



# Benefit corporations: are they really sustainable?

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# In general

What is a company for?

- Profit...
- ...or more?

In this area we have to consider sustainability – hard to define!  
- But this does not necessarily involve more costs for the company

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# We can distinguish...

- Between
    - Usual companies
      - Mainly – usually just profit

and

  - “good” companies
    - Not just profit but some social benefit
      - Who decides when a benefit is a benefit?
      - And how much?
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# Usual companies

- Some benefits for the community...
  - ...but most commonly as a marketing perspective
    - Medium to long-term advantage for the company (reputation)
  - Stronger commitment *might be* possible, but rather rare
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# Whose commitment?

- 2 levels:
    - Fundamental basis: members/shareholders
    - Management basis: directors
  - Theoretically, the directors could never go against shareholders
    - Practically, well, they have their own interests...
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# But there is a huge “if”

- What is a *normal* company for?
  - Just profit?
  - Profit, and...?
  - Not the same everywhere: more or less shades, but there is a grand classic: profit maximisation (mainly in the US)
    - Social norm, not legal norm
    - Easier life for directors; easier to have them liable
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# Who maximises and for whom?

- The directors, theoretically in the interest of the shareholders
    - But not necessarily
  - What can shareholders do to impose decision to the directors?
    - Depending on the national company law
    - Anyway, in general dismissal
    - But again in general, the directors hold the management power
  - These decisions might be dealing with social benefits:
    - This is the starting point of benefit companies
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# Benefit companies, where do they come from?

- Private labels for a private certification Certified B-Corp
  - US company B-Lab
  - The underlying idea: in the US profit maximisation is the strongest – if I want to be different, I need to signal my enterprise
    - Only where (State-based company law) I am allowed to
    - Also – but not only – marketing purpose
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# No problem, so far...

- ... the problem is when the label passes from private to public...
  - ... and the how this is carried out!
  - By the way: not all of them are even named as “benefit”
    - E.g. in France, *société à mission*
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# B-Lab as a private lawmaker... or lobby

- From a private certification B-Lab develops a Model Benefit Company Legislation...
  - ...and submits it to local lawmakers, to overcome the necessary profit maximisation paradigm by creating a new model of enterprise)
    - In the US: Maryland (2010), + 36!
    - The assumption is debatable in its fallout...
  - But also where there is not a strict logic of profit maximisation!
    - EU: Italy, France, Spain...
    - And other: BC, Columbia, Ecuador, Peru, Puerto Rico
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# What do they do?

- Profit is pursued along with a public benefit
    - General benefit
      - Positive material impact or reduction of negative material impact on the community and the environment generally considered
    - And/or special benefit
      - Identification of a series of categories and people in the articles of incorporation
        - People, communities, territories, environment, cultural and social activities, , workers, customers, suppliers...
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# General vs. special benefit

- General: model act -> general commitment
  - Special: Delaware, Italy -> specific identification of beneficiaries
  - Risk: even if special, too generic
    - If it is so, what's the directors' actual duty?
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## But the point is that...

- If there is a specific benefit purpose in the articles, the directors *must* pursue it
    - If there is a general benefit, not necessarily, at least in the States
  - Discretionarily on the how, but not on the *if*
    - As it is in usual companies
    - Duty to balance between the profit and the benefit
      - Even if this is not necessarily true...
      - Cases where the company increases its profits via benefit activities
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# How to do that?

Duty of care: the company must be managed in a...

- ...Transparent,...
- ...Responsible, and...
- ...Sustainable -> meaning? Perhaps not damaging one stakeholder while benefitting another (principle ex Taxonomy regulation)

Way

E.g.: Delaware and Italy

But: what about the “normal” companies’ duty of care?

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# Benefit impact ad its measurement

- Standards...
  - Generally elaborated by B-Lab
  - Fine, if it is just a private label...
  - ...but if it is a public model...
    - Huge risk of conflict of interest
    - And very arbitrary threshold settings
      - There is for the private label (very low: 80/200)...
      - ...but for the public one, apart from France...
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## But in any case....

- This does not deal with the company's qualification!
  - In most cases, it is a self assessment, and box-ticking
  - Only in France there is a much more effective system of external assessment
    - Perhaps even too demanding! Very few sociétés à mission
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# Where does the information go?

- Benefit report:
    - What you've done in general
    - In specific common benefit
    - Obstacles
    - Justify the chosen standard
  - Yearly issued (every second year, Delaware)
  - Duty of the directors
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# Who's in charge?

- The benefit officer (Model legislation and Italy; or the comité de mission in France)
    - Specific obligations regarding the pursuit of the benefit purpose
    - Specific obligations regarding the drafting of the report
  - In charge for enacting?
    - Depends if director (in Italy not necessarily; in France neither, and with the participation of an employee) – and the role
    - For sure duty to give advice to the directors on the topic
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# The directors (or officers)

- Duty to balance profit and benefit purpose...
  - ...but how doing that is left to them
  
  - Clearer obligations if specific (very specific) common benefit
  - Blurred obligations if general benefit
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# What if... they do not comply?

- This is the major of the flaws
  - The directors are liable, everywhere, but towards the company and the shareholders...
  - ...never towards external constituencies/stakeholders
  - The point is private or public (somehow France) enforcement
    - In Italy (but in general in the EU): unfair competition (customers and competitors entitled)
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## And also...

- ... in many jurisdictions, the shareholders need to point out a damage for the company to sue the directors...
  - ... what if no damage occurs as a consequence of non-compliance? Or even more profit was produced?
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# Some other flows

- The spirit
    - Do we really need specific company forms to have “good” companies?
      - France shows that very well with a three-step system coming with the Loi Pacte:
        - Directors' duties towards constituencies other than shareholders (enlightened shareholders' value – Section 172 CA UK 2006) – directors' possibility
        - company's purpose
        - sociétés à mission – directors' duty
  - The wording in some States
    - Italy, for instance: de facto no pursuit for common benefit purpose (not singular one-off activities) by normal companies
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## Some other flows

- What if the main purpose is reputation? Is there a minimum benefit threshold required?
  - Public/private non-competition with B-Lab: conflict of interests
  - Public assessment (apart from France)
  - But, in general: is it up to the State supplying labels?
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# What about sustainability

- Considered in the duty of care
  - Possible (but needed?) in the activity
    - Sure that every kind of common benefit falls within sustainability?
    - Sure that companies with very impacting activities are forbidden from getting the qualification?
      - Questioning the general holistic idea of sustainability
  - In the multi-stakeholder perspective, is there a balance between the benefit activities?
  - Pay attention to unintended consequences: to have a more sustainable specific company form, there's the risk that the others will go more towards a profit-only approach
    - Would this be good, for the system as a whole?
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