ARTICLE

Benefit Legal Entities in Italy: An Overview

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Benefit legal entities combine the normal logic of profit-making with corporate sustainability. They pursue, in addition to the profit purpose, one or more aims of common benefit to be indicated in the articles of association relating to the corporate activity. An initial question is whether the pursuit of these joint objectives (i.e., profit and social responsibility) is reserved solely to benefit corporations and whether (and to which extent) non-benefit legal entities are excluded from pursuing these dual aims. As regards the notion of common benefit, its specification in the articles of association raises some significant legal issues. Firstly, it affects the assessment of the directors' duty of care; they are required to balance the interests of the shareholders with those other interests provided for in the by-laws, and consequently such balance has potential implications on directors' liability. Secondly, stakeholders adversely affected by the entity's failure to achieve those common benefit aims must be protected, but it is difficult to assess how. Finally, setting out a corporation's common benefit could trigger, under certain conditions, the exit right of dissenting shareholders following the acquisition or loss of the «benefit status».

Keywords: benefit legal entities, directors' duties, exit right, legal entities pursuing common benefit purposes

1. INTRODUCTION[1]

A benefit corporation (in Italian *società benefit* (SB)) is a legal entity that pursues positive impacts (or the reduction of negative ones) on society, workers, communities, the environment, cultural and social heritage or other stakeholders, in addition to profit as its legally defined goal (Article 2247 of the Italian Civil Code).[2]

Benefit legal entities were introduced in Italy with the approval of the Law 28 December 2015, n. 208, which came into effect on 1 January 2016, aimed at encouraging the spread of companies pursuing the dual purpose of profit and common benefit. Italy became the first European State to create a new legal status for the *SB*, which evokes the US benefit corporations foreseen by the Model Benefit Corporation Legislation.[3] However, national regulation has some specific features that have drew attention of the Italian scholarship: this article aims to focus on the most interesting aspects.

A *SB* represents a traditional legal entity, but with modified obligations relating to higher standards of purpose, accountability and transparency. It is part of a set of new forms of business organization that illustrates the hybridization of for-profit and non-profit models, constituting a case of formal adoption of a legal form that allows the main purpose of the entity to be non-profit-making (in addition to social enterprise *ex* Legislative Decree no. 122/2017).[4]

The main characteristics of a benefit legal entity can be summarized as follows: (1) a twofold purpose, namely a profit division generally foreseen by Article 2247 of the Italian Civil Code – which is common to all for-profit legal entities under Italian law (partnerships, corporations and LLCs) – and a positive impact (or the

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1 The contribution is inspired by the reflections presented at the international conference *Substainable Corporation Symposium*, organized by the University of Padua held on 22 Apr. 2021.

2 Under Italian law all for-profit legal entities (partnerships; corporations or LLCs) and also mutual-type companies could become benefit: *see infra.* Some definitions of benefit corporation are available on the website, www.societabenefit.net. Furthermore, Assobenefit, a non-profit association which aims to contribute to the establishment of a new economic model of sustainable development on the Italian territory, coordinates the network of benefit corporations being set up in Italy and collects their data: *see* www.assobenefit.org.

3 However, some not-for-profit legal entities similar to the American benefit corporation have emerged elsewhere in Europe: the *Community Interest Company* (CIC) in the UK, a social enterprise which could be either a company limited by shares or by guarantee with primarily social objectives and whose surpluses are reinvested for those purposes in the business or the community (Pt. 2 of Companies Act 2004); more recently the *société à mission* in France (introduced by the *Pacte Law* in 2019), which must publicly declare its social and environmental objectives by including them in the by-laws.

4 On the topic *see* in the Italian scholarship: S. Corso, *Le società benefit nell'ordinamento italiano: una nuova 'qualifica' tra profit e non-profit*, Nuove leggi civ. comm. 995 ff. (2016); C. Angelici, *Società benefit*, Orizzonti dir. comm. 1 ff. (2017); M. Stella Richter, *Società benefit e società non benefit*, Riv. dir. comm. 271 ff. (2017); F. Denozza & A. Stabilini, *La società benefit nell'era dell'*investor capitalism, Orizzonti dir. comm. 1 ff. (2017); A. Zoppini, *Un raffronto tra società 'benefit' ed enti 'non profit': implicazioni sistematiche e profili critici*, Orizzonti dir. comm. 1 ff. (2017); A. Bartolacelli, *Le società benefit: responsabilità sociale in chiaroscuro*, in *Non profit paper* 253 ff. (2017); S. Prataviera, *Società benefit e responsabilità degli amministratori*, Riv. soc. 926 ff. (2018); G. Marasà, *Imprese sociali, altri enti del terzo settore, società benefit*, Torin0, 13 ff. (2019); M. Cian, *Dottrina sociale della Chiesa, sviluppo e finanza sostenibili: contributi recenti*, Riv. dir. soc 53 ff. (2021); M. Cian, *Sulla gestione sostenibile e i poteri degli amministratori: uno spunto di riflessione*, Orizzonti dir. comm. 1131 ff. (2021); A. Daccò, *Le società benefit tra interesse dei soci e interesse dei terzi: il ruolo degli amministratori e i profili di responsabilità in Italia e negli Stati Uniti*, I Banca borsa tit. credito 40 ff. (2021); G. M. Nori, *La società Benefit un (nuovo) mezzo per (non) fare impresa*, Riv. dir. soc. 787 ff. (2021); A. Bartolacelli, *Modelos de sociedades 'especiais' com fim adicional de 'benefício comum': benefit corporations dos EUA, società benefit italianas e sociétés à mission francesas (com uma nota anglo-alemã)*, in *VI Congresso de Direito das Sociedades em Revista* 285 ff. (2022); G. A. Rescio, *L'oggetto della società benefit* 1 ff., intended to be published in the Studies in honour of Paolo Montalenti and read thanks to courtesy of the Author.

Speranzin, Marco . 'Benefit Legal Entities in Italy: An Overview'. *European Company Law Journal* 19, no. 5 (2022): 142–150.

reduction of negative ones) on society and environmental sustainability,[5] which must be included in the corporate purpose[6]; (2) accountability, since a benefit corporation is committed to considering the impact of the business on society and the environment in order to create long-term sustainable value for all stakeholders; (3) transparency, since it is required to report its progress and activity annually, and using third party's standards.

The Italian law extends the possibility to become benefit to all for-profit legal entities (*società di persone*: partnerships; *società di capitali*: corporations or LLCs), and to cooperatives (*società cooperative*: mutual-type entities). Thus, the benefit model does not constitute a new corporate type: in fact, existing entities that decide to pursue an additional common benefit purpose do not have to undergo a corporate conversion, but must amend their articles of association (by modifying the clause relating to the corporate purpose), in accordance with the provisions specific to each type.[7] Therefore, since a benefit corporation is not a new corporate type, the rules are in line with those provisions specific to each corporate type laid down in the Italian Civil Code, with some additional obligations aimed at achieving the common benefit (which will be discussed below).

Under Italian law, the legal framework of benefit entities provides no specific tax benefits to the legal entity – excluded the granting of a tax credit of 50% of the costs of setting up or becoming a benefit corporation (*see* '*Decreto Rilancio*', Article 38-*ter*, paragraph 1) – nor does it allow waivers to the ordinary rules of corporate or partnership law laid down by the Italian Civil Code.

However, benefit legal entities have important marketing advantages, since they can attract customers and turn to those investors interested in an impact investment.[8] Therefore the option (not the obligation) to introduce next to the corporate name the words '*società benefit*' or the acronym '*SB*' and to use this qualification in any securities issued, in the documents and in the communications towards third parties (paragraph 379 Law n. 208/2015), gives the legal entity the opportunity to obtain advantages on the market. For instance, the benefit corporation may have an edge over other competing corporations in relationships with lenders and customers that prefer to finance and consume products belonging to socially and environmentally responsible legal entities.

Five years after the Law's introduction, there are almost two thousands *SB* in Italy. The majority are public corporations and LLCs (*società a responsabilità limitata*), mainly based in the North-Centre (Lombardy, Lazio and Emilia Romagna), and more than half work in the sector of business services.[9]

The US non-profit agency B-Lab has aimed since 2007 to promote a socially and environmentally sustainable business model through the issuance of B-corporation certification to those companies that pass an assessment test of their business.[10] However, BCorp and benefit legal entities do not necessarily coincide. In fact, while BCorp are corporations that have voluntarily submitted to an assessment concerning environmental and social impact profiles, Italian benefit legal entities are those which provide for the pursuit of a common benefit in their by-laws. In addition, while BCorp certification is time-limited (two years, renewable if a subsequent assessment is passed), benefit corporation status, deriving from an amendment to the articles of association, remains without time limits.[11] Therefore, in Italy there are benefit corporations that are not BCorps, BCorps which are not benefit corporations, and benefit corporations which have BCorps certification.[12]

5 Thus, integrating economic and social development, as well as environmental protection (or, in other words, the three Ps: profits, people and planet). For an historical background on the three-dimensional concept of sustainable development, *see* World Commission on Environment and Development, *Our Common Future* (Oxford university press 1987) (also generally known as the «Brundtland Report»).

6 The introduction of common benefit in the corporate purpose has the dual advantage of ensuring that such a provision is known to third parties and binding the directors to its pursuit: for a broader analysis of the profit-making purpose and the common benefit purpose *see* E. Codazzi, *Scopo di lucro e di beneficio comune nel passaggio da società non benefit a società benefit*, Orizzonti dir. comm. 1243 ff. (2021).

7 For example, it may be provided that the activity of jewellery manufacturing must use only recycled materials. For other examples *see* Stella Richter, *supra* n. 4, at 273. The problem whether such an amendment could trigger an exit right is examined in para. 5.

8 Daccò, *supra* n. 4, at 49.

9 According to data reported by *Il Sole24Ore*, by 26 Jun. 2021, benefit corporations in Italy were 926, distributed as follows: 898 corporations or LLCs; fourteen partnerships; fourteen other forms (such as mutual-type companies); the number doubled in the year of the Covid pandemic: currently, as reported by *Il Sole24Ore* by 24 May 2022, the number of benefit legal entities totals 1,922, of which 97% are corporations or LLCs, with a dozen corporations also joining the Euronext Growth Milan stock exchange and an increasing tendency for start-up companies to adopt the benefit model.

10 For a critical analysis on the fact that being certified as BCorp does not necessarily lead to the respect of human rights *see* J. Bauer & E. Umlas, *Do Benefit Corporations Respect Human Rights?*, Stan. Soc. Innovation Rev. 27 ff. (2017).

11 For a broader analysis of the distinction between benefit corporations and BCorp *see* L. Ventura, *Benefit corporation e circolazione di modelli: le 'società benefit', un trapianto necessario?*, Contratto e impr. 1134 ff. (2016); M. Bianchini & C. Sertoli, *Una ricerca Assonime sulle società benefit. Dati empirici, prassi statutaria e prospettive*, in *Analisi giuridica dell'economia* 207 ff. (2018); Prataviera, *supra* n. 4, at 926 ff.

12 In Italy, more than 120 corporations have obtained BCorp certification according to the data reported by the B Book 2021, www.nativalab.com. For instance, Arbos s.r.l., which realizes environmentally sustainable and innovative paper products for schools, offices and gifts using exclusively recycled materials, is not a benefit corporation, but has been certified as a BCorp since 2019; Alessi s.p.a., one of the leading internationally renowned Italian Design manufacturers, has been certified BCorp since May 2017 and is also a benefit corporation; another corporation with dual status is Fratelli Carli s.p.a., active in producing olive oil, which is a benefit corporation that has also been certified as a BCorp since 2014; Nativa s.r.l. is both a benefit corporation and certified BCorp: more specifically, it was the first BCorp in Italy – in 2013 – and it is Italian partner of BLab that also collaborated with the Italian Senate for the introduction of the benefit corporation law; Sesa s.p.a., a leading operator in the sector of technological innovation and IT and digital services, was one of the first Italian listed corporations to include in its by-laws the aim of sustainable growth and to become a BCorp.

2. COMMON BENEFIT

Italian Law no. 208/2015 defines the 'common benefit' under paragraphs 376 and 378. It means the pursuit of one or more positive effects, or the reduction of adverse ones, for stakeholders, such as individuals, communities, territories and the environment, cultural and social heritage, entities and associations as well as other third parties, while carrying out the corporation's economic activities.[13] More specifically, stakeholders can be identified as individuals or groups of individuals directly or indirectly involved in, or affected by, the activities of the benefit corporation, being, *inter alios*: workers, clients, suppliers, lenders, creditors, public administration and society in general.[14]

Even before the introduction of Law no. 208/2015, legal entities were allowed to realize common benefit purposes also by means of specific provisions in the articles of association, while respecting the typical for-profit purpose.[15] Now paragraphs 377 and 379 of such Law affirm that the common benefit should be specifically stated in the corporate purpose[16] and pursued through management practice that balances the interests of the shareholders with the interests of those potentially affected by the corporation's activities.
Determining the common benefit lies with shareholders, whilst directors are responsible for the actual pursuit of the common benefit, but still having to balance it with the essential profit-making purpose.[17] The obligation to manage the legal entity by balancing shareholders' and stakeholders' interests raises crucially the question of how this balance can be achieved.[18]

Therefore, on the one hand, according to the letter of the Law no. 208/2015 (paragraphs 377 and 379), the common benefit should be *specifically* described and outlined in the section of the articles of association covering corporate purpose, being inadmissible the provision of purposes for which no form of objective verification is possible. On the other hand, in practice, there is no recurring pattern regarding the specification of common benefit in the corporate purpose, and it typically differs from one corporation's by-laws to another. As a result, in some cases, the corporate purpose takes on a general character, with blurred boundaries and non-quantifiable goals, which do not appear to entail a significant change in the corporation's activities.[19] In other cases, instead, the clause in question is spelled out in detail as required by the law, for example with the specific indication that the legal entity allocates a part of the annual profit to the pursuit of the common benefit.[20] Preferably, there should be a *specific clause* in the articles of association detailing the aims of common benefit that the legal entity intends to pursue, since this may be useful in identifying third party beneficiaries, assessing directors' actions and, finally, the possible exercising of exit right, as it will be discussed below.[21]

The status of *SB* is subject to the adoption and maintenance of the pursuit of common benefit, and paragraphs 382 and 383 of Law no. 208/2015 are designed to check its compliance. The legal entity is therefore required to produce and publish on its website an annual benefit report and to attach it to the annual financial statement. The report informs the public about the overall social and

13 M. Cian, *Clausole statutarie per la sostenibilità dell'impresa: spazi, limiti e applicazioni*, Riv. dir. soc. 481 (2021) specifies that the common benefit is pursued *in* the exercise of the economic activity and that it is not intended that the business need to be flanked by the exercise of a non-productive activity, since it is the economic activity itself that is characterized by the tension towards common benefit.

14 From the definition laid down by para. 376 it follows that a legal entity can be qualified as benefit if it employs production processes and business strategies that minimize the negative externalities that the corporation produces towards them: in this sense, *see* Circolare Assonime, 19/2016, at 11. *See* again Cian, *Sulla gestione sostenibile*, *supra* n. 4, at 1136, where the Author emphasizes that the common benefit could also fall outside the area of sustainable management in the strict sense: this is the case, e.g., of the awareness of public opinion on the condition of women in distant countries of the world, by a publishing company that distributes in schools a series of works on this subject free of charge.

15 G. Oppo, *Sulle erogazioni gratuite delle aziende di credito*, in *Scritti giuridici* vol. IV, 139 ff. (Padova 1992); G. Oppo, *Le banche di credito cooperativo tra mutualità, lucratività ed 'economia sociale'*, in *Scritti giuridici* vol. VI, 548 (Padova 2000); R. Costi, *La responsabilità sociale dell'impresa e il diritto azionario italiano. (Per i trent'anni di Giurisprudenza commerciale)* 83 ff. (Milano 2006); M. Libertini, *Impresa e finalità sociali. Riflessioni sulla teoria della responsabilità sociale dell'impresa*, Riv. soc. 1 ff. (2009); V. Calandra Buonaura, *Responsabilità sociale dell'impresa e doveri degli amministratori*, in AA.VV., *La responsabilità sociale dell'impresa. In ricordo di Giuseppe Auletta* 91 ff. (V. di Cataldo & P. M. Sanfilippo eds, Torino 2013); M. Stella Richter, *L'impresa azionaria tra struttura societaria e funzione sociale*, in *La funzione sociale nel diritto privato tra XX e XXI secolo. Atti dell'incontro di studio* 77 (F. Macario & M.N. Miletta eds, Roma 2015) (where the Author already develops a first consideration of benefit corporations).

16 In Italy, the articles of association must provide for the corporate purpose. On the topic of the corporate purpose of benefit legal entities *see* Rescio, *supra* n. 4, at 1 ff.; in general, for a comparative analysis of the evolution of the public company's corporate purpose *see* H. Fleischer, *La definizione normativa dello scopo dell'impresa azionaria: un inventario comparato*, Riv. Soc. 803 ff. (2018).

17 Bartolacelli, *Le società benefit*, *supra* n. 4, at 263–264. For directors' duties and liability *see* para. 4.

18 In this respect, it should be noted that the balance between different interests is not new in the Italian legal system, as it already exists e.g., firstly, in the regulation of corporate groups, where the management of the group aims to balance the interests of the parent corporation and those of the subsidiaries (Art. 2497 Civil Code), and, secondly, in the context of corporations managing public services and therefore subject to specific service obligations, where the interest in the remuneration of capital must be balanced with the protection of public purposes (*see* Art. 4, Legislative Decree no. 175/2016 (*Testo Unico in materia di società a partecipazione pubblica*); Circolare Assonime, *supra* n. 14, at 5).

19 This trend mainly concerned the first benefit corporations. For example, Illycaffè s.p.a., which represents an entity whose sustainable practices are focused on ecosystem conservation and environmental stewardship, seeks to reduce the environmental impact of the entire production process, and the common benefit drafted in its articles of association refers to the following areas: (1) responsible chain of value and sustainable agriculture; (2) aspiration to quality and happiness of life; (3) circular economy and innovation. This clause includes general and non-quantifiable goals, such as the achievement of happiness: on the topic *see* Rescio, *supra* n. 4, at 9 ff.

20 Pieces of Venice s.r.l. has included in its by-laws a specific common benefit: it collects recyclable materials from Venice and its lagoon and transforms them into design objects for children, it involves social revitalization and rehabilitation, and it devolves to charity the added value obtained from the auctions of unique pieces. Edilgeo 4.0. SB deals with projects aimed at reducing the negative impacts of earthquakes on the entire communities in which it operates, and its by-laws specify that the corporation allocates at least 5% of any annual profit (but not more than 30%) to the improvement or structural adjustment of public buildings; for other examples of how the common benefit is declined in different corporations, *see* Bianchini & Sertoli, *supra* n. 11, at 209 ff.

21 Daccò, *supra* n. 4, at 53. For directors' liability and the exit right *see* paras 4 and 5.

environmental performance of the benefit corporation, and it also serves 'to inform directors so they are better able to meet their duties and shareholders so they are better able to exercise their rights'.[22] In fact, it includes: (1) the description of the specific objectives, methods adopted and action taken by the directors in order to pursue the aims of common benefit; (2) the evaluation of the general impact of the company, using a third-party evaluation having the requirements listed in the law; (3) a specific section containing the description of the new objectives which the benefit corporation intends to pursue in the following fiscal year.[23]

The common benefit that the legal entity aims to achieve is the material feature of the law under analysis, and the positive impact on society and the environment becomes one of the factors in the production of value of the business, also contributing on a reputational and competitive level. Pursuant to paragraph 384 of the Law no. 208/2015, a benefit legal entity's failure to pursue the common benefit purpose is subject to the provisions on misleading advertising (*pubblicità ingannevole*: Legislative Decree no. 145 of 2 August 2007) and to the provisions of the Consumer Code (Legislative Decree no. 206 of 6 September 2005), with regard to unfair commercial practices, including anti-competitive practices.[24]

These provisions are extremely relevant not only to counter the risk of 'benefitwashing', but also to neutralize, in general, 'greenwashing' practices, i.e., declaring commitment to sustainable activities just to gain visibility and public relations. Advertising messages containing 'green' declarations on the sustainable qualities of a product, cannot be vague and generic, but truthful and scientifically verifiable.[25] Recently, an Italian decision by the Court of Gorizia, on 25 November 2021, issued a precautionary order against a legal entity (not benefit) accused of misleading advertising and communication, as it used advertising messages with an impact on environmental and sustainability issues, whilst proposing, in fact, polluting products: the Court ordered the inhibition of the misleading claims, also setting penalties for any failure to comply with the decision, and to publish the order on its website.[26]

In addition to civil remedies, which could be triggered by competitors, an important role is played by the Competition Authority (*Autorità Garante della concorrenza e del mercato, AGCM*), which is required to identify and stop cases of misleading advertising and can start the procedure on its own initiative or at the request of those stakeholders who came into contact with the corporation.[27] To protect both entrepreneurs and consumers, the *AGCM* has the task of imposing the administrative sanctions due, in particular, when the corporation abuses the «benefit status» in order to improperly acquire a competitive advantage over other companies or to carry out transactions intended to mislead the consumer. The *AGCM* could issue inhibiting measures aimed at preventing anti-competitive behaviour, and financial penalties for breach of the regulation.[28]

3. THE FINE LINE BETWEEN BENEFIT AND ORDINARY LEGAL ENTITIES PURSUING COMMON BENEFIT PURPOSES

From the above observations, a further question which inevitably arises is whether non-benefit legal entities (a for-profit corporation or a mutual-type company) are prevented from balancing a for-profit purpose with a common benefit purpose.

Paragraph 379 of the Law no. 208/2015 states that non-benefit corporations which intend to pursue also aims of common benefit shall amend accordingly their articles of association, in compliance with the relevant provisions applying to the different forms of legal entities foreseen by Italian law. As the pursuit of a common benefit

22 General information about the content of the annual benefit report is, www.societabenefit.net.

23 In general, disclosure obligations concerning corporate sustainability are becoming increasingly important not only at national but also at European level. The European Parliament, on 10 Mar. 2021, approved the proposal for a Directive on '*Corporate due diligence and corporate accountability*', which aims to oblige legal entities to adopt a diligent strategy and to set up procedures for consulting and informing stakeholders (on this topic, *see* in the Italian scholarship M. Libertini, *Sulla proposta di direttiva UE su 'Dovere di diligenza e responsabilità delle imprese'*, Riv. soc. 325 ff. (2021); F. Denozza, *Incertezza, azione collettiva, esternalità, problemi distributivi: come si forma lo* short-termism *e come se ne può uscire con l'aiuto degli* stakeholders, Riv. soc. 297 ff. (2021)). On 23 Feb. 2022 the European Commission has adopted a proposal, anticipated in the European Green Deal, for a Directive on '*Corporate sustainability due diligence*', in order to improve corporate governance through the integration of the identification and, if necessary, the prevention and mitigation of human rights and environmental risks into corporate policies.

24 Furthermore, the rules of misleading advertising concerning benefit corporations are the same as those that apply when a mutual-type company presents itself to the public as predominantly mutual but is not: on the topic *see* A. Bartolacelli, *'Predicare bene e razzolare male': la concorrenza sleale delle società dichiaratamente benefit, ma che non perseguono una finalità di beneficio comune,* in *Aa.Vv., Desafíos del regulador mercantil en materia de contratación y competencia empresarial* 323 and 335 ff. (Madrid 2021): the Author also specifies that the provisions of misleading advertising and of the Consumer Code also apply to non-benefit corporations that have included the pursuit of common benefit in their corporate purpose, in coherence with the thesis, to which the Author adheres, that these corporations are considered benefit (for a broader analysis *see* para. 3); in this sense, the corporate purpose is recognized as having a commercial communication function and, therefore, an external relevance for the application of remedies for failure to pursue the common benefit.

25 Article 12 of the Code of Self-Discipline for Commercial Communication (*Codice di autodisciplina della comunicazione commerciale*, issued by the *Istituto dell'Autodisciplina Pubblicitaria*), states that commercial communication claiming or evoking environmental or ecological qualities of a product *'must be based on truthful, relevant and scientifically verifiable data'*.

26 *Se*, www.dejure.com. However, in a precautionary order of 12 Mar. 2022, the Court of Gorizia upheld Miko's claim against the first instance order, holding that the complaint against Miko was unfounded for lack of the precondition of *periculum in mora* and that no proof had been offered that the corporation's 'green' communication had resulted in the loss (or a risk of loss) of customers by the claimant in favour of Miko.

27 Bartolacelli, *supra* n. 24, at 349: the AGCM thus acts as a '*gatekeeper of the effectiveness of benefit corporations*', establishing the boundaries of legitimacy of the adoption of this form and repressing opportunistic behaviour. The reference to the rules on misleading advertising for benefit corporations that do not pursue a common benefit confirms that reputation advantages play a significant role on the market: Marasà, *supra* n. 4, at 18.

28 P. Jaeger, F. Denozza & A. Toffoletto, *Appunti di diritto commerciale* 732 (Milano 2019), state that the AGCM may firstly impose fines even in the event of insufficient or unsatisfactory prosecution of the common benefit due to fraud or negligence and order the immediate cessation of the communication of misleading advertising and, secondly, the authors assume an obligation to pay compensation to consumers harmed by the deception.

is part of the general planning of an entity's activities and not simply related to an individual management choice, it follows that non-benefit corporations, whose by-laws do not even include common benefit aims, are prohibited from planning the pursuit of a common benefit as a general purpose.

Consequently, a crucial distinction has to be made between general purpose (plan of activities) and single management operations (acts).[29] The prohibition imposed by paragraph 379 on a non-benefit legal entity from planning its activities for the pursuit of a common benefit does not necessarily imply a prohibition from performing single operations aimed at pursuing a purpose of this kind. For instance, the program to allocate a fixed annual percentage of the profit to financing a museum is reserved exclusively to a benefit corporation; instead, corporations other than benefit would not be prohibited from making specific donations to the same museum.[30]

The complexity of the issue becomes more evident when trying to draw a line between benefit corporations (especially when the common benefit does not take a prominent position) and non-benefit corporations that provide for the pursuit of common benefit goals in their articles of association (without having changed their name to '*SB*'), since the latter are considered as well to be entitled to plan the pursuit of activities aimed at realizing the common benefit.[31] Some authors argue that the qualification of benefit corporation is in this hypothesis automatically triggered: since the addition of the acronym *'SB'* in the corporation name is optional, the legal entity may be benefit *ab origine* if it has included the pursuit of common benefit in its purposes from the moment of its constitution, or it may become one later by introducing such an indication.[32] On the contrary, according to a different – and preferable – thesis, there can be no automatism, since the shareholders' will cannot be ignored in the event of a submission to an additional, specific regulation such as that of benefit corporations, which would be the case in the event of automatic acquisition of benefit status.[33]

In other words, some differences should be made. On the one hand, benefit corporations must pursue the common benefit, which however does not necessarily assume greater functional importance than the profit purpose, unless the by-laws define which purpose has priority.[34] On the other hand, corporations other than benefit, even if they have included the pursuit of common benefit in their articles of association, can (but need not) aim at pursuing a common benefit, but the profit-making purpose must be a priority.[35] It could be difficult, in practice, to distinguish between a benefit corporation that pursues the common benefit together with the

29 Angelici, *supra* n. 4, at 7 ff.; Cian, *supra* n. 13, at 478; according to Marasà, *supra* n. 4, at 20, the law seeks to encourage the achievement of general interest goals and socially responsible behaviour by all legal entities, so it would be paradoxical to imagine a reading of the provisions in analysis that prevents non-benefit corporations from behaving 'virtuously'; Codazzi, *supra* n. 6, at 1260.

30 Angelici, *supra* n. 4, at 7 ff.; Denozza & Stabilini, *supra* n. 4, at 10; U. Tombari, *L'organo amministrativo di S.p.A., tra 'interessi dei soci' ed 'altri interessi'*, Riv. Soc. 26 ff. (2018).

31 Unlike non-benefit corporations that have not included any reference to common benefit in their articles of association, which can only carry out single management operations or acts for that purpose: *see supra* n. 30.

32 For this thesis *see* A. Bartolacelli, *The Unsuccessful Pursuit for Sustainability in Italian Business Law*, in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* 277 ff. (B. Sjafjel & C. M. Bruner eds, Cambridge 2020); Bartolacelli, *supra* n. 4, at 277 ff.: para. 379 must be interpreted as meaning that if a legal entity that is not yet benefit intends to pursue activities of common benefit, it has to amend its articles of association so as to become a benefit legal entity; however, the Author has slightly modified his opinion over time (as indicated in *supra* n. 30), affirming that, while common benefit purpose is performed exclusively by benefit legal entities, plurality of common benefit acts may also be performed by non-benefit entities.

33 Prataviera, *supra* n. 4, at 954; Marasà, *supra* n. 4, at 25; Codazzi, *supra* n. 6, at 1264; P. Montalenti, *La società per azioni: dallo* shareholder value *al successo sostenibile. Appunti*, in *Studi di diritto commerciale per Vincenzo di Cataldo* vol II, tome II, 679 (A. Mirone, R. Pennisi, P. M. Sanfilippo & R. Vigo eds, Torino 2021): in addition, the Author wonders whether it is possible to assume that adherence to Borsa Italiana's Corporate Governance Code (Jan. 2020) configures the legal entity as benefit, since the Code states that sustainable success *'should guide the action of the board of directors'*, consisting in the creation of long-term value for the benefit of shareholders, taking into account the interests of stakeholders relevant to the legal entity.

According to an intermediate theory, only if the clause in the articles of association is worded in terms of directors' obligation (not option) to pursue the common benefit, does the legal entity become benefit to all intents and purposes. *See* Stella Richter, *supra* n. 4, at 276.

34 This can be deduced from para. 376, which does not impose any hierarchy between the two different purposes, and even before that from the law itself, which makes no provision for the 'weight' of common benefit purposes over economic ones, unlike what is derived from the regulations on social enterprises and mutual-type corporations, in which the subjective profit does not constitute the main purpose of the entity, since this must remain the pursuit, respectively, of the 'civic, solidarity and socially useful purposes' (Art. 2, Legislative Decree no. 112/2017) and the mutualistic purpose (Art. 2511 Civil Code): *see* Marasà, *supra* n. 4, at 15 ff. Of the opposite opinion is U. Tombari, *'Potere' e 'interessi' nella grande impresa azionaria* (Milano 2019), according to which, in benefit legal entities, common benefit and profit-making purposes must be placed in any case on the same level.

If the legal entity pursues the common benefit as its primary goal, the difference between benefit corporations and social enterprises (included in the Italian legal system with Legislative Decree no. 155/2006), becomes almost imperceptible. The main differences between benefit legal entities and social enterprises are the following ones: (1) social enterprises are associations, foundations, partnerships, start-ups, corporations, which have, as a purpose, to develop, fund and implement social, cultural or environmental issues; instead the status of benefit corporation is reserved only to corporations; (2) while social enterprises are basically non-profit, benefit corporations are a type of for-profit legal entity in which the common benefit does not replace the profit goals; (3) while the social enterprise has to draw up a social financial statement and is subject to control by the Ministry of Labor, the benefit corporation has to draw up an annual report and is subject to the control of the AGCM. *See* A. Cetra, *Impresa sociale vs. impresa socialmente responsabile: prove di avvicinamento tra terzo e secondo settore*, in *Oltre la pandemia. Società, salute, economia e regole nell'era* post *Covid-19* 254 ff. (Napoli 2020): reflecting on the rapprochement between «second» and «third» sector, and taking into account that para. 380 of Law no. 208/2015 does not affect the compositional function of the board of directors, the Author argues that in benefit legal entities there could be an involvement in governance of external interests, as in social enterprises; the Author leaves open the question of whether this conclusion could already be supported *de iure condito*, prospecting the expansive potentiality of Art. 11 of Legislative Decree no. 112/2017. The empirical analysis carried out by Bianchini & Sertoli, *supra* n. 11, at 217 ff., has identified a case of a benefit corporation that changed its status to social enterprise, Izmade s.r. l., an architecture and design firm that creates furnishings and installations with products resulting from the encounter between eco-sustainable materials and artisanal production processes.

35 Cian, *Sulla gestione sostenibile*, *supra* n. 4, at 1139 ff.; Codazzi, *supra* n. 6, at 1256 ff.

profit-making purpose, which remains principal, and a non-benefit corporation that pursues a common benefit, included in the corporate purpose, together with the principal profit-making purpose. The main difference measured in terms of mandatory provision: while the benefit legal entity must, necessarily, pursue the common benefit, the latter (non-benefit with a common purpose) retains a choice with respect to the realization of this further objective.

Furthermore, a part of the scholarship has argued that directors of a non-benefit corporation may pursue the common benefit without ever sacrificing the profit-making purpose. Therefore, according to such thesis, the common benefit has to be realized *residually* with respect to the profit-making interests of the shareholders, and *instrumentally* (*functionally*) with respect to the pursuit of profit-making purpose of the legal entity in the long-term.[36] However, it is difficult to follow this thesis, since it is not clear exactly what the *instrumentality* that should link the two purposes, of profit and of common benefit, consists of. On the contrary, preferable is the view where it is sufficient that the pursuit of the latter is *subsidiary* to the former.[37]

To summarize, three scenarios can be envisaged under Italian law: (1) benefit legal entities, which have included the common benefit in their articles of association, *must* necessarily pursue it; (2) non-benefit corporations, which have included the common benefit in their articles of association, *may* plan to carry out activities in pursuit of the common benefit, but without an obligation to do so; (3) non-benefit corporations, which have not amended their articles of association, may realize *individual* common-benefit transactions.

4. DIRECTORS' DUTIES, BENEFIT JUDGMENT RULE AND LIABILITY

The common benefit purpose is closely linked to directors' duties.

A benefit legal entity needs to identify one or more individuals to be appointed as «benefit director» with a specific task of aiding and controlling the pursuit of the common benefit, and reporting the activities of the corporation (paragraph 380). Law no. 208/2016 does not specify those who have to pursue this goal or the conditions required to be appointed. The so-called benefit director has been identified in 90% of cases as a person who holds an office in the corporation and only in the remaining 12% of cases as an external consultant.[38] The benefit officer is often a member of the Board of Directors.

The appointment of benefit director does not reduce the other directors' controls and powers (and any liability of the benefit director does not exonerate other directors from liability for failing to pursue the common benefit[39]). Furthermore, directors may be liable if they fail to appoint the benefit director, since this appointment is one of the directors' obligations imposed by law. In this case, the provisions of the Civil Code shall apply in relation to each type of corporation with regard to the liability of directors.[40]

The balance of objectives and, consequentially, directors' duties and liability represent a delicate point of the regulation. The board of directors of all (ordinary) legal entities must balance various interests, which are normally homogeneous,[41] and this balance cannot be judicially challenged under the business judgement rule. However, directors of a benefit corporation are expected to manage the legal entity also with the aim of pursuing the common benefit, taking into account heterogeneous interests, i.e., those of shareholders and also those of all stakeholders.[42]

Since the legislator has not fixed any specific criteria, it is difficult to determine how the board of directors should manage the business while balancing profit maximization and common benefit. Furthermore, there is a close relationship between the content of the provision regarding corporate purpose in the by-laws and leeway reserved to the directors, since the more general the definition of common benefit is, the more room directors will have to identify the concrete ways in which it will be pursued.[43] For this reason, it might be useful to include in the by-laws, to facilitate the balance between different interests, the constitution of advisory committees composed of independent directors or experts at the disposal of the board,[44] or to require shareholder authorization for directors to carry out any acts that could adversely affect shareholders' interests. In any case, the identification of specific criteria that directors should respect when balancing the different interests remains one of the currently more discussed issues of the regulation in question.

Thus, directors are required to manage the corporation in accordance with the obligations and duties relating to the corporate

36 Denozza & Stabilini, *supra* n. 4, at 10; Tombari, *supra* n. 30, at 27; of the same opinion also Codazzi, *supra* n. 6, at 1260.

37 Marasà, *supra* n. 4, at 19; Stella Richter, *supra* n. 15, at 78 ff.

38 The data were collected from research on benefit corporations conducted by Alta Scuola Impresa e Società presented on 5 Jun. 2018 in Milan at the Università Cattolica del Sacro Cuore; a graphic showing this data can be found in Bianchini & Sertoli, *supra* n. 11, at 214.

39 Daccò, *supra* n. 4, at 54; Circolare Assonime, *supra* n. 14, at 1172 ff.

40 Daccò, *supra* n. 4, at 54.

41 In ordinary legal entities (not *benefit*), the profit-making or mutualistic purpose of the shareholders must be considered primary, and the directors must only pursue the interests of the stakeholders, the fulfilment of which may be included among the objectives to be pursued within the articles of association, if the realization of these further interests is functional, at least in the long term, to procuring an advantage for the shareholders.

42 C. Angelici, *A proposito di shareholders, stakeholders e statuti,* II Riv. dir. comm. 213 ff. (2021). R. Caputo Jr, *Benefit Corporations: The End of Shareholder Primacy in the Takeover Context?*, Del. J. Corp. L. 279 ff. (2021). As noted, this would result into adding a further «benefit judgment rule» to the traditional «business judgement rule»: *see* Stella Richter, *supra* n. 4, at 278; C. Sertoli, *La società benefit: tendenze e problematiche in prospettiva comparatistica* 90 ff. (Roma 2017) (dattil.).

43 M. Cian, *Diritto delle società* vol. III, 50 ff. (Torino 2020); Bianchini & Sertoli, *supra* n. 11, at 213; R. Sacchi, *La capacità propulsiva della s.p.a. quotata è andata esaurendosi?*, Orizzonti dir. comm. 596 ff. (2021).

44 Circolare Assonime, *supra* n. 14, at 17.

type chosen[45] and they must employ the highest degree of care required by the nature of the office. They may be exposed to liability for not complying with the pursuit of common benefit, which can trigger the regulation of directors' liability foreseen by the Civil Code.

Firstly, there is little doubt that non-compliance with the obligation to pursue the common benefit can be defined as 'non-compliance with the obligations imposed by the by-laws', and this motivates the removal for just cause of the director.[46]

Secondly, even if shareholders could be clearly interested in pursuing a common benefit, it is difficult to demonstrate if non-compliance has damaged the legal entity's assets and consequently whether this can lead to a claim against directors or officers for compliance or damages.[47]

Furthermore, third parties who are the beneficiaries of the common benefit pursued by the benefit legal entity have no means of acting against the directors of the corporation for failure to pursue the common benefit.[48] According to the majority doctrine, this justifies the application of Article 2395 Italian Civil Code (Article 2476 for the LLC).[49] These articles represent a 'stand-alone case' regulating the action for damages which can be proposed by an individual shareholder or an interested third party when they are directly damaged by negligent or intentional actions carried out by the directors.[50] Since the pursuit of the common benefit is part of the directors' duties, when they have caused, by a negligent or intentional act, a legitimate expectation that the legal entity will perform the promised common benefit, stakeholders can sue the directors directly for damage arising from the non-compliance with that duty.

However, the potentially vague nature of the stakeholders' relations vis-à-vis the corporation needs to be addressed. Firstly, it is necessary to identify exactly the third parties entitled to act: an answer could be to request a specific 'relation' that qualifies the position of the third party and its reliance on the fulfilment of the common benefit (duty of protection).[51] Secondly, it is extremely difficult to obtain proof (and the amount) of the damage directly caused to the third parties[52] and so, alternatively, it could be possible to give the beneficiaries of the common benefit, through ad hoc provisions in the articles of association, a greater and more specific impact on corporate governance with a view to providing stakeholders' empowerment.[53]

In any case, directors have considerable leeway in balancing the different interests at stake and in adopting strategic decisions, and the application of the business (and therefore benefit) judgment rule could protect them from the risk of incurring liability when making business decisions.[54]

45 This is confirmed by para. 380, Law no. 208/2015, which provides that failure to comply with the obligations may constitute a breach of the duties imposed on directors by law and by the articles of association and that such a breach entails the application of the provisions of the Civil Code in relation to each type of corporation.

46 Angelici, *supra* n. 4, at 10; Prataviera, *supra* n. 4, at 966–967. *See also* Cian, *Sulla gestione sostenibile*, *supra* n. 4, at 1139 ff., where the Author develops an analysis of the clauses that bind directors to pursue sustainability by integrating stakeholders' requests in non-benefit corporations: if these clauses are formulated in terms of an obligation for directors, their violation, even if the legal entity is not benefit and even if it suffers no damage, would result in removal for just cause of the directors.

It should be noted that, in the LLCs, the individual shareholder (even a minority shareholder) has the power to challenge the directors' failure to pursue the common benefit by requesting their removal (Art. 2476, para. 3, Civil Code). It is also possible to assume the activation, in both public companies and LLCs, of judicial control *ex* Art. 2409 Civil Code for severe irregularities committed by the directors, when they have neglected the realization of the common benefit thereby causing damage to the company (identifying what the damage is remains problematic).

47 Angelici, *supra* n. 4, at 10, who points out that the non-fulfilment is not sufficient, since compensation requires the existence of a real damage to the corporation; of same opinion shared by Prataviera, *supra* n. 4, at 965, who notes the difficulty in proving a causation between the managerial conduct and the damage allegedly sustained.

48 Except for the class action: Bartolacelli, *Le società benefit*, *supra* n. 4, at 270.

49 Circolare Assonime, *supra* n. 14, at 27; Corso, *supra* n. 4, at 1025 ff.; Bartolacelli, *Le società benefit*, *supra* n. 4, at 270 ff.; Angelici, *supra* n. 4, at 10 ff.; G. D. Mosco, *L'impresa non speculativa*, I Giur. comm. 234 (2017); P. Agstner, *Benefit Corporations and the Directors' Accountability*, draft read thanks to the courtesy of the Author.

50 Articles 2395 and 2476 Civil Code are applicable to (public and closed) corporations and to other legal entities (partnerships and mutual-type companies): *see* V. Pinto, *La tutela risarcitoria dell'azionista tra 'danno diretto' e 'danno indiretto'* 38 ff. e 279 ff. (Pisa 2012); M. V. Zammitti, *La responsabilità della capogruppo per la condotta socialmente responsabile delle società subordinate* 267 ff. (Milano 2020).

51 Angelici, *supra* n. 4, at 12, who affirms that 'the prevailing answer is to require a specific "social relation" capable of qualifying the position of the "third party", and its reliance on the performance of the contract concluded between others'. For example, if the corporate purpose provides that the legal entity must take into account the interests of the health and welfare of workers, this specification would legitimize such people, or the associations representing them, to act under Art. 2395 Civil Code, since they have a qualified relationship. The qualified relationship of the stakeholders necessary to act against the directors has also concerned foreign jurisprudence: F. Denozza, *Responsabilità dell'impresa e 'contratto sociale': una critica*, in *Diritto, mercato ed etica* 269 ff. (Milano 2010), recalls the foreign case *Tripody v. Johnson and Johnson*, 877 F. Supp. 233 (D.N. J. 1995), in which the Court decided that Johnson and Johnson's 'Credo' lacked 'specificity and detail required to justify employee reliance'.

52 Denozza & Stabilini, *supra* n. 4, at 12–13, are skeptical, arguing that it is difficult for stakeholders to take direct action against the corporations' directors and wondering whether the choice of being a benefit corporation does not entail the emergence of any rights for the stakeholders, but only the emergence of their potential claims against directors.

53 Some inspiration could be drawn from the regulation of corporate groups and that of public companies. For instance *see* Bartolacelli, *Le società benefit*, *supra* n. 4, at 271, where the Author gives an example: in the case of public companies, hybrid financial instruments with the right to appoint an independent member of the management body, with control functions in relation to the pursuit of the common benefit.

54 S. A. Cerrato, *Appunti per una 'via italiana' all'ESG* 16 ff.: the Author addresses the problem of balancing the profit-making purpose and the protection of interests included in the 'ESG criteria' (in general, with reference to the legal entity taking a spontaneous active part in social and environmental policies, and not only with regard to benefit entities) from a different perspective, based not on the expansion of the interests that directors are required to pursue, but on the implementation of the principle of solidarity imposed by the Italian Constitution (Arts 2, 9 and 41) on people as individuals and in social groups: the criterion of solidarity requires the entrepreneur to direct his actions according to the logic of proportionality, reasonableness and balancing between his own selfish interest and that of those who may be affected by the initiatives undertaken; according to the Author, the violation of the criterion of solidarity in the process of making a decision may be reviewed by the judge – overcoming the BJR – and may give rise to a liability of the director for mismanagement.

5. THE EXIT RIGHT

The inclusion of the common benefit in the articles of association affects the position of the shareholders as well. In fact, another important issue is to assess whether the inclusion (or deletion) in the articles of association relating to the pursuit of the common benefit enables dissenting shareholders to exercise their exit right, whether the legal entity is qualified as benefit (following the by-laws' amendment) or not, and this in accordance with the majorities required by law and the articles of association to change the corporate purpose.[55] The issue is also discussed in other legal systems: for instance, in the United States there is no uniform regulatory system for the exit right, but the issue is mitigated by the requirement for a resolution passed with the affirmative vote of 2/3 of the share capital in order to become a benefit corporation; furthermore, recently, in July 2020, Delaware amended the PBC statute to exclude the exit right for dissenting members of traditional corporations that become benefit.[56] However, it should be borne in mind that in the United States benefit corporations are identified as corporate types, unlike Italian benefit legal entities, as already explained.

The exit right, i.e., the shareholder's power to exit the legal entity by means of his own decision (and to obtain the fair value of its shareholding), is recognized under Italian law in certain events that are considered by the law as reasonable indications of a change in the corporation's organization, such as to affect the original activity. Moreover, the exit right is an effective remedy that balances the power of the majority and the interests of the dissenting minority in the face of radical choices made by the former.[57] In the context of benefit legal entities, the issue should be analysed firstly by considering whether such a change is of a significant and substantial nature, and should be explored in relation to the different types of companies affected by the amendment.[58]

With regards to partnerships, the unanimity rule solves the problem of the dissenting shareholders' exit right with respect to a change in the corporate purpose that includes the common benefit. Instead, if the partners derogate from the unanimity principle and introduce the amendment clause by majority vote, it is first necessary to check whether the articles of association provide for an exit right and details of its just cause (it could be expressly provided, for example, that a change in the corporate purpose constitutes just cause for dissenting shareholders to exit). In any case, given the accentuated personalistic component of partnerships and the partners' unlimited liability, the acquisition (or loss) of the benefit status may assume a wider scope and, according to a more extensive approach, could integrate – regardless of whether the articles of association provide for – a hypothesis of just cause and therefore an exit right pursuant to Article 2285 Civil Code.[59]

With regards to public companies and LLCs (Italian *società per azioni* and *società a responsabilità limitata*), when there is a substantial change in the essential structure of the corporation or in its economic risk the exit right respectively provided for in Articles 2437 and 2473 Civil Code could be triggered.

More specifically, it has to be understood whether the resolution by which the legal entity has modified the corporate purpose enables an exit right pursuant to Article 2437, letter *a)*, Civil Code, which is triggered when the amendment causes a *material* change in the corporate purpose, which in turn determines a change in the investment's risk; or to Article 2473 Civil Code, when some operations carried out by the LLC, related to purposes other than those defined in the articles of association, entail a *substantial* change in the corporate purpose. This assessment should probably be made on a case-by-case basis that takes into account the exact content of the common benefit set out in the corporate purpose and tries to establish whether the change in the latter affects corporate governance choices and the corporation's overall production processes.[60] As the scholarship notes, the exit right cannot be triggered when the corporate purpose is general since the new benefit activities would not represent any substantial changes in the corporate purpose that provide for a significant alteration in the investment's risk, whether increasing or reducing it.[61] Therefore, the balance

55 *See* Rescio, *supra* n. 4, at 10.

56 *See* www.corpgov.law.harvard.edu/2020/08/31/delaware-public-benefit-corporations-recent-developments/.

57 For a broader analysis of the exit right (in general) in Italian legislation *see ex multis*: M. Stella Richter, *Diritto di recesso e autonomia statutaria*, I Riv. dir. comm. 403 ff. (2004); V. Calandra Buonaura, *Il recesso del socio di società di capitali*, I Giur. comm. 316 ff. (2005); P. Revigliono, *Il recesso nella società a responsabilità limitata* 1 ff. (Milano 2008); C. Frigeni, *Partecipazioni in società di capitali e diritto al disinvestimento* 1 ff. (Milano 2009); P. Piscitello, Sub *art. 2437 c.c.*, in *Le società per azioni. Codice civile e norme complementari* 2499 ff. (P. Abbadessa & G. B. Portale eds, Milano 2016); E. Ginevra, *La partecipazione azionaria*, in *Diritto delle società* 302 ff. (M. Cian ed., Torino 2020).

58 For an analysis *see* M. V. Zammitti, *Il diritto di recesso nelle società c.d. benefit* 575 ff.

59 Stella Richter, *supra* n. 4, at 280 ff.; *ibid.*, at 589 ff.; Codazzi, *supra* n. 6, at 1282 ff.

60 Corso, *supra* n. 4, at 1013–1014; Zammitti, *supra* n. 58, at 583 ff.

61 Stella Richter, *supra* n. 4, at 280 ff., who also develops an analysis of the hypotheses of the exit right in the different types of legal entities that are qualified as benefit; Zammitti, *supra* n. 58, at 593 ff. For example, Vita Società Editoriale s.p.a., a benefit corporation which was listed on the Alternative Investment Market (AIM) from Oct. 2010 to May 2017, became benefit in 2016 by amending its articles of association; the corporation promotes sustainable economic and social models with particular attention to social entrepreneurships and their development: these conditions are extremely general and do not contravene the economic purpose of the legal entity and it is clear why in this case the exit right would presumably not be recognized.

It should be remembered that, according to the prevailing scholarship, the dissenting shareholder may exercise the exit right only if there has been a formal resolution to change the corporate purpose, since a mere de facto change is not sufficient. For a more complete analysis of the exit right in the case of a substantial and formal change of the corporate purpose *see* for all Revigliono, *supra* n. 57, at 91 ff.; Calandra Buonaura, *supra* n. 57, at 2069; G. Zanarone, *Della s.r.l.*, II Comm. Schlesinger 1266 ff. (Milano 2010); in comparison with the Spanish case law S. Ciceri, *L'impugnazione delle delibere negative e il diritto di recesso del socio per modifica dell'oggetto sociale nella giurisprudenza spagnola*, to be published in *Riv. dir. soc.* and read thanks to the courtesy of the Author.

directors must achieve between stakeholders' benefit purpose and shareholders' profit goal does not appear to be automatically reflected in the risk conditions of the investment, unless the alteration in those conditions is linked to a significant modification of the activities that can actually be carried out that may lead to discontinuity with those previously performed.

From this perspective, another paragraph of Italian corporate law could be material: Article 2437, letter *g)*, Civil Code, which provides for the exit right in case of a change in the corporation's by-laws affecting rights connected to the shares. It could apply when there are other beneficiaries or stakeholders in the benefit corporation, since these other beneficiaries can affect the shareholders' rights to take part of the corporation's profits. An example is where a modification aims to destine a certain percentage of the profits to benefit activities; in this case the exit right could be considered as resulting not from the change of the corporate purpose, but from the modification of the participation rights referred to in Article 2437, letter *g)*, of the Civil Code.[62]

What has been pointed out regarding public companies is also material with regards to LLCs: the change of the corporate purpose, with the inclusion of the common benefit, must entail a material alteration in the investment's risk to entitle the dissenting shareholder to exercise the exit right (on the basis of the rule provided by Article 2437 Civil Code, which represents a general principle applicable also to the LLCs).[63]

6. CONCLUSIONS

The regulation of benefit legal entities could represent a new way of doing business, where profit and common benefit are necessarily two sides of the same coin. Although the greater attraction of investors and consumers interested in sustainable development and the corporation's reputational gains may be important advantages in the long term, the breadth of the regulation analysed raises the question of whether it can bring real change in the entrepreneurial paradigm its promoters aim for.

In particular, the Italian regulation of benefit corporations has shortcomings in some areas, particularly in the criteria to be established in the by-laws specifying the purposes of common benefit. As a result, three problems emerge: firstly, directors may have excessive discretion when pursuing the common benefit; secondly, stakeholders have no express right to act against the directors for failing to pursue the common benefit; thirdly, it is not clear when, and according to what criteria, dissenting shareholders can exercise the exit right when the legal entity acquires or loses the benefit status.

62 *See* Cass., 22 May 2019, n. 13845, in *Società*, 2019, at 1273 ff., commented by P. Piscitello, *Recesso organizzato* ex *art. 2437, comma 1, let. g), c.c. e modifica delle regole di partecipazione ai risultati*: the Court specifies that the amendment of a clause in the articles of association relating to the distribution of profits, which has a negative effect on the patrimonial rights of shareholders by providing for the reduction of the percentage allocated to the distribution of profits in view of the increase in the percentage to be allocated to reserves, justifies the exit right of minority shareholders; Stella Richter, *supra* n. 4, at 283–284.

63 M. Maltoni, *Il recesso e l'esclusione nella nuova società a responsabilità limitata*, Notariato 307 ff. (2003); O. Cagnasso, Sub *art. 2473 c.c.,* in *Aa.Vv*., *Il nuovo diritto societario* vol. II, 1838 (Bologna 2004); F. Chiappetta, *Nuova disciplina del recesso di società di capitali: profili interpretativi e applicativi*, Riv. soc. 492 ff. (2005); F. Magliulo, *Il recesso e l'esclusione,* in *Aa.Vv., La riforma della società a responsabilità limitata* 252 (Milano 2007); F. Annunziata, Sub art. 2473 c.c., in *Aa.Vv., Commentario sulla riforma delle società* 470 ff. (Milano 2008); A. Daccò, *La s.r.l.: la struttura finanziaria, in Diritto delle società* 714 ff. (M. Cian ed., Torino 2020); Codazzi, *supra* n. 6, at 1274; Orientamento I. H. 1 Consiglio Notarile Triveneto, *Modifica dell'oggetto sociale e recesso*: 'For LLCs, it must be considered that any change in the purpose of the company, even if minor, is not sufficient to legitimize the dissenting shareholders to exercise the exit right; though Art. 2473 Civil Code simply speaks of a "change in the purpose", a significant change in the company's activity is instead necessary (as expressly prescribed by Art. 2437 Civil Code for public companies)'.