



Benefit companies in the US and in the EU

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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



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
 - 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...
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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
 - Social norm, not legal norm
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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
 - 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 lawmaker... or lobby

- From a private certification B-Lab develops a Model Benefit Company Legislation...
 - ...and submits it to local lawmakers, to overcome profit maximisation paradigm (a new model of enterprise)
 - In the US: Maryland (2010), + 36!
 - 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
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But the point is that...

- If there is a specific benefit purpose in the articles, the directors *must* pursue it
 - 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...
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How to do that?

- Duty of care: the company must be managed in a...
- Transparent
- Responsible
- Sustainable -> meaning? Perhaps not damaging one stakeholder while benefitting another (principle ex Taxonomy regulation)

Way

Delaware and Italy

N.B.: what about the “normal” companies?



How to measure the impact?

- 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
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But in any case....

- This does not deal with the company's qualification!
 - In many 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!
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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) – 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
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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?
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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: no pursuit for common benefit by normal companies
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Some other flows

- What if the main purpose is reputation? Minimum benefit?
 - Public/private non-competition with B-Lab: conflict of interests
 - Public assessment (apart from France)
 - But, in general: is up to the State to supply labels?
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