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BLEUSE
BUSINESS LAW IN THE EUROPEAN UNION
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Using Consumer Protection for a More Suitable Corporate Governance?

Benefit companies, social enterprises, third-sector organisations: evidence from Italian Business Law

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The key question

How can we enforce companies with a theoretical "social purpose" to actually walk the talk?

A preliminary issue: *which kind* of companies? And *where*?

- Social enterprises?
- Other "social" organisations?
- Benefit companies?
- …and common companies?

and

- In Italy,
- But with a few remarks applicable at least Europewide…

Unfair Competition in Italy: an overview

- Art. 2598 Civil code
  - Specific practices
    - Confusion, imitation, denigration, misappropriation of the qualities of other entrepreneurs
  - General clause
    - Whoever uses, in a direct or indirect way any other instrument not appropriate to the principles of business loyalty, and suitable to create a prejudice to another enterprise
- Unfair commercial practices (arts 18-27 Consumers' code)
  - "any act, omission, conduct or statement, commercial communication, including advertising and marketing of the product, by a professional, in connection with the promotion, sale or supply of a product to consumers"…
  - …which is "contrary to professional diligence", and is false or likely to distort to an appreciable extent the economic behaviour in relation to the product of the average consumer to whom it reaches or to whom it is addressed, or of the average member of a group if the commercial practice is addressed to a particular group of consumers

Is this interesting for our purposes?

Definitely yes!

There is a competition between "common" and "sustainable" operators, within the same market

- The "sustainable (economic) operator" satisfies at once both the markets' and collective needs
  - But there is not a one-size-fits-all approach: the measure of such an approach is dependent on its members' decision
    - Somehow shareholders' primacy? Perhaps, but we have always the need to understand if and how shareholders have the power to enforce directors' approach to the business
  - The operator needs to signal its "sustainable attitude" to the market
    - And here we need to verify whether such a *declared* sustainable approach has really been *actually* pursued

What enterprises are we talking about?

"Social" business organisations

- Social enterprises (properly speaking) (2006, ref. 2017)
- Third sector organisations (unified 2017)
  - When pursuing economic activity (not necessarily social enterprises)

"Common" business organisations, with "sustainable approach"

- Benefit companies (*società benefit*) (2016)

- Other companies?
  - Rather questionable under Italian Law
  - Distinction to be made between "common good purpose" and "common good activities"

"Social" business organisations

Innovations in July 2017

- Third-Sector Organisations (no profit purpose)
- Social Enterprises (since 2017, in a few cases, low profit purpose)
  - That are *ex lege* Third-Sector Organisations

Specific "civic, solidaristic and social utility" purpose by means of activities "of general interest"

- Important: such activities could be carried out by "common" enterprises as well. No exclusivity, but competition

"Social" business organisations

Two specific and exclusive labels (and necessarily registered in a public register)

- If they fail their mission, they are removed from the register
- They *must* use the label: no choice

Why?

- Tax-law related benefits
- And, naturally, commitment recognition

What if they don't walk the talk?

Unfair competition remedies are naturally applicable:

- Consumers
- Competitors

This usually leads to the "disqualification" of the organisation as a Third-Sector organisation, or Social Enterprise

- But they however remain a business organisation

Benefit companies (and partnerships, and beyond…)

- Basic notion in Italian Law: the company's or partnership's purpose is to distribute the generated profits among its members
  - Issues: not necessarily with a short-term maximisation…
  - …but also pursuing a longer term interest, if this is economically profitable for the company (even just as far as reputation is concerned? Depends…)
  - In general, this applies to any company or partnership

- Since 2016, Benefit companies
  - Not a company form, but basically a label
  - Compatible with all the existing partnerships, company and even cooperative forms
  - Directors have the *duty* to pursue a common good purpose, along with (balanced with) the profit one
    - The common good purpose is to be specifically stated in the articles of association

Benefit companies (and partnerships, and beyond…)

- Profit purpose is always present…
- … But it *must* be balanced with a common good purpose

Other companies?

- According to the Italian Law, partnerships and companies "that are not *Società benefit*, if they also intend to pursue common benefit purposes, must modify their articles of association"
  - By this means, they – IMO – convert into *Società benefit*
    - The only legal requirement is the mention of the purpose in the articles
  - And this means that *Società benefit* only are entitled to pursue common benefit purposes
    - Other "common" companies could carry out activities (but not purposes)
      - Very much border-line… And without a penalty!

Benefit companies (and partnerships, and beyond…)

- How is the sustainable approach of SB advertisable?
  - By integrating company's name with the letters "SB", or "Società benefit"
    - This is possible, but…
    - … It is not mandatory
      - This is different from Social Enterprises and Third-Sector Organisations

- Besides this, how can we be sure that the SB (irrespective of its actual denomination) is actually walking the talk?
  - The biggest problem: is there a minimum threshold for common benefit purpose/activity?
    - NO!
  - And is it to be scientifically assessed?
    - Yes, with the report. But if the minimum is really a minimum… This is a substantive problem in any case

The choice of being a SB could be simply driven by reputational advantages… With no need for an effective common benefit purpose to be pursued

Two basic questions

1. What if the SB does not pursue any common benefit purpose?

2. What if the SB actually pursues just minimal common benefit purposes? Are there limits to hinder such a practice?

Question one: no common benefit purpose at all

- Company law profile:
  - Directors' liability
    - Debatable whether it is actually enforceable, and above all, by whom...
      - For sure shareholders (do they have an interest?)
      - What about (other) stakeholders? Much more than debatable, according to the current jurisprudential interpretation in Italy

- Competition law (market) profile:
  - We are facing here a unfair commercial practice (and misleading advertisement)
  - And Italian Law explicitly refers to this in the SB rules

Question one: no common benefit purpose at all

The issue is very relevant: there was no need for a specific mention of the application of the rule

- And it would have been reasonably held as applicable in any case to SBs that are advertised as SBs...
- But what about SBs *legitimately not advertised* as SBs?
  - Without a specific reference to the competition law rules, they would have not been punished
  - This means that, *in this case only*, the social object clause in the articles of association has an external relevance that is not cmmonly recognised
- And, even more, it is to be held as an advertisement, even if the common consumer does not usually check the trade register (i.e.: where the articles are publicly available)

Question two: just minimal benefit purpose

- Italian Law on SB is silent on this
- But we have, in this case, too, the rules on misleading commercial practices
  - i.e.: that practice that "even if the information is factually correct", it nevertheless "causes or is likely to cause" the consumer to take a decision that he would not have taken, based on, i.a., "the extent of the trader's commitments, the motives for the commercial practice"
- Therefore, if the alleged SB's commitment is minimal, such a solution is likely to be used

Question two: just minimal benefit purpose

This means that the competent authority for deciding on this claim would be the administrative or judiciary body with a competence over unfair commercial practices, in Italy the AGCM (Independent Authority on Competition and Market – Antitrust)

Such a conclusion seems to be extremely useful: a specialised authority would take care of these issues too. It could serve as a sort of qualified gatekeeper, also with reference to the minimum quantity of common benefit purpose (and therefore activity) is to be carried out by a company for being a SB.

And non-SB companies?

- A few issues:
  - No purpose, but activity
  - How has it been advertised/disclosed?
    - Articles? NO: it would be a SB
      - But, even in the case (with reference limited to activities), debatable whether third parties can rely on the articles without a specific enabling rule
    - Other means of disclosure? If addressed to third parties, competition law remedies apply
      - Therefore, national competent authorities would perfectly serve to set the appropriate and consistent thresholds in this case, too
  - In any case: no specific remedies at company law seem to be available

And outside Italy?

- The competition law remedies we observed so far come from EU Law
- In particular, see Directive 2005/29/EC of the European Parliament and of the Council on unfair business-to-consumer commercial practices in the internal market, especially art. 6 on misleading actions
- The national competent courts or administrative authorities would therefore serve as gatekeepers
  - This would facilitate the possibility for a sort of bottom-up harmonisation if national authorities agree a common approach to the issue
  - Pursuant to the specific features proper to each national experience in the area of business organisations pursuing (at least partially) common interest goals

Thank you very much for your kind attention!

Questions?

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