

# The Italian benefit corporation: to profit and .... beyond!

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Benefit corporations are for-profit companies that – in addition to maximize shareholder’s value and profits – undertake to expand their purpose to explicitly include the creation of public benefit and the commitment to carry out their activities in a responsible, sustainable and transparent way, in favour of persons, communities and environment. They are being introduced in some legal systems to meet the global trends demanding greater accountability and transparency from business and stimulate a new role that business can and should play in society.

Italy is the first country after US to have introduced in its legal system (Law n. 208 of December 28, 2015, hereinafter “Law”) the so called “società benefit” (hereinafter “SB”). The main characteristics of the SB are taken from the US benefit corporation, which was firstly introduced in the US legal system in 2010 in Maryland and then in other 29 US States.

## What is a benefit corporation?

The distinguishing features of the Italian SB are: (i) the legal duty to create general public benefit in addition to financial return; (ii) to carry out its activities in a responsible, sustainable and transparent way in favour of persons, communities, environment, cultural and social activities, associations and other stakeholders (hereinafter collectively “Beneficiaries”); and (iii) the impact of the SB’s activities must be assessed annually by the directors with a written report, and must take into account the requirements set forth in Annex 4 to the Law.

The Italian legislator did not create a new form of corporation but provided for that any company can change its status and become an SB. It is the intentional creation of social and economic benefit that differentiates the SB from traditional for-profit and non-profit entities. In an SB the directors are committed to pursue the general benefit, while the market and the public must be correctly and transparently informed on how the corporation is achieving its goals.

## What are the advantages of becoming an SB?

Benefit corporations can help meet the demands of those who are interested in having their business help solve social and environmental challenges. Becoming an SB can also help the company to grow its business and market share, since an increasing number of consumers expect companies to act and align their policies to a sustainable growth, to take into consideration not only profit but also values like the need of social communities and the impact on the environment.

## The benefit activities

The activity/ies of public benefit selected by the SB must be specifically indicated in the SB’s bylaws and must be achieved taking into account and balancing both the shareholder’s interest and the interest of the Beneficiaries. The SB must achieve a general public benefit (“beneficio comune”). This is defined both to induce a positive impact or reduce the negative effects on the Beneficiaries and other stakeholders (“altri portatori di interesse”). Other stakeholders are the persons or groups who benefit from the SB’s activities, such as workers, customers, suppliers, financial backers, creditors, public administration and civil society.

## The annual report

The SB must prepare annually a report (to be attached to the yearly financials) where it assesses the impact of its activities on the general public benefit. The report must be published on the SB’s website. The report must include: (i) a description of the ways and actions implemented by the directors to pursue general public benefit during the year and any circumstances that have hindered or delayed its creation; (ii) an assessment of the SB’s performance

determined taking into account the standards outlined in the EAS; **(iii)** a section outlining the new goals that the SB wants to achieve in the following year.

### Third-party validation

The report must be prepared applying a third-party standard (“standard di valutazione esterno” or “EAS”) that must be: **(i)** comprehensive because it assesses the effects of the business and its operations upon the general public benefit; **(ii)** developed by an entity that is not controlled by the SB; **(iii)** credible because it is developed by an entity that both: (a) has access to necessary expertise to assess overall corporate social and environmental performance; and (b) uses a balanced multi-stakeholder approach to develop the standard, including a reasonable public comment period; **(iv)** transparent because the following information is publicly available: (a) the criteria considered when measuring the overall social and environmental performance of a business; (b) the relative weightings, if any, of those criteria; (c) the identity of the directors, officers, material owners, and the governing body of the entity that developed and controls revisions to the standard; (d) the process by which revisions to the standard and changes to the membership of the governing body are made; (e) an accounting of the revenue and sources of financial support with sufficient detail to disclose any relationships that could reasonably be considered to present a potential conflict of interest.

The EAS is not to be confused with the B Lab certification that – contrary to the EAS – is not mandatory. An SB can become a B Corp (Benefit certified corporation) by meeting the B Lab standards and obtain the relevant certification. B Lab is a non-profit organization that serves a global movement of people using business as a force for good.

### The areas of assessment

The assessment of the effects of the SB’s activities, must include the following areas: **(i)** SB’s corporate governance: so that to assess the degree of transparency and commitment of the corporation for the achievement of the benefit indicated; **(ii)** employees: to determine the relationship with workers and associates in terms of salary, other benefits, training opportunities, quality of the workplace, internal communication, flexibility and health & safety at work; **(iii)** other stakeholders: to assess the relationship of the corporation with suppliers, the territory and local communities, charity activities, donations, cultural and social activities and any other actions implemented to support the local development and the SB’s supply chain; **(iv)** environment: to assess the impact of the SB’s products and activities regarding the use of resources, energy, raw materials, the manufacturing, logistic and distribution cycles, the use, consumption and disposal of the products.

### Directors’ duties

In addition to the general duties that directors have under Italian corporation laws, the SB legislation set forth specific duties that SB’s directors must comply with. Section 380 of the Law set forth that the SB must be managed in way to balance the interests of shareholders, the pursuing of the general public benefit and the interests of the other Beneficiaries. The corporation must appoint the person/s who shall have the responsibility to achieve the goals indicated, who can be one of the directors but also an officer of the corporation or a third party, taking however into account the general duty that directors have to put place a corporate governance structure that is adequate for the dimensions and nature of the corporation. If this duty is delegated to a third party, it is appropriate that the delegate has enough experience in the specific sector that the SB has chosen for achieving the general benefit.

### Directors responsibilities

SB’s directors (like directors of any other corporation) must act in the best interest of the corporation and in compliance with the obligations set forth by the law and the corporation’s bylaws. Directors have a duty of care, duty to act knowledgeably (for example, with the appropriate skill and professionalism) and to monitor the actions of the other directors.

The extent of these duties and responsibilities and the standard of care required for each director depend on the

director's office and specific expertise. Directors may have civil liability duties towards: **(i)** the corporation, if they have caused damage to that corporation due to the breach of the law, the corporation bylaws, or the general duties; **(ii)** the corporation's creditors, if the directors have breached the specific rules regarding the preservation of the corporate assets, and those assets are insufficient to pay the creditors off; **(iii)** each shareholder and each third party, if they have suffered direct damage from an act performed with fraud or gross negligence by the directors.

As to the SB, it is questionable and still to be assessed by jurisprudence, whether directors can have any liability towards the other Beneficiaries. In any event, directors are not accountable and responsible for the negative results of the corporation provided that their decisions were taken with adequate diligence and with the goal of achieving the corporate object. SB's directors are however liable in the event they fail to appoint a person who has the duty to supervise, control and be responsible to implement all actions necessary to achieve the general benefit. The Law does not provide any sanctions for failure to prepare the annual report but, since this is mandatory obligation, directors shall be liable also in this latter case.

### Sanctions for non-compliance

The Law set forth that the SB which fails to achieve the general benefit indicated, is subject to the sanctions established by Legislative Decree 145/2007 (governing unfair competition and misleading advertising) and by Legislative Decree 206/2005 (the so called Consumer's Code, with particular reference to the rules regarding the prohibition of unfair commercial practices). This provision was enforced in order to guarantee that all information disclosed to the public are true and accurate so to avoid that an SB that does not comply with the Law, take any illicit advantage with respect to its competitors as well to avoid any distortion of the information provided and disclosed to consumers. It is the Italian Competition Authority (Autorità garante della concorrenza e del mercato) that shall have the duty to sanction any non-complying SB, with administrative sanctions provided for by the law.

**References:** Assonime, Circolare n. 19, of June 20, 2016; Esela – The first European benefit corporation: blurring the lines between social and business; Le società benefit – La nuova prospettiva di una Corporate Social Responsibility con Commitment (Fondazione nazionale dei Commercialisti); Domenico Siclari – Le società benefit nell'ordinamento italiano; Autorità garante della concorrenza e del mercato <http://www.agcm.it/en>

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