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# SUITABLE BUSINESS LEGAL STRUCTURES FOR SUSTAINABLE TRANSPORT. THE BENEFIT CORPORATION

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## 1. *Making the transport sector sustainable: an ambitious, but necessary goal*

The transport sector is crucial in today's economy and society and has a big impact in particular on employment and growth, making "a decisive contribution to social and territorial cohesion, industrialization and economic development" [1].

At the same time, however, it is also the largest contributor of greenhouse-gas emissions at global level (28% of total emissions in the EU) [2]. For accelerating the transition process toward a sustainable economy [3] a

[1] «With transport contributing around 5% to EU GDP and employing more than 10 million people in Europe, the transport system is critical to European businesses and global supply chains. At the same time, transport is not without costs to our society: greenhouse gas and pollutant emissions, noise, road crashes and congestion» (European Green Deal, available at *https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/transport-and-green-deal_en).*

[2] *Luca Milani/Detlev Mohr/Nicola Sandri*, "Built to last: Making sustainability a priority in transport infrastructure", October 2021, available at *https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/built-to-last-making-sustainability-a-priority-in-transport-infrastructure.*

[3] *Paul Adrianus van Baal, Matthias Finger*, "The converging Energy-Mobility System needs an integrated Approach for the Sustainability Transition", Network Industries Quarterly, 2020, Vol. 22, issue 2, 3 et seq.

worldwide approach to transport decarbonization is therefore needed [4].

Policy makers and institutions at global level are indeed expressing growing concerns about the need for a substantial intervention in this field and are proposing several legislative measures to buffer especially the climate emergency.

The European Union is aiming to make Europe the first climate neutral continent by 2050 and, with the *European Green Deal*[5] and the *Fit for 55% Package* presented in July 2021 [6], has already adopted several initiatives [7], with the purpose, on the one hand, to impose the reduction of $CO_2$ emissions in road [8],

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[4] This is even more true after the Covid-19 crisis, which has indeed affected transport and connectivity by severely limiting them, but at the same time has raised the attention on the opportunities for a radical rethinking of the transport system: «While the Covid-19 crisis has profound implications for the global economy and transport network, it has also resulted in a high degree of creativity in responding to the crisis, as manifested through changes in business models across the industry, altered habits of transport users, as well as the more concerted effort by private companies to share data so as to help shape evidence-based government policies and decisions in response to the pandemic. Building upon this momentum can help to pave the way towards a more sustainable, integrated and reliable mobility system, while contributing to the Commission's decarbonisation and digitalisation agendas» (*Teodora Serafimova*, "Covid-19: An Opportunity to redesign Mobility towards greater Sustainability and Resilience?", Network Industries Quarterly, 2020, vol. 22, No. 2, 21).

[5] See the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (*European Green Deal*), available at *https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0006.02/DOC_1&format=PDF*.

[6] The *Fit for 55 Package* is a set of proposals aiming at revising and updating EU legislation and at putting in place new initiatives to ensure that EU policies are in line with the climate goals agreed by the Council and the European Parliament". Its name refers to the EU's target of reducing net greenhouse gas emissions by at least 55% by 2030. The measures proposed aim at bringing EU legislation in line with the 2030 goal and at providing a coherent and balanced framework for reaching the EU's climate objectives, which: «ensures a just and socially fair transition; maintains and strengthens innovation and competitiveness of EU industry while ensuring a level playing field vis-à-vis third country economic operators; underpins the EU's position as leading the way in the global fight against climate change» (*https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/*).

[7] The strategic long-term vision for a prosperous, modern, competitive and climate neutral economy has been described by the European Commission in its *Communication* of 28 November 2018 "*A Clean Planet for All*" (*https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0773&from=EN*).

[8] See Directive (EU) 2022/362, amending Directives 1999/62/EC, 1999/37/EC and (EU) 2019/520, as regards the charging of vehicles for the use of certain infrastructures, also known as the *Eurovignette Directive*. It provides the legal framework for charging heavy goods vehicles (HGVs) for the use of certain roads, sets the minimum levels of vehicle taxes for HGVs and specifies the modalities of infrastructure charging, including the variation of charges according to the environmental performance of vehicles.

air[9] and sea[10] transport, and, on the other hand, to encourage forms of mobility considered more eco-friendly, such as railways[11].

But the focus on the problem is high worldwide.

Recently (on August 16, 2022) the *Inflation Reduction Act* has been issued in the US, which is considered the largest piece of United States federal legislation ever to address climate change. Aim of the bill is to curb inflation by reducing the deficit, lower prescription drug prices and invest into domestic energy production while promoting clean energy. To this end, it plans to invest $391 billion in provisions relating (not only to energy security, but also) to climate change[12].

Furthermore, the very recent Report intitled "*Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions*" released on 8 November 2022 at *COP27* by the *United Nations' Expert Working Group*[13] highlights the extremely critical situation and makes very clear that measures have to be urgently taken at different level and in different directions, stressing in particular the role played not only by governments – that have of course "to take the lead in reducing emissions" – but also by "non-state actors", whose actions are critical in achieving global net zero[14].

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[9] The package of proposals presented by the European Commission on 14 July 2022 includes also a draft regulation to ensure a level playing field for sustainable air transport, also known as the *ReFuelEU Aviation initiative*, which «proposes obligations on fuel suppliers to distribute sustainable aviation fuels (SAF), with an increasing share of SAF (including synthetic aviation fuels, commonly known as e-fuels) over time, in order to increase the uptake of SAF by airlines and thereby reduce emissions from aviation» (*https://www.europarl.europa.eu/thinktank/it/document/EPRS_BRI(2022)698900*).

[10] About the maritime transport, in the *Fit for 55 Package* is included the Proposal for a Regulation of the European Parliament and of the Council on the use of renewable and low-carbon fuels in maritime transport amending Directive 2009/16/EC, aimed at increasing the demand of renewable and low-carbon fuels (RLF) in the maritime transport sector.

[11] According to the European Union, rail is, in fact, by far the greenest mode of mass transportation (it accounts for less than 0.5% of transport-related greenhouse gas emissions). The *Fit for 55 Package* foresees a set of measures aimed at incentivizing this form of clean mobility.

[12] The bill also provides funds toward the decarbonization of the economy in other areas, providing various tax credits and grants and loans toward decarbonizing the industrial and transportation sectors.

[13] *United Nations' High Level Expert Group on the net zero emissions commitments of non-State entities*, "Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions", 2022 available at *https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf*.

[14] See *Giuseppina Capaldo*, "Linee evolutive in tema di soggetti per una società sostenibile", Persona e mercato, 2020, 335 et seq.

## 2. *Attracting private capital for the sustainable transport (r)evolution*

The transformation towards sustainable transport calls for an integrated approach. Not only technical innovation and increased digitization (the "indispensable engine" of the transformation of the transport system, in order to make it more efficient, safe, reliable and comfortable [15]) are needed; but also the creation of a favorable legal framework for sustainable transport enterprises.

The enormous amount of financial resources required for the achievement of a sustainable transport system [16] makes it essential, indeed, to engage the private sector, that will play a crucial role «to fill the infrastructure investment gap, particularly given current strains on public finances».

As acknowledged by the European Commission in the European Green Deal, reaching the sustainability objectives (also) in the transport sector means, in fact, to encourage "efforts to direct private capital towards interventions in favor of the climate and the environment".

Furthermore, the relevance of the non-state sector was stressed in the already mentioned UN-Report presented at Cop27, that recognizes the crucial role played in achieving this goal not only by multinational enterprises, but also by smaller non-state actors. In fact, to be able to "peak global emissions in just three years, by 2025, and cut emissions in half in less than eight years, by 2030 […] money needs to move from funding fossil fuel infrastructure and instead be invested at scale in clean energy. The decisions made by governments and nonstate actors today, tomorrow, and each and every day after will determine whether we meet this goal, and whether we meet it in a way that enhances equity, justice, empowers women, and respects Indigenous rights» [17].

It is thus necessary to develop a regulatory framework that will make green and sustainable transport enterprises more attractive to investors, recognizable and trustworthy in their commitment towards more sustainable business practices.

This should also encompass, on the one side, innovation in the financial

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[15] To this end, the revision of the *EU Directive 2010/40 /EU* on intelligent transport systems is planned: systems that integrate telecommunications, electronics and information technologies with transport engineering in order to plan, design, make operational, maintain and manage the transport systems (Whereas n. 4 of the *Directive*).

[16] «By 2050, global investment needs for land transport infrastructure will reach USD 3 trillion per year on average» (*OECD*, "Mobilising private investment in sustainable transport structure", available at *https://www.oecd.org/env/cc/financing-transport-brochure.pdf*).

[17] *UN High Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities*, "Integrity Matters", *supra* note 13, 7.

sector [18], especially through the development of new instruments specifically aimed at developing sustainable projects in the transport field, and, on the other side, creation of new legal structures that integrate financial returns and positive social and environmental impact [19].

One possible way for sustainable enterprise to channel private investments towards projects implying a virtuous change in the transport sector, is the issuance of green bonds [20] by private (financial or non-financial) companies, whose proceeds are dedicated to the implementation of eco-sustainable projects. Characterized by a very rapid development, these private capital raising tools are, indeed, described by the European legislator as "one of the main instruments for financing investments related to low-carbon technologies, energy and resource efficiency, as well as transport infrastructures".

Another possible way to finance sustainable entrepreneurial activities in the transport sector il also to invest in stocks issued by green and sustainable transport companies and in funds that hold their stocks [21]. The green stock market has indeed rapidly grown in the recent years, due also to the investors' sensitivity for environmental, social and governance issues related

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[18] See *Giovanni Strampelli*, "Gli investitori istituzionali salveranno il mondo? Note a margine dell'ultima lettera annuale di *Blackrock*", in Rivista delle società, 2021, 54 et seqq.

[19] Mobilizing private capital financing requires in particular the development of effective tools for private sector engagement, considered that debt and equity are the most common investment instruments that can «seek or facilitate private sector investments in adaptation projects». See *Climate Action Network Europe (CAN)*, "Climate change adaptation and the role of private sector. Creating effective tools for private sector engagement", April 2013, 10, available at *https://climatenetwork.org/*.

[20] Green, blue, sustainable, climate aligned bonds are all forms of bonds characterized by the allocation of the capital raised to eco-sustainable project. See *Monica Cossu*, "Delle scelte di investimento dei Post-Millennials, e del difficile rapporto tra analfabetismo finanziario e finanza sostenibile", Rivista delle società, 2021, 1253 et seq.; *Gabriella Iermano*, "I *green bond* tra incertezze definitorie e nuove prospettive *de iure condendo* alla luce della recente proposta di Regolamento europeo", in *Maria Cristina Quirici* (ed), "La finanza sostenibile nella politica economica dell'Unione Europea: i *green bond*", Giappichelli, 2022, 112.

With specific reference to green bonds associated with sustainable transport projects, see in this volum *Maria Cristina Quirici*, "Green bond as instrument of impact investing for financing sustainable transports"; *Arunma Oteh/Nancy Vandycke/Mafalda Duarte*, "Transition towards sustainability mobility – Where is the financing?, 26 April 2021, available at *https://blogs.worldbank.org/transport/transition-towards-sustainable-mobility-where-financing*.

[21] In the US market «California's move to phase out new gasoline cars by 2035 and the Inflation Reduction Act's support for renewable energy seems to be creating new momentum for environmental investing». This is, for instance, the case of the stocks issued by one of the leading electric vehicle maker globally, which promises less emissions in the auto sector (*Matt Whittaker*, "9 Best Green Stocks and EFTs to Buy", in US News, August 31, 2022, available at *https://money.usnews.com/investing/stock-market-news/slideshows/best-green-stocks-to-buy?slide=2*).

to their investments and, in some cases, to the incentives given by recent legislative acts, which may help buy green stocks and funds [22].

The development of the market of sustainable debt or equity instruments issued by private companies exposes, however, a major question: are their issuers trustworthy enough in their commitment towards sustainability? Or is there a possible conflict between the institutional goals of private companies, which are (mainly) by legal definition profit-oriented business legal structures, and the sustainability goals?

Pursuing sustainability and implementing higher environmental, social and governance standards usually requires big investments for the company and leads to higher costs, thus to lower profits: are managers entitled to take sustainable decisions that can lead to reduce the company's financial result for the company? Can the company legally commit to pursue the common good (like the reduction of $CO_2$ emissions)? Or, considered that the managers must achieve the company's interest, do they have to pursue exclusively or at least as a priority the shareholders' interest to maximizing their shares' value [23]?

In other words, is there a conflict between corporate law and sustainability? Is a change in corporate law to achieve the targets of a sustainable transport necessary, or at least helpful?

## 3. *Innovative legal business models for sustainable transport enterprises: social enterprise and benefit corporation*

The interplay between corporate law and sustainability is certainly a more general issue, which does not specifically concern the transport field but refers to all the business sectors and involves critical questions and reflection, such as the company's purpose and interest and, correlatively, the directors' powers and duties [24].

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[22] Indeed, «investment barriers […] often limit private investment in sustainable transport infrastructure projects, due to the relatively less attractive risk-return profile of such projects compared to fossil fuelbased alternatives», and «governments have a key role to play in influencing private sector investment, by improving the enabling conditions for investment in sustainable transport infrastructure and delivering investment grade policies» (*Géraldine Ang/Virginie Marchal*, "Mobilising Private Investment in Sustainable Transport. The case of land-based passanger transport infrastructure, OECD Environment Working Papers, No. 56, 2013, OECD Publishing, available at *http://doi.org/10.1787/5k46hjm8jpmv-en*.

[23] See, inter alia, *Marco Cian*, "Dottrina sociale della Chiesa, sviluppo e finanza sostenibili: contributi recenti", Rivista delle società, 2021, 54 et seq.

[24] See *Holger Fleischer*, "Klimaschutz im Gesellschafts-, Bilanz- und Kapitalmarktrecht", Der Betrieb, 2022, 37 et seq.

On a global level the most widespread business model in the private business sector (also for transport enterprises) is the (public or private) limited liability company, which is the subject nowadays of profound rethinking, prone to accusation of being excessively profit-oriented and of leaving no room for balancing with environmental and social issues [25].

The process of reviewing the cornerstones of corporate law has led worldwide to responses of a different nature, which range from intensifying legislative corrective measures aimed at mitigating the profit aim to leave room for external interests (such as socio-environmental protection), to the creation of new legal business models and/or forms of companies.

An emblematic expression of the first approach is the rewording of the very notion of company in the French civil code, modified by the so called *Loi PACTE*, contained in art. 1833, according to which «*Toute société doit avoir un objet licite et être constituée dans l'intérêt commun des associés. La société est gérée dans son intérêt social et en prenant en considération les enjeux sociaux et environnementaux de son activité*» [26]. In comparison with the company's definition given, for example, in the art. 2247 of the Italian civil code, the innovative scope of the law clearly emerges, tempering the profit aim with the need to take into account all the «*enjeux sociaux et environmentaux de son activité*», whereas the Italian legislation (as well as the previous French law) still defines companies and partnerships as generally and exclusively aimed at the distribution of profits among the shareholders, without any reference to further, external interests, such as environmental protection.

About the second approach, instead, in various legislative systems new forms of enterprises and in particular of companies have been introduced,

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[25] *William H. Clark Jr./ Elizyabeth K. Babson,* "How Benefit Corporations Are Redefining the Purpose of Business Corporations", in William Mitchell Law Review, 2012, vol. 38, Issue 2, 817 et seq.

[26] The wording of the rules recalls § 172 of the UK Companies Act 2006 ("Duty to promote the success of the company"), according to which: (1) 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, and in doing so have regard (amongst other matters) to: (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.

The article is in line with section Section 166 Indian Companies Act 2013, according to which: «A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment».

characterized by an institutional compression of the profit aim and the (voluntary) compliance with higher socio-environmental responsibility standards.

In this regard, the two entrepreneurial forms that best express this trend are, on the one hand, the social enterprises and, on the other hand, the benefit corporations [27].

Although coming from a different starting point [28], social enterprises and benefit corporations can be seen in fact as the two sides of the same coin; the two extremes of the same phenomenon of modification of the company's purpose; the *trait d'union* between two areas traditionally considered as antithetic: that of entrepreneurial organizations with altruistic purposes, the former, and that of (for-profit) companies, the latter.

In fact, as result of the reforms that have been taken place in the last years [29], social enterprises – while still keeping their altruistic purpose – can in some legislative system, like the Italian one, adopt the form of share companies [30] and make profits. These cannot, however, be distributed to the shareholders [31] (or only to a limited degree) [32].

Benefit corporations, on the other hand, can qualify as the corporate

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[27] For a comparative approach, see *Giovanni Castellani/Dario De Rossi/Lorenzo Magrassi/Andrea Rampa*, "Le società benefit (Parte II). In *requiem* alle imprese sociali", Fondazione Nazionale dei Commercialisti, 31 July 2016.

[28] See *Andrea Zoppini*, "Un raffronto tra società benefit ed enti non profit: implicazioni sistematiche e profili critici", Orizzonti del diritto commerciale, 2017, 1 et seq.

[29] See, in Italy, the D.Lgs. 2 July 2017, No. 112. On the relationship between benefit corporation and social enterprise, with reference to the Italian legislative framework, see *Paolo Guida*, "La «società benefit» quale nuovo modello societario", in Rivista del Notariato, 2018, 501 et seq.

[30] According to the Italian legislation on social enterprises, as well as to the proposal on European Statute for social and solidarity based enterprises (see European Parliament's recent resolution of 5 July 2018 – Recommendations to the Commission on a Statute for social and solidarity-based enterprises, available at *https://www.europarl.europa.eu/doceo/document/TA-8-2018-0317_EN.html*) can take a variety of legal forms and status, such as associations, foundations, cooperatives and even share companies.

[31] «Social enterprises include organisations that totally prohibit the distribution of profits and organisations such as co-operatives, which may distribute their profit only to a limited degree» and they «therefore avoid profit maximising behaviour, as they involve a limited distribution of profit» (*OECD*, "The social enterprise sector: a conceptual framework", *https://www.oecd.org/cfe/leed/37753595.pdf*). Because of the profit-distribution constraint, they often struggle to acquire external funding.

[32] Social enterprises are present, with different characteristics, in various legal systems. As previously mentioned (*supra*, note 30), a unitary statute at European level has been recently proposed by the Statute for social and solidarity-based enterprises (draft 2018).

model closest to that of non-profit organizations[33]. In fact, they are institutionally oriented to the balance between the classic profit purpose and the pursuit of an external interest, in addition to the statutory commitment of compliance with the ESG standards.

In both cases, the combination between profit-aim and altruistic purpose (with different intensity, of course) makes these new organizational forms of business particularly functional to the pursuit of sustainable growth objectives.

## 4. *Benefit corporations and sustainable transport: the perfect match?*

Focusing the attention, in this study, in particular on the benefit corporation's model, this seems, thus, at a first glance, to be the perfect match between shareholders' interest and stakeholders' governance[34], representing a new form of enterprise that bridges the for-profit and the not-for-profit model.

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[33] Literature on the Italian *società benefit* is becoming the more and more copious. See among others: *Alessandra Daccò*, "La società Benefit tra interesse dei soci e interesse dei terzi: il ruolo degli amministratori e i profili di responsabilità in Italia e negli Stati Uniti", Banca borsa titoli di credito, 2021, 40 et seq.; *Michele Squeglia*, "Le società benefit e il *welfare* aziendale. Verso una nuova dimensione della responsabilità sociale delle imprese", Diritto delle relazioni industriali, 2020, 61 et seq.; *Daniela Caterino*, "Denominazione e *labeling* della società benefit, tra marketing "reputazionale" e alterazione delle dinamiche concorrenziali", Giurisprudenza commerciale, 2020, 787 et seq.; *Stefano Prataviera*, "Società benefit e responsabilità degli amministratori", Rivista delle società., 2018, 919 et seq.; *Paolo Guida*, "La «Società benefit» quale nuovo modello societario", Rivista del notariato, 2018, 501 et seq.; *Carlo Angelici*, "Società Benefit", in De Donno/Ventura (ed.), Dalla ***benefit corporation*** alla società benefit, Bari, 2018, 19 et seq.; *Serenella Rossi*, "L'impegno multistakeholder della società benefit", Orizzonti del diritto commerciale, 2017, 1 et seq.; *Marco Palmieri*, "L'interesse sociale: dallo shareholder value alle società benefit", Banca Impresa Società, 2017, 201 et seq.; *Giorgio Marasà*, "Scopo di lucro e scopo di beneficio comune nelle società benefit", Orizzonti del diritto commerciale, 2017, 1 et seq.; *Mario Stella Richter Jr.*, "Società benefit e società non benefit", Orizzonti del diritto commerciale, 2017, 1 et seq.; *Silvia Corso*, "Le società benefit nell'ordinamento italiano: una nuova "qualifica" tra *profit* e *non-profit*", Nuove leggi civili commentate, 2016, 995 et seq.; *Alberto Lupoi*, "L'attività delle "società benefit" (l. 28 dicembre 2015, n. 208)", in Rivista del Notariato, 2016, 816 et seq.

[34] *William H. Clark/Larry Vranka*, "The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public", 2013, available at *http://benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf*; *Mara Del Baldo*, "Acting as a benefit corporation and a B Corp to responsibly pursue private and public benefits. The case of Paradisi Srl (Italy)", in International Journal of Corporate Responsibility, 2019, vol. 4.

The intention of this survey is, therefore, to verify whether the benefit corporation's legal structure [35] can offer the transport sector a good alternative legal tool for achieving the sustainability targets [36], highlighting possible critical aspects, which may compromise its real effectiveness in the perspective of the ecological transition [37].

Introduced for the first time in 2010 in Maryland and rapidly spread subsequently in the majority of the other US legislations, the benefit corporation is experiencing a (moderate) success also outside the US, both in Europe and in other continents. Nonetheless, it remains a model still extraneous to most national legislations, inside and outside the European context. In particular, the model has been foreseen in Italy (the first European country), Canada [38], Colombia [39], British Columbia [40], Ecuador [41], Peru [42]; Argentina [43], Rwanda [44],

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[35] The study will refer mainly on the Italian legislation on the *"Società benefit"* (law No. 208 issued on 28 December 2015).

[36] About the interplay between social enterprises and development of a a sustainable transport sector, see in this *Volume Giulia Boletto*, "Suitable legal structures for sustainable transport. The social enterprise", 115.

[37] *Michael B. Dorff/James Hicks/Steven Davidoff Solomon*, "The Future or Fancy? An Empirical Study of Public Benefit Corporations", Harvard Business Law Review, 2021, 113.

[38] *Carol Liao*, "A critical Canadian perspective on the benefit corporation", Seattle University Law Review, 2017, 683.

[39] See the Colombian *Ley 1901 del 18 de junio de 2018*, that has introduced the *Sociedades Comerciales de Beneficio e Interés Colectivo (BIC)*. On the spread of this company's form in Colombia, see *INCP*, "*SuperSociedades: Ya hay 19 empresas BIC en Colombia"*, available at *https://incp.org.co/supersociedades-ya-19-empresas-bic-colombia/*.

[40] See the B.C. Business Corporations Act in force since 20 June 2020, introducing the Benefit company.

[41] *Ley de Emprendimiento e Innovación,* passed on 7 January 2020, introducing the *Sociedades BIC (Beneficio e Interés Colectivo)* in Ecuador.

[42] On the Peruvian *Ley de la Sociedad de beneficio e interés colectivo (Sociedad BIC)* No 31072 passed on November 2020, see Edgar Romario Aranibar Ramos/Fabiola Choque Zambrano/Antony Jonny Patiño Huayhua, "Las sociedades de beneficio e interés colectivo en el Perú: un análisis de legislación comparada en Iberoamérica y Norteamérica", Illustro. Revista de investigation en ciencas económicas, contables y empresariales, 2021, vol. 12, 120 et seqq.

[43] See the Argentinian *Empresas de beneficio e interés colectivo (BIC)*, introduced on 31 May 2022 by the Law No. 303 and defined as "*aquellas sociedades mercantiles que tienen como principal objetivo la generación de un impacto positivo en la sociedad y en el ambiente mientras derivan sus ingresos de actividades comerciales*". First information is available at *https://www.fundacionmicrofinanzasbbva.org/revistaprogreso/empresas-de-beneficio-e-interes-colectivo/*.

[44] See the Rwandan Company law of 2021, which established a Community Benefit Company (CBC). Under the Company Law, the CBC is described "as that company with primary social objectives whose surpluses are re-invested, for that purpose, in the busi-

(and maybe in France[45], where there is not, however, an *ad hoc* legislation). In many other countries the debate on a possible introduction in the legal system is open[46], while in others fully formalized bills are already pending. However, even within the United States, the contents of the concerned legislations are not always homogeneous, but there are substantially two reference models: the PBCL (Public Benefit Corporation Law, adopted in the state of Maryland) and the Model Legislation (adopted in particular in Delaware and California)[47]. The benefit corporations are, thus, regulated on a national basis and this has as a consequence a considerable lack of homogeneity at international level in the law applicable and also in the main characteristics of the model.

In any case, despite the existence of differences at the definitional, regulatory and nomenclature levels, among the various forms of benefit companies regulated worldwide, some elements common to all them (a sort of lowest common denominator) are however identifiable. These can be seen, in particular, in the presence – alongside the profit (or mutualistic, but in any case egoistic) purpose, typical of the corporate form adopted – of "one or more aims of common benefit"[48], and the commitment to "operate in a responsible, sustainable and transparent manner vis-à-vis individuals, communities, territories and the environment, cultural and social heritage, entities and associations as well as other stakeholders"[49]. These aims are indicated in the corporation's statute and are pursued through a management system aimed at balancing the interests of the shareholders with the interests of those on whom the activity may have an impact. The company

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ness or in the community rather than being driven by the need to maximize profit for its shareholders or owners".

[45] The new art. 1835 c.c. of the French Civil Code, modified by the *Loi Pacte*, foresees the "*sociétés à mission*". These companies should specify in the statute their *raison d'être* (Art. 1835 c.c. «*Les statuts peuvent préciser la raison d'être dont la société entend se doter dans la réalisation de son activité*»). *See Céline Tridon,* "Entreprises à mission: vers une moralisation de l'économie", 2018, available at *https://www.decision-achats.fr/Thematique/fournisseurs-1235/Breves/Entreprises-mission-vers-moralisation-economie-332491.htm*.

[46] See the Brasilian Decreto n° 9.244, 19 December 2017 on the introduction of the "negócios de impacto", withdrawn by the Decreto nº 9.977, de 2019. About the state of the debate in Portugal, see the accurate survey of *Carlos Olivera*, "The Delaware Public Benefit Corporation Model – Analysis and Comparison", Portuguese Law Review, 2020, 1 et seqq.

[47] On the differences among the US benefit corporations' legislations, see *J. Haskell Murray*, "Social Enterprise Innovation: Delaware's Public Benefit Corporation Law", in Harvard Business Law Review, 2014, 345 et seq. (expecially 371).

[48] The spefic public benefit purpose is mandatory according to the Italian legislation and the PBC, but on the contrary is optional in the MBCL system.

[49] Art. 1, *al.* 376, Law 28 December 2015, No. 208, on the Italian "*società benefit*".

also has specific reporting obligations of a non-financial nature relating to the socio-environmental impact of its activities, which – with reference to Italian legislation [50] – is held annually, as well as the obligation to adapt to external reference standards (third-party standard) [51]. On the other hand, not always a certification by an external body is required [52].

For the sake of clarity, it has to be specified that the benefit corporation qualification differs from the BCorp certification, that, on the contrary, has homogeneous characteristics worldwide. The BCorp certification is granted by a private no-profit organization (BLab) [53] based in Pennsylvania, which has offices all over the world and can be considered the forerunner of the introduction of the legislation on benefit corporations, not only for historical reasons (the BLab lobby has exerted pressure to obtain the approval of the legislation on the benefit corporation), but also for substantial reasons [54].

BCorp's requirements for the certification, in fact, follow the pattern of the benefit corporations' standards (compliance with sustainability standards; pursuit of a benefit purpose alongside the purely profit one; reporting obligation of a non-financial nature).

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[50] According to art. 1, *al.* 382, Law 28 December 2015, No. 208 on the Italian "*società benefit*", «the benefit corporation shall produce an annual report concerning the pursuing of common benefit; such report shall be attached to the annual financial statements and shall include:

a) the description of the specific objectives, modalities and actions implemented by the directors in order to pursue the aims of common benefit and the possible mitigating circumstances which have prevented, or slowed up, the achievement of the above aims;

b) the evaluation of the generated impact, using a third party evaluation having the requirements listed under Annex A and which includes the evaluation areas identified under Annex B;

c) a specific section containing the description of the new objectives which the benefit corporation intends to pursue in the following fiscal year».

The annual report shall be published on the benefit corporation's website, if existing.

[51] The compliance to third party standard is, instead, optional according to the PBCL.

[52] This certification is not foreseen in the Italian legislation on the "*società benefit*", but is foreseen (on a voluntary basis) in the US PBCL and MBCL legislations.

[53] BLab is a nonprofit networking "transforming the global economy to benefit all people, communities at the planet" (See *Alberto Lupoi*, "L'attività", *supra* note 27, 816 et seq.).

[54] There are several examples worldwide of Certified BCorps active in the transport sector, especially having their seat in countries where the legal form of the benefit corporation is not foreseen. One of them is, Baobab Express SA, with seat in Parakou, Benin, that, according to its website, aims at having a special focus on isolated and unserved communities and at providing «safe and reliable transportation services in an ecosystem where mobility is a matter of luck», showing in this way «that there is another way to do business, by being inclusive and sustainable in everything they do» *(www.baobabexpress.org)*.

There remains, however, a substantial difference between BCorp certified companies and benefit corporations: while for the former, in fact, the voluntary submission to the additional obligations does not affect the legal structure of the company, on the contrary the benefit corporations incorporate in their articles of association the obligation to pursue the chosen benefit purpose, as well as (not the mere maximization of shareholders' profit, but) the balance between the traditional for-profit purpose and a benefit aim, thus making the clause enforceable *erga omnes*.

Without going further into the differences with the BCorps, nor focusing on the peculiarities of the single national legislations on benefit corporations, it is, however, clear that this new legal form, strengthening its commitment to the adoption of sustainability standards; pursuing (often) a beneficial purpose (which in most cases coincides with the fight against climate change and the reduction of pollution thresholds); including in the company's interest, alongside that of the shareholders, the further interests of external stakeholders, appears – on paper – the most adequate entrepreneurial form for ensuring the pursuit of sustainable growth objectives also in the transport sector and, therefore, to convey private capital towards forms of sustainable investment [55].

In fact, even if these targets are in principle not precluded to other (non-benefit) companies, alongside the obligation to respect the ESG factors, in the benefit corporations they become part of the company's by-laws [56]. They modify the extension of powers and duties of directors; legitimize a compression of the shareholders' remuneration, in the name of the pursuit of the general interest adopted; also impose to future shareholders to maintain the altruistic purpose, regardless of the personal inclina-

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[55] Economic studies are starting to confirm the correlation between corporate social responsibility and financial performance. *Matteo Ferioli/Patrizia Gazzola/Daniele Grechi/Elena-MădălinaVătămănescu*, "Sustainable behaviour of B Corps fashion companies during Covid-19: A quantitative economic analysis", Journal of Cleaner Production, 10 November 2022, 134010 highlight «the positive relationship between sustainability certification and higher financial performance», observing that «the most sustainable companies» analyzed in their paper «were also the most profitable»; *Teodora Serafimova*, Covid-19: An Opportunity to redesign Mobility towards greater Sustainability and Resilience?, Network Industries Quarterly, 2020, vol. 22, 2020, 17 et seqq.

[56] On the role the benefit corporation could play within the corporate law system, see *Alberto Gallarati*, "Incentivi e controllo del mercato nella società benefit. Un'analisi economica e comparata", Contratto e impresa, 2018, 806 et seq.; *Aldo Frignagni/Paolo Virano*, "Le società benefit davvero cambieranno l'economia?, Contratto e impresa, 2017, 503 et seq.; *Giovanni Castellani/Dario De Rossi/Andrea Rampa*, "Le società benefit. La nuova prospettiva di una *Corporate Social Responsability* con *Commitment*", 2016, available at *https://www.fondazionenazionalecommercialisti.it/filemanager/active/01030/2016_05_15_Documento_Benefit_Corporation_Castellani_De_Rossi_Rampa.pdf?fid=1030.*

tions of managers or majority shareholders, at least until the benefit clause is removed from the statute [57].

To better understand this point, it is necessary to focus attention on the legal reasons that led to the introduction of the benefit company model in the US, that was explained by its supporters with the need to offer certain legal basis to overcome the shareholder primacy. In the wake of the emblematic – and dating back – jurisprudential case that had seen the American Supreme Court condemn the majority shareholder Ford to pay damages to the minority shareholders Dodge brothers [58] for having allocated part of the company's assets to activities not functional to maximizing the shareholders' profits, but to external interests (of the workers, in this case), the supporters of the American legislation on the benefit corporation stressed the need to expand the range of action of the directors of profit-oriented companies in such a way as to include in the benefit corporations' interest also the pursuit of purposes not related to the remuneration of the shareholders' capital, but of external origin and of an altruistic nature (such as socio-environmental sustainability and governance objectives).

If the legislative change was necessary or if, instead, the business judgment rule already made it possible to consider the directors stakeholders interests in their decision-making, while interpreting the company's best interest, is still a debated issue [59]. And this in the United States [60], in Cana-

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[57] *William H. Clark Jr./ Elizabeth K. Babson*, "How Benefit Corporations Are Redefining the Purpose of Business Corporations", in William Mitchell Law Review, 2012, vol. 38, Issue 2, 817 et seq.

[58] «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 nondistribution of profits among stockholders in order to devote them to other purposes» (Michigan Supreme Court, *Dodge v. Ford Motor Co*., 170 N.W. 668, 684 –1919, available at *http://www.law.illinois.edu/aviram/Dodge.pdf*; *Jonathan Macey*, "A close read of an excellent commentary on Dodge v. Ford", 2008, Faculty Scholarship Series. Paper 1384, Yale Law School).

[59] For an extremely critical approach, see *Amy Klemm Verbos/Stephanie L.Black,* "Benefit Corporation as a Distraction: An Overview and Critique", Business & Professional Ethics Journal, 2017, 229 et seqq., according to whom benefit corporations «(1) are unnecessary under the law; (2) benefit corporation legislation does not enhance corporate law; (3) benefit corporation laws create unnecessary new legal risks for both traditional and benefit corporations, and their respective directors; and (4) third party certification in entity formation law is inappropriate»..

[60] See the interesting position of *Lynn A. Stout*, "Why should we stop teaching *Dodge v. Ford*", UCLA School of Law Law & Econ Research Paper Series, Research Paper No. 07-11, 2007 (revised 2008): «*Dodge v. Ford* is indeed bad law, at least when cited for the proposition that the corporate purpose is, or should be, maximizing shareholder wealth.

da [61] and above all in European countries, where the definition of the notion of social interest hardly coincides exclusively with that of the interest in maximization of shareholders' profit.

What is certain, however, is that in the benefit corporation, the inclusion of the benefit aim in the statute and the adoption of the specific commitment to comply with higher sustainability standards allow to affirm that the directors can legitimately go "a little further" in the compression of shareholders' profits, compared to what they can do in "traditional" companies in the name of respect for the environment or other altruistic purposes [62]. And this also when the managers' behavior does not strictly serve to strengthening the company's position in the market, even only in the long run.

It becomes thus interesting to investigate whether the benefit corporation really is the ideal corporate model for the pursuit of the described objectives of ecological transition and implementation of a sustainable transport system, or whether this conclusion collides with practical obstacles of a different nature, which lead to limit its effectivness and to compress its potential. The relevance of the question is not only theoretical, considered that, on a practical level, some transport enterprises worldwide have already adopted this legal form (or at least have received the BCorp certification) [63] .

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*Dodge v. Ford* is a mistake, a judicial "sport," a doctrinal oddity largely irrelevant to corporate law and corporate practice. What's more, courts and legislatures alike treat it as irrelevant. In the past 30 years the Delaware courts have cited Dodge v. Ford as authority in only one unpublished case - and then not on the subject of corporate purpose, but on another legal question entirely».

[61] This possibility was considered, for instance, already available according to the Canadian law, «specifically under the requirement that directors manage the corporation in the "best interest if the corporation» (*Carol Liao*, "A critical Canadian Perspective", *supra* note 35).

[62] See *Carlo Angelici*, "Società benefit", in Orizzonti del diritto commerciale, 2017, 4 et seq.; *Francesco Denozza/Alessandra Stabilini*, "La società benefit nell'era dell'*investor capitalism*", in Orizzonti del diritto commerciale, 2017, 1 et seq.

[63] As practical examples of benefit corporations active in the transport sector, see the Italian *MUV Società Benefit*, that aims to «turn sustainable urban mobility into a global movement and to strive towards ever more ambitious challenges» (*https://www.muvgame.com*); *Maganetti Spedizioni S.p.A.* (*http://www.maganetti.com/*); *Outset S.r.l.* (*https://outset.it/it/*).

Abroad, see *Metropolian Transportation Authority*, a public benefit corporation incorporated in the NY (*https://new.mta.info/document/50971*); *Mobility 4 all*, Minnesota Public Benefit corporation.

## 5. *Critical issues: legal uncertainty, lack of homogeneity and risk of greenwashing*

At a closer observation, some critical issues that could hinder the potential of the benefit corporation legal structure to this extent can be indeed identified.

They mainly concern the legal uncertainty, the lack of homogeneity at a transnational level and, last but not least, the risk of greenwashing.

Under the first aspect, a relevant obstacle capable of slowing the spread of the benefit corporation worldwide and, therefore, its application also in the transport sector, derives from the uncertain legislative solutions applicable to some relevant issues.

In particular, combining a "beneficial" purpose with the profit aim does not create particular problems from a theoretical point of view, but on a practical level it makes necessary to concretely establish terms and methods of this balance, especially when the two interests in question lead to opposite managerial decisions. As the legislations on benefit corporations don't specify which interest should prevail between the profit maximization and the benefit aim (protection of the environment, etc.) [64], the choice between them is left to the directors, who are consequently liable for damages caused by their decisions [65].

In the same way, other questions of not negligible practical importance remain without clear legislative response. One of these is, for example, with reference to the Italian legislation, the controversial right of withdrawal for the dissenting shareholders from the resolution amending the articles of association with which the company adopts the form of benefit corporation [66]. This should not pose particular problems if the future benefit corporation has the legal form of a partnerships (in this case, in fact, according to the general rules the resolution requires the unanimous consent of the members, ex article 2258 of the Italian civil code). On the contrary, if it is incorporated in a (public or private)

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[64] It is, indeed, "difficult to address questions such as what weight the directors should assign to shareholder and non-shareholder interests, and what standards a court should use in reviewing directors' decisions to consider (or not to consider) non-shareholder interests" (referring, however, to the US constituency statutes). *William H. Clark Jr./ Elizabeth K. Babson*, "How Benefit Corporations", *supra* note 21, 831.

[65] On the managers' liability in case of negligent pursuit of the benefic aim, see, referred to the Italian "Società benefit", *Diletta Lenzi*, "Le società benefit", Giurisprudenza commerciale, 2019, I, 894 et seq.

[66] See, among others, *Domenico Siclari*, "Trasformazione" in società benefit e diritto di recesso", *Rivista trimestrale di diritto dell'economia*, 2019, 80 et seqq.

limited liability company it is less easy to identify the applicable rule [67].

A further obstacle to the effectiveness of benefit corporations comes from the lack of a homogeneous regulatory framework at transnational level. The existence of this corporate model only in some legal systems and, in any case, the lack of homogeneity among the single national legislations issued in the different countries severely limits its use in companies operating on international markets.

But undoubtedly the greatest impediment to the functionality of benefit corporations is represented by the risk of greenwashing [68]: i.e., the risk of a socio-environmental commitment that is simply a facade, serving as a mere marketing function but not corresponding to any real action [69]. To this regard, the existing national legislations clearly show the difficulty of national legislators to provide adequate tools for identifying, preventing and sanctioning greenwashing phenomena. If the traditional private law remedies (damage compensation) show their inadequacy (e.g. about the difficult identification of the subjects entitled to take action, on the one hand, and about proof and quantification of pecuniary damages, on the other hand), sanctions of a different nature are rarely envisaged. The same sanction foreseen by the Italian law [70] – based on the application of the

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[67] In fact, art. 2437, paragraph 1., of the Italian Civil Code, referred to the S.p.A., recognizes the right of withdrawal in case of "change in the clause of the company's object, when it allows for a significant change in the company". Referring to the s.r.l., instead, art. 2473 of the Italian Civil Code provides for it in the event of a "change in the company's object purpose". Now, strictly speaking, becoming a benefit corporation for sure is not a transformation in another company's type, but does not affect the object (activity) of the company either. It rather affects the ways the company runs its activity or, more correctly, its purpose. There is no doubt, on the other hand, that the transition from a purely profit-oriented (traditional) company to a benefit corporation involves a change in the risk exposition of the shareholders and this could justify the right of withdrawal. See *Silvia Corso*, "Le società benefit", *supra* note 27, 995 et seq.

[68] Greenwashing is one of the biggest issues of the the *UN-High Level Group of Experts on the Net Zero Emissions Commitments of Non-State Entities*, "*Integrity Matters*", *supra* note 11.

In the vaste literature published worldwide on the topic see, one for all, *Frances Bowen/J. Alberto Aragon-Correa*, "Greenwashing in Corporate Environmentalism Research and Practice: The Importance of What We Say and Do", Sage Journal, 2014,

[69] To avoid greenwashing, disclosure plays a significant role: «To prevent dishonest climate accounting and other actions designed to circumvent the need for deep decarbonization […] nonstate actors must report publicly on their progress with verified information that can be compared with peers» (*United Nations' HighLevel Expert Group on the Net Zero Emissions Commitments of Non-State Entities*, "*Integrity Matters*", *supra* note 11, 7).

[70] The Italian "società benefit" that does not pursue the aims of common benefit, according to the law, «is subject to the provisions of Italian Legislative Decree 2 August 2007, No. 145, regarding misleading advertising and the provisions of the Italian Legislative

anti-trust legislation – is difficult to apply in practice and, in fact, there have been no applications so far.

Moreover, some doubts about the capacity of the benefit corporation's form to really impact on the social and environmental sustainability, also in the transport sector, could arise from the current legal structure's transformation of one of the first US benefit corporations, Patagonia, Inc. [71]. This company, while maintaining the legal form of benefit corporation, recently announced a radical change within its corporate structure [72], summarized by its CEO, Yvon Chouinard, as "going purpose instead of going public" [73]. To this end, it has established that the action carried out by the

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Decree, 6 September 2005, No. 206 (the Italian Consumer Code)» (art. 1, *al.* 384, of the Law No. 208/2015).

Furthermore, the breach of the obligations [*to pursue also aims of common benefit*] may be deemed as a breach of the duties imposed by the applicable laws and the by-laws upon the directors of the company». In this case, «the relevant provisions of the Civil Code regarding directors' liability shall apply» (art. 1, *al.* 381, of the Law No. 208/2015).

[71] On the history of this company and its commitment to a sustainable growth, see *Mary-Clare Bosco*, "From Yosemite to a Global Market: How Patagonia, Inc. has Created an Environmentally Sustainable and Socially Equitable Model of Supply-Chain Management" , 2017, Pomona Senior Theses. 178, available at *http://scholarship.claremont.edu/pomona_theses/178*; *J. Haskell Murray*, "Defending Patagonia: Mergers and Acquisitions with Benefit Corporations", Hastings Business Journal, 2013, vol. 9, 485 et seqq.

[72] Patagonia's adoption of the new corporate structure is generating a lot of attention in the economic press (see e.g. *Matthew Erskine*, "How will the Patagonia perpetual purpose trust terms be enforced?, Forbes, 5 October 2022, available at *https://www.forbes.com/sites/matthewerskine/2022/10/05/how-will-the-patagonia-perpetual-purpose-trust-terms-be-enforced/?sh=22ceae4a2508*), not only in the US (see *Ruth Fend*, "Patagonia ist jetzt Pionier einer neuen Form des Kapitalismus", Zeitonline, 23 September 2022, available at *https://www.zeit.de/green/2022-09/patagonia-verantwortungseigentum-kapitalismus-armin-steuernagel#:~:text=Patagonia%20und%20Verantwortungseigentum%20%22Patagonia%20ist,Modell%20erkl%C3%A4rt%2C%20wie%20es%20geht*). And some critics: see *David Weitzner*, "Patagonia's grand gesture sends the wrong message about ethical capitalism", The Conversation, 11 October 2022, available at *https://theconversation.com/patagonias-grand-gesture-sends-the-wrong-message-about-ethical-capitalism-191660*.

[73] Taking the company public and then prioritizing environmental protection and worker well-being was excluded by the founder of the company due to his mistrust in the stock market, because *"Once you're public, you've lost control over the company, and you have to maximize profits for the shareholder, and then you become one of these irresponsible companies*" (Yvon Chouinard, quoted from *David Gelles*, "Billionaire No More: Patagonia Founder Gives Away the Company", New York Times, 14 September 2022, available at *https://www.nytimes.com/2022/09/14/climate/patagonia-climate-philanthropy-chouinard.html*). See also *Francesco Denozza*, "Lo scopo della società: dall'organizzazione al mercato", Orizzonti del diritto commerciale, 2019, 621; *Carlo Angelici*, "Potere" e "Interessi" nella grande impresa azionaria: a proposito di un recente libro di Umberto Tombari", Rivista delle società, 2020, 4 et seqq.

company in order to preserve the environment was not decisive in solving the climate problem which, due to its urgency and dimension, requires an even more massive commitment. Consequently, it has sought a solution that would allow them to strengthen their commitment even more: solution that was concretely and briefly described by its founder and CEO as being "in business to save the planet" (purpose no longer achievable " simply "by donating 1% of sales each year for environmental protection purposes)[74]. Not considering a valid legislative option available, he decided therefore to proceed autonomously ("to tell the truth, there was no valid option. So we created ours"), donating 2% of the company's shares (equal to 100% of the shares with voting rights) to a trust specifically created for the purpose of "safeguarding and protecting the values of the company" and making sure that the profits are actually used for the environmental cause. 98% of the non-voting shares (common shares), on the other hand, was donated to a no-profit association, also specifically created. The final result of this operation was that the company will therefore distribute the profits not reinvested in it to the two new shareholders, who will use them, however, to protect the environment[75].

From a formal point of view the company is still formally profit-oriented and has the form of benefit corporation. But from a substantial perspective the shareholders' profit aim is lost, being the whole dividends assigned to a no-profit legal structure. The overall plan implemented places in the end the new business structure created outside the profit-oriented entities: at least as long as the ownership of the shares remains with the association.

The case of this company (whose details have been only partially disclosed) does not in itself testify to the failure of the benefit corporation's model, nor its inadequacy, in absolute terms, as mission-driven legal form, but shows rather a dissatisfaction of its founders about the fulfillment of the

[74] See *Andrew Perez/Andy Kroll/Justin Elliott*, "Barre Seid's «Attack Philanthropy»", 6 September 2022, available at *https://www.levernews.com/barre-seids-attack-philanthropy/*; *Giulia Sciola*, "Il nostro unico azionista ora è il Pianeta. Patagonia passa a un fondo e a una no-profit", 15 settembre 2022, available at *https://www.pambianconews.com/2022/09/15/il-nostro-unico-azionista-ora-e-il-pianeta-patagonia-passa-a-un-fondo-e-a-una-no-profit-353809/*; *Kenneth P. Vogel – Shane Goldmacher*, "An Unusual $ 1.6 Billion Donation Bolsters Conservatives", New York Times, 22 August 2022, available at *https://www.nytimes.com/2022/08/22/us/politics/republican-dark-money.html*.

[75] The structural change aims at preserving the company's independence and ensuring that all the profits (ca. 200 million per year) will be destinated to fighting climate change (*David Gelles,* "Billionaire no more"*, supra* note 59)*,* so that to «give away the maximum amount of money to people who are actively working on saving this planet» (quoting the founder and CEO of Patagonia, Y. Chouinard, in a recent interview).

objective – considered absolutely priority – of the ecological transition [76].

The critical approach implicitly taken by the founders of the company, after having strongly advocated the creation of business corporation model, however, necessarily imposes a reflection on the effective functionality of this business structure as a legal tool for accelerating the progression towards a sustainable economy.

On the other hand, it leads to the question whether, in a regulatory context in which it seems that compliance with higher sustainability standards, non-financial reporting obligations and corporate sustainability due diligence duties are increasingly extended to all the companies, benefit corporations still keep their *raison d'être* (quoting art. 1835 of the French civil code). In a *de iure condendo* perspective, this could be probably kept by legally attributing, in the balance between shareholders' interest and benefit aim, more weight to the latter.

## 6. *Conclusions*

In conclusion, it seems correct to say that the implementation of the objectives of ecological transition and the realization of a sustainable transport system require adequate business legal forms. The company's structure – traditionally considered as based on the shareholders' primacy – does not seem to be able for itself to give adequate space for compliance with sustainability principles and ESG factors. It is in fact questionable if the directors have the power to adopt entrepreneurial choices in line with the objectives of socio-environmental protection if these are potentially detrimental to the shareholders's interest.

To deal with this legal difficulty, the introduction of benefit corporations in some legal systems seems to offer the possibility of overcoming these regulatory obstacles, introducing a new form of company that is profit-driven, and therefore competitive, but at the same time strongly committed to pursuit more general interests, as well as compliance with socio-environmental and sustainability standards. And in the transport sector, some transport enterprises worldwide have indeed become benefit corporations.

However, if on a theoretical level the benefit corporation's model seems

[76] Showing to believe in the effectivness of the new legal structure, in fact, the founder of Patagonia stated some years ago that "benefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership" (quoted from *J. Haskell Murray*, "Defending Patagonia", *supra* note 58).

to be the one that better than the others allows to implement the sustainability standards and, therefore, to henance the transport ecological transition, on the other hand various obstacles limit their effectiveness.

Legislative lacks, which increase legal uncertainty; absence of the benefit corporation's form in most legal systems outside the United States, which makes it not easily recognizable in the international context; disuniformity in the legal standards, requirements and definitions adopted in the different national legislations on benefit corporations issued worldwide; inadequate legal tools against greenwashing, make, in fact, the model of the benefit corporation, as currently conceived, not very functional to its success and not very suitable to cope with the global dimension of the markets.

It would be different if, at least at the European level, the benefit corporation model were foreseen in all member states. An intervention of the European legislator aimed at setting commun legal standards for the benefit corporation within Europe or even the introduction of a European benefit corporation, following the examples of the European Economic Interest Grouping (EEIG), the European Company (Societas Europaea) and the European Cooperative Society (Societas Cooperativa Europeaea) [77] would undoubtedly help overcoming some of the obstacles mentioned above, making it is easier for benefit corporations to access international markets.

Nonetheless, the European legislator doesn't show a big interest in taking legislative measures in this direction. The path it is taking, on the contrary, leads to the progressive extension to all the companies (for now, the larger) [78] to mandatory corporate sustainability duties [79].

Furthermore, also at national level – even in the countries with a strong

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[77] On the three forms of supranational business organizations (EEIG; SE; SCE), in the framework of a critical approach to a theory of supranational companies in Europe, see *Holger Fleischer*, "Supranationale Gesellschaftsformen in der Europäischen Union", Die Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR), 2010, 385 et seq.

[78] See in this *Volume Luca Della Tommasina,* "Sustainability-related disclosures in financial services and dialogue policies in listed companies", 130 et seqq.

[79] See, in particular, recently issued Directive (EU) 2022/2464 of 14 December 2022 on Corporate Sustainability Reporting and the recently issued *Corporate Sustainability Reporting Directive* (EU) 2022/2464 of 14 December 2022 and adopted by the European Commission on 23 February 2022 (on which, in this *Volume*, *Daniele Buoncristiani*, "The EU Taxonomy Regulation and the Corporate Sustainability Reporting Directive", 87 seqq.; *Federica Agostini/Michele Corgatelli*, "Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence: Enlightened Shareholder Value or Pluralist Approach?'. European Company Law Journal, 2022, 92 et seqq.).

The proposal was anticipated at national level from the German *Lieferkettensorgfaltspflichtengesetz*, that was issued on 11 June 2021 and will enter into force from 1 January 2023 (to this regard, see *Holger Fleischer*, "Grundstrukturen der lieferkettenrechtlichen Sorgfaltspflichten", Corporate Compliance Zeitschrift, 2022, 205 et seq.).

sensitivity to both corporate law innovation and sustainable development, like Germany [80] – the debate on the introduction of the benefit corporation's form in the internal legal systems is in Europe not silent, but quite moderate.

The explanation of this lack of interest is probably linked to a bigger issue that benefit corporations raise: does it make sense to maintain its voluntary character? Or the urgency of the transformation of the global economy – including in the transport sector – in a more sustainable direction requires extending its "virtuous" characteristics (or some of them) to all the companies, in a mandatory way [81]? Is the voluntary character of commitment towards the pursuit of sustainability goals [82] enough? Or, in a global regulatory context characterizeb by a deep rethinking of the company's purpose (the more and more comprehensive of shareholders' and stakeholders' interest), can the benefit corporations keep its identity only as particularly virtuous niche phenomenon, in which – in the balance between profit and benefit aim – the latter should (at least from a *de iure condendo* perspective) be heavier than the former?

[80] See *Holger Fleischer*, "Benefit Corporations zwischen Gewinn- und Gemeinwohlorientierung: Eine rechtsvergleichende Skizze", Festschrift für Ulrich Seibert zum 65. Geburtstag, Otto Schmidt, Köln, 219 et seq.; *id./Yannick Chatard*, "Gesetzliche Zertifizierung nachhaltiger Unternehmen. Die französische «société à mission» als Vorbild für Deutschland?, Neue Zeitschrift für Gesellschaftsrecht, 2021, 1525 et seq.

[81] See *Klaus Hopt*, "Director's Duties and Shareholders' Rights in the European Union: Mandatory and/or Default Rules?", Rivista delle società, 2016. 13 et seqq.; *id/Rudiger Veil*, "Gli *stakeholders* nel diritto azionario tedesco: il concetto e l'applicazione. Spunti comparatistici di diritto europeo e statunitense", Rivista delle società, 2020, 921 et seqq.

[82] This reflection seems to be in line with the position expressed by the *UN-High Level Group of Experts on the Net Zero Emissions Commitments of Non-State Entities*, "*Integrity Matters*", *supra* note 11: «To effectively tackle greenwashing and ensure a level playing field, nonstate actors need to move from voluntary initiatives to regulated requirements for net zero. Verification and enforcement in the voluntary space is challenging».