



The First European Benefit Corporation: blurring the lines between 'social' and 'business'

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A. Introduction

In December 2015, the Italian parliament passed the “Stability Act of 2016”, thereby creating the “*Società Benefit*”, an innovative management structure for entrepreneurs looking to pursue common benefits. More precisely a “*Società Benefit*” is a company which pursues one or more “common benefit” purposes as well as an economic activity. The “*Società Benefit*” is the first ‘Benefit Corporation’ created in a civil law legal system and the second one created in history (after the basic form created in the US). The characteristics of a “*Società Benefit*” are very similar to a US Benefit Corporation, a legal entity introduced in 30 jurisdictions in the USA. The “*Società Benefit*” should not be confused with the B-Corp certification, which is a label offered to any company that scores more than 80 points on the B Impact Assessment and obtains a private certification from B Lab.

This article will analyze the new Italian law introducing the “*Società Benefit*” starting with a comparison between the US and the European context, highlighting common aspects and peculiarities, and pointing out the potential impacts of the Italian experience on other EU Members’ legal systems. We will then further develop the relationship and the interaction, if any, between “B” certification, the “B” impact assessment and the “*Società Benefit*” under the new Italian law. Finally, we will predict the global outcome and benefits related to the increasing dissemination of Benefit Corporation, B-Corp companies, and new similar models in Europe.

B. The Birth of Benefit Corporations

The Benefit Corporation emerged within a very specific legal context in the US. Indeed, the US Benefit Corporation was created in order to soften the harsh reality of what US corporate law refers to as the shareholder primacy doctrine. The shareholder primacy doctrine emerged in case law more than 100 years ago and was recently upheld by a Delaware Court in 2010¹. Under this doctrine, US directors must choose the highest bid in the event of a hostile takeover or a change of control in order to maximize shareholder profit². Moreover, the directors of for-profit companies must act in the best interests of the company, which has been defined as maximizing shareholder value. Therefore, in certain circumstances, US social businesses cannot take into the consideration the interests of stakeholders or other community interests, notably in the area of environment.³

The classic example is the case of the Ben & Jerry's sale of shares to Unilever. The directors of Ben & Jerry's were approached by a couple of multinational corporations and investors interested in buying the company. The value-driven founders wanted to accept a bid offered by a group of socially concerned investors; however US law required them to accept Unilever's bid since it was the highest bid. If Ben & Jerry's chose to sell its shares to the socially concerned investors, they would breach their fiduciary duties to maximize shareholder wealth under the shareholder primacy doctrine.

Due to the fact that US corporate law does not allow directors of social businesses to make decisions in the best interest of all stakeholders (not only shareholders), B-lab, a not-for-profit corporation created in 2006, decided to hire William H. Clark, Jr., partner at Drinker Biddle & Reath, to draft legislation for a new "Benefit Corporation". In the US, a Benefit Corporation expands the obligations of directors beyond consideration of the financial interests of the shareholders, to include also stakeholder interests. The most important aspect and purpose of this legal form is the protection of directors and officers in their pursuit of a social mission – to have a positive and significant impact on society and the environment. This is what we call a 'triple bottom line' company.

C. What has changed: Benefit Corporation Characteristics in the US and in Italy

Characteristics of a US Benefit Corporation

The first Benefit Corporation legislation was passed in Maryland in 2010. In the USA, Benefit corporations are present in 29 states (and in Washington DC).⁴ Their main requirements can be found in the Model Benefit Corporation legislation upon which each State more or less relies.

According to the model legislation, a Benefit Corporation is a special form of corporation, which is available to for-profit corporations. It is also important to note that the legal form of Benefit Corporation does not affect a corporation's tax status, as it can still choose to be taxed as a C-corporation or S-corporation.

As a general rule, the Benefit Corporation has three main characteristics:

1) Broader purpose. The purpose of Benefit Corporation activities lies beyond maximizing share value to include general and specific public benefits. The general public benefit is defined as a material positive impact on society and on the environment, taken as a whole.⁵ The Benefit Corporation may also elect to pursue one or more specific public benefit purposes, enumerated in the Model Benefit Corporation legislation, such as providing low-income or underserved individuals or communities with beneficial products or services, promoting economic opportunity for individuals or communities beyond

¹ Ebay v. Newmark 16 A.3d 1 (2010)

² Alissa Mickels (Pelatan), *Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the US and Europe*, 32 Hastings Int'l & Comp. L. Rev. 271 (2009)

³ *Why are Benefit Corporations important*: <http://benefitcorp.net/faq>; 28 states have enacted 'constituency statutes' which allow directors to balance all stakeholder interests; however, these statutes are hardly used and case law on constituency statutes is not as well-established as the shareholder primacy doctrine.

⁴ The actual status of passed legislation can be seen here: <http://benefitcorp.net/policymakers/state-by-state-status>

⁵ Model Benefit Corporation Legislation §102

the creation of jobs in the normal course of business, protecting or restoring the environment and many other benefits.⁶ The Benefit Corporation may also choose a public benefit different from the ones listed in the legislation.

The measurement of 'impact' of a Benefit Corporation is assessed by a "third-party standard" for defining, reporting, and assessing corporate social and environmental performance. This "third-party standard" must be developed by the entity that is not controlled by the Benefit Corporation and which has access to the necessary expertise to assess the company's impact on society and the environment. It is crucial to make sure that such standard meets the legal requirements: it should be comprehensive, independently developed with opportunities for stakeholder input, and transparent. B Lab has assembled a list of third-party standards that it believes meet the requirements for use by Benefit Corporations.⁷

In order to become a Benefit Corporation, the shareholders of the company must vote in favor of becoming a Benefit Corporation and change the articles of incorporation so that the company will pursue the purpose of creating general public benefit. In the event the company pursues a specific public benefit, this additional information may be included in the articles of the incorporation.⁸

2) Expanded responsibility. The responsibility of a Benefit Corporation director is expanded and protected. Firstly, directors must consider the impact of their activities not only on the shareholders but also on the stakeholders of the company. This category of stakeholders is quite large since it includes: the workers of the Benefit Corporation and its subsidiaries, its suppliers, as well as customers who are the beneficiaries of general and specific public benefit. Moreover, the interests of any other group deemed appropriate can be also taken into consideration. The model legislation for US Benefit Corporations also provides for an exoneration of personal liability of directors against third party suits. According to section 301 (c) of the model legislation, "a director is not personally liable for monetary damages for: (1) any action or inaction in the course of performing the duties of a director [of a benefit corporation]...or (2) failure of the benefit corporation to pursue or create general public benefit or specific public benefit". Furthermore, according to section 301 (d), "a director does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary." However, a benefit enforcement proceeding may be brought in the event the Benefit Corporation fails to publish its Benefit Report on the company's website or provide copies if the company does not have a website⁹.

3) Transparency. A Benefit Corporation must publish (except in Delaware) an annual benefit report, which states the ways in which the Benefit Corporation has pursued general public benefit, the extent to which public benefit was created and an assessment of its overall social and environmental performance.

Characteristics of the Italian "Società Benefit"

Unlike the US, the Italian "Società Benefit" was created in a completely different legal and social context. In Italy and in many other civil law countries, directors may take into consideration stakeholder interests; thus, the concept of a shareholder primacy doctrine is weaker than the American equivalent. As a result, the European Benefit Corporation was not created to protect directors; rather it was created to promote a completely new model of conducting business, which seeks to pursue an economic and a social purpose.¹⁰

The Italian Benefit Corporation does not exactly mirror the US Benefit Corporation given the differing legal, social and historical contexts. More specifically, the requirements for the Italian Benefit Corporation "Società Benefit" can be found in the Stability Act of 2016. This new legislation describes the "Società Benefit" as a company that "aims at the distribution of profits, but, at the same time, pur-

⁶ Ibid

⁷ Third Party Standards for Benefit Corporations <http://www.triplepundit.com/2012/03/third-party-standards-benefit-corporations/#>

⁸ Model Benefit Corporation Legislation §201

⁹ Model Benefit Corporation Legislation §305

¹⁰ Benefit Corporation seminar – the new B Corp legislation and "doing business" in Italy today – February 2016 <http://esela.eu/news/benefit-corporation-seminar-new-b-corp-legislation-business-italy-today/>

sues one or more common benefit goals in favour of other stakeholders in the business, including people, communities, territories and the environment, cultural heritage, social activities, entities and associations, by working in a responsible, sustainable and transparent manner.”¹¹ According to the Stability Act, the “Società Benefit” is available to any for-profit company (company, cooperative, mutual, partnership...). Moreover, the “Società Benefit” must list the specific benefit purposes of the company, must act in the best interest of stakeholders and must publish an annual benefit report.

Differences between the Benefit Corporation in the US and in Italy

As a general note, the Italian equivalent of the Benefit Corporation has adopted the three main characteristics of a US Benefit Corporation. However, there are four major differences: 1) the “Società Benefit” must list in the bylaws the specific benefit activities, 2) the annual report must be more detailed than the US Benefit Corporation, 3) no limitation of liability clause exists for Benefit Corporation directors with respect to third party lawsuits and 4) the scope of the law applies not only to for-profit companies, but also to limited-profit companies.

Firstly, the articles of association of the “Società Benefit” must specify benefit goals and how directors will act in order to achieve these benefit goals. This requirement is different than a US Benefit Corporation because the US Benefit Corporation does not require a specific list of benefit activities. The Italian legislation decided to add this additional requirement to make sure that the activity is specific enough to ensure a social purpose is respected. In Italy, the “Società Benefit” is seen as an innovative management framework for entrepreneurs pursuing a viable business model and a social mission. As a result, entrepreneurs using the Italian “Società Benefit” status are more likely to pursue a social purpose as a primary aim and as a key component of the value chain.¹² In the US, on the other hand, adding a social purpose to the corporation’s main activity gives the directors the opportunity to take into consideration factors other than profit-sharing and, in most cases, the social purpose remains secondary to business activities. Therefore, the specific activities do not need to be listed in the corporate documents.

Secondly, with respect to the annual report, a “Società Benefit” must include the description of actions implemented by the management in order to pursue a common benefit purpose. The report must also include an assessment of the positive and material impact along with a section dedicated to the description of new objectives that the company intends to pursue the following year.¹³ Also, in order to measure the impact generated by the company, an Italian “Società Benefit” must use an external standard assessment, which must be independent, credible and transparent but also must take into account the areas related to corporate governance.¹⁴ This leaves us with the question as to whether the “Società Benefit” will use the B-impact assessment for the Benefit Report assessment test.

Thirdly, directors’ responsibilities are significantly different between the US Benefit Corporation and the Italian Benefit Corporation. US Benefit Corporation directors are exonerated from personal liability for an act or omission in the capacity of a benefit director unless the act or omission constitutes self-dealing, willful misconduct, or a knowing violation of law.¹⁵ In Italy, the dispositions put more pressure on benefit corporation directors, as it is quite clear that the decision to become a “Società Benefit” means that the directors are willing and, at the same time, capable to give more value to their actions. As a result, Italian legislation imposes quite strict rules in administrative management of a “Società Benefit” to, in essence, protect stakeholders from directors who do not act according to the values of a social enterprise. The Articles of association of a “Società Benefit” should identify the person or persons responsible to be entrusted with functions and tasks aimed at the pursuit of the statutory goal and identify how directors will balance interests of shareholders and stakeholders and common benefit goals. Failure to comply with the above-mentioned obligations would constitute a breach of the duties imposed on directors by Law and by-laws. In case of such failure, Civil Code provisions concerning directors’

¹¹ Benefit Corporation seminar – the new B Corp legislation and “doing business” in Italy today – February 2016: <http://esela.eu/news/benefit-corporation-seminar-new-b-corp-legislation-business-italy-today/>

¹² Benefit Corporation seminar – the new B Corp legislation and “doing business” in Italy today – February 2016: <http://esela.eu/news/benefit-corporation-seminar-new-b-corp-legislation-business-italy-today/>

¹³ Roberto Randazzo, “B-Corp and ‘Società Benefit’: new models of sustainable business”

¹⁴ Ibid

¹⁵ Model Benefit Corporation §302

responsibility with respect to each type of company, shall apply.¹⁶ Italian Benefit Corporations not pursuing common benefit goals shall be subject to the same penalties provided for companies performing misleading advertisement and are subject to the provisions of the Italian Consumer Code.

Finally, the Stability Act 2016 allows for for-profit companies and limited-profit companies (co-operatives, limited companies and mutual companies pursuing common benefits with limited profit distribution)¹⁷ to apply for the status of a “Società Benefit”. However, in the US, only for-profit companies can become Benefit Corporations. The US distinction excludes hybrids and non-profit corporations from being able to transform into a Benefit Corporation.

D. Relationship between legal framework and B-certification in Europe

To further examine the disruptiveness of the Italian “Società Benefit” within the European legislative context, a further distinction must be made between certified B-corps and Benefit Corporations. A Certified B Corp is a company that chooses to take the B-Impact Assessment in order to certify their business model¹⁸. All companies worldwide are entitled to be certified through B Lab, a nonprofit organization, which aims to create a global movement of people using business as a force for good. The B-Impact Assessment sets a high standard of verified overall social and environmental performance, public transparency, and legal accountability to be met with a minimum score of 80 points over 200, in order to obtain the certification.

After the enactment of the Stability Act, a company can now also choose to become a Benefit Corporation, or “Società Benefit”, by law (where opted, using the B Impact Assessment as the tool for the Benefit Report until the final application decrees have been published on the rules on certification). Today, in Europe, companies pursuing or willing to achieve common benefits have a twofold opportunity only in Italy. That is why B Lab has already certified some of the first “Società Benefit” companies incorporated in 2016.

However, the Italian law does not set any clear distinction between the evaluation standards required to become “Società Benefit” and those comprised in the B-Impact assessment. Within the few months following the enactment of the “Società Benefit”, it is already clear how inspiring and useful the experience of B-Lab is and will be during the implementation of the law on “Società Benefit”. In fact, a “Società Benefit” company is required not only to report, but more importantly to measure the impact generated by their activities using an external standard assessment, independent, credible and transparent, taking into account the areas related to corporate governance, employees, environment, etc. In short, the “Società Benefit” aims at interesting challenges putting in practice some academic reasoning undertaken a few years ago about how to classify all those for-profit enterprises operating with a strong social vocation; indeed, the Italian legislation focuses not so much on the form and statutory requirements, but rather on the results and common benefits that the company can generate. As the impact becomes a requirement, the key challenge is mainly linked to the identification of shared metrics able to assess the company and the targets of common benefit pursued by the “Società Benefit”.

Given this context, the experience and the evolving tools of B-Certification will most likely represent an important supportive instrument for the Italian “Società Benefit” (as well as potential other legal forms in the rest of Europe) if correctly and effectively implemented. If it is true that the legislation provides accurate instructions on how to evaluate the impact – indicating very specific areas - it is also true that an in-depth check on how they will be implemented will also be necessary. This is indeed the most difficult aspect of a European Benefit Corporation.

¹⁶ Legge di Stabilità, ecco le società benefit: <http://www.pmi.it/impresa/normativa/approfondimenti/109429/legge-stabilita-societa-benefit.html>

¹⁷ a cooperative can only distribute a maximum of 80% of profit to shareholders (see Roberto Randazzo, “B-Corp and ‘Società Benefit’: new models of sustainable business”; See also, «A map of social enterprises and their eco-systems in Europe ». Available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2149>

¹⁸ Details about the B-Impact assessment and the certification process: <http://bcorporation.eu/>

E. Conclusion

In exploring the major opportunities, challenges and gaps in the “B” world, and highlighting similarities and differences between the US Benefit Corporations and their expansion into a new frontier (Italy and Europe), much uncertainty remains as to how the US Benefit Corporation will develop in Europe. What is clear is that in the United States, Benefit Corporations are already spreading like wild fire across the country.

One of the issues which has been controversial in Italy, but also at the European level, is the recognition of Benefit Corporations as something completely different from social enterprises. The Italian legislation was drafted with the intent of addressing corporate vehicles carrying out business activity with the aim of sharing profits and simultaneously pursuing one or more common public benefit purposes by operating in a responsible, sustainable and transparent way with regards to people, community, territories, environment, cultural and social activities, social organizations, associations and other stakeholders. This is different from a social enterprise. Certainly there is some overlap between Benefit Corporations and the world of social entrepreneurship, and social enterprises. Moreover, the “Società Benefit” is not a new actor in the Third Sector; the Stability Act simply provides a legal framework to recognize one type of Third Sector companies. However, in Italy, “Società Benefit” is seen as a new revolutionary step forward, within a context traditionally static and sometimes obsolete. The new law has generated strong interest and enthusiasm and over the past six months, and several companies have already decided to become a “Società Benefit”. The next step is to wait for the response of the market with three main hopes: first that the “Società Benefit” will become an appropriate vehicle for entrepreneurs doing business in a sustainable and inclusive way, second, that it will be attractive to patient investors looking for business models capable of generating both economic and social benefits. And finally, the Italian experience will generate a “domino” effect among other EU Member States (and especially in civil law countries) facilitating the spread of the “B” approach and, consequently, promoting companies with strong positive impact measured with verifiable standards for overall social and environmental performance, public transparency, and legal accountability.