Is There a Role for Benefit Corporations in the New Sustainable Governance Framework?

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In this paper, we ask whether benefit corporations have a role to play in the emerging EU sustainable governance framework. In sec. 2, we briefly introduce the benefit corporation with regard to US law and to the laws of some EU member States, such as France and Italy, which have adopted this company form. In sec. 3, we focus on the benefit corporation's purpose and function from a comparative law perspective, asking whether benefit corporations perform a useful function internationally. We argue that corporate purpose tends to be a flexible concept across countries and that benefit corporations are not the only way to reconcile profit and social values in business corporations. In sec. 4, we compare the critical features of the law relating to benefit corporations with the essential elements of the emerging sustainable governance framework. We show that the latter partially overlaps with the laws on benefit corporations and to some extent is a substitute for them, therefore reducing the potential interest in this corporate form. In sec. 5, we conclude that mainly firms which the new EU sustainable governance framework does not apply to, such as non-listed SMEs, will adopt the benefit corporation model when available in their jurisdiction, while other companies may still adopt it mostly for communicating their commitment to sustainability.

Keywords: Benefit corporation, corporate purpose, corporate governance, corporate social responsibility, shareholder primacy, shareholder value, shared value, social value, stakeholder governance, sustainability

JEL Classifications: G30, G32, G38, K20, K32, L21, M14, P12

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1. *Introduction*

In this paper, we ask whether benefit corporations have a role to play in the emerging EU sustainable governance framework. In sec. 2, we briefly introduce the benefit corporation with regard to US law and to the laws of some EU member States, such as France and Italy, which have adopted this company type. In sec. 3, we focus on the benefit corporation's purpose and function from a comparative law perspective, showing that company laws are not easily defined as either shareholder primacy or pluralist systems. We argue in particular that corporate purpose tends to be a flexible concept across countries and that benefit corporations are not always needed to reconcile profit and social values in business corporations. In sec. 4, we consider the essential elements of the sustainable governance framework which is emerging in the EU and compare them with the critical features of the law relating to benefit corporations. In sec. 5, we ask whether benefit corporations can represent a model for business corporations in such a sustainable governance framework, and then conclude.

2. *The rise of benefit corporations*

Benefit corporations were firstly introduced in Maryland through legislation in 2010[1] and then adopted in many other States.[2] They were subsequently transplanted to other jurisdictions outside the US, either of common law (British Columbia) or civil law (Italy, France, Colombia, Ecuador) and to Puerto Rico, and are undergoing the legislative process in Australia, Argentina, Chile, and Canada. Benefit corporations have also

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[1] Department of Legislative Services, Maryland General Assembly 2010 Session, Fiscal and Policy Note on SB 690. *See* Andrew Kassoy, Maryland First State in Union to Pass Benefit Corporation Legislation, CSRWIRE (Apr. 14, 2010, 10:57 AM), https://www.csrwire.com/press_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation- Legislation.

[2] Currently, in the US 37 States have legally recognized benefit corporations, and 4 are working on it. A complete list of jurisdictions recognizing this special hybrid organization is available on http://benefitcorp.net/policymakers/state-by-state-status (last visited 15 May 2021).

become one the most discussed models of “blended” or “dual-mission” organizations in scholarly works.[3]

2.1. *US origins*

Benefit corporations should not be confused with Certified B-Corporations, which do not necessarily qualify as benefit corporations in jurisdictions recognizing this corporate form, but are certified as B-Corps by a private non-profit organization named B Lab after achieving a minimum verified score on the B Impact Assessment defined by B Lab.[4] In addition to offering such a certification, B Lab promoted a model law - the Model Benefit Corporation Legislation (‘Model Legislation’) - [5] that State legislatures may adopt for the establishment of a new form of corporation structured to pursue social and environmental interests in addition to profit. The Model Legislation rapidly gained success in many US states, including Delaware, where the Public Benefit Corporation (PBC) was introduced in 2013, however under less rigid rules.[6] To date, more than 7704 benefit corporations have been established in the US,[7] the majority of which are small, privately held and newly incorporated companies operating in a wide variety of industries,[8] and are based in the states of Oregon, New York, Nevada, Delaware and Colorado.[9]

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[3] Other two well-known examples are the low-profit limited liability company (L3C) and the social purposes corporation (SPC). *See* R. T. Esposito, ‘The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation’ (2013) *William & Mary Business Law Review*, 4, 681 ff.

[4] *See* https://bcorporation.eu/about-b-corps (last visited 15 May 2021).

[5] BLab, Model Benefit Corporation Legislation (Model Legislation), available at https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf (17 April 2017).

[6] A. E. Plerhoples, ‘Delaware Public Benefit Corporations 90 Days Out: Who’s Opting In?’ (2014) *UC Davis Business Law Journal*, 14, 247, 250, and J. Murray, ‘Social enterprise innovation: Delaware's public benefit corporation law’ (2014), *Harvard Business Law Review*, 4(2), 345-372 (“While most of the other states adhere closely to the Model, Delaware seems to have merely consulted the Model and created a new social enterprise form called a "*public* benefit corporation" (PBC)).

[7] Between October 1, 2010, and December 31, 2017. These represent about 0.26% of nearly thirty million businesses in the United States. *See* E. Berrey, ‘Social Enterprise Law in Action: Organizational Characteristics of U.S. Benefit Corporations’ (2018) *Transactions: The Tennessee Journal of Business Law*, 20.

[8] Let just consider large publicly traded companies such as Lemonade Inc., Laureate Education and Vital Farms.

[9] Berrey, note 7.

One of the reasons behind the success of the benefit corporation model[10] can be traced back to the need to protect managers from shareholder lawsuits when pursuing social and environmental interests.[11] This issue was clearly illustrated by the Ben & Jerry case, the ice-cream company which was founded in 1978 with a strong social commitment such as investing part of their profits in a charitable foundation. The company was then sold by the founders to Unilever, the multinational consumer goods company, after a bidding contest, regardless of the fact that this could compromise its original corporate purpose, as the board of Ben & Jerry could have been sued by shareholders for not maximizing their wealth.[12] Stockholder interests were also at the centre of the litigation between Craigslist and eBay, where the Court of Chancery (Delaware) recognized the value of a corporate culture chasing charitable goals, but stated that directors of for-profit companies have the fiduciary duty to promote corporate stock value above any other interest.[13]

Benefit corporations were originally intended to soften shareholder primacy. However, they differ from standard corporations also in other ways reflecting their main legal requirements. First, a company can be incorporated as a benefit corporation or become one by amending its articles of incorporation so as to specify that it is a benefit corporation.[14] Second, benefit corporations should pursue the general public benefit,[15] but may also elect one or more specific public benefit purposes.[16] Third, the board of

[10] *See* generally W. H. Clark Jr. and E. K. Babson, 'How Benefit Corporations Are Redefining the Purpose of Business Corporations' (2012) *William Mitchell Law Review*, 38(2), 8.

[11] *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684-85 (Mich. 1919) in which the court stated that "a business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes."

[12] K. A. Neubauer, 'Benefit Corporations: Providing A New Shield for Corporations With Ideals Beyond Profits' (2012) *Journal of Business & Technology Law* 11 (1), 7.

[13] *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 8 (Del. Ch. 2010). *See* also Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919), Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986); Plaza Sec. Co. v. Fruehauf Corp., 643 F. Supp. 1535, 1543 (E.D. Mich. 1986).

[14] *See* Model Legislation, § 104(a).

[15] 'General public benefit' is defined as "a material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard". *See* Model Legislation, § 102.

[16] 'Specific public benefits' include: (1) providing low-income or underserved individuals or communities with beneficial products or services; (2) promoting economic opportunity for individuals or communities beyond jobs in the normal course of business; (3) protecting or restoring the environment; (4) improving

the benefit corporation should act in the best interest of the company, but also consider the effects of any action or inaction on a wide range of stakeholders in connection with the general public benefit and/or the specific public benefit purpose elected.[17] Fourth, the benefit corporation should have an independent 'benefit director' who shall submit an annual benefit compliance report to the board of directors.[18] Fifth, the benefit corporation should issue an annual report in which it assesses, among other things, the ways in which it has pursued the general/specific public benefits against a third-party standard.[19]

2.2. *Criticism*

U.S. commentators have criticized the benefit corporation and its legal framework on various grounds. Firstly, it is argued that the Model Legislation fails to provide clear guidance to directors as to their responsibilities.[20] Benefit corporations should pursue the general public benefit, but are not required to elect one or more specific public benefit purposes.[21] They are only entitled to choose these additional purposes without displacing the requirement of a general public benefit.[22] As a result, directors have no guidance as to which stakeholder interests they should prioritize[23] and enjoy wide discretionary powers in the exercise of their mandate.[24] No doubt, benefit corporations could specify in their by-laws which particular stakeholder group they aim to serve and adopt internal policies and procedures to assure compliance with their purposes.[25]

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human health; (5) promoting the arts, sciences, or advancement of knowledge; (6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and (7) conferring any other particular benefit on society or the environment. *See* Model Legislation, § 102.

[17] *See* Model Legislation, § 301(a).

[18] *Id.*, § 302.

[19] *Id.*, § 401.

[20] Murray, note 6. *See* also J. Haskell Murray, 'Defending Patagonia: Mergers & Acquisitions with Benefit Corporations' (2013) *Hastings Business Law Journal*, 9, 485; J. H. Murray, 'Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes' (2012) *American University Business Law Review*, 2(1), 24; M. J. Loewenstein, 'Benefit Corporations:A Challenge in Corporate Governance' (2013) *The Business Lawyer*, 68(4), 1007-34.

[21] In this regard, most states follow the Model Legislation. See J. M. Heminway, 'Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations' (2017) *Seattle University Law Review*, 40, 611-682.

[22] *See* Model Legislation, § 102.

[23] Murray, note 6. See also Murray, note 20; Loewenstein, note 20.

[24] J. H. Murray, note 20.

[25] S. Munch, 'Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form' (2012) *Northwestern Journal of Law and Social Policy*, 7, 180-181.

Departing from the Model Legislation, Delaware law requires benefit corporations to choose one or more specific public benefit purposes, but does not offer precise guidance to directors simply requiring them to "...manage [...] the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation".[26]

Secondly, some commentators denounced the absence of adequate accountability and enforcement systems, since stakeholders have no rights of actions against directors who do not pursue the social and environmental purposes defined in the articles of association.[27] Only a shareholder owning at least 2% of capital (or the holder of 5% or more of the benefit corporation's parent capital) can bring benefit enforcement proceedings. No doubt, the Model Legislation requires directors to consider the interest of stakeholders while performing their activities, but the board still responds only to shareholders as in other business corporations, the main difference being that shareholders' interest can be pursued in a diversified way.[28] Shareholder primacy is therefore the rule, with limited space for stakeholders' demands.

To fill this gap, some commentators proposed that a benefit corporation commission – including representatives of stakeholder categories – should be established.[29] Others suggested introducing an enforcement system similar to the one existing for community interest companies (CICs) in England,[30] where the CIC regulator has broad powers of intervention on supervised institutions.[31] Moreover, some States have introduced special

[26] Delaware Code, §365. Murray, note 6.

[27] L. Johnson, 'Pluralism in Corporate Form: Corporate Law and Benefit Corporations' (2013) *Regent University Law Review*, 25, 269; Esposito, note 3; White III, note 3, 6; J. Blount, K. Offei-Danso, 'The Benefit Corporation: A Questionable Solution to a Non-Existent Problem' (2017) *St. Mary's Law Digital Repository*; Munch, note 25; B. Cummings, 'Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest' (2012) *Columbia Law Review*, 112(3), 580.

[28] J. E. Hasler, 'Contracting for Good: How Benefit Corporations Empower Investors and Redefine Shareholder Value' (2014) *Virginia Law Review*, 100(6), 1301; White III, note 3.

[29] White III, note 3.

[30] The CIC is a limited company, created for trading and performing activities for the benefit of the community, granting investors' dividends with a cap limitation. The CIC has the obligation to lock the assets and earnings growing beyond the cap and to use them for community purposes. *See* D. B. Reiser, 'Governing and Financing Blended Enterprise (2010) *Chicago-Kent Law Review*, 85, 630.

[31] The monitoring activities performed by the CIC Regulator appear particularly strong, especially if we consider its power to intervene in company operations by, for instance, putting financial limitations on dividend distributions, transferring the company's shares, bringing legal proceedings in its name or on its behalf, removing directors and appointing a manager to run the CIC. Companies (Audit, Investigations and

legal actions allowing shareholders to enforce the special duties of benefit corporations' directors and officers.[32] In Minnesota, for instance, shareholders can ask the court - under certain circumstances, such as the company's failure to pursue the common benefit objectives - to remove the status of benefit corporation, to replace one or more directors, and even to appoint a court commissioner to either liquidate or manage the company so as to properly pursue the common benefit purposes indicated in the bylaws.[33]

Thirdly, the reporting system established for benefit corporations has been widely debated, as (i) the annual reports do not need to be audited;[34] (ii) statutes do not prescribe any particular methodology or metrics for measuring social and environmental impacts, and companies may select among many different third-party standards;[35] (iii) the reporting activity leads to additional costs[36] and (iv) the compliance rate is very low.[37] Hence, there is a high risk of greenwashing practices,[38] since benefit corporations are exempt from government oversight unless they violate the law.[39] In Delaware, the PBCs follow even laxer rules, as they should report only biannually and a third-party standard for measuring public benefits is not required.[40]

Fourthly, some commentators argued that the benefit corporation has been over-adopted in some States, also as a consequence of the lack of adequate enforcement and rigorous standards, so that the original function of signalling a true social enterprise has been lost.[41] Others doubted that the new legal form was necessary to prevent hostile takeovers and protect the social commitment of an enterprise. According to them, the

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Community Enterprises) Act, 2004, §§ 44, 46, 47, and 49. *See* also D. B. Reiser, 'Benefit Corporations – A Sustainable Form of Organization?' (2011) *Wake Forest Law Review*, 46.

32 G. Riolfo, 'The new Italian benefit corporation' (2020) *European Business Organization Law Review*, 21(2), 279–317. https://doi.org/10.1007/ s40804-019-00149-9.

33 Minnesota Statute, Chapter 302A, Section 302A.202.

34 Blount & Offei-Danso, note 27; Munch, note 25; Murray, note 20.

35 The list of third-party standards is availabe at https://benefitcorp.net/how-do-i-pick-third-party-standard (last accessed 15 May 2021). *See* Esposito, note 3; Munch, note 25.

36 Murray, note 20

37 About 6%. *See* Berrey, note 7.

38 R. Robson, 'A New Look at Benefit Corporations: Game Theory and Game Changer' (2015) *American Business Law Journal*, 52(3): 501-555.

39 *Id*..

40 Delaware Code, §366.

41 Berrey, note 7.

sale of Ben & Jerry's to corporate giant Unilever was not legally required and the takeover defences set up by the founders would have resisted before a court.[42] As a result, benefit corporations are deemed unnecessary.[43] Furthermore they would lead to the creation of a dangerous dichotomy between benefit and business corporations, implying that the latter should not pursue social missions,[44] and so again reinforcing "the corporate governance machine's directional focus on shareholder interests for the vast majority of companies".[45] Requiring a wider category of business corporations to act in a responsible and sustainable way would benefit society more.[46] Some commentators also viewed the emergence and evolution of the benefit corporation as "a means for facilitating the 'privatization of the public interest' or the shift of responsibility for public welfare into the private sector".[47]

2.3. *Transplants to France and Italy*

In the EU, only Italy and France have so far recognized benefit corporations in their national legislation.

(A) In Italy, benefit corporations were introduced under the name of *società benefit* by the Stability Act No. 20 of 28 December 2015.[48] The Italian legislator was the first to

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42 A. Page and R. A. Katz, 'The Truth About Ben and Jerry's' (2012) *Stanford Social Innovation Review*, 10, 4.

43 M. A. Underberg, 'Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy (2012) *Harvard Forum on Corporate Governance & Financial Regulation*, available at https://corpgov.law.harvard.edu/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/ (last visited 15 May 2021).

44 Noked, note 43.

45 D. Lund & E. Pollman, 'The Corporate Governance Machine' (2021), *Columbia Law Review* 122, U of Penn, Inst for Law & Econ Research Paper No. 21-05, European Corporate Governance Institute - Law Working Paper No. 564/2021, USC CLASS Research Paper No. CLASS21-15, USC Law Legal Studies Research Paper Series No. 21-15, Available at SSRN: https://ssrn.com/abstract=3775846 or http://dx.doi.org/10.2139/ssrn.3775846.

46 J. Blount and P. Nunley, 'What is a "Social" Business and Why Does the Answer Matter?' (2014) B*rooklyn Journal of Corporate, Financial & Commercial Law*, 8, 278, 279.

47 It would "...enable(s) further colonization of the public sphere as the legislation institutionalizes a set of governance structures and accountability regimes that facilitate the encroachment of financial capital". L. Baudot, J. Dillard, N. Pencle, 'The emergence of benefit corporations: A cautionary tale' (2020) *Critical Perspectives on Accounting*, 67–68, 102073.

48 The Italian legislator did not introduce a new 'type' of company but rather a qualification that existing types of companies can obtain by performing specific activities.

introduce this type of legislation in Europe.[49] To date, at least 500 Italian companies qualify as benefit corporations.[50] Their legal regime is similar to the one prevalent in the US, but some of its provisions were especially inspired by Delaware law.[51] However, under the US Model Legislation only for profit companies can become benefit corporations, whereas under Italian law any type of business corporation can qualify as a *società benefit*, including cooperatives and partnerships.[52] Moreover, the US benefit corporation is entitled to adopt a specific benefit purpose as an option, whereas its Italian counterpart must identify specific benefit purposes in the articles of association, in order to ensure that its activities are properly aligned with the common benefit purpose.[53]

Furthermore, under the US Model Legislation benefit directors are not "personally liable 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",[54] whereas directors of the *società benefit* can be held liable to the company for failing to balance the interests of shareholders with those of stakeholders and the common benefit goals.[55] Therefore, the directors of a *società benefit* appear to be more accountable with regard to the benefit activities specified in the company's bylaws. However, also in Italy it is doubtful that the directors could be held liable towards the company's stakeholders, not to mention the difficulties in assessing the damages allegedly caused to such stakeholders.[56] In addition, based on the business judgement rule as specified by the

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[49] B. Bertarini, 'La società benefit: Spunti di riflessione sulle nuove prospettive del settore non profit' (2016) *Diritto e Giustizia*, 14, 1–23. According to some commentators, the introduction of benefit corporations was justified by the failure of the social enterprise system to provide a sufficiently attractive model for social entities. See G. Castellani and D. De Rossi, L. Magrassi, A. Rampa, 'Le Società Benefit (Parte II). In requiem alle imprese sociali' (2016) *Fondazione Nazionale dei Commercialisti*.

[50] *See* https://nativalab.com/cms/wp-content/uploads/2020/08/The_B_Book_202008.pdf (last visited 15 May 2021).

[51] This could be said, for example in relation to the requirement to balance the interests of shareholders with those affected by the corporation's conduct. *See* S. Corso,'Le società benefit nell'ordinamento italiano: una nuova "qualifica" tra profit e non profit' (2016) *Le Nuove Leggi Civili Commentate*, 995–1031.

[52] G. Riolfo, 'The new Italian benefit corporation' (2020) *European Business Organization Law Review*, 21(2), 279–317. https://doi.org/10.1007/ s40804-019-00149-9.

[53] The "common benefit purpose" is defined as the aim to produce one or more positive effects, or to reduce negative externalities, for one of more of the categories identified by the law (people, communities, territories and environment, cultural and social heritage and activities, organizations, associations and other stakeholders). Stability Act of 2016, §376 and §378.

[54] Model Legislation, § 302.

[55] Stability Act of 2016, §381.

[56] P. Marco, 'L'interesse sociale: dallo shareholder value alle societa benefit' (2017) *Banca Impresa Società*, 2, 201-237.

Italian jurisprudence,[57] directors should not be held liable when the common benefit objective has not been achieved if they acted in good faith, diligently and with no conflict of interest.[58]

Moreover, Italian company law entitles individual shareholders and third-parties to sue directors for the damages directly caused to them, but the claimants should prove that the damages were caused through directors' wilful or negligent behaviour.[59] Furthermore, the violation of the duties related to the pursuit of the common benefit purpose can be pursued as an act of unfair competition,[60] misleading advertising or unfair commercial practice,[61] while under certain circumstances a class action could be filed against the company by consumer associations or associations representing common interests.[62]

The board of the *società benefit* must appoint a person responsible for the pursuit of the common benefit. However, unlike the US benefit corporation statutes which require the election of a benefit director, Italian law does not require the responsible person to be elected amongst directors. On the contrary, the board has full discretion in the appointment of the responsible person and may even decide to externalize the function in question.[63]

Italian benefit corporations are subject to the surveillance of the national Antitrust Authority (*Autorità Garante della Concorrenza e del Mercato*, AGCM).[64] However, similarly to the US Model Legislation, Italian law does not specify how this surveillance should be performed,[65] which gives rise to a certain level of uncertainty.[66] Like US benefit

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57 *See*, for instance: Italian Supreme Court, decision no. 5718/2004 and decision no. 17761/2016. See also G. Ferrarini, G. G. Peruzzo, and M. Roberti, 'Corporate Boards in Italy', in P. Davies, K. Hopt, R. Nowak, G. van Solinge (eds.) *Corporate Boards in Law and Practice. A Comparative Analysis in Europe* (Oxford: Oxford University Press, 2013), 367-427.

58 Riolfo, note 52.

59 Italian Civil Code, Artt. 2395 and 2476 par. 6; Riolfo, note 52.

60 Italian Civil Code, Article 2598. See also Corso, note 51.

61 Legislative Decree No. 145/2007 and Legislative Decree No. 206/2005.

62 Italian Civil Code, Artt. from 840-bis to 840-sexiesdecies.

63 Circolare Assonime n. 19/16, p. 23 s.; Corso, note 51.

64 Stability Act of 2016, §384.

65 Corso, note 51.

66 S. Tirelli, 'La vigilanza dell'Autorità garante della concorrenza e del mercato sulle società benefit' (2017) Diritto.it, Available at: https://www.diritto.it/la-vigilanza-dellautorita-garante-della-concorrenza-del-mercato-sulle-societa- benefit/ [Last visited 15 May 2021].

corporations, the *società benefit* must issue an annual impact report assessing the ways in which it has pursued its purpose according to a standard established by an independent third-party. However, there is no audit requirement for this annual benefit report. Moreover, recent studies show that the level of compliance with the requirement at issue by Italian benefit corporations is low and that the quality of reporting should be improved, also to enhance the comparability of reports across firms.[67]

Italian scholars expressed doubts about the impact of the new legislation.[68] They also criticised the lack of guidance on how directors should balance multiple interests,[69] the only indication being that they should operate in a 'responsible, sustainable and transparent' way,[70] and the wide discretion attributed to them under their mandate.[71] In addition, some of them considered the Italian rules on *società benefit* as superficial or inadequate compared to those in force in some US states.[72] However, on the positive side, the Italian Government has recently granted tax incentives in the form of a 50% tax credit on the administrative costs to set up or become a *società benefit*.[73]

Italian benefit corporations, like their US counterparts,[74] are usually small, with a few exceptions.[75] It is still difficult to say whether their introduction in Italy has been successful and the empirical research conducted so far does not clarify the question.[76]

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[67] G. Mion, 'Organizations with impact? A study on Italian benefit corporations reporting practices and reporting quality' (2020) *Sustainability*, 12(21), 9038.

[68] A. Testa, 'Le "società benefit" e i limiti di interpretabilità della norma' (2016), Quotidiano IPSOA, 4.

[69] Stability Act of 2016, §377. Such provision recalls Delaware's Code. *See* Riolfo, note 52.

[70] Stability Act of 2016, §387.

[71] Corso, note 51; Riolfo, note 52.

[72] Riolfo, note 52.

[73] Article 38-ter, Attachment 1, Law 17th July 2020 n. 77, Legislative Decree 34/2020. Moreover, Legislative Decree 124/2019 introduced a new reward criterion in public tenders for companies that measure their social and/or environmental impact through the external evaluation standard of *società benefit*.

[74] Berrey, note 7.

[75] Consider, for example, Reti S.p.A, one of the leading Italian players in the IT Consulting listed AIM Italy, and Fratelli Carli, a large company operating in the olive oil industry.

[76] Mion, note 67; G. Mion & C. R. Loza Adaui, 'Understanding the purpose of benefit corporations: An empirical study on the Italian case' (2020) *International Journal of Corporate Social Responsibility*, 5(1). https://doi.org/10.1186/ s40991-020-00050-6; C. Corsi, A. Prencipe & D. Boffa, 'Corporate governance and the choice to take on the hybrid organizational model of the benefit company: Evidence from Italy' (2020) *Journal of Modelling in Management*, ahead- of-print. https://doi.org/10.1108/JM2-07-2020-0184; M. Del Baldo, 'Acting as a benefit corporation and a B corp to responsibly pursue private and public benefits. The case of Paradisi Srl (Italy)' (2019) *International Journal of Corporate Social Responsibility*, 4(1), 4. https://doi.org/10.1186/s40991-019-0042-y; and M. Sciarelli, S. Cosimato & G. Landi, 'Benefit corporations approach to environmental, social and governance disclosure: A focus on Italy' (2020) *Entrepreneurship Research Journal*, 10(4). https://doi.org/10. 1515/erj-2019-03181186/s40497-017-0079-x.

(B) In France, a new corporate form tracking the US benefit corporation - the *société à mission* - was introduced in May 2019 by the PACTE Act amending the *Code de Commerce*.[77] For a company to become a *société à mission* the following requirements must be complied with: a) its *raison d'être* should be specified in the statute together with one or more social and environmental purposes that the company shall pursue as a mission in the performance of its activities; b) a *comité de mission* should be established, distinct from other corporate bodies and including at least one employee, which shall be in charge of the monitoring of the execution of the social/environmental mission and of the presentation of an annual report attached to the management report and verified by an independent third party body; c) a new statute of *société à mission* shall be communicated to the clerk of the commercial court, who shall publish it subject to compliance of the same with the above-mentioned conditions.[78] The French law provides that when one of these conditions is not met, or when the opinion of the independent third-party concludes that one or more of the social and environmental objectives that the company has set for itself are not complied with, the public prosecutor or any interested person may refer the matter to the president of the court for ordering, if necessary under penalty, the legal representative of the company to remove the indication of *société à mission* from all the company's acts, documents and communications.[79]

Clearly, French law tries to overcome some of the enforcement weaknesses found in US Model legislation, both requiring the establishment of a commission including at least one employee representative and introducing sanctions in the event that the company fails to comply with the above-mentioned rules. However, contrary to US benefit corporations, the *société à mission* is not required to establish a standardized assessment framework, but enjoys wide discretion in defining its mission and evaluation

[77] Based on the recommendations of the Notat-Senard report, available at https://minefi.hosting.augure.com/Augure_Minefi/r/ContenuEnLigne/Download?id=FAA5CFBA-6EF5-4FDF-82D8-B46443BDB61B&filename=entreprise_objet_interet_collectif.pdf.

[78] Code de commerce, Article L 210-10. *See* also S. Schiller, 'L'évolution du röle de sociétés depuis la Loi PACTE' (2019) *Orizzonti del diritto commerciale*, 3, 517-532.

[79] Code de commerce, Article L 210-11 of the .

methods.[80] After the new rules entered into force in January 2020, 171 companies have adopted the statute of *société à mission*, including large ones like the Groupe Rocher and Danone.[81]

3. *Corporate purpose and the benefit corporation*

In order to better understand the function and merits of the benefit corporation in general, a brief comparative legal analysis may be useful focussing on the concept and treatment of corporate purpose.[82] Indeed, the benefit corporation is largely identified by its purpose, given the limited scope of its special regime. Therefore, the way in which corporate purpose is generally defined in a stated jurisdiction is relevant in order to assess the actual or potential role of benefit corporations in that jurisdiction. Moreover, our comparative analysis has already shown the difficulties in solving the trade-offs between corporate profits and public benefits in all jurisdictions regulating benefit corporations. No doubt, the solution of these trade-offs in practice will depend on the way in which the public benefits are defined in the articles of association and the potential conflicts with corporate profits are dealt with. However, also the characteristics of the corporate law and governance system at issue will be relevant, to the extent that benefit corporations are subject to it in addition to being regulated by specific rules taking their social purpose into account.

3.1. *Pluralist systems and shareholder value*

Corporate law scholars generally distinguish between shareholder governance and stakeholder governance depending on whether a given system assigns a central role to

[80] B. Segrestin, A. Hatchuel & K. Levillain, 'When the Law Distinguishes Between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose' (2020) *Journal of Business Ethics*.

[81] *See* https://societeamission.com/liste-des-societes-a-mission/ (last visited 15 May 2021).

[82] For more general remarks, *see* G. Ferrarini, 'Corporate Purpose and Sustainability' (2020) European Corporate Governance Institute - Law Working Paper #559/2020. An edited version of this paper will be published as a chapter in D. Busch, G. Ferrarini and S. Grünewald (eds.) *Sustainable Finance* (London: Palgrave MacMillan, Forthcoming), available at SSRN: https://ssrn.com/abstract=3753594 or http://dx.doi.org/10.2139/ssrn.3753594. *See* also E. Pollman, 'The History and Revival of the Corporate Purpose Clause' (2021) *Texas Law Review*, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3803604; and J. E. Fisch and S. Davidoff Solomon, 'Should Corporations have a Purpose?' (2021) *Texas Law Review*, Forthcoming, available at SSRN: https://ssrn.com/abstract=3561164 or http://dx.doi.org/10.2139/ssrn.3561164.

either shareholders or stakeholders in the corporation.[83] Scholars often compare corporate law systems along this dimension,[84] as we show in this paragraph by briefly analysing German law, which epitomizes the pluralist system of corporate governance in Europe, and US law which at State level exemplifies both shareholder primacy and stakeholder governance. The general intuition behind our path is that the need for benefit corporations is weaker in countries committed to stakeholder governance than in countries where shareholder primacy prevails. At the same time, we are aware that the borderline between shareholder and stakeholder governance is often blurred, so we avoid drawing too radical conclusions.

(A) According to Holger Fleisher, the first definition of corporate purpose in Germany was found in the Corporate Law of 1937, which was strongly influenced by the ideology of the time and made reference to the common good of the enterprise, the people and the Empire, without specifically mentioning the interest of shareholders.[85] The same definition was kept in post-war legislation with the understanding that it should be adapted to describe the new economic and political system commonly known as social market economy. The management board was tasked with the reconciliation of the company's interest with the collective one, however as a matter of public policy rather than as a duty of board members.

Corporate purpose was considered again in preparations for the German Corporate Law of 1965, the first draft of which reformulated the 1937 provision by stating that the management board should manage the company under its own responsibility, as required by the good of the enterprise, its workers and shareholders, and by the common

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[83] *See*, for illuminating comments on this topic, R. Skog, 'The Importance of Profit in Company Law – a Comment from a Swedish Perspective' (2015) *European Company and Financial Law Review*, 12(4), 563.

[84] *See*, for a recent account, E. Rock, 'For Whom is the Corporation Managed in 2020: The Debate over Corporate Purpose', ECGI Law Working Paper 515/2020, https://ecgi.global/working-paper/whom-corporation- managed-2020-debate-over-corporate-purpose. For a comparative perspective on non-shareholder constituencies, see R. Kraakman et al., *The anatomy of Corporate Law. A comparative and functional approach* (Oxford:Oxford University Press, 3rd ed., 2017), 79 ff.

[85] H. Fleischer, 'Gesetzliche Unternehmensziel Bestimmungen im Aktienrecht – Eine vergleichende Bestandsaufnahme', in ZGR, 46, p. 411. We cite from the Italian version of this paper, 'La definizione normativa dello scopo dell'impresa azionaria: un inventario comparato' (2018) *Rivista delle Società*, 803. For an updated analysis and interesting comparisons, *see* H. Fleisher, 'Corporate Purpose: A Management Concept and its Implications for Company Law' (2021), ECGI Law Working Paper N° 561/2021.

good.[86] However, the proposed provision was rejected as superfluous and other proposals were also rejected by the legislator, while acknowledging in the preparatory works that corporations should not be run only for profit, but also in the interest of the national economy and in the collective interest. In the end, the old provision which emphatically defined corporate purpose was cut back to the following: "the management board should manage the corporation under its own responsibility".[87] According to Fleischer, the 1965 provision has shown practical importance only in a few cases,[88] while scholars and courts tend to implicitly assume the enduring validity of the 1937 provision and defend a pluralist vision of corporate purpose.

The concept of shareholder value has also gained ground in Germany.[89] Fleischer recalls that the original formulation of corporate purpose in the German Corporate Governance Code made reference to long-term value creation,[90] but was changed in 2009 to emphasize the role of stakeholders, given the criticism addressed to capitalism after the financial crisis.[91] The same provision was changed once more in 2017[92] and was further amended in the 2019 edition of the Code, which simply states under Principle 1: "The Management Board is responsible for managing the enterprise in its own best interests". However, the Foreword to the Code highlights 'the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued

[86] *Ibidem*, at 806.

[87] German Corporate Law, Sec. 76 (1).

[88] Fleischer, note 85, 806.

[89] *See* the seminar paper by P. Mülbert, 'Shareholder Value aus rechtlicher Sicht' (2009) *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 26, 2, 129.

[90] Fleischer, note 85, 808. *See* Para. 4.1.1 of the German Code of Corporate Governance 2002, convenience translation, which stated: 'The Management Board is responsible for independently managing the enterprise. In doing so, it is obliged to act in the enterprise's best interests and undertakes to increase the sustainable value of the enterprise'.

[91] *See* Para. 4.1.1 of the German Corporate Governance Code 2009, convenience translation, at https://www.dcgk.de/files/dcgk/usercontent/en/download/code/D_CorGov_final_2009.pdf, stating: 'The Management Board is responsible for independently managing the enterprise with the objective of sustainable creation of value and in the interest of the enterprise, thus taking into account the interests of the shareholders, its employees and other stakeholders'.

[92] *See* Para. 4.1.1 of the German Corporate Governance Code 2017, convenience translation, at https://www.dcgk.de/files/dcgk/usercontent/en/download/code/170214_Code.pdf, stating: 'The Management Board assumes full responsibility for managing the company in the best interests of the company, meaning that it considers the needs of the shareholders, the employees and other stakeholders, with the objective of sustainable value creation.'

existence of the enterprise and its sustainable value creation (the enterprise's best interests)'.[93] These repeated changes testify to the continuing discussion and the fluctuating political values involved in it, rather than to the practical relevance of the definitions found in successive editions of the Code. At the same time, they reflect the pluralistic vision of corporate purpose, its link to the social market economy and an overall preference for stakeholder governance.[94]

In other countries in Europe, corporate laws often define corporate profit as the main purpose of the company and the shareholders' interest as the main interest to pursue in the management of companies.[95] However, stakeholders are taken care of on governance grounds even in countries that follow the shareholder primacy model. Stakeholders' protection in these countries mainly depends on either contracts or regulation (such as environmental and labour laws), but also on corporate governance to the extent that stakeholders' interests are considered at board and management levels. Under this approach, the task of the board of directors and top management is to reconcile the interests of shareholders with those of stakeholders in view of maximizing enterprise value over the long term.[96]

(B) In traditional US jurisdictions, the "objective" of the corporation was identified by Chancellor William Chandler of the Delaware Supreme Court as follows: "to promote the value of the corporation to the benefit of its stockholders".[97] The situation is different

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[93] *See* German Corporate Governance Code 2019, convenience translation, at https://www.dcgk.de//files/dcgk/usercontent/en/download/code/191216_German_Corporate_Governance_Code.pdf.

[94] In this regard, a recent comparative study on corporate governance codes in the EU found that, in addition to Germany, other five national codes (Bulgaria, Luxemburg, the Netherlands, Portugal and Sweden) in defining the purpose and function of corporate governance expressly mention the need to take corporate responsibility towards stakeholders and society into account. Moreover, the same study found that the majority of European corporate governance codes (15 out of 27) presently include sustainability considerations in their principles and recommendations by addressing CSR and sustainable value creation or devoting entire chapters or principles to the duties of the company towards its stakeholders. *See* M. Siri & S. Zhu, 'Integrating sustainability in EU Corporate Governance Codes', in D. Busch, G. Ferrarini and S. Grünewald (eds.) *Sustainable Finance in Europe* (London: Palgrave MacMillan, Forthcoming).

[95] G. Ferrarini, note 82, 230 ff.

[96] M. Becht, P. Bolton and A. Roell, 'Corporate Governance and Control' (2002), ECGI Finance Working Paper 02/2002, arguing that corporate governance is concerned with the resolution of collective action problems among dispersed investors and the reconciliation of conflicts of interest between various corporate claimholders.

[97] *See* the case of e-Bay Domestic Holdings, Inc. v. Newmark, 16 A.3rd 1, 34 (Del. Ch. 2010), cited by Rock, note 84.

in "constituency jurisdictions" like Pennsylvania, where the statute explicitly rejects the shareholder primacy norm and allows the board of directors to consider all relevant interests, making it clear that the board need not put shareholders' interest first. Nevertheless, in traditional jurisdictions, shareholder primacy is not dictated by the statute, but grounded on case law.[98] In cases of conflict between the interests of shareholders and those of stakeholders, courts are either in a condition to defer to the discretion of the board under the business judgement rule or affirm the primacy of shareholders' interest.[99]

In a ground-breaking paper on corporate purpose, Edward Rock concedes that outside of the sale of company context there is no general legal duty to *maximize* shareholder value, but insists that there is a general legal duty to *pursue* or *promote* such value as decided in the *e-Bay* case.[100] He concludes however that the shareholder primacy framework of Delaware corporate law does not answer many of the questions that "partisans" think it should. It does not decide, for instance, whether shareholders as "owners" of the corporation "have the right to tender into a tender offer at a premium to the current market price"; or that corporations "must reduce wages to the minimum to maximize current share price".[101] He adds that Delaware corporate law is deeply "board centric" and that under the business judgement rule courts give great discretion to the board to the extent that directors are disinterested and act in good faith.

As a result, "disinterested directors seeking in good faith to promote the value of the corporation have the discretion to make the decisions that they believe are best for the corporation and its stakeholders".[102] Moreover, Rock believes that constituency jurisdictions do not diverge from traditional ones beyond the point of rejecting the *Revlon* doctrine in the sale of control context.[103] On one side, boards in traditional jurisdictions may take into account the interests of stakeholders in a large range of areas under the discretion granted to boards outside of "conflict" scenarios. On the other,

[98] Rock, note 84, 9.

[99] Rock, note 84, 12, criticises the thesis advanced by shareholder value opponents, who argue that the business judgement rule would ensure that managers of public companies have no enforceable legal duty to maximize shareholder value. *See* L. Stout, *The Shareholder Value Myth* (San Francisco: BK Publishers, 2012).

[100] Rock, note 84, 13.

[101] *Ibidem*, 11.

[102] *Ibidem*, 12.

[103] *Ibidem*.

courts in constituency jurisdictions follow traditional approaches outside of the sale of company context; some of them even interpret the constituency laws as consistent with the shareholder primacy approach.

3.2. *The flexibility of corporate purpose*

Today's supporters of stakeholderism criticize corporate law for mainly focusing on shareholder wealth and considering profit as the corporate purpose par excellence.[104] Yet our analysis shows that a similar criticism does not hold from a comparative law perspective: neither the European laws referred to above nor the US ones consider shareholder value as the sole corporate purpose despite the emphasis put on this concept in financial practice. Noteworthy examples are the "constituency" jurisdictions in the US and the codetermination regime applicable to large corporations in Germany.[105] Moreover, most jurisdictions show that the borderline between shareholder and stakeholder governance is often blurred, and that the concept of corporate purpose is flexible, as we argue in this paragraph.

According to J. Fish and S. Davidoff Solomon,[106] US statutory requirements that corporations articulate in their charter the purpose for which they are formed go back to the time when there were limitations to the use of the corporate form. Modern corporation statutes have eliminated these limitations and presently do not restrict the permissible purpose for which a corporation may be formed, save for the requirement that it is lawful. As a result, most corporate charters contain a generic statement that the purpose of the corporation is to engage in any lawful activity.[107] At the same time, statutes do not require the charters to endorse a shareholder profit maximization norm. Fish and Davidoff believe that the pursuit of stakeholder and societal interest can be reflected in the purpose provisions of traditional for-profit corporations (as typically happens for benefit corporations); however, 'few corporations contain any language in

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[104] C. Mayer, *Prosperity, Better Business Makes the Greater Good* (Oxford: Oxford University Press, 2018); and A. Edmans, *Grow the Pie. How Great Companies Deliver Both Purpose and Profit* (Cambridge: Cambridge University Press, 2020).

[105] K. Hopt, 'Labour Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe' in R. Buxbaum et al. (eds.) *European Economic and Business Law* (Berlin/New York: De Gruyter, 1996) 269.

[106] Fisch and Solomon, note 82.

[107] *Ibidem*, 105.

their charters reflecting a commitment in such a way as to provide questionable legal impact'.[108]

Interesting developments in the same area have recently occurred in France, where Article 1833 Civil Code simply provided that any company shall have 'a legal purpose and shall be formed in the common interest of the partners'. The PACTE Act of 22 May 2019 added a second paragraph to this Article stating: 'A company shall be managed in its corporate interest, factoring in the social and environmental issues raised by its business activity'.[109] Alain Pietrancosta, in a comment on this new provision, remarked that Article 1833 had remained almost unchanged since the time of Napoleon and had always represented one of the cornerstones of the French economic model.[110] Nonetheless, 'the new wording broadly reflects French case law which leans towards an open concept of corporate interest and, therefore, one that is not limited to maximizing shareholder value, as has been often alleged during discussions'.[111] He also noted that the 'reference to factoring in the social and environmental issues is, in itself, more innovative and raises a number of questions', such as the content and scope of the new obligations placed on corporate organs.[112]

Pierre-Henri Conac similarly remarked that the recent reform had a strong political dimension, envisaging a broad conception of the company's interest and the need for 'un droit des sociétés sociétal', i.e. a company law subject to social imperatives.[113] In his view, the reform should be seen more as a restatement than a revolution, as French law in the last twenty years and particularly after the 2008 financial crisis has repeatedly acknowledged the corporate social responsibility (CSR) of enterprises in several pieces of legislation. Interestingly, however, the reform bill found strong opposition in the French Senate, which objected that the new provisions will increase the legal risk for

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[108] *Ibidem*, 105-106.

[109] *See* the Law No. 019-486 of 22 May 2019 concerning the growth and transformation of enterprises, known as *Loi PACTE*.

[110] A. Pietrancosta, "Intérêt social" and "raison d'être": Thoughts about two core provisions of the Business Growth and Transformation Action Plan (PACTE) Act that amend corporate law' (2019) *Réalités Industrielles*, 2 (we quote from an English translation which was kindly provided by the author).

[111] *Ibidem*, 3.

[112] *Ibidem*.

[113] P. Conac, 'Le nouvel article 1833 du Code Civil Français et l'integration de l'intérêt social et de la responsabilité social d'entreprise: constat ou revolution?' (2019) *Orizzonti del diritto commerciale*, 3, 500, available at http://www.rivistaodc.eu/HomePage (last visited 15 May 2021).

business enterprises, which could be sued for not taking the environmental and social issues sufficiently into account.[114]

The PACTE Act also added a new provision to article 1835 of the Civil Code, under which companies can specify their *raison d'être* (corporate purpose) in their charter, which consists of the principles that the company adopts and complies with in the performance of its activities. Clearly, the more specific corporate purpose is, the more likely are the obligations for the company and its directors that will derive from it.[115] A generic statement of purpose will no doubt be less meaningful and more difficult to enforce.

French law distinguishes corporate purpose from the company's interest, though overlaps may occur between these two concepts, given that the company's interest must factor in those social and environmental issues that will be more specifically defined in the charter when dealing with corporate purpose.[116] Wealth maximization is also part of both concepts, to the extent that it characterizes the concept of corporate interest together with other objectives, while the charter's definition of corporate purpose can refer to it at least as a requirement to satisfy when taking care of other interests, such as those of employees or the local communities. Ultimately, French corporate law leans towards a mixed notion of the *intérêt social*, which reconciles the interest of shareholders to profit maximization with those of stakeholders and more generally with the interests of the environment and society as a whole.

The fact that the same PACTE Act introduced the *société à mission* is striking. On one side, it is consistent with the other changes carried out by this Act, such as the reference to the environmental and social issues in the definition of the company's interest and the possibility of specifying the *raison d'être* of the company in the articles. On the other side, the use of the *société à mission* is somehow less significant once the other changes have been brought about, as we shall argue more generally with respect to the emerging sustainable governance framework in the EU (sec. 4).

3.3. *The role of enlightened shareholder value*

[114] *Ibidem*, 501.
[115] Schiller, note 78.
[116] I. Urbain Parleani, 'L'article 1835 et la raison d'être' (2019) *Orizzonti del diritto commerciale*, 533 ff.

Another way of reconciling the social interests of the firm with those of shareholders is offered by the economic theory of enlightened shareholder value. ESV suggests that shareholder wealth should be maximized in the medium-long term, which requires the interests of stakeholders to be met as a condition for maximizing the value of the firm.[117] On legal grounds, Section 172 of the UK Companies Act reflects this theory.[118] Moreover, the ESV approach has been widely followed by corporate governance codes applicable to listed companies in all major jurisdictions, including countries where corporate law is stakeholder oriented, but shareholder value concepts have been imported as a consequence of capital markets development.[119] No doubt, the emphasis on shareholder value is stronger when a company is listed and its shares are traded on a capital market, given that investors expect a return on their investment which can derive both from dividends and capital gains.[120]

Under Section 172 (1) of the 2006 UK Companies Act: "A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole (…)." This duty is "the modern version of the most basic of the loyalty duties owed by directors",[121] which applies to every exercise of judgement that the directors undertake either in the straight implementation of their powers or in situations of conflict of interest.[122] The formulation of this duty was the subject of considerable controversy in the preparatory works of the Companies Act, especially since it was proposed that the statute should not simply repeat the common law duty of directors to act in good faith in what they believed to be "the best interests of the company".[123]

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[117] M. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (2010) Journal of Applied Corporate Finance, 22, 32, and (2002) *Business Ethics Quarterly*, 12, 235 (from which we quote), 8.

[118] V. Harper Ho, 'Enlightened Shareholder Value: Corporate Governance beyond the Shareholder-Stakeholder Divide' (2010) *Journal of Corporation Law*, 36, 59.

[119] G. Ferrarini, 'Shareholder Value and the Modernization of European Corporate Law', in K. Hopt - E. Wymeersch (eds.) *Capital Markets and Company Law* (Oxford: Oxford University Press, 2003), 230.

[120] P. Davies, 'Shareholder Value, Company Law, and Securities Markets Law', in Hopt and Wymeersch (eds.) *Capital Markets and Company Law* (Oxford: Oxford University Press, 2003), 261 ff.

[121] L. Gower & P. Davies, *Principles of Modern Company Law*, 9th ed. by P. Davies and S. Worthington (London: Sweet & Maxwell, 2012), 540.

[122] *Ibidem*.

[123] *Ibidem*.

A similar test was considered as too vague, so that the question arose whether the directors should be required to act in the interests of shareholders (shareholder primacy) or give equal status to all the company's various stakeholders (pluralist approach).[124] The final outcome is something between these two extremes. Section 172 (1) continues by setting a non-exhaustive list of six matters to which the directors must "have regard" in performing their duty to promote the success of the company, such as: "(a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company." This provision not only rejects the pluralist approach - given that the interests of stakeholders are subordinate to those of shareholders - [125] but also redefines shareholder primacy. According to the Company Law Review, the philosophy behind the statutory formulation was to be one of ESV.[126]

Italian law has recently followed the UK path both from a doctrinal perspective and in the corporate governance code. Italian legal scholars traditionally recognized that companies must be managed in the company's interest and the majority of them defined it as the common interest of shareholders.[127] Moreover, they identified the company's interest with the purpose of profit, which is one of the core elements of the general definition of a company under Article 2247 Civil Code.[128] As a result, corporate purpose was constructed in terms of maximization of either corporate profits or shareholder value.[129] Exceptions were found in judicial cases, where courts (including the Supreme

[124] *Ibidem*, 541.

[125] *Ibidem*.

[126] DTI, Company Law Reform, 2005, 20.

[127] A. Mignoli, 'L'interesse sociale' (1958) *Rivista delle società*, 725; P.G. Jaeger, *L'interesse sociale* (Milano: Giuffrè, 1964); on the evolution of legal scholarship in this area, see the collective volume *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders. In ricordo di Pier Giusto Jaeger* (Milano: Giuffrè, 2010).

[128] L. Enriques, *Il Conflitto d'interessi degli amministratori di società per azioni*, Giuffrè, 2000, 173; U. Tombari, *"Potere" e "interessi" nella grande impresa azionaria*, (Milano: Giuffrè, 2019), 62.

[129] Ferrarini, note 119. For a radical criticism of this and other concepts of modern corporate law, see G. Rossi, *Il conflitto epidemico* (Milano: Adelphi edizioni, 2003), 47 and 71.

Court) typically defined the company's interest as the interest of the company as such, rejecting the contractarian approach followed by the great majority of scholars.[130]

However, contemporary legal scholars argue that companies could also pursue the interest of stakeholders whenever similar behaviour is instrumental to the maximization of corporate profits in the medium-long term.[131] Moreover, they argue that corporate purpose can be specified in the company's charter, despite the fact that this is not explicitly stated in the law.[132] They also acknowledge that a similar definition could include a reference to stakeholders and to sustainability in general.[133] Consistently, the 2020 edition of the Italian Corporate Governance Code [134] states under Principle 1.I that the board of directors leads the company in the pursuit of its 'sustainable success', while defining the latter as the 'creation of value in the long term to the benefits of shareholders, taking account of the interests of other relevant stakeholders'. This definition follows the ESV approach and the UK model examined above.

3.4. *Are benefit corporations useful?*

The preceding comparative analysis has shown, albeit briefly, that the legal systems examined cannot be rigidly classified as either shareholder or stakeholder oriented. Constituency jurisdictions allow for shareholder value to be maximized (or corporate profits to be pursued), while jurisdictions inspired by shareholder primacy allow for stakeholders to be taken into account by directors and managers in order to maximize shareholder wealth in the long-term. Given the flexibility of company laws as to corporate purpose, the reasons for regulating benefit corporations as either an autonomous type of company or a variation of traditional types of companies are not obvious.

No doubt, benefit corporations emphasize the relevance of stakeholders and allow directors to pursue stakeholders' interest in conformity with the benefit purpose and

[130] L. Enriques, note 128, 162, n. 64.

[131] *See* the discussion by M. Libertini, 'Un commento al manifesto sulla responsabilità sociale dell'impresa della *Business Roundtable*' (2019) *Orizzonti del diritto commerciale*, 602; U. Tombari, *"Potere" e "interessi" nella grande impresa azionaria* (Milano: Giuffrè, 2019), 30 ff.

[132] Libertini, note 131, at 633.

[133] *See* the discussion by U. Tombari, in Orizzonti del diritto commerciale, note 28, 627, at 633. See however, for critical remarks, F. Denozza, 'Lo scopo della società: dall'organizzazione al mercato', *ibidem*, 615, at 617.

[134] Italian Corporate Governance Code (2020), Principle I.

with relative tranquillity as to the risk of being sued by shareholders for breach of fiduciary duties. However, similar results could be reached in many jurisdictions also in the absence of a statute specifically allowing for benefit corporations and the likes, especially if general company law permits corporate purpose to be specified in the articles in ways which go beyond the pure pursuit of profit. Therefore, the main advantage of the benefit corporation appears to be on communication grounds, for the recourse to this form of company is a potent signal of the company's commitment to the care of stakeholder interests and social values, in addition to the pursuit of profit which remains a core component of corporate purpose also in benefit corporations.

4. *Benefit corporations and the new sustainable governance framework*

At this point, we find it interesting to analyse benefit corporations in the context of the pending EU sustainable governance reform, with specific reference to the redefinition of director's fiduciary duties in relation to sustainability goals; to the introduction of due diligence duties and of a corporate accountability regime for environmental and social impacts; to the strengthening of non-financial reporting requirements through the proposed Corporate Sustainability Reporting Directive (CSRD). A similar analysis will allow us to assess the role of benefit corporations by answering two questions in particular. The first is whether and to what extent benefit corporations will be a useful legal form for business once the new sustainable governance framework is in place. The second question is whether benefit corporations could usefully complement such a framework through their special focus on sustainability goals.

4.1 *Fiduciary duties*

Directors' fiduciary duties and corporate due diligence obligations have been addressed by the Commission in the Sustainable Corporate Governance Initiative launched in October 2020.[135] This Initiative sought feedback from stakeholders on the need for EU legislation and its potential scope and structure, in view of enabling

[135] *See* the European Commission Consultation, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance (last visited 15 May 2021).

companies to focus on long-term sustainable value creation rather than on short-term benefits.

(A) The relevant Consultation document, consisting of 26 questions, addressed several issues, including the redefinition of directors' fiduciary duties. The Consultation was preceded and inspired by the 'Study on directors' duties and sustainable corporate governance', prepared by EY and published by the Commission's DG Justice and Consumers in July 2020.[136] This study aimed to "assess the root causes of 'short termism' in corporate governance, discussing their relationship with current market practices and/or regulatory frameworks" and to "identify possible EU-level solutions, also with a view to contributing to the attainment of the UN Sustainable Development Goals and the goals of the Paris Agreement on climate change."[137]

Based on the results of the Study,[138] which were however strongly criticized both by academics and practitioners,[139] the Consultation document argued that companies' social performance should be enhanced through better specification of directors' duties and possibly through changes in the legal regime applicable to them under EU company law. The Commission asked consultation participants to consider whether directors should be required by law to identify the company's shareholders and their interests, to manage the risks for the company in relation to stakeholders and their interests, and to identify the opportunities arising from promoting stakeholders' interests. The Commission also asked whether corporate directors should balance the interests of all

[136] EY, Study on directors' duties and sustainable corporate governance, July 2020, available at https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en/format-PDF (last visited 15 May 2021).

[137] *Ibidem*, i.

[138] The study identified seven key drivers of short-termism: (1) directors' duties and company's interest to favour the short-term maximization of shareholder value; (2) growing pressures from investors with a short-term horizon; (3) companies lack a strategic perspective over sustainability; (4) board remuneration structures that incentivize the focus on short-term shareholder value; (5) current board composition inadequacy to support a shift towards sustainability; (6) insufficient stakeholder engagement and involvement in current corporate governance frameworks and practices; and (7) limited enforcement of the directors' duty to act in the long-term interest of the company.

[139] M. J. Roe, H. Spamann, J. M. Fried, and C. C. Y. Wang, 'The European Commission's Sustainable Corporate Governance Report: A Critique' (2020) European Corporate Governance Institute - Law Working Paper 553/2020; European Company Law Expert Group (ECLE), 'Comment regarding the EY Study on directors' duties and sustainable corporate governance' (2020), available at https://europeancompanylawexperts.wordpress.com/publications/european-commission-study-on-directors-duties-and-sustainable-corporate-governance (last visited 15 May 2021).

stakeholders, rather than focusing on the short-term financial interests of shareholders, and whether this should be clarified in legislation as part of the directors' duty of care.

(B) The Commission's arguments were rejected by scholars as based on logical misconceptions and unjustified assumptions.[140] Firstly, the need to specify directors' duty of care in the sense that directors should take stakeholder interests into account was found unjustified since many EU jurisdictions already allow directors to take stakeholders' interests into consideration.[141] Moreover, the enlightened shareholder value (ESV) approach to the direction and management of companies is widespread in practice and followed by legislators and jurists in several jurisdictions. Under this approach, corporations should take care of the interests of stakeholders in view of their long-term shareholder value maximization. It is however uncertain whether adding a similar requirement through a Directive would make corporate behaviour more sustainable. ESV is widely followed by responsible companies both for reputational reasons and for responding to shareholders' interests. One reason for legislating on this topic could be to protect directors from liability towards the company and its shareholders when they motivate corporate decisions with reference to stakeholders' interests. Another reason could be that company law performs an education function with respect to corporate directors and managers that leads them to take wider account of sustainability issues. However, as we have already argued in section 3, EU member States already provide rules on either corporate purpose or the company's interest in terms that are sufficiently flexible and therefore compatible with sustainability goals.

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[140] European Company Law Expert Group (ECLE), 'Comment by the European Company Law Experts Group on the European Commission's Consultation Document: Proposal for an Initiative on Sustainable Corporate Governance' (2020), available at https://europeancompanylawexperts.wordpress.com/publications/comment-by-the-european-company-law-experts-group-on-the-europeancommissions-consultation-document-proposal-for-an-initiative-on-sustainable-corporate-governance/ (last visited 15 May 2021); and G. Ferrarini, M. Siri & S. Zhu, 'The EU Sustainable Governance Consultation and the Missing Link to Soft Law' (2021), European Corporate Governance Institute - Law Working Paper No. 576/2021.

[141] Ferrarini, note 82.

Secondly, the Commission did not sufficiently consider the role of corporate governance codes[142] and of international principles and guidelines.[143] Indeed, soft law addresses some of the consultation questions that have an impact on the way in which boards perform their activities. Several corporate governance codes in the EU not only recommend boards to maximize shareholder value in the long-term taking into account stakeholders' interest, but also encourage them to adopt CSR policies linking the variable component of executive remuneration to CSR criteria and assigning CSR functions to a pre-existing board committee or to an ad hoc committee. In a previous study, we found that 20 out of 27 corporate governance codes mention stakeholders, with 12 of them also including a more or less detailed definition of them. Most of the definitions provided refer to the OECD Principles' definition of stakeholders and specify the interest groups that fall under it (employees, clients, investors, suppliers, local communities and regulators). More specifically, in different combinations, all the codes just cited recommend the board to identify the stakeholders who are in a position to influence the company's sustainable development; to comply with existing laws protecting stakeholders' rights; to ensure transparency and access to information through constant dialogue and non-financial disclosure; to ensure that stakeholders can freely communicate their concerns about illegal or unethical practices to the board; to promote stakeholder participation in corporate decisions; to report on the board's relationships with stakeholders. Thirdly, potential reforms should be evaluated within the broader context of the measures adopted by the EU legislator aiming to curb corporate short-termism (such as the Non-Financial Disclosure Directive, the Taxonomy Regulation, the Sustainable Finance Disclosure Regulation and the Shareholder Rights

[142] In particular, many corporate governance codes already encourage corporate boards to adopt CSR policies, linking the variable component of executive remuneration to CSR criteria and assigning CSR functions to an *ad hoc* committee, but also include provisions on the treatment of stakeholders' interests. *See* Siri & Zhu, note 94.

[143] Specifically, many international guidelines and principles issued by international organization and standard setters (such as the UN Guiding Principles on Business and Human Rights and the UN Global Compact Principles) have increasingly been adopted by companies, especially in view of strong investor attention to the recourse to policies and practices in compliance with such non-binding recommendations. *See* Ferrarini, Siri & Zhu, note 140; and Mariana Pargendler, 'The Rise of International Corporate Law' (2020), European Corporate Governance Institute - Law Working Paper, 555/2020, FGV Direito SP Research Paper Series n. Forthcoming.

Directive II), which offer better prospects for sustainable governance than the reform of directors' duties that the Commission is planning.[144]

4.2. *Due diligence obligations*

While the introduction of EU rules redefining directors' duties met strong opposition in various circles,[145] the proposal of an EU due diligence framework[146] was better received. In an unusual move (given the initiative powers of the Commission as to legislation), on 11 March 2021 a large majority of the European Parliament voted a resolution concerning a draft directive on corporate due diligence and corporate accountability. This resolution aimed to ensure that all Union and non-Union large undertakings and high-risk or publicly listed SMEs operating in the EU are subject to harmonised due diligence obligations to "take all proportionate and commensurate measures and make efforts within their means to prevent adverse impacts on human rights, the environment and good governance from occurring in their value chains, and to properly address such adverse impacts when they occur".[147] In order to do so, the draft directive would require Member States to lay down rules to mandate undertakings to establish, effectively implement, publish and periodically revise a due diligence strategy, involving relevant stakeholders during the process, and also provide a grievance mechanism in relation to any human rights, environmental, or governance risks.

Similar duties should be performed not only in relation to the firm's own operations nor even just along its supply chain, but along its whole "value" chain, which involves all the "entities with which the undertaking has a direct or indirect business relationship upstream and downstream, and which either: (a) supply products, parts of products or services that contribute to the undertaking's own products or services, or (b) receive

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144 Ferrarini, Siri & Zhu, note 140.

145 For a critical analysis of the Consultation, see Ferrarini, Siri & Zhu, note 140.

146 This was preceded by 'Study on due diligence requirements through the supply chain' published in February 2020. *See* Lise Smit, Claire Bright, Robert McCorquodale, Matthias Bauer, Hanna Deringer, Daniela Baeza- Breinbauer, Francisca Torres-Cortés, Frank Alleweldt, Senda Kara and Camille Salinier and Héctor Tejero Tobed, 'Study on due diligence requirements through the supply chain, Final report' (January 2020), available at https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

147 European Parliament, Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), Annex, Art 1(2).

products or services from the undertaking . . .".[148] National authorities should supervise the correct production, implementation and revision of the strategies, investigate whether the company has complied with its obligations under the Directive, and order the company to take remedial measures and sanction them in the case that such measures are not taken.[149] Moreover, Member States should have a regime of civil liability in place under which companies are to "be held liable and provide remediation for any harm arising out of potential or actual adverse impacts" where they have "caused or contributed to" those harms. In addition, they should provide an extra-judicial remediation process where the company itself identifies that it has caused or contributed to an (actual) adverse impact.[150]

A recent study by ECLE offers a critical evaluation of the draft Directive and offers suggestions for its improvement.[151] A major criticism concerns the reference made by it to international and regional standards in the areas of human rights, the environment and good governance, which were originally negotiated between states as voluntary guidelines, and that cannot be easily embodied in hard law in another context. A similar transposition will be made even more difficult by two features of the Directive, which are (i) the sheer range of international instruments that should be made legally binding on companies, with only a generic reference to the fields (human rights, environment and good governance) to which they should apply; and (ii) the highly supervised context - involving national authorities, stakeholders and courts - in which companies will have to adapt these standards to their particular business operations. Moreover, even if there is a clear aim to maximize the impact of the Directive on non-EU businesses, it is still doubtful which national authority will be expected to supervise

[148] *Id.*, Art. 3(5).

[149] *Id.*, Artt. 12-13.

[150] *Id.*, Art 19 and 10. "Adverse impact" is defined e in Art.3(6) to (8) by reference to a list of international and European standards to be set out in Annexes to the Directive.

[151] *See* P. Davies, S. Emmenegger, G. Ferrarini, K. Hopt, A. Opalski, A. Pietrancosta, A. Recalde Castells, M. Roth, M. Schouten, R. Skog, M. Winner, E. Wymeersch, 'Commentary: The European Parliament's Draft Directive on Corporate Due Diligence and Corporate Accountability', April 19 2021, https://ecgi.global/news/commentary-european-parliament%E2%80%99s-draft-directive-corporate-due-diligence-and-corporate (last visited 15 May 2021); see also G. Ferrarini, 'Sustainable Governance and Corporate Due Diligence: The Shifting Balance between Soft Law and Hard Law', in P. Camara (ed.), *ESG and Corporate Governance*, Forthcoming.

non-EU companies under the Directive, especially those operating in a large part of the EU territory.[152]

4.3. *Corporate sustainability reporting*

On 21 April 2021 the Commission adopted a proposal for a Corporate Sustainability Reporting Directive ('CSRD'),[153] which would amend the existing reporting requirements of Directive 2014/95/EU on disclosure of non-financial and diversity information ('Non-financial Reporting Directive' or NFRD), which notably requires certain large companies[154] to disclose information in relation to environmental, social and employee matters, respect of human rights, anti-corruption and bribery issues, and diversity on company boards.

This proposal followed the consultation process for the revision of the NFRD,[155] which had been deemed as necessary in light of the criticisms raised especially in relation to the lack of a minimum requirement for mandatory third-party verification[156] and other limits in practice.[157] Respondents to the consultation showed support,

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[152] *Id*.

[153] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM/2021/189 final.

[154] This directive applies, specifically, to "large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year. *See* Article 19a of the Non-Financial Reporting Directive.

[155] In accordance with Article 2 of the same directive, in 2017 the EU Commission published some voluntary guidelines on methodology for reporting non-financial information in order "to help companies disclose high quality, relevant, useful, consistent and more comparable non-financial information in a way that fosters resilient and sustainable growth and employment, and provides transparency to stakeholders". The EU Commission further integrated such guidelines to improve the corporate disclosure of climate-related information in line with recommendations made by the EU Technical Expert Group on Sustainable Finance. European Commission. See Guidelines on non-financial reporting 2017/C 215/01 and European Commission. Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-Related Information, C (2019) 4490 Final (17 June 2019). Available online: https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines_en.pdf).

[156] Recital 16 of the Non-Financial Reporting Directive requires that 'statutory auditors and audit firms should only check that the non-financial statement or the separate report has been provided' and leaves to the Member States the discretionary power to 'require that the information included in the non-financial statement or in the separate report be verified by an independent assurance services provider'. The lack of mandatory third-party verification of non-financial statements reduces their reliability level. *See* M. Siri & S. Zhu, 'Will the EU Commission Successfully Integrate Sustainability Risks and Factors in the Investor Protection Regime? A Research Agenda' (2019) *Sustainability*, 11, 1-23.

[157] Empirical research found that non-financial statements are generally affected by lack of quantitative disclosure, lack of clarity concerning the selection and measurability of non-financial targets, but also that they are over-generic, they do not appropriately address climate-related risks nor provide sufficient descriptions of due diligence processes, especially related to human rights and social matters. *See* ESMA, 'Report

amongst other things, for (a) the adoption of a common reporting standard, so as to allow non-financial data comparability, reliability and relevance; (b) the imposition of stronger audit requirements; (c) the digitalization of non-financial information that would become available through a single access point and machine-readability; (d) the requirement on companies to disclose their materiality assessment process; the expansion of the scope of the Directive to a larger number of companies; and (e) the alignment of environmental disclosure with the EU taxonomy.[158]

Based on the feedback given by respondents to the relevant consultation,[159] the upcoming CSRD aims to make sustainability reporting requirements more consistent with the broader sustainable finance framework. To this end, it introduces stricter rules requiring, in particular, that reported information should be audited;[160] that companies should follow mandatory EU sustainability reporting standards to be developed by the Commission expanding on the current set of data to disclose (so as to include, amongst others, the KPIs defined by the company and the progress made towards them);[161] and that companies should digitally 'tag' the reported information, so it is machine readable and feeds into the European single access point envisaged in the Capital Markets Union Action Plan.[162] Moreover, the CSRD extends the scope of the non-financial reporting requirements to all large companies and all companies listed on regulated markets (except for listed micro-enterprises),[163] covering therefore almost fifty thousand companies in the EU, compared to the approximately eleven thousand that are subject to the existing sustainability reporting rules. For listed SMEs, in particular, the Commission will adopt delegated acts to provide simplified sustainability reporting standards, proportionate to their capacities and characteristics.[164]

Enforcement and regulatory activities of European enforcers in 2019' (2020) and Alliance for Corporate Transparency, 'Research Report: An analysis of the sustainability reports of 1000 companies pursuant to the EU Non-Financial Reporting Directive' (2020).

[158] EU Commission, Summary Report of the Public Consultation on the Review of the Non-Financial Reporting Directive, Ares(2020)3997889 - 29/07/2020, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive/public-consultation.

[159] *Id.*

[160] Art 3 of the Proposal for a Corporate Sustainability Reporting Directive.

[161] Art 1 of the Proposal for a Corporate Sustainability Reporting Directive.

[162] *Id.*

[163] *Id.*

[164] *Id.*

4.4. *Impact on benefit corporations*

Following this brief analysis of EU sustainable governance reforms, we examine their impact on benefit corporations and attempt to answer the two questions posed at the beginning of this section: (i) whether the legal form of a benefit corporation will remain interesting for those companies which fall under the new sustainable governance framework; (ii) whether the regime of benefit corporations will usefully complement such a framework. We answer these two questions with reference to each of the areas considered in the present section, i.e. fiduciary duties, due diligence obligations and non-financial disclosure.

Starting from directors' fiduciary duties, our assessment of the proposed EU reform has been critical essentially because national company laws already allow for the specification of similar duties by the courts, also in the direction of sustainable governance, through a consideration of stakeholder interests and long-term value creation. Moreover, soft law instruments already provide recommendations in a similar direction both on organizational grounds (for instance, by suggesting an *ad hoc* committee of the board) and with respect to corporate purpose, which increasingly includes environmental and social sustainability. Furthermore, corporate practice is significantly oriented in the same direction, as shown by the corporate documents of medium/large enterprises such as articles of association, codes of ethics and sustainability reports.[165]

Consequently, the impact of the proposed EU reform of fiduciary duties on companies in general would be modest, assuming of course that the redefinition of such duties were in line with the prevailing trends in corporate law and jurisprudence. Also the impact on benefit corporations would be limited, as this form of company gives prominence to stakeholders' interests in ways that the future EU legislation might also follow. As already argued, the Italian *società benefit* and the Delaware PBCs ask directors to manage the company in a manner that balances the interests of shareholders with those of stakeholders, as well as the public benefit goals.[166] The EU sustainable

[165] Ferrarini, note 82.

[166] Delaware Code, §365 and Stability Act of 2016, §381.

governance framework could therefore overlap with the regime of benefit corporations without necessarily answering the main questions posed by the latter, such as how to solve the trade-offs between shareholders' and stakeholders' interests, and between the interests of given stakeholders. It is also clear that the benefit corporations regime would not usefully complement the sustainable governance framework, unless the former was reformulated so as to help solve the trade-offs just indicated.

The draft Directive on corporate due diligence is likely to have a strong impact on companies in general, despite the criticism made regarding some parts of it in paragraph 4.2.[167] A similar impact would occur also with respect to benefit corporations and shape the monitoring of their negative social and/or environmental impacts in ways that are not foreseen by the legislation concerning this form of company. Interestingly, Italian law defines the 'common benefit' concept also with reference to "the reduction of negative impacts" on stakeholders,[168] while the other laws on benefit corporations are predominantly focused on the generation of positive impacts. Moreover, all laws on benefit corporations lack a specific set of rules and standards concerning the measurement of risks and the negative impacts of business operations, and will therefore be usefully complemented by the upcoming regime. The latter would also remedy some of the weaknesses highlighted with reference to the benefit corporation regimes as to the absence of adequate accountability and enforcement systems. On the whole therefore the new regime will usefully complement the legislations, such as the Italian and French ones, that specifically regulate benefit corporations.

The Corporate Sustainability Reporting Directive, once entered into force in January 2023, will positively affect both the *société à mission* and the *società benefit*, although in different ways depending on their size and their listed/non-listed status. Under the CSRD, large companies and SMEs with securities listed on regulated markets that also qualify as benefit corporations will be subject to a partially overlapping regime with stricter reporting requirements (such as the mandatory audit rule) than those presently applicable under Italian and French law. Non-listed SMEs which qualify as *società benefit*

[167] *Id.* and Ferrarini, note 151.
[168] Stability Act of 2016, §378.

or *société à mission* will not fall under the scope of the CSRD, but only be subject to their present impact reporting duties, while being entitled to follow the upcoming simplified EU sustainability reporting standards for SMEs.

5. *Conclusions*

On the whole, the EU Sustainable Governance Initiative will significantly affect a large number of EU and, to some extent, non-EU businesses, complementing the national rules on benefit corporations in the countries that foresee them, to the extent that they are either listed or large companies falling under the new sustainable governance framework. Once such a framework is in place, national legislators will be in a condition to reconsider the function and value of benefit corporations and determine whether they should either be kept (when present already) or introduced in national company laws, and whether the present regimes are still appropriate or should be changed to better fit the EU sustainable governance regime.

Corporations will also be in a condition to assess whether the legal form of a benefit corporation is still useful to them in the new regulatory context or whether the new rules on sustainable governance are a good substitute for the benefit corporation regimes. We feel that the practical interest for benefit corporations may diminish, unless their regulation is renewed in conformity with the new framework of sustainable governance and the complementarity between the two regimes is enhanced. Clearly, the interest to benefit corporations could remain greater in firms which do not fall under the new framework, such as non-listed SMEs. In general, however, the function and value of benefit corporations will likely be appreciated on grounds other than legal, to the extent that they offer a signal of the firm's commitment to sustainability both outside and inside the organization. To this extent, benefit corporations could usefully complement the sustainable governance framework by adding a better focus on the pursuit of corporate purpose and on the communication relative to it.

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