary and not the prevailing purpose. Consequently, only an explicit legal provision can allow the use of corporate organizational structures to pursue purposes that are different from making profits (e.g., a consortium or football club) or for mixed purposes (BCs).[67]

If we follow the second position, we can say that only members can determine the concrete purposes of their corporation. The shareholder interest is only that identified in the bylaws. The BC legislation recognizes the power of the members to specify the activity (and therefore to choose the purpose) of their company within the legal scheme that characterizes the legislative type of corporation.[68]

In any case, only the hybridization of the company contract *causa* authorizes directors to 'balance' the double aims of the corporation. This means that in managing, the company directors can (or, perhaps, must) sacrifice the profit purpose in

[63] We find different solutions in the law of North American states: for example, in Minnesota (Sec. 304A.101, subd. 2(1) and 2(2)) such a corporation must insert the words 'general benefit corporation' (or the acronym 'GBC') or else 'specific benefit corporation' ('SBC'). In Delaware (§ 362(c)) the use of formulas or abbreviations ('public benefit corporation' or 'PBC') is instead authorized but is not mandatory. However, in the case of the issue of shares or other financial instruments, the lack of a special denomination compels the company to inform interested parties in other ways.

[64] Briefly, in Italy the '*causa*' of the company contract is the joint exercise of an economic activity to produce profits to be distributed to the members. The object of the contract is the type of economic activity (the business) exercised by the company.

[65] See Angelici (2017), pp 2 et seq.

[66] Unless explicitly provided by law. Think about social enterprises, referred to in Legislative Decree No. 155/2006, now replaced by Legislative Decree No. 112 of 3 July 2017.

[67] In the US, McDonnel (2014), pp 29 et seq., correctly recognizes that benefit corporation statutes do not simply 'allow' but 'require' the pursuit of a dual mission; so we can clearly make a distinction between a BC and traditional for-profit corporations (even if the latter are 'socially oriented').

[68] See again Angelici (2017), pp 4–5.

order to achieve the common benefit purpose.[69] Furthermore, this way of acting, which is allowed by law through the contract *causa* hybridization, is completely legal. It is a typical characteristic of a BC.

Therefore, a non-benefit corporation can also pursue purposes other than profit. This is a free choice for the directors, but it must be made in the best interests of the company and of its members as a whole. This means that profit maximization remains the guideline, i.e., the first aim. If the members, in the bylaws, expressly introduce the possibility to pursue common benefit aims alongside making a profit,[70] the directors can attempt to find a way to achieve the benefit objectives determined in the bylaws, but the profit purpose must remain as the company's main focus (gains can only be limited, not excluded[71]).

In other words, only members can decide to depart from the typical *causa* of a company contract (providing the directors with the duty of 'balancing' different purposes), but this choice is lawful if they adopt the BC model.

The real challenge is finding a way to provide effectiveness to the common benefit mission of the corporation due to the 'separation of benefit and control'.[72] This aspect is linked with the directors' duties and the disclosure obligations.

4.1 Directors' Fiduciary Duties

One of the central issues in the BC regulation is the management of corporations and, consequently, the duties incumbent upon the directors.

The duties of directors and corporation purposes are strictly linked. Management has to act, in good faith and without personal interest, in the best way to benefit the company. If we consider that the main interest of the company is the maximization of profits, then this must be the goal that they have to try to attain. In doing so, since directors make reasonable decisions, acting (with wide discretion) in good faith and diligently, no one can claim the responsibility of those directors in managing the company even in the case of a lack of profit or losses for the corporation.[73]

[69] Balancing two different (and opposite) interests means that directors must diligently find the best equilibrium between them. And if they think that this equilibrium may lead to sacrificing the profit purpose, they are authorized to act as they see fit.

[70] In a non-BC profit remains as the *causa*; without its hybridization, the company could pursue different aims (of common benefit) but while the profit can somehow be limited, it cannot be sacrificed.

[71] Part of the profits will likely be used to attain the common benefit indicated in the bylaws (e.g., donations).

[72] Using the words of Winston (2018), pp 1783 et seq.

[73] This is, in synthesis, the so-called 'business judgment rule' (that grants broad discretion to directors' decisions as long as these are rationally related to a business purpose), determined far in the past by US states (since the famous case of *Dodge v. Ford Motor Co.* (170 NW 668, [Mich. 1919]) and the UK courts. See for the US situation, e.g., Miller and Gold (2015), pp 539 et seq. ('the director's sole fiduciary duty is to deliver profits to the shareholders'); Kawaguchi (2014), pp 493 et seq.; Johnson (2013), pp 435 et seq.; Lafferty et al. (2012), pp 849 et seq.; Stout (2008), pp 168 et seq. For the evolution in the UK see, e.g., Davies and Worthington (2012), pp 475 et seq.; Keay (2009), pp 146 et seq.; Beale (2007), pp 1033 et seq. Also the Italian courts follow the business judgment rule.

The courts have not changed their positions in spite of the emergence of new theories on the corporation and its purposes (such as 'corporate social responsibility'). Even with the presence of new legal provisions (constituency statutes in the US; the new Section 172, Companies Act 2006 in the UK and the Enlightened Shareholder Value theory) the courts have remained intransigent. When the law authorizes directors to consider not only the interests of the members as a whole but also the interests of the so-called stakeholders (workers, customers and suppliers, the impact on the environment and community, and so on), this is always effective for achieving the maximization of profit (not likely in the short term, but certainly in the long term).[74]

The introduction of the BC regulation seems to have changed the starting point of the discussions on corporations' purposes and directors' duties, thanks to the

[74] It has been said that 'a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare' (Strine 2015, p 768, fn. 26).

Bainbridge (2003), pp 601–605, thinks that the business judgment rule, in some situations, could have the effect of allowing directors to consider non-shareholders' interests in making corporate decision without any fear of liability towards shareholders. But a review of 'the case law provides non support for the argument that the business judgment rule is intended to allow directors to mediate between competing interest groups' (p 605). Again, Bainbridge (1992) states at p 980 that: 'the court may hold forth on the primacy of shareholder interest, or may hold forth on the importance of socially responsible conduct, but ultimately it does not matter. Under either approach, directors who consider non-shareholder interests in making corporate decisions, like directors who do not, will be insulated from liability by the business judgment rule'.

For others scholars, the real problem is instead that if directors can take into account the interests of non-shareholder constituencies in making corporate decisions, then it is difficult to hold the same directors accountable. So, e.g., Hess (1999), p 60, has argued that if 'management [becomes] accountable to everyone, they may become accountable to no one' (Bainbridge 1992, p 990, referring to the interpretation of constituencies' statutes, notes that courts have to consider that 'if directors are entitled to ignore shareholder interests, the directors' fiduciary duties are rendered meaningless. No meaningful legal mechanism would remain to hold managers accountable to shareholders. At the same time, because the statutes create non fiduciary duties running to nonshareholder constituencies and are not enforceable by them, management could not be held accountable by stakeholders').

In the context of the Enlightened Shareholder Value theory, there have been no real changes in directors' duties under Sec. 172, Companies Act 2006: shareholders' interests remain the central issue in corporate board decision-making and the factors (listed in the law) which directors are prompted to take into account constitute a means to pursue, in the best way, shareholders' interests. See, e.g., Bruno (2017), p 319 ('stakeholders' interests shall be taken into consideration by directors in so far as they enhance the value of the company and its shares. Certainly, however, the value of the company is meant in a wide sense in that it also includes reputation, regulatory consequences and other factors. On the contrary, if a director pursues stakeholders' interest where this may detrimentally affect the value of the shares the director is actually in breach of section 172 and might be sued for damages suffered by the company's assets and, indirectly, by its shareholders towards whom they owe the primary duty to promote the success of the company').

Another question, which is not of lesser importance, is the difficulty in showing that directors have breached 'this duty of good faith, except in egregious cases or cases where the directors have, obligingly, left clear record of their thought process leading up to the challenged decision' (Davies and Worthington 2012, p 543). On the unenforceability (or the difficult enforceability) of Sec. 172, Companies Act 2006, see also Bruno (2017), pp 315 et seq. (she underlines that the intention of the Government in introducing Sec. 172 was 'originally that the duty would have acquired its force not through the threat of litigation but through increased disclosure obligations'); Grier (2014), pp 100 et seq.; Keay (2007b), p 593.

hybridization or duplication of a company's purpose: maximizing profit and a common benefit at the same time.[75] Indeed the solutions adopted in states' statutes in the US do not seem to allow a real change in the courts' positions, and there are many critics of the 'new' duties of the directors of a BC.[76]

As pointed out by North American doctrine, the legal prediction of specific duties (other than the traditional ones) for managers might be an ineffective solution for the operation of benefit corporations and their propagation. In this model of companies, the risk of opportunistic behaviour on the part of directors is increased because they have to balance the interests of the members in terms of maximizing profit with the pursuit of a common benefit (as identified by the same members).[77] These are two antithetical objectives and one often prevails at the expense of the other. This allows managers to justify a failure in pursuing one of the two purposes with the attempt to attain the other.

In Italy, we will see how the legislator, probably unconsciously, has offered jurists, scholars and the courts a tool for enforcing directors' responsibility in pursuing common benefit aims.

The Italian law on BCs adds little or nothing to what the Civil Code already provides for the directors of any corporation. Paragraph 380, Law No. 208/2015 establishes that the management must 'balance the interests of the members, the pursuit

[75] For example, Strine Jr. (2012), p 151 and (2014), pp 235 et seq., has recognized the fact that BC statutes offer a different structure in which directors can operate (and, we can consequently state, this also means that the rules of conduct in managing the corporation will diverge from the traditional ones).

[76] See, e.g., Clark Jr. and Babson (2012), p 848: it seems that the directors of a BC have a reduced risk of liability. The 'dual mission' makes it more difficult for shareholders to claim a reduction of profits when management has prioritized the interests of the stakeholders, and in most BCs' statutes it is provided that 'the consideration of all stakeholders shall not constitute a violation of the general standard for directors, which requires good faith, the care of an ordinarily prudent person, and the consideration of the best interests of the corporation'.

At the same time, there are few opportunities for non-shareholder stakeholders to bring an enforcement action to protect their interests. The lack of specific remedies for 'third beneficiaries' is pointed out, for example, by Murray (2016), p 550 (in the US BC form, only shareholders, not the stakeholders, may bring benefit enforcement proceedings). But the same difficulties are present in the UK under the Enlightened Shareholder Value regulation: as we have seen, directors owe their duties only to the company and the stakeholders cannot seek remedies against management.

Pollman (2017), p 7, highlights the courts' 'uncertainty […] regarding whether shareholders might bring lawsuits when their interests were not prioritized and how a court would treat a corporation that pursued a dual mission'. And this depends on 'the legal uncertainty regarding corporate purpose and fiduciary duties that justifies establishing a separate form of organization'. MacLeod Heminway (2017), pp 627 et seq., underlines the probability that the new BC form will result in different types of claims related to whether a company is acting outside its promised public benefit or social purposes.

[77] The ambiguity and vagueness of the procedure of balancing the different interests of stakeholders (and shareholders) is underlined by, for example, Sukdeo (2015), pp 107 et seq.; lamenting the lack of clear standards to implement the balancing activity of the board is Paterno (2016), p 536 (the 'relatively loose standard may pose future danger for shareholders of benefit corporations, allowing directors to evade their duty of loyalty through the pretext of their pursuit of other interests affected'); for Brownridge (2015), p 743, the directors will not be able to 'serve two masters', both profit and a public benefit.

of the purposes of common benefit and the interests of the categories indicated in paragraph 376, in accordance with the provisions of the bylaws'.[78]

Moreover, from the point of view of internal structures, the law requires that members identify 'a subject or […] subjects to whom functions and tasks aimed at the pursuit of the (benefit) objectives can be entrusted'.

Finally, paragraph 381 provides that 'a failure to comply with the obligations under paragraph 380 may constitute a breach of the duties imposed on directors by law and bylaws'. Therefore, 'in the event of the non-fulfilment of the obligations referred to in paragraph 380, the provisions of the Civil Code with regard to the liability of directors shall apply in respect of each type of company'.

Directors (although paragraph 382 refers 'to the company') are always obliged to draw up 'annually a report on the pursuit of the common benefit to be attached to the company's financial statements'. Despite this terminological inaccuracy, the directors are the ones who are required to prepare the report. While the company may be held responsible[79] for not drafting the report, it is clear that this is a further specific duty for the directors (either all or some of them).

A new generic obligation certainly arises concerning BC managers[80]: in operating the business, they must achieve a balance between profit[81] and the common

[78] Minnesota Law (Minn. Stat., Chapter 304A, § 304A.201) lays down a detailed standard of conduct for directors: 'In discharging the duties of the position of director of a general benefit corporation, a director: (1) shall consider the effects of any proposed, contemplated, or actual conduct on: (i) the general benefit corporation's ability to pursue general public benefit; (ii) if the articles also state a specific public benefit purpose, the general benefit corporation's ability to pursue its specific public benefit; and (iii) the interests of the constituencies stated in section 302A.251, subdivision 5, including the pecuniary interests of its shareholders; and (2) may not give regular, presumptive, or permanent priority to: (i) the pecuniary interests of the shareholders; or (ii) any other interest or consideration unless the articles identify the interest or consideration as having priority' (subd. 1). And: 'In discharging the duties of the position of director of a specific benefit corporation, a director: (1) shall consider the effects of any proposed, contemplated, or actual conduct on: (i) the pecuniary interest of its shareholders; and (ii) the specific benefit corporation's liability to pursue its specific public benefit purpose; (2) may consider the interests of the constituencies stated in section 304A.251, subdivision 5; and (3) may not give regular, presumptive, or permanent priority to: (i) the pecuniary interests of the shareholders; or (ii) any other interest or consideration unless the articles identify the interest or consideration as having priority' (subd. 2). More detailed is Cal. Corp. Code, Sec. 14620 and 14622.

[79] We should also understand in which way someone can act against the company claiming its responsibility.

[80] Indeed this is an important legislative innovation. In fact, as noticed by Bruno (2017), p 325, 'the Italian jurisdiction, despite having introduced an important reform of company law, in 2004, looks very old as the new provisions of the Civil Code do not even mention stakeholders, nor contemplate the possibility that directors may take into consideration those interests. The reform has adopted a pure traditional shareholder value approach and directors' duties are meant to be owed to the company for the benefit of its shareholders as a whole whereas, however, no express consideration even of long-term shareholders is contemplated […]. Looking at the Civil Code provisions directors are not required nor expressly permitted to consider impact on non-shareholders of the policies adopted. They actually lack discretion in determining how to balance different factors including impacts; in theory, if an Italian board of directors considers stakeholders' interest, it may assume additional liabilities'.

[81] The law lays down that the directors have to balance 'members' interests', 'the pursuing of common benefit aims and other categories of interests' with those indicated by the law. However, shareholders (also) have the duty of pursuing the common benefit objectives (that they introduced in the bylaws). We could say that this is in the interest of the majority shareholders and not of all members but, in any case,

benefit interest (which are usually in conflict with each other). This imposes a task on the directors in which the discretionary component is extremely wide (perhaps more so than managing). When deciding on the business policies of the company, the management will have to determine, where it is not possible to pursue gains and an outside collective benefit simultaneously, which interest has to prevail and which has to be sacrificed, the optimal size of the sacrifice, and how much benefit is thus obtainable.[82] The yardstick of this management action will always be professional diligence, and directors will have to make informed and reasonable choices.

There are, however, no reference guidelines[83] to orientate management choices or to judge the directors' work subsequently. It is unclear when the company, its creditors, or third parties will be able to act in the case of liability. There is no definition of the perimeter within which the balance of the opposite interests leads to a lawful result (perhaps negative for some but positive for others) and when the management choices amount to wrongfulness or bad management decisions. These are questions that are difficult to answer. According to the provisions of paragraph 376, first part, Law No. 208/2015, directors will have to base their choices on the principle of 'responsible, sustainable and transparent'[84] entrepreneurial action. These are the main coordinates that have to be followed in managing a BC. According to the prevailing Italian jurisprudence on company directors' liability, managers cannot be held responsible when they have diligently and in an informed way balanced the

Footnote 81 (continued)

it is in the interest of 'the members'. The realization of the chosen common benefit goals, once disclosed, is also in the interest of persons who are third parties in relation to the company contract that benefits from them and provides relevance for the directors in their task of balancing.

[82] The phrase 'in accordance with the provisions of the bylaws' has an ambiguous meaning: it may refer to the purposes of common benefit and to the categories of beneficiaries identified in the bylaws, or it may mean that the bylaws could indicate how to balance the various interests. The first option seems to be more logical: both because management is not a task for the members and because it seems difficult to predetermine guidelines for the directors in the bylaws (unless they are very general principles and purposes). If the bylaws indicate more common benefits, it will be up to the directors independently to assess which is (or are) to be pursued. In the annual report, they will have to explain the reasons why they have chosen to pursue one aim rather than another.

[83] Although in a partially different context, Sec. 172, UK Companies Act 2006, for example, provides that directors' choices, even if they are directed toward the protection of the environment or the local community in which the company operates and the like, are always made in the 'best interest of the company'. This is also true in the benefit corporation legislation of many North American states; for example, Minn. Stat., Chapter 304A, para. 304A.104, subd. 3, states that 'the pursuit of general public benefit or a specific public benefit purpose […] is in the best interests of a public benefit corporation'; likewise Cal. Corp. Code, Sec. 14610(c); the Delaware Statute, however, contains rules that are similar to those introduced by the Italian legislator, although they are more accurate (Del. Gen. Corp. Law, Title 8, Subchapter XV, § 362(a)).

[84] What is a sustainable and responsible way of doing business? When answering this question one can be guided by both Art. 41 of the Italian Constitution and the aforementioned Art. 3 of the Treaty on European Union. Directors must draw up the annual report based on assessment standards determined by a third independent subject, following standards that permit the identification of the impact of company activity. Law No. 208/15 contains Annex 5 that indicates the 'assessment areas'. Based on that Annex directors have to manage the company realizing a congruent 'stakeholder engagement'; making the 'policies' and 'practices adopted by the company' transparent; creating a workplace in which quality, security, training and personal growth opportunities are attainable; adopting operational solutions that reduce waste in the use of resources, energy, and raw materials and improve production, logistics and distribution processes.

different interests involved, trying to implement the best solution[85] (in other words, when they act in good faith and make reasonable choices[86]), and when they decide in the absence of any possible personal interest (hence, with no conflict of interest).[87]

So, directors cannot be held responsible because they have not achieved the common benefit objectives set out in the bylaws if they have acted diligently in balancing the various interests (profit, the common benefit, and the protection of the categories of beneficiaries identified in the bylaws). However, they may be held liable if, in addition to failing to achieve the common benefit objectives, the company has not operated in a sustainable, responsible and transparent way.

A breach of the obligation to draw up an annual report is, however, easy to identify. A failure to comply implies liability on the part of the directors, who may be revoked and obliged to compensate the company for any damage that may result from such a breach.

In any case, directors will only be responsible for the nature of their assignment and for the functions they actually exercise. In this context the law compels the members of the company to identify 'one or more responsible persons'. What are the functions and tasks of these subjects? This issue is interesting both from the point of view of the possible division of responsibilities and in terms of the governance of the corporation (in which there must be appropriate organizational structures).

Italian law does not specify whether the person(s) responsible should be entrusted with operative tasks or merely with supervisory and control functions. Given the generic formulation of the rule ('functions and tasks aimed at pursuing' common benefit purposes), both options are possible. A company may decide to delegate one or more directors with the task of pursuing common benefit purposes. But directors who only have monitoring and control functions[88] concerning the board's activity or the managers' actions also have this responsibility.[89] If this is the case in a

[85] Precisely because the law requires a balancing between potentially conflicting interests, we can say that the best solution is when the sacrifice of the interests of a category is offset by an advantage for the interest of another category.

[86] As we have seen, this is the business judgment rule.

[87] The Delaware law on benefit corporations specifies that 'a director will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary sound judgment would approve' (Del. Cod., Title 8, § 365(b)).

[88] Monitoring functions, together with disclosure obligations (which we will discuss in the next section), are important tools for attempting to grant respect for common benefit purposes. In the US, under the Model Act, Benefit Enforcement Proceedings can be brought by either the corporation itself, a director, or a shareholder with a significant financial interest. As we will see, not all BC statutes have introduced these enforcement proceedings. So, for example, Brownridge (2015), p 718, highlights that under Delaware law only the traditional derivative lawsuit is a remedy for acting against a BC failure. An indirect method of monitoring is the provision that we find in the BC law requiring an annual benefit report to be published, which describes how the BC has pursued the public or specific benefit, the creation of any benefit and whether any factors have limited the pursuit of the benefit aims. The report must be prepared using a third-party standard. Increasing the enforcement of transparency requirements would assist in monitoring directors' and management's decision-making. After all, transparency through reporting is a traditional legal approach to achieving monitoring and compliance.

[89] If more than one subject is in charge a committee could be established.

joint-stock company, in a limited liability company[90] one could imagine the assignment of particular rights (of management or control powers over management) to certain shareholders (see Article 2468, third paragraph, Civil Code).

The law lays down the necessity of appointing such responsible persons (irrespective of the type of company chosen and their proper organizational rules[91]), who are therefore part of the internal structure of the company. The board of directors, or its executive members, will have to create such structures and determine their powers (direct management by delegation, or mere supervision or advice). The concrete operational definition of these figures may allow the corporation to have a more or less adequate BC structure, with defined consequence in the event of management accountability. There will be no responsibility for directors who have created and maintained appropriate internal organizational structures, irrespective of the results of the company management.[92]

Since the law expressly obliges directors to strike a balance between the interests of the shareholders and those of third-party categories, do the latter have (individually or through organizations representing widespread interests) the ability to act with direct responsibility versus the managers?[93] This issue is linked to the provisions of paragraph 384, Law No. 208/2015, which penalizes a BC that does not pursue the declared common purposes by subjecting the company to provisions regarding misleading advertising and those contained in the Consumer Code.[94]

It is difficult but not impossible for a non-shareholder (part of any of the categories of beneficiaries of the benefit company's business) to act directly against the directors due to a failure to achieve the company's declared benefit. In fact, by applying ordinary corporate law, third parties (or individual members) may act according to the conditions laid down in Article 2395 of the Civil Code, which refers to direct

[90] In partnerships there are many bylaw variables, and so it becomes very difficult to make concrete assumptions.

[91] This seems to be the meaning of the phrase 'the benefits corporation, regardless of the provisions of the regulations of each type of company provided for in the Civil Code, identifies the person or persons responsible' (para. 380, last part).

Hence the possibility that the 'responsible' party is identified in the bylaws as the members of the supervisory board (or as the board itself) cannot be excluded. Indeed, Law No. 208/2015 says nothing specific regarding supervisory bodies or the supervisory powers of non-directors.

[92] If the main obligation of BC directors is to balance the diverging interests of members and non-members, it may be more correct that such an activity is carried out by the board of directors in its *plenum* and not by an individual executive director. In its essence this balancing activity is nearest to high-level administration and direction and should be set out by the board as a whole and then executed by the delegates. Management choices related to benefit activities should be included in the 'strategic, industrial and financial plans' (in accordance with the terms used in Art. 2381, para. 3, Civil Code) as elaborated by the delegated directors but evaluated by the *plenum* of the board.

Identifying a 'responsible manager' does not seem to be a discretionary option for members or directors; the manager is a segment of the internal organizational structure, whose configuration competes exclusively with the directors themselves (who may be called upon to respond in the case of inadequacy). In the bylaws, it is likely that the members determine specific requirements (of professionalism or integrity and independence) for appointing responsibility.

[93] In the benefit corporation law of North American states, it is excluded that third parties, not members, may pursue responsibility claims against directors of a benefit corporation.

[94] The part of this Act that provides rules for repressing unfair commercial practices.

and immediate damage (that must be 'unjust')[95] caused by a negligent or intentional act by the directors in the exercise of or on the occasion of their office.[96] Failing to pursue the common benefit objectives due to negligence (or fraud) on the part of the directors may constitute, for the categories of potential beneficiaries, an unjust direct loss and thus lead to a breach of their rights. The question is: Do these third parties have a right, or do they only have a simple expectation rather than an legal expectation?[97] Moreover, in any case, the difficulties in providing evidence of the harm suffered must be considered.

An erroneous execution (as a result of negligent or intentional behaviour) of the duty to balance the interests involved, when it damages the third party directly, allows that third party to act against the managers. In particular, if the false (or incorrect) information provided by the directors in their annual report may have induced members or third parties to engage in certain forms of behaviour,[98] the individual (partner or third party) may sue the directors under Articles 2395 and 2476 of the Civil Code.[99] However, he or she must prove the injustice of the damage suffered and its amount.

When the company has not pursued the declared common benefit purposes, it can itself be sued under the action provided for in paragraph 384, Law No. 208/2015. This paragraph refers to the discipline contained in Legislative Decree No. 145/2007 (the law on misleading advertising) and in Legislative Decree No. 206/2005 (the Consumer Code), allowing action to be taken against misleading advertising and

[95] According to the prevailing opinion of Italian doctrine and jurisprudence; for example, Sanfilippo (2016), p 468; Campobasso (2015), p 390; Galgano (2007b), p 337.

[96] According to the consistent practice of the courts, the harm suffered by the third party (or the single partner) must be direct and immediate, and it must result from an unlawful act by the administrator and not from company *mala gestio* acts (the latter damages the single partner or the third party but only indirectly).

[97] Considering the fact that the action described in Art. 2395 Civil Code represents a specific hypothesis of non-contractual misconduct (regulated in Arts. 2043 to 2059 Civil Code: this is the position, for example, of Galgano 2007b, p 338). So, the evolution in doctrinal and jurisprudential theories (the injustice of damage was initially referred to as only a violation of absolute rights and was then also extended to a violation of credit rights, in order to admit non-contractual action even in the presence of a breach of interests 'deserving of protection under the legal order'; see, for example, Franzoni 1993, pp 183 et seq.) and the peculiarities of goods that the BC's activities might involve (the environment, health, work, culture) allow us to assert the enforceability of the non-contractual responsibility of directors even when it has involved a collective interest and linked expectations.

[98] Behaviour such as investing in company shares or financial instruments, entering into contracts, or establishing legal relationships with the company on the assumption of the stated public benefits.

[99] Beyond this specific case, however, the use of the action provided for in Art. 2395 Civil Code is allowed when no truthful information has been provided by the directors (in the financial statements or in other public reports) and, as a result, members or third parties have taken decisions which have resulted in direct damage (Sanfilippo 2016, p 468; Campobasso 2015, p 391).

In such cases (with reference to the annual reports provided for by law), the directors may also be subject to criminal liability under Arts. 2621, 2621-*bis*, 2621-*ter* and 2622 Civil Code (if the information relating to the common benefit purposes can affect the 'economic, patrimonial and financial situation of the company'); Art. 2630 Civil Code; Art. 173-*bis*, Legislative Decree No. 58/1998 called the Law on the Financial Markets (assuming that the benefit activities of the company affect the overall situation of the company in certain situations—such as admission to listing, the public offering of financial products, takeover bids or share exchange offers); Art. 185, Law on Financial Market (market manipulation).

unfair commercial practices as well as against unfair competition[100] (according to the provisions of Article 2598 of the Civil Code). In addition, the provisions contained in Article 2601 of the Civil Code allow the representative associations to act in the event of prejudice to the interests of a professional category. Meanwhile, Articles 139 and 140 of Legislative Decree No. 206/2005 enable consumer associations or associations representing common interests to act directly against the company (also by means of a class action based on the provisions of Article 140-*bis*). Such actions (made available, in the case of a BC, by paragraph 384 of Law No. 208/2015) are similar to the one laid down in Article 2395 of the Civil Code because both are not linked to a breach of contract.

So, the pursuit of interests and purposes with a broader common benefit, to which BC directors are bound, may be the way for the wider use of an action (action by individual members or third parties against managers) although this is rarely used in Italian company law. Moreover, at the same time, this action could be one of the few legal mechanisms for compelling directors to effectively pursue (or to try to do so to the best of their ability) the common benefit purposes set out in the bylaws.

4.2 Disclosure and Transparency Obligations

The Italian legislator has regulated different forms of publicity regarding the benefit nature of the company as well as regarding the specific benefit purposes that are actually pursued. Hence, we find the BC indication in the company name, the duty to describe the common benefits according to their corporate purpose and the duty to deposit, publish, and register the related bylaw changes in the company register as well as the duty to draft an annual specific report.[101]

This latter obligation, in particular, is included in paragraph 382, Law No. 208/2015, which prescribes that the report (which must be annexed to the financial statements) concerning the 'pursuit of the common benefit includes'[102]: (a) a description of the specific objectives, modalities, and actions taken by the directors for the pursuit of the common benefit purpose as well as the circumstances that have prevented or slowed it down; (b) the impact assessment generated, as measured by the external evaluation standard for the areas expressly identified in the Annex; and (c) a section which includes a description of the new objectives that the company intends to pursue in the following year.

According to paragraph 378(c), the 'external evaluation standard' means 'rules and criteria referred to in Annex 4' of the law, which must be 'necessarily used for

[100] Expressly recalled, for example, in Art. 8, para. 15 of Legislative Decree No. 145/2007.

[101] Pollman (2017), p 9, for example, notes that in the US the BCs' statutes consider information to the market to be important. A 'specialized form [of corporation] is needed in order to bake the dual mission into the very organization and to create a 'brand' that signals this to investors, employees and customers'. But (p 15) just because 'investors, employees, customers' often 'have incomplete information and limited option', disclosure is important but probably not enough ('certification and disclosures help provide information but do not provide means for people to perfectly sort themselves, supporting only businesses fully aligned with their individual beliefs regarding a range of values').

[102] It can be assumed that the elements set out in the law are the minimum mandatory content.

the evaluation of the impact generated by the benefit corporation in terms of common benefit'. For (d) of the same paragraph 'assessment areas' are the 'areas identified in Annex 5' that should be 'necessarily included in the evaluation of the common benefit activity'.

Before examining the contents of the report, the standards, and the evaluation areas, it should be noted that paragraph 383 provides that the annual report should be 'published on the company's website, if any', while 'some financial data in the report may be omitted', for the 'protection of the beneficiaries'.[103] Given the apparent importance of this report for the Italian legislator, it is unclear why there is no indication of an alternative form of advertising other than an internet site. Paragraph 382 lays down the obligation to attach the report to the financial statements in order to inform the members. But obviously the same report is crucial for the monitoring capability of the various stakeholders (the categories of potential beneficiaries of the company's activities).[104] If a BC is (as far as possible) a partnership (or a similar type of company), the fact that the annual report is attached to the financial statements does not guarantee that it (and the financial statements themselves) will be available to third parties when there are no deposit and publication obligations but only conservation duties (as in the case of a partnership).

Even if the annual report was intended only for company members (and it is not), as with other reports that must be attached to the financial statements they should at least be made available (as provided for closed corporations) at the registered office of the company before the assembly (Article 2429 Civil Code).[105] In this way, however, the objective to inform the third-party beneficiaries or other individuals who are interested in the action of the BC fails. In publicly held corporations (listed ones in particular), the law has instead expanded the use of the company's internet site, but, in addition or alternatively (accordingly to the particular type of economic operations), publication in newspapers and depositing at the registered office of the company are mandatory.[106] External effects on third parties (of the results of the common benefit activities) are certain. So the legislator would have had to impose suitable forms of advertising for the annual report, except in the case of BCs that are

[103] The rule is unclear. First, it is not clear which purposes of beneficiaries' protection should justify the omission of 'certain' (but which?) financial data. Maybe the omission of financial data could be aimed at preserving the privacy and secrecy rights of the company's members. Conversely, the more elements that are disclosed in the annual report, the more the protection of the 'beneficiaries' will be achieved.

[104] It can be presumed that the annual report, exposing the actual corporate activity, may form the basis of the sanctioning procedures referred to in para. 384 of Law No. 208/2015. Therefore, it cannot be said that the report on the benefit objectives favours the sole partners; third parties (in particular potential investors) will need to be able to know the benefit activities in detail, the operating methods and the perspectives for achieving the goals.

[105] The use of the ordinary regulation of the company 'type' chosen for the BC means that this provision is also applicable to the annual report on the common benefit aspects.

[106] In the Law on the Financial Markets, there are many examples. For instance, rules regarding the convening of shareholders' meetings and how to make the required documentation to exercise voting rights available (Arts. 125-*bis* et seq.) as well as rules on how the report on management and corporate governance (Art. 123-*bis*), the remuneration report (Art. 123-*ter*), and the financial reports (Art. 154-*ter*) must be published.

already listed or publicly held companies. In this latter case the rules laid down for the other reports, as required by law, are still applicable.[107]

The annual (benefit) report is intended not only to inform the members what the managers have done (obviously, the members will still be interested in being aware of the activities of the directors in pursuing the common benefit purposes laid down in the bylaws). The beneficiaries also need such an information. The contents of the report as required by law confirm that the benefit report is important for informing members and third beneficiaries.

Near the beginning (see paragraph 382(a)), the report must describe the specific objectives and the methods and actions that the directors have utilized to achieve the common benefit goals. Despite the imprecision of the language used in the law, it is clear that managers are required to indicate which specific aims (there may be more than one), among those indicated in the corporate purpose, have been pursued and how. The report must indicate 'any circumstances' that have prevented or slowed down the pursuit of those goals.[108] Linked to this part of the report is the 'section' where directors must describe the 'new objectives'[109] to be pursued in the following year (paragraph 382(c)). It is possible that in the course of a single activity that has been undertaken, the common benefit goals may not have been achieved. The Italian law seems to admit that new goals can be added from one activity to another. Assuming that more activities may be required to achieve the purposes that the company has set out, it would be useful for the report to indicate the progress towards the achievement of longer-term goals[110] (possibly highlighting the causes of unexpected delays). Once a specific purpose has been achieved (or has become impossible to achieve) the company can establish another common benefit objective.[111]

Paragraph 382(b), Law No. 208/2015 then provides that the report must describe the 'impact generated'[112] by the company through its actions. This should be measured by means of an 'external evaluation standard' which must be (1) exhaustive and articulate, (2) developed by an independent entity (i.e., not controlled by the BC or connected with it), (3) credible (developed by an institution that has access to the expertise needed to assess the social and environmental impact and uses a

[107] As we will see, for listed companies, benefit and non-financial information reports will tend to overlap.

[108] The law does not explicitly require a description of how a 'balance' has been struck between the various interests involved. This is the main 'new' duty, whose diligent exercise frees directors from liability, so this new regulation could have been imposed to motivate the reasoning for certain choices.

[109] Among those already mentioned in the bylaws. Otherwise, directors would be able to autonomously choose new purposes of common benefit, and this is clearly unacceptable, considering that it requires a change in the bylaws to introduce new goals (or to delete those previously indicated). We can imagine that more specific purposes could be indicated in the corporate purpose, thereby allowing the directors to choose one or more among them.

[110] The bylaws could contemplate a tool for verifying the progress of the company's activities towards the set benefit goals.

[111] If several purposes (all or some of those set out in the bylaws) are jointly pursued, a description of the operational modality, the outcome, and the progress of each of them will be given. If, among the various purposes set out in the articles of association, it is left to the directors to decide which one to pursue first, they will have to justify the reasons for their choice in the annual report.

[112] In pursuing the common benefit purposes, as it is seems to emerge from no. 1 of Annex 4.

scientific and multidisciplinary approach), and (4) transparent (because the information on the governance structure and the internal organization of the entity is made public).[113] The impact assessment must include the following areas of analysis: (1) corporate governance,[114] (2) employees,[115] (3) other interested parties,[116] and (4) the environment.[117]

The third and independent entity has only to arrange the impact assessment standards,[118] as indicated in the law, which are available for any BC and will then be used by the directors in their report. No external certification is required, only a (self-) assessment that covers the 'areas' set out in Annex 5 (that is, internal governance, employee relations and the working environment, commercial and social relations with external components and the relationship with the environment). These areas of assessment could be 'outside' the specific common benefits that the company intends to pursue. So, if the goal is to make less profit but to improve the quality of the environment, the effects of the actions taken by the directors will still have to be described in relation to the internal governance rules (the degree of transparency and responsibility in the company's actions in pursuit of the common benefit purposes[119]), employment and other stakeholders' relationships, and the impact on the environment (which, in the example, would be the sole aim pursued). The area of corporate governance should always be described as the company (in order to be a BC) is anyhow required to operate 'in a responsible, sustainable and transparent' way (paragraph 376).

[113] Also, according to Annex 4, the following should be mentioned: (a) the criteria used to measure the social and environmental impact of the activities of a company as a whole; (b) the weight given to the various measurement criteria; (c) the identity of the directors and the governing body of the institution that has developed and manages the evaluation standard; (d) the process by which changes and updates to the standard are made; and (e) a report of the entity's revenue and financial support to exclude possible conflicts of interest.

[114] 'To assess the degree of transparency and accountability of the company in pursuing the aims of common benefit, with particular attention to the company purpose, the level of stakeholder engagement and the degree of transparency of the policies and practices adopted by the corporation'.

[115] 'To assess relationships with employees and collaborators in terms of remuneration and benefits, personal growth opportunities, the quality of the working environment, internal communication, flexibility and job security'.

[116] 'To assess the company's relations with its suppliers, with the territory and local communities in which it operates, voluntary actions, donations, cultural and social activities, and any action to support local development and its supply chain'.

[117] 'To assess the company's impacts, with a lifecycle of products and services perspective, in terms of resources, energy, raw materials, production processes, logistics and distributive processes, use and end-of-life consumption'.

[118] In the US, the first 'third-party standard-setter' is B-Lab.

[119] The annex requires highlighting the correlation between the social purpose (both profit and common benefit) and the level of involvement of the beneficiaries and other stakeholders (not directly affected by the social activity but for whom it is still important to understand the ways of pursuing the common benefit aims, e.g., investors or consumers who, only by virtue of the particular benefit goals declared, are linked to the company).

Objective problems of comprehensibility will arise, not concerning the report as such, but concerning the standards[120] followed, their application and the relevance of the impact level for the company and for the various stakeholders.[121]

The importance of disclosing non-financial information is well known. As we have seen, in the UK for example, the original idea of the legislator in introducing Section 172, Companies Act 2006 was to strengthen the duty of directors (to also consider stakeholders' interests), not through the threat of litigation but through increasing disclosure obligations.[122]

We can find the same objectives in the EU rules on the disclosure of non-financial information as laid down in Directive 2014/95/EU. Before the Directive, 'corporate social responsibility' was based on the voluntary efforts of single undertakings, which believed that socially responsible business actions (and the related disclosure of information) could be profitable in the long term.

The Directive introduces mandatory rules on which and how non-financial information has to be given. As commentators have stated, 'the ultimate aim of amending the directive is to affect how business is conducted' and 'the enhanced information disclosure should facilitate a "change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection" […]'. Disclosure 'helps measuring and monitoring the undertakings' impact on society' so that 'investors and other stakeholders may press the management toward conducting business in a more sustainable way' and it is a 'relatively cheap and non-intrusive way of trying to promote change towards sustainability'.[123]

[120] Also think about the fact that there could be more persons who are qualified to establish valuation standards, and these could diverge among the various third-party standard setters. Choosing some standards rather than others might already mean different outcomes in understanding the impact generated. With different standards to choose from, it will be necessary for directors to explain in the report the reasons as to why they opted for some standards and not others.

[121] However, the pursuit of common benefit purposes has implications for the financial structure, the composition of assets, and the means of operating, so the external auditor may also make his or her own assessments of the benefit 'sector' of the revised company.

[122] See Bruno (2017), pp 317 et seq.: 'the original intent […] was to provide a voluntary disclosure meant as an incentive for companies to disclose […] information [on the company policies towards employees, environment, community, social issues and any other material for the company's reputation] and through it to foster directors to take into consideration also stakeholders' interests in designing the company's activity'. This type of report 'never came to light' and something similar was only provided for listed companies. A review 'is an integral part of the duty of loyalty to the company'; and with 'directors of a listed company having the duty to report on all the factors listed in sec. 172(1) CA 2006, their minds will, at at minimum, focus on stakeholders' interests and […] the disclosure regime underpins the core of the duty of loyalty'. In 2013 the introduction of the 'Strategic Report' reinforced these obligations and 'directors may breach the duties stated under sec. 172(1) whenever they do not give adequate attention to any of the factors therein addressed and the consequent decisions are clearly unsuccessful in business terms' (but 'damage to the company's assets, however, shall always occur to enforce a breach of section 172(1)'). In other words, the Strategic Report informs members of the company and helps them to assess how the directors have performed their duties under Sec. 172, Companies Act 2006.

[123] See Szabó and Sørensen (2015), p 316. The authors underline that an 'alternative' could have been to 'change the duty of directors or the purpose of companies (and other undertakings), but' these would have been 'more complicate solutions' (fn. 45).

Note that the Directive is a flexible legislative instrument and, in the case of the disclosure of non-financial information, it allows a single undertaking to follow 'the CSR policy' that it 'favours and even to abstain from adopting a policy if that suits' it best.[124] The 'legal device adopted in the Directive to indirectly foster disclosure is the comply or explain rule'.[125] So the EU legislator did not want to impose a way of managing corporations whereby business activities 'are best made sustainable', leaving it 'to the undertakings to find the best solution'. Undertakings 'that do not have any policies' on environmental, social, and employee matters, respect for human rights, or anti-corruption and bribery matters will only 'have to explain why'.[126]

Within the principles set out by the Directive, each single state (implementing the Directive) was free to adopt detailed solutions (e.g., additional enforcement mechanisms or the verification of the contents of the non-financial statement by an independent auditor). In Italy, the Directive was implemented by Legislative Decree No. 254 of 30 December 2016.[127] The Communication from the European Commission, Guidelines on non-financial reporting (methodology for reporting non-financial information), provides non-binding guidelines to help companies disclose non-financial information in a 'relevant, useful, consistent and more comparable manner'.[128]

It is evident that the BC regulation (particularly the part in which we find the rules on the annual benefit report) interacts with non-financial information rules. There are many contact points but also significant discrepancies. First, every type of company, regardless of its size, its relevance or the number of employees, can be a BC. Non-financial disclosure is only mandatory for large corporations (so-called 'public interest entities'[129]). However, Article 7 of Legislative Decree No. 254/2016 allows a non-public interest entity to voluntarily draw up and issue such a report. To obtain a declaration of conformity by an external auditor, these (smaller) companies must also respect the rules of the Decree.[130]

Two other differences between benefit reports and non-financial information reports are relevant. On the one hand, the directors of a BC must pursue the

[124] Szabó and Sørensen (2015), p 317.

[125] Bruno (2017), p 321.

[126] Szabó and Sørensen (2015), p 321. The authors then provide more specifications on this theme: see pp 331 et seq.

[127] In the UK, for example, Part 15 of the Companies Act 2006 has been amended by inserting two new sections, 414CA and 414CB (following Sec. 414C). In this way, in implementing the Directive, the UK legislator has given 'new life' to Sec. 172(1). For more information on the implementation of the Directive in the UK see, for example, Bruno (2017), pp 323 et seq.

[128] [2017] OJ C 215/01. See point 1 ('Introduction') of the Communication. Point 2 ('Purpose') specifies that the aim of the guidelines is 'to help companies disclose high quality, relevant, useful and more comparable non-financial (environmental, social and governance related) information in a way that fosters resilient and sustainable growth and employment, and provides transparency to stakeholders'. The guidelines 'are intended to help companies draw up relevant, useful, concise non-financial statements according to the requirements of the Directive'.

[129] These are listed companies, banks and insurance companies.

[130] A BC that is not a public interest entity could in this way voluntarily submit to non-financial information rules and procedures.

company's dual mission. Thus, in this case, they cannot 'explain' why they have failed to 'comply' with that mission. Rather, the directors must highlight the difficulties in achieving the benefit objectives, and they must eventually point out the reasons as to why their attempts have failed. However, they must always attempt to pursue the common benefit purposes set in the bylaws. On the other hand, under the non-financial disclosure regulation, the directors of a non-benefit corporation are not obliged to pursue policies that are related to the topics set out in the law and in the Directive. They simply have to explain the reasons as to why they do not believe that it is necessary or convenient for the company to do so.

From another point of view, a benefit report must be drafted using an external evaluation standard.[131] But, as we will see in the next section, there is no external control or certification of regularity concerning this report. Nevertheless, based on the aforementioned report, the independent Market and Competition Regulatory Authority could impose penalties on BCs that fail to pursue their declared common benefit aims. Non-financial statements must be checked by an external auditor. To comply with the Italian legislation, the auditor has to verify the existence of the report[132] as well as the conformity of its contents with the provisions of the law.[133] If the directors, the internal control body, and/or the external auditor fail to comply with these rules, they will be punished with fines. No penalties will be imposed on the company.[134]

It is not possible here to discuss in more detail the differences and convergences between the BC and the non-financial information regulations. Probably, however, some rules of the latter could be used to fill in the gaps in the law on BCs. These rules can help jurists and scholars to find the essential elements that must be present in the benefit statement to provide effective and efficient information to members, investors, beneficiaries, and other stakeholders.

4.3 The (Absence of) Independent External Certification and the Intervention of the Independent Market and Competition Regulatory Authority to Repress 'Misleading Information'

The Italian BC law has chosen not to impose external certification (by a third and independent entity[135]) as a condition for being able to operate as a BC. Only

[131] This provision is similar to the one contained in Legislative Decree No. 254/2016.

[132] This provision is included in the Directive.

[133] And this provision is only present in Italian law (Art. 3) and is not included in the Directive.

[134] The board of directors and the internal control body of a BC are responsible to the corporation if they do not compile an annual benefit report, as we have said. But also 'members of the administrative, management, and supervisory bodies have collective responsibility for the management report. […] Member States should ensure that adequate and effective means exist to guarantee disclosure in compliance with the directive. To that end, the Member State should ensure that effective national procedures are in place to enforce compliance and that those procedures are available to all persons and legal entities having a legitimate interest in ensuring that the provisions of the […] directive are respected […]. It is less clear whether stakeholders should also be able to complain if the information disclosed in the statement (or separate report) is wrong or misleading' (Szabó and Sørensen 2015, pp 338 et seq.).

[135] Called upon solely to formulate the evaluation standards that the companies will use to describe their own business.

members can decide to convert the 'for-profit' activity into a mixed one (profit/non-profit). The 'BC' qualification is even optional, and the same members have the power to verify and monitor (in terms of the type of company adopted) the directors to ensure that they pursue the common benefit objectives set out in the bylaws.

The justification (at least in the US) for the lack of imperative rules on external certification is the desire to avoid excessive costs for the company[136] (which would make the BC model less attractive). Even so, a single company may still choose to have a specific quality certification of its benefit business. Such an investment could benefit the company's image and thus result in competitive advantage in the market. To do this, as we stated earlier, the company, for example, could voluntarily submit to the non-financial information regulation.

By making an innovative choice (with respect to the rules introduced in North America for the benefit corporation), the Italian legislator penalizes companies that, while declaring themselves to be benefit organizations, do not actually 'pursue common benefit purposes'. In that case paragraph 384, Law No. 208/2015 thereby extends the 'provisions of Legislative Decree No. 145 of 2 August 2007, concerning misleading advertising', as well as those of the 'Consumer Code, Legislative Decree 6 September 2005, No. 6' to this situation. The independent Market and Competition Regulatory Authority (the Antitrust Authority) has to oversee the activities of the BC, especially those that, without justified reasons and repeatedly, do not pursue the declared common benefit purposes.

Applying the rules of Legislative Decree No. 145/2007 first implies that declaring a company to be a BC and not 'pursuing' the related objectives is a form of misleading advertising.[137] These rules protect the 'professionals' (i.e., 'any natural or legal person who acts in the context of his business, industrial, craft or professional activity'[138]). The definition of 'advertising' contained in the legislative decree is broad but it is a necessary interpretive effort to extend it to companies that claim to be benefit organizations but in reality are not. It may be that the Italian legislator, with the provisions contained in paragraph 384, Law No. 208/2015, has widened the aforementioned notion of advertising.

The Antitrust Authority operates (autonomously or through the request of an interested party) to protect, first of all, other entrepreneurs. While qualification as a BC may allow a company to acquire the best market position (because consumers could be more attracted to a company that pursues a common benefit), competitors will be able to denounce the BC for fraud in the event of the illicit use of

[136] This is the reason why the rules of Directive 2014/95/EU are only mandatory for 'certain large undertakings and groups'.

[137] Legislative Decree No. 145/2007 defines publicity as 'any form of message that is diffused, in any way, in the pursuit of a commercial, industrial, craft or professional activity in order to promote the transfer of movable or immovable property, the provision of services or work, or the constitution or transfer of rights and obligations on them' (Art. 2, para. 1, point (a)). Misleading advertising is 'any advertising that in any way, including its presentation, is liable to mislead the natural or legal persons to whom it is addressed or that it reaches and which, because of its deceptive nature, may adversely affect its economic behaviour or, for this reason, that it is capable of harming a competitor' (Art. 2, para. 1(b)).

[138] The definition of a professional is contained in Art. 2, para. 2(c), Legislative Decree No. 145/2007.

this qualification. In addition to antitrust proceedings, it is always possible to resort to the ordinary courts by means of an unfair competition action (Articles 2598 and 2601 Civil Code). Article 8, paragraph 15, Legislative Decree No. 145/2007, expressly refers to this legal remedy, so it is available in the case of BCs when it is not possible to uphold a breach of the principles of professional fairness (Article 2598(3) Civil Code[139]). In addition, category associations can act in the interests of their members.[140] In any case, it is necessary to evaluate the directors' activities annually, at the end of each financial year (unless long-term plans have been adopted). After all, the report on the pursuit of the common benefits is annual.[141]

Surely, a task for the interpreter will be to select which rules of the Consumer Code (Legislative Decree No. 206/2005) may be considered applicable to the case of a BC. The report on draft bill No. 1882 contains a suggestion referring to the provisions of the Consumer Code 'relating to unfair commercial practices'. These are the rules referred to in Articles 18 et seq. (up to Article 23), Article 27 to 27-*quarter*, and Articles 39 and 136 to 140-*bis*. In any event, an interpretative adaptation of the BC concept is necessary to exclude the application of rules that are clearly incompatible with this case.

By referring to the Consumer Code, the legislator also authorizes 'consumers'[142] (in the broadest sense) to take action against a company that has defined itself as a BC but has not pursued its declared aims or has misled them. In this way, taking action is not only made available to consumer associations or associations for the protection of the public interest (e.g., environmental associations). The only type of 'class action' that exists in Italian law (Article 140-*bis*, Consumer Code) could also be effectively used in the case of BCs.[143]

Ultimately, the Italian legislation enables the company, its members and third parties[144] to act against the directors using ordinary responsibility actions. It allows competitors (or any other undertaking) to bring an action to the Antitrust Authority for misleading advertising or to the courts to punish unfair competition acts by the corporation. And it allows consumers to appeal against a company that inhibits unfair commercial practices.

[139] The assumptions in nos. 1 and 2 seem to be ineffective.

[140] Art. 8, para. 2, Legislative Decree No. 145/2007 and Art. 2601 Civil Code.

[141] It will therefore be very complex for a court or for the Antitrust Authority to determine whether or not a company actually pursues the declared benefit objectives.

[142] The definition contained in Art. 3(a) (and (b) with regard to consumer associations), then replicated in Art. 18(a), of Legislative Decree No. 206/2005, does not appear to entirely match the list contained in paras. 376 and 378(b), Law No. 208/2015.

[143] Other specific rules regulating the company type adopted for the BC will probably apply to BCs. For example, the criminal liability of the legal person referred to in Legislative Decree No. 231/2001; or responsibility for the non-correct disclosure of information if, on the basis of the false representation of the pursuit of a common benefit, the company appeals to the venture capital market, thereby deceiving the investor. See, for example, Sartori (2011).

[144] According to the assumptions, social creditors can also take action against a BC's directors for violating the duty to maintain the integrity of the company's social capital (this duty also applies if the company also pursues social goals).

5 A Brief Comparison with the North American 'Benefits Corporations'

Considering the development of the benefit phenomenon, the declared application of the ordinary discipline of the type of company chosen allows us to imagine various mechanisms that could be introduced through specific and targeted bylaw options to effectively pursue the objectives of the common benefit laid down in the corporate purpose. With regard to joint stock companies, it would be useful to finance the company's benefit project by issuing particular categories of shares, such as 'related shares' (Article 2350, paragraph 2, Civil Code) which could be linked to benefit activity outcomes. The constitution of a '*patrimonio destinato*', a sort of separate asset that can be used to pursue a specific business (Articles 2447-*bis* et seq. Civil Code), or the use of funding intended for a specific business (Article 2447-*decies* Civil Code) would also be useful. We could also imagine other financial mechanisms ensuring the social mission by keeping control of the company in the hands of the founding members, in spite of raising capital on the financial market (i.e., multiple-voting shares, voting limits, and scalar voting rights[145]).

Comparing the Italian rules with those of some North America states, it appears that the Italian legislator has failed to regulate certain aspects, highlighting a general superficiality in regulating a BC. Here is a brief list below.

We do not find, for example, rules that establish qualified majorities to introduce or remove the common benefit goal, and to modify the benefit goals when they are transferred from one to another. The so-called supermajority vote is a recurring theme in the statutes of most North American states.[146] Some of the legislation requires a specific indication in the meeting notice, to which 'a statement from the board of directors of the reasons why the board is proposing the amendment and the anticipated effect on the shareholders of becoming a benefit corporation' must be attached.[147]

No right of withdrawal is provided for dissenting shareholders. In California and Minnesota law, for example, the company has the duty to buy the shares of the dissenting member at fair market value.[148]

There are no special rules in the case of mergers and acquisitions involving BCs and 'for-profit' companies. A topic that North American lawmakers regulate in the same articles is the transition from a for-profit corporation into a public benefit corporation and vice versa. These steps could in fact be realized through extraordinary corporate operations, such as mergers or acquisitions.

[145] Art. 2351, paras. 3 and 4, Civil Code. Particular solutions can also be envisaged in limited liability companies such as, for example, assigning special administrative rights to certain shareholders, or special property rights (Art. 2468, para. 3, Civil Code.).

[146] For example, Cal. Corp. Code, Sec. 14603 and 14604; Del. Gen. Corp. Law, § 363(a); Minn. Stat., Chapter 304A [Minn. Publ. Benefit Corp. Act], § 304A.102, subd. 1.

[147] See, for example, Verm. Stat. Ann., Title 11A, § 21.05(1).

[148] Cal. Corp. Code, Sec. 14603 and 14604; Minn. Stat., Chapter 304A, § 304A.102, subd. 3; the same in Del. Gen. Corp. Law, § 363(b), that however contain a detailed discipline and some exceptions to the general rule.

Referring to the purposes of the common benefit, in Italy it is unclear whether it is sufficient (or necessary) to pursue a general benefit and/or one or more specific benefits. Some US statutes on benefit *corporations* compel BCs to pursue a 'general public benefit' to which it is possible to add (but not replace) additional 'specific public benefits'.[149]

The Italian rules on publicizing the hybrid nature of the company and on publishing the annual directors' report appear to be superficial. The contents required for the latter are quite generic[150] and the disclosure tools are inadequate (certainly in terms of the interest of non-member beneficiaries and the market). In the North American legislation, the rules diverge, both in terms of periodicity (in some cases it is annual, in others biennial) and in content (more or less detailed).[151] Alongside the duty of the company to have an internet site as an advertising vehicle, the company should have the obligation (as in some North American regulations) to make a copy of the report available at the company's registered office for anyone who is interested (including a non-member).[152]

In this regard, some suggestions can come from the regulation on non-financial information disclosure. As we have seen, Legislative Decree No. 254/2016 is only applicable to large undertakings, and some of the rules are specifically intended for public interest entities. However, an extensive interpretation of the provisions regarding the contents of the annual report (e.g., subjects, the six corporate social responsibility-related topics,[153] and the related five items[154]) is probably possible[155] and could serve as effective guidance for annual benefit reports as well.

[149] See Brakman Reiser (2011), p 598: the author emphasizes, among other things, how 'the statutes all declare that the general or specific public benefits that benefit corporations pursue are in the best interests of the corporation'.

[150] Not to mention that the corporate balance sheet will list the investments made to achieve the common benefit purposes, their impact on the company's profit activity (for example, in terms of falling gains) and the foreseeable positive effects in the short or medium to long term. In essence, the benefit activity will also have to emerge in the annual financial statements, but no specific rule provides for *ad hoc* reporting obligations.

[151] See, as an example, Cal. Corp. Code, Sec. 14621 and 14630; Del. Gen. Corp. Law, § 366 (however, statutory rules may be derogated from in the bylaws, making the obligations for the company and its directors less compelling); Minn. Stat., Chapter 304A, § 304A.301 (in which a special penalty is provided if the obligation to draw up the benefit report is not fulfilled annually: subd. 5 allows a revocation of the benefit corporation status by the Secretary of State).

[152] See, e.g., Del. Gen. Corp. Law, § 366(c)(4), which allows, but does not oblige, the report to be made public; Minn. Stat., Chapter 304A, § 304A.301, subd. 1, which obliges the report to be transmitted to the Secretary of State for its deposit, without requiring verification or evaluation by a third party; Cal. Corp. Code, Sec. 14630(b), (c) and (d), which provides for the transmission of the annual report to each member, its publication on the company's website or, failing a site, making a free copy available at the company's registered office for any interested party). The contents of the rules vary from state to state; see a review in Brakman Reiser (2011), p 604.

[153] Environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters (see Szabó and Sørensen 2015, pp 321 et seq.).

[154] The undertaking's business model, the policies adopted, the outcomes of these policies, the principal related risks, and 'key performance indicators' relevant to the particular business (see Szabó and Sørensen 2015, pp 324 et seq.).

[155] Consider also that the provisions of the 'Guidelines on non-financial reporting (methodology for reporting non-financial information)' contained in the Commission Communication 2017/C 215/01 could constitute a useful framework for benefit reporting.

The law could have attributed more incisive powers of investigation and action to the Market and Competition Regulatory Authority[156] as well as giving single members the power to promote a liability action against directors in the case of a failure to (negligently or intentionally) pursue the company's common benefit aims.[157] At the same time it could have given a qualified minority of shareholders[158] the authority to take action towards the eventual removal of managers (for failing to pursue the benefit goals and correctly balancing the various interests involved). Note that the law of many states in North America provides for a special action called a 'benefit enforcement proceeding'.[159] It is a 'special right of action […] to enforce the special duties of benefit corporation directors and officers and the public benefit purposes of the corporation. The statutes limit potential plaintiffs […] to shareholders entitled to bring derivative actions and, in some cases other groups, if specified in a corporation's charter'.[160] A particular legal action is contained in Minnesota's corporate law (Section 302A.751), now extended to benefit corporations in addition to ordinary actions against directors. Through this action, in the event that the directors or persons that control the company have violated the statutory duties (in the case of the benefit corporation), or if the BC has failed to pursue the common benefit objectives (general or specific) for a reasonably long period of time, the court may have the option of:

- removing the BC status;
- removing one or more directors (possibly appointing their substitutes);
- appointing a court commissioner to liquidate or manage the company in order to properly pursue the purposes of common benefit indicated in the bylaws.[161]

To avoid unfair uses of the BC qualification, and for the protection of third-party beneficiaries, it could be determined that a BC that for whatever reason has lost this status cannot regain it until a reasonable period of time has elapsed. A rule of this type is present in the Minnesota Statute: 'A public benefit corporation that terminates its status, or has its status revoked more than once pursuant to Section 304A.301, subdivision 5, may not elect to become a public benefit corporation under this chapter until 3 years have passed since the effective date of termination or revocation'.[162]

[156] For example, assigning a complaint or alert authority to the supervisory body or to the director in charge of the benefit sector.

[157] We refer to joint stock companies because limited liability companies already have such an individual initiative.

[158] Further hypotheses regarding the revocation are regulated by Art. 2393, para. 5, Civil Code. In some states the law provides that the company cannot be held responsible for damages in the event of a failure to pursue the intended benefit (e.g., Minn. Stat., Chapter 304A, § 304A.202(b)).

[159] See, e.g., Cal. Corp. Code, Sec. 14623.

[160] Brakman Reiser (2011), p 605.

[161] Minn. Stat., Chapter 304A, § 304A.202, subd. 2 and 3.

[162] See Minn. Stat., Chapter 304A, § 304A.103, subd. 4.

In Italy there are no assessment standards (except those adopted by foreign entities), and we have no independent, transparent, and competent entities (according to the provisions of the law) that can produce and share such standards and ensure that they are commonly accepted.

Other critical aspects of the Italian BC are related to the freedom of choice among the different corporation types present in Italian law that this hybrid company variant can adopt. This amplifies the application problems, particularly with regard to adjusting the new regulation to the general provisions of corporation law.

6 Concluding Reflections

Despite the reported difficulties, and while the law is not well drafted and there are risks in assigning a central role in defining the characteristic of the new model to economic operators or interpreters, the diffusion of BCs depends first and foremost on aspects that are upstream of the introduced regulations.

As Alberto Toffoletto has pointed out,[163] a 'deep' cultural change is needed among those who hold managerial positions in business enterprises to overcome the logic of profit and efficiency at any cost and to take into account the interests of the various stakeholders. In this way, a vision could emerge that allows the real consequences of all choices to be weighed in order to effectively protect those who suffer the negative consequences of the business activity. Toffoletto, optimistically, believes that society at large is ready for this 'evolution'.

The question is whether the business world is ready to embrace a completely new economic philosophy. Moreover, can consumers and investors, by means of conscious and targeted choices, really influence the business activities of a company to direct it toward the pursuit of a sort of collective purpose? It appears that, in the absence of fiscal incentives or other types of motivations, there is little agreement that the pursuit of common benefit objectives, while reducing the margins of earnings in the short and medium term, will allow a future extension of the company's market position and, consequently, higher earnings in the long run.

The principles of the European Treaties[164] and of the Italian Constitution,[165] especially when interpreted in the light of the new tendency to recognize the 'social' importance of business enterprises, can contribute to the consolidation of an image of an undertaking no longer tied to merely speculative aims. The idea of a 'non-speculative enterprise',[166] of which the BC is a mixed-object type, is an important reality both from a social and economic point of view. However, only a deep cultural

[163] Toffoletto (2015), p 1209.

[164] Art. 50, para. 2(g), of the Treaty on the Functioning of the European Union requires Member States to ensure, in relation to freedom of establishment, coordination to make guarantees equivalent for safeguarding the interests of members as well as third parties ('protection of the interests of members and others').

[165] Art. 41, para. 2, provides that private business activity may not be in conflict with social utility or occur in such a way as to cause harm to human security, liberty, and dignity.

[166] According to the definition by Mosco (2017), p 216.

re-establishment and the setting up of a new way of doing business[167] could contribute to the establishment of the BC model and to the wider idea of sociality in the economic world. And this 'new way' of doing business should involve all the components of the market (both active and passive, including investors and, last but not least, the Regulator).

From a strictly legal point of view, the success of the BC model is undoubtedly linked to the different interest-balancing powers of directors, the monitoring powers available to shareholders and, most importantly, to the monitoring powers available to the beneficiaries (or stakeholders in general). The presence (or the absence) of a judicial enforcement mechanism relating to the directors' duties that is available to third parties and interested beneficiaries is a crucial factor.

The last aspect is probably the more important and the most critical. Italian corporation legislation has a rule regarding the responsibility of directors and managers towards single members of the corporation or interested third parties. If we can apply (and it seems to be possible) this rule to BC boards of directors, this corporation model could play an important role.

However, for the rule to have a practical application, the courts should elaborate a new judicial standard, partially different from the 'business judgment rule'. We could call it the 'benefit judgment rule'.[168] This new standard should be based on a simple consideration: a BC is a special form of company in which directors must follow special rules of conduct. Directors have a double mission to pursue: profits for shareholders and a common benefit for shareholders as well as for particular categories of stakeholders. Moreover, profits could be legitimately sacrificed to obtain the common benefit expected by the same members.

Which purpose is prioritized, and in which way, depends on the specific provisions of the bylaws. The directors, in pursuing the corporate purposes, must diligently act in performing this duty, that we call the duty of finding a balance. In any event, through the business and operative choices of the directors, a BC must act in a responsible, transparent, and sustainable way. Then, the reasoning for these choices and this way of conducting business must be provided in the annual benefit report.

In fulfilling all these obligations, directors must act diligently, honestly, and in a disinterested way. Good faith and diligence must be linked to the double objective (or the dual mission) of the BC. In verifying whether a business choice is reasonable (if so, directors' liability would be excluded), the courts will have to consider the respect given to the objectives (of profit and common benefit) set out in the bylaw, with the best interests of shareholders and stakeholders (or beneficiaries) in mind.

In a BC we cannot completely avoid the risk that directors' discretion could be increased. Thus, giving beneficiaries a concrete ability to act against the directors is a possible means to decrease that risk.

Directors' behaviour and duties, within a general framework common to all corporations, change depending on the specific aims pursued by the particular model of company (consider the special purposes of a 'social enterprise', a state-owned corporation, or a BC). However, this change is based on specific legislation that

[167] Summarizing the words of Toffoletto (2015), p 1209.

[168] See Stella Richter Jr. (2017), p 7 and fn. 5.

determines particular rules for these 'special models'. The courts must take note of the particular features of the model in question and, when evaluating the correctness of the directors' choices, apply the judicial standards to the special situation.[169]

Giving beneficiaries the ability to enforce their expectations could be a step towards a more sustainable and 'social' economy. As we have said, the Italian BC is an experiment which is maybe exportable to others EU states, and we need time to determine if and how this model will work.

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[169] Directors' diligence and care must be evaluated with particular attention in these special corporation models.

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