



## **Shifting the SME Corporate Model Towards Sustainability: Suggestions from Italian Company Law**

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### **Abstract**

While Corporate Social Responsibility (CSR) is currently at the center of debates regarding company law all over the world, the discourse on this topic remains predominantly focused on large enterprises operating at a multinational level. The purpose of this paper is to introduce some reflections on the relationship between CSR and smaller companies. It examines what organisational solutions can be found in the regulatory framework of Italian company law to encourage small and medium-sized enterprises (SMEs) to transition towards sustainability. Firms of this dimension represent ninety nine per cent of European businesses and account for more than ninety per cent of the world's business enterprises that need to make this transition. Despite the fact that SMEs are defined as the 'backbone of Europe's economy', organisational models of sustainability in SMEs have not yet been studied in depth, and the usefulness of company models that combine altruistic and lucrative corporate purposes, and above all impose a sustainable manner of action on company activities, are still to be analysed comprehensively as they relate to enterprises of a smaller dimension.

The main contribution of this article is to identify the effects of the introduction of the 'Società Benefit' model into Italian company law and examine the first empirical evidence from its application. Useful operational tools are drawn from it, especially for smaller companies, which, inspired by this business model, can develop their own sustainability strategies by relying on an organisational model that highlights comprehensive communication and analysis of non-financial performance.

### **I. Introduction**

It is widely known that Corporate Social Responsibility (CSR) has reached a prominent position in the current debate on corporate law and corporate governance. In a recent book, two distinguished company law scholars declare their ambition to 'establish sustainability-related study of corporate law and corporate governance as a field'<sup>1</sup> and they outline numerous initiatives aimed at

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<sup>1</sup> B. Sjäffjell and M. Bruner, 'Corporations and sustainability', in B. Sjäffjell and M. Bruner eds, *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge: Cambridge University Press, 2019). The application of a strong conception of sustainability places companies' action, as regulated by company law and corporate governance rules, above the minimum target of 'social foundation' and within the limits of 'planetary boundaries'. It is an original application to the corporate law and corporate governance field of well-known concepts

reconsidering the future of the corporations that are developing on both sides of the Atlantic.

More recently, and with particular emphasis, the very purpose of the corporation has been questioned. On the one hand, the 'Future of the Corporation Program' promoted by the British Academy suggests reformulating the concept of corporate purpose in a sense that is 'not solely about profit, but about public purposes that relate to the firm's wider contribution to public interests and societal goals'. On the other hand, from the heart of the American economic system, comes the exhortation to redefine the purpose of the corporation, 'to promote an economy that serves all Americans'.<sup>2</sup>

The CSR mentality is growing fast in managerial theory. Its focus has always included institutional arguments in its toolbox that analyse business organisations, and this has increasingly affected the legal discourse around CSR approaches.

Within this framework, European and European Union (EU) Member States' legislation is increasingly characterised by aims of ensuring a sustainable footprint, especially by promoting the mandatory disclosure of non-financial information by companies and encouraging voluntary models for purposeful businesses. At a national level, the French loi 'Plan d'Action pour la Croissance et la Transformation des Entreprises' (loi PACTE, 22 May 2019 no 486) provided the opportunity to companies to introduce a *raison d'être* into company bylaws. This is characterised as a purpose which encompasses principles at the very basis of a company's mission and values for which the company intends to allocate resources to carry out its activity. This reform aspires to comprehensively redesign the mission of enterprises. It has its origin in the drive to place the undertaking of a business within a framework of a responsible economy and to construct a third way between public action and the market economy, aiming at conciliating financial objectives of companies

developed by scientists belonging to other fields: see J. Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' 14(2,32) *Ecology and Society* (2009); W. Steffen et al, 'Planetary Boundaries: Guiding Human Development on a Changing Planet', 347(6223) *Science*, 736-747 (2015) and K. Raworth, *Doughnut Economics, Seven Ways to Think Like a 21<sup>st</sup> Century Economist* (White River Junction-Vermont: Chelsea Green Publishing, 2017). This approach makes it possible to review the famous triple-bottom-line scheme, discussed by the author himself still from a three-dimensional perspective based on the pillars of environmental, social and economic sustainability: J. Elkington, '25 Years Ago I Coined the Phrase "Triple Bottom Line". Here's Why It's Time to Rethink It' *Harvard Business Review*, 25 June 2018.

<sup>2</sup> Business Roundtable, 'Statement on the Purpose of a Corporation' of 19 August 2019, available at <https://tinyurl.com/364h7j8t> (last visited 30 June 2021). The aim of the signatories would not be so transparent: see M.J. Roe, 'Why Are America's CEOs Talking About Stakeholder Capitalism' *Project Syndicate*, 4 November 2019, available at <https://tinyurl.com/ubuk2b47> (last visited 30 June 2021). For an update of American CEOs' commitment to the benefit of all of their stakeholders, especially during pandemic and racial crises which dramatically affected the United States in 2020, see Business Roundtable, 'One Year Later: Purpose of a Corporation', available at <https://tinyurl.com/2jza3drh> (last visited 30 June 2021).

with social and environmental goals.<sup>3</sup> The French loi PACTE has been heavily criticised in France including the questioning of its real innovativeness.<sup>4</sup> However, ethics and compliance are the current passwords in the implementation of corporate governance practices in the French ecosystem of industrial companies.<sup>5</sup>

The European legal framework is accelerating its transformation towards a sustainable approach underpinning the operations of businesses and is also intervening at the board level to enhance corporate sustainability performance. It is not audacious to suppose that the exit of the United Kingdom (UK) from the EU and consequently from the EU decision-making table has been playing a role in the promotion of a new legislative initiative for sustainable corporate governance. This new model is based on a controversial Ernst & Young (EY) report produced on behalf of the European Commission.<sup>6</sup>

The report starts from the assumption – not rigorously proven<sup>7</sup> – that many listed companies pursue shareholder value creation in a manner that is incompatible with long-term strategies of the company and the pursuit of environmental and societal goals.<sup>8</sup>

The shareholder primacy myth<sup>9</sup> seems destined to give way to a new approach, of stakeholderism moving from the traditional role of presupposition of legitimacy in business theory to a central concept in corporate governance regulation.

<sup>3</sup> For further information on the origin of this reform, see N. Notat and J. Senard, 'L'entreprise, objet d'intérêt collectif', Rapport du 9 mars 2018, available at <https://tinyurl.com/ruyrb4t> (last visited 30 June 2021).

<sup>4</sup> P. Conac, 'Le nouvel article 1833 du Code civil français et l'intégration de l'intérêt social et de la responsabilité sociale d'entreprise: constat ou révolution?' *Rivista ODC*, 497, 500 (2019).

<sup>5</sup> J.C. Magendie, 'Ethique et conformité dans les entreprises' *Revue des sociétés*, 730 (2019); M.A. Frison-Roche, *Pour une Europe de la compliance* (Paris: Dalloz, 2019); J. Ballet et al, *L'entreprise et l'éthique* (Paris: Seuil, 2011).

<sup>6</sup> European Commission-EY, 'Study on Directors' Duties and Sustainable Corporate Governance', Final report (2020), available at <https://tinyurl.com/3x43uppp> (last visited 30 June 2021).

<sup>7</sup> The question of the methodology adopted in the study was discussed in depth during the consultation and has been indicated as a weakness of the initiative. Scholars also are aware that the Commission's objective to focus on long-term value creation and improvement of resiliency of European undertakings in current market and social terrible development deserves maximum support: see for example A. Bassen et al, 'University of Hamburg Feedback Statement' (2020), available at <https://tinyurl.com/92vue6vp> (last visited 30 June 2021).

<sup>8</sup> The report has been criticised for being based on scant significant empirical data, both in terms of the number and variety of categories considered: see, amongst other commentary, the feedback of the Confederation of Finnish Industries, of 6 October 2020, available at <https://tinyurl.com/4wnu2s22> (last visited 30 June 2021) where it is pointed out that the web survey on which the EY report was based was limited to sixty-two stakeholders with only twelve people being interviewed in twelve countries. This weakness in the report's quantitative analysis could make the empirical basis of the study unreliable for EU-wide application.

<sup>9</sup> J.R. Macey, 'The Central Role of Myth in Corporate Law', ECGI Law Working Paper no 519/2020, available at <https://tinyurl.com/jejdbnsw> (last visited 30 June 2021).

In recent months, however, the COVID-19 crisis, starting in China at the end of 2019 and spreading all over the world during 2020 and 2021, offers a new significant input that resonates powerfully with climate-emergency concerns, as declared existed by governments and scientists in December 2016. The declaration aimed at reconstructing a business model that was more aware of environmental responsibilities and more resilient to global and systemic crises.

In this complex and fast evolving framework, minor companies, belonging to the category of so-called small and medium sized enterprises (SMEs), are mostly outside the center of the debate because CSR issues are seen to mainly concern large enterprises, operating at a multinational level and particularly those listed on regulated markets.<sup>10</sup>

Nevertheless, SMEs represent ninety nine per cent of European businesses<sup>11</sup> and account for more than ninety per cent of the world's business enterprises.<sup>12</sup> It is already clear that the engagement of SMEs in responsible business conduct is crucial to world economies, considering that these enterprises help create employment opportunities, drive economic growth and a more equitable distribution of income in society.<sup>13</sup> Business organisation theory, in fact, has already developed copious literature about CSR and SMEs, which is why we can also expect future development of the legal debate on this issue.

The first formal definition of the concept of CSR was made in the seminal work of Bowen,<sup>14</sup> who defined it as 'the set of moral and personal obligations that the employer must follow, considering the exercise of policies, decisions or courses of action in terms of objectives and values desired by society'. Subsequently, it has assumed ever more importance in a debate with multiple topics: from the ideas of Drucker, who underlines the need to take public opinion into account in organisational decision making processes, regardless of the size of a corporation or an industry,<sup>15</sup> to the contributions by Davis, where he discusses the role played by the trust of stakeholders for business success and strength, giving way to a theoretical trend known as corporate constitutionalism.<sup>16</sup> The company, in fact, bases its success on the responsible exercise of power, taking into account the interests of its stakeholders. If it does not live up to this

<sup>10</sup> European Commission-EY, n 6 above, 1.

<sup>11</sup> Compare data provided by European Commission on the website <https://tinyurl.com/6ex5x57e> (last visited 30 June 2021).

<sup>12</sup> See, for example, United Nations, 'Supporting Small Business through Covid-19 Crisis' (2020), available at <https://tinyurl.com/4px3tdr7> (last visited 30 June 2021), when the United Nations refers to the data provided by the International Council for Small Business.

<sup>13</sup> W. Luetkenhorst, 'Corporate Social Responsibility and the Development Agenda' 39 *Intereconomics*, 157, 158 (2004).

<sup>14</sup> H. Bowen, *Social Responsibilities of the Businessman* (New York: Harper & Brothers, 1953), 6.

<sup>15</sup> P. Drucker, *The Practice of Management* (New York: Harper & Row, 1954).

<sup>16</sup> K. Davis, 'Can Business Afford to Ignore Social Responsibilities?', 2(3) *California Management Review*, 70-76 (1960); see also S. Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance* (Aldershot: Ashgate Publishing, 2007).

goal, it is doomed to failure and expulsion from the market.

Although the debate is now quite old and has had growing relevance in the late twentieth and early twenty-first centuries,<sup>17</sup> – so much so that it has become a real paradigm of economic development for major international organisations – the literature available on CSR of SMEs is rather scarce.<sup>18</sup> Therefore, once the notions of SMEs and CSR have been defined, taking into account the voluntary pattern that constantly remains at the basis of the social and environmental commitment of the for-profit enterprise, it is certainly possible to highlight the main regulatory data in Italian company law in order to build on this hybrid form of enterprise to arrive at a prospective statute to promote socially responsible SMEs.<sup>19</sup>

## II. Defining Small and Medium-Sized Enterprises

The definition of SMEs does not have only one meaning. While constantly based on quantitative parameters, what is an SME varies in different geographical areas, in different types of industry and depending on the organisational forms of businesses.<sup>20</sup>

Even in the academic field, the concept of an SME is quite varied. However, it is customary to distinguish SMEs from larger companies by the presence of qualitative characteristics, such as businesses controlling a small market share, being subject to the direct management of their owner and lacking bureaucratised organisational structures.<sup>21</sup>

In Europe, the notion of a SME is contained in the EU Recommendation 2003/36, and is fundamentally based on quantitative data, such as numbers of employees, turnover and balance sheet total, although other factors must also be considered for a correct application of the rules intended for them, especially

<sup>17</sup> OECD, 'Better Policies for 2030: An OECD Action Plan on the Sustainable Development Goals' (Paris, Meeting of the OECD Council at Ministerial Level Paris, 1-2 June 2016), available at <https://tinyurl.com/m7pykc9y> (last visited 30 June 2021); United Nations, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (New York, United Nations General Assembly September 2015) available at <https://tinyurl.com/yhjeth7h> (last visited 30 June 2021).

<sup>18</sup> M. Libertini, 'Economia sociale di mercato e responsabilità sociale dell'impresa' *Rivista ODC*, 1, 8 (2013); A. Kechiche and R. Soparnot, 'CSR Within SMEs: Literature Review' 5(7) *International Business Research*, 97-104 (2012); R. Vázquez-Carrasco and M.E. López-Pérez, 'Small&Medium-Sized Enterprises and Corporate Social Responsibility: a Systematic Review of the Literature' 47 *Quality & Quantity*, 3205-3218 (2013).

<sup>19</sup> See, in relation to the Italian system, F. Massa ed, *Sostenibilità. Profili giuridici, economici e manageriali delle PMI italiane* (Torino: Giappichelli, 2019).

<sup>20</sup> G. Berisha and J.S. Pula, 'Defining Small and Medium Enterprises: a critical review' 1(1) *Academic Journal of Business, Administration, Law and Social Sciences*, 17-28 (2015).

<sup>21</sup> L. Spence and J.F. Lozano, 'Communicating About Ethics with Small Firms: Experiences from the UK and Spain' 27 *Journal of Business Ethics*, 43 (2000); G. Enderle, 'Global Competition and Corporate Responsibilities of Small and Medium-Sized Enterprises' 13(1) *Business Ethics: A European Review*, 50, 51 (2004).

incentives. A company, in fact, while remaining below the quantitative threshold indicated by the recommendation, could have access to significant additional resources because it is owned by, linked to, or partnered with, a larger enterprise.<sup>22</sup> Therefore, together with quantitative requirements, other aspects relating to ownership, partnership and linkages must be considered when categorizing a SME, so as to ensure that it is a genuine SME.

If we then look at the qualitative data, such as is done in Italy under Art 2083 of the Civil Code, the characteristics of a smaller company mainly revolve around direct and personal management which operate in an informal way and are based on interpersonal relationships, focusing on direct communication with stakeholders and the dedication of particular consideration towards employees, community and consumers.<sup>23</sup>

Although it has always been investigated from the perspective of large companies, especially multinationals, CSR naturally belongs to the sphere of SMEs. SMEs' agile organisational form, indeed, facilitates the transmission of ethical values from the owner of the SME to stakeholders and the community in which the business is located, looking for their endorsement and support. The owner's perspective is quite particular: they tend to impart a cooperative spirit to the management of the business and impresses an ethical corporate culture on the entrepreneurial organisation, where profit is not the only goal, as achieving results of creating shared value within the community is an equally important purpose.

### III. CSR: Too Vague a Notion?

In addition to the points made above, it is worth noting that the extremely popular notion of CSR has been developed as a rather vague concept, to indicate the impact that running company activities has on society and on the environment. From time to time, a wide range of conduct, combined with the purpose of mere profit, has been linked to the concept of social responsibility: including engaging in a philanthropic action, applying stewardship principles and pursuing social goals.

In this extreme interpretation, the voluntary nature of social responsibility represents a fixed point, possessing a double meaning. Firstly, the non-mandatory essence of CSR is inferred from the fact that the pursuit of social goals entails the undertaking of significant costs or risks for the company, which

<sup>22</sup> 'For enterprises with a more complex structure, a case-by case analysis may therefore be required to ensure that only those enterprises that fall within the 'spirit' of the SME Recommendation are considered SMEs', European Commission, 'User Guide to the SME Definition', available at <https://tinyurl.com/3kdjj9y7> (last visited 30 June 2021).

<sup>23</sup> J. Lepontre and A. Heene, 'Investigating the Impact of Firm Size on Small Business Social Responsibility: A Critical Review' 67(3) *Journal of Business Ethics*, 257-273 (2006).

could influence its market success or failure.<sup>24</sup> Second, as explicitly clarified in the Green Paper adopted by the European Commission on CSR,<sup>25</sup> being socially responsible does not mean only ensuring compliance with legal and statutory obligations, but involves the assumption of altruistic values and commitment to the community in which a company operates.

The evolution of the CSR concept has passed through, and has been characterised by, various ways of conceiving the relationship between business and society. The well-known opinion of Milton Friedman, which is considered as starting the myth of shareholder maximisation, acknowledged that

there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.<sup>26</sup>

Since the nineteen-eighties, in economic theory social responsibility has increasingly assumed the existence of a rationality criterion in business management,<sup>27</sup> taking up a vision of a commitment to efficiency according to social, environmental and ethical concerns, thus enhancing behaviors based on social and environmental sustainability as a source of business opportunities, innovation and competitive advantages.<sup>28</sup>

Moreover, the notion of CSR remains a broad concept even in the most recent definition adopted by the EU, which encompasses multiple values at the very basis of responsible conduct: it remains, under several aspects, a precise synonym of business ethics.

The European Commission defines CSR as ‘the responsibility of enterprises for their impacts on society’ and it also clarifies that CSR is something different from mere compliance with laws and that regulations underlining ‘respect for applicable legislation, and for collective agreements between social partners, is a *prerequisite* for meeting that responsibility’ (emphasis added).<sup>29</sup>

In terms of language, we can observe that we need a stipulative definition of

<sup>24</sup> C.C. Walton, *Corporate Social Responsibilities* (Belmont: Wadsworth Publishing, 1967).

<sup>25</sup> European Commission, Green Paper ‘Promoting a European Framework for Corporate Social Responsibility’ [COM(2001) 366 def] of 18 July 2001, available at <https://tinyurl.com/f9s5fhdw> (last visited 30 June 2021).

<sup>26</sup> M. Friedman, ‘The Social Responsibility of Business is to Increase its Profits’ *The New York Times Magazine*, 13 September 1970, available at <https://tinyurl.com/yw6akp4v> (last visited 30 June 2021); Id, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962).

<sup>27</sup> A. McWilliams and D.S. Siegel, ‘Corporate Social Responsibility: Strategic Implications’ 43 *Journal of Management Studies*, 1-18 (2006).

<sup>28</sup> P.F. Drucker, ‘Social Impacts and Social Problems’, in Id, *The Essential Drucker 2001* (Oxford: Routledge, 2001); M.E. Porter and M.R. Kramer, ‘Strategy & Society. The Link Between Competitive Advantage and Corporate Social Responsibility’ 84(12) *Harvard Business Review*, 78-92 (2006).

<sup>29</sup> European Commission, Communication ‘A Renewed EU Strategy 2011-2014 for Corporate Social Responsibility’ [COM(2011) 681 final] of 25 October 2011, available at <https://tinyurl.com/2s9rktzt> (last visited 30 June 2021).



CSR that is able to facilitate the modeling of organisational structures (and culture) and societal values aiming to promote the wider adoption of responsible behavior in running businesses.

In this sense, the way in which we can imbue a general clause mandating CSR with meaningful significance is through a strategic approach. Strategic CSR is a well-known orientation which starts from an obvious affirmation: only if CSR investments are also good for the business itself, can they work as a driver of innovation, economic growth and societal prosperity. This vision is shared by a large number of authors who underline how strategic CSR tends to align to the well-known objective of the creation of value in the long term, which is also dear to European and national legislators.<sup>30</sup> When business leaders are aware that a proactive attitude towards shareholders is able to generate gains for the business itself and at the same time achieve social benefits, they are inclined to set a strong affirmative CSR agenda in doing business.<sup>31</sup>

This approach seems quite compatible with Friedman's theory, referred to above, according to which the responsibility of a corporate executive is to conduct the business in accordance with the desires of the owners, 'which *generally* will be to make as much money as possible while conforming to their basic rules of society, both those embodied in law and those embodied in ethical custom' (emphasis added). It is worth noting that the definition of CSR inferable from Friedman's position goes beyond the respect for legal rules and ethical custom. It consists of the behavior of corporate executives who run the company for purposes differing from those of its shareholders' interests, voluntarily adhering to socially desirable conduct which is neglected by the law and the ethical norms.<sup>32</sup>

It is evident that large-scale success of a CSR approach cannot be detached from acceptance and trust in the competitive value of ethical business practices

<sup>30</sup> Compare, for example, European Commission, Communication 'Action Plan on Financing Sustainable Growth' [COM(2018) 97 final] of 8 March 2018, available at <https://tinyurl.com/nd8hw3fy> (last visited 30 June 2021): 'this is necessary, if the EU is to develop more sustainable economic growth, ensure the stability of the financial system, and foster more transparency and long-termism in the economy'. On the uncertainty that arises from the use of the long-term concept, as a panacea for sustainability concerns, see M. Stella Richter jr, 'Long-Termism' *Rivista delle società*, 16-52 (2021).

<sup>31</sup> Arguments form the strategic approach are widely shared in the economic literature: see, among other references, R.E. Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge: Cambridge University Press, 2010); R.E. Freeman et al, *Stakeholder theory: The State of the Art* (Cambridge: Cambridge University Press, 2010); E. Garriga and D. Melé, 'Corporate Social Responsibility Theories: Mapping the Territory' 53 *Journal of Business Ethics*, 51-71 (2004); S. Wheeler, *Corporations and the Third Way* (Oxford and Portland-Oregon: Hart Publishing, 2002).

<sup>32</sup> This would be the real field of Corporate Social Responsibility: for this definition of voluntariness, see C. Angelici, 'Divagazioni sulla "responsabilità sociale" d'impresa' *Rivista delle società*, 3, 7 (2018).

and consideration of stakeholders' needs,<sup>33</sup> especially for the purpose of legitimacy and increasing the reputation of the firm in the market and in the community.

If organisational integration of CSR acts or activities in the business has a proven capacity to increase company value and its profits in the long term, then expenditures on strategic CSR activities become long-term investments that are likely to yield financial returns.<sup>34</sup>

This point of conceptual equilibrium, which enhances social responsibility as a productivity factor and a tool for creating value, fits in coherently with other actions of European authorities, related to the encouragement of long-term shareholder engagement<sup>35</sup> and the strong promotion of sustainable investing.<sup>36</sup>

#### IV. CSR in Italian Company Law, from Large Enterprises...

Despite its cultural and theoretical appeal, the implementation of CSR goals has had a lukewarm welcome in the Italian discourse on corporate law.

In Italy, the contrast between 'institutionalism' and 'contractualism' in the theory of the firm has always been strong. A contractualist approach has been prevalent in the discourse on company law since the postwar period. This largely unhindered preference, which implies the rejection of any legal construction that references institutionalist theories of the firm, is not only based on the strong contractualist culture mentioned above, but also on a profound distrust of approaches, like institutional ones, which seem to have an ideological link with fascist corporatism.<sup>37</sup> This has meant that there has been no room in Italian company law for a vision of CSR that was not merely a voluntary vision. Not surprisingly, the latest organic reform of company law, approved in 2003, did not consider the issue of CSR and there is still no trace of

<sup>33</sup> P. Ruggiero and S. Cupertino, 'CSR Strategic Approach, Financial Resources and Corporate Social Performance: The Mediating Effect of Innovation' 10(10) *Sustainability*, 3611 (2018).

<sup>34</sup> G.P. Lantos, 'The Boundaries of Strategic Corporate Social Responsibility' 18(7) *Journal of Consumer Marketing*, 595-632 (2001).

<sup>35</sup> European Parliament and Council Directive (EU) 2017/828 of 17 May 2017 amending Directive 2007/36/EC on the encouragement of long-term shareholder engagement [2017] OJ L132/1.

<sup>36</sup> See European Commission, n 30 above, and, just before the pandemic crisis hit Europe, Sustainable Europe Investment Plan (SEIP), the investment pillar of the Green Deal: European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the Just Transition Fund', of 14 January 2020, [COM (2020) 22], and European Parliament and Council Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088 available at <https://tinyurl.com/nzystazs> (last visited 30 June 2021). The framework of European authorities' interventions has been shaped by the European Commission Communication 'The European Green Deal' [COM (2019) 640 final] of 11 December 2019, available at <https://tinyurl.com/yyah6jpk> (last visited 30 June 2021).

<sup>37</sup> Full explanation in M. Libertini, n 18 above, 11.

general provisions in Italian law such as Art 1833 of the French Civil Code, according to which *'la société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité'* or section 172 UK Companies Act which imposes on directors the duty of an enlightened decision making process, having regard to a series of factors listed in the section, which refer to the promotion of environmental, social and governance objectives.<sup>38</sup>

The view can be taken that the recognition of CSR principles is implicit in the provision of Art 41, para 2, of the Italian Constitutional Charter which establishes that private economic initiative 'cannot take place contrary to social utility or in such a way as to damage security, freedom or human dignity'. However, this provision, according to a widely shared interpretation of it, does not mean that the company must necessarily pursue social ends or assume sustainability as a central objective in its strategy and operation. It only makes it clear that the freedom of economic initiative must not be exercised in conflict with fundamental human rights, defining this not as a fundamental right itself, but only as a regulated freedom, which is limited by a series of rules and principles established by the legislator.<sup>39</sup> Therefore, it is clear that Italian company law has not shown a particular concern for CSR issues, whose regulation is substantially left to the mandatory rules provided for by laws dedicated to environmental and social protection. Nevertheless, in recent years some disciplines have appeared, drawing inspiration from the international models in this area, that aim to boost more sustainable action by Italian enterprises. This comes also in the wake of European measures.

First of all, we have to consider the law defining the 'Business Act' (legge 11 November 2011 no 180), which was adopted to ensure the full application of the European Commission's Communication 'Think Small First – A Small Business Act for Europe'.<sup>40</sup> The purpose of the law is to promote national and regional legislation consistent with the scope of the Small Business Act; and in so doing, it identifies some fundamental principles that should ensure the further strengthening of the sustainable growth and competitiveness in SMEs.

The Italian Business Act aims, incidentally, to 'promote the inclusion of

<sup>38</sup> This is the wording of section 172, of the Companies Act 2006 (UK), subsection 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, 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 of high standards of business conduct, and f) the need to act fairly as between members of the company'.

<sup>39</sup> M. Libertini, n 18 above, 20; Id, 'A "Highly Competition Social Market Economy" as a Founding Element of the European Economic Constitution' *Concorrenza e mercato*, 491 (2011).

<sup>40</sup> [COM(2008) 394 final] of 25 June 2008, available at <https://tinyurl.com/4na3j6re> (last visited 30 June 2021).

social issues and environmental matters in the conduct of business activities and in their relations with stakeholders'. Even if the law has the characteristics of a declamatory discourse, rather than a strict prescriptive formulation, it represents proactive support for sustainability as it introduces social aims among the general principles of the business legal system, which may be relevant in the interpretation of more specific legal rules and should improve collaboration between business and public authorities.

A second, very strong boost coming from EU law, is connected with the implementation of Directive 2014/95/EU, on non-financial and diversity information.<sup>41</sup> As a sign of increasing CSR juridification, the Directive introduces mandatory communication, including a description of the policies pursued in relation to environmental social governance (ESG) matters and due diligence processes implemented by the company and its supply chain. Although it does not impose legal obligations of conduct on undertakings, it offers, by a comply or explain mechanism, a strong reputational incentive to adopt ESG strategies and practices.<sup>42</sup>

The Directive concerns large undertakings which are public-interest entities (as defined by Directive 2013/34/EU) and public-interest entities which are parent undertakings of a large group.<sup>43</sup> However, it is possible that even SMEs can provide a non-financial statement containing information about environmental, social and employee matters, because Italy has applied the optional provision underlined by recital 14 of the Directive, opening the regulation to the discretionary adoption by small undertakings.

The recital shows, on the one hand, the legislator's conscientiousness in not imposing a disproportionate burden on minor enterprises in terms of the cost of reporting sustainability information;<sup>44</sup> and on the other hand it allows

<sup>41</sup> European Parliament and Council Directive 2014/95/EU of 22 October 2014, amending Directive 2013/34/EU on the disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1. The regulation is actually under review: see The European Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) no 537/2014, as regards corporate sustainability reporting of 21 April 2021 [COM(2021) 189 final] available at <https://tinyurl.com/2uaxtusw> (last visited 30 June 2021).

<sup>42</sup> Note that the Sustainable Finance Action Plan expanded the non-financial reporting requirement to include disclosure of initiatives to reduce the impact of climate change: Communication of the Commission, Guidelines on non-financial reporting. Supplement on reporting climate-related information [2019] OJ C209/1.

The recent European Commission Proposal for a Directive on corporate sustainability reporting (n 41 above) confirms the choice not to put new reporting requirements on small enterprises, except for SMEs with securities listed on regulated markets. The burden to listed SMEs is also limited, as they will be allowed to report their sustainability information using simpler standards than the standards that will apply to larger undertakings.

<sup>43</sup> 'In each case having an average number of employees in excess of five hundred, in the case of a group on a consolidated basis', Directive 2014/95/EU, Whereas 14.

<sup>44</sup> Sustainable paths of SMEs would in any case be assured to the extent that larger companies are obliged to disclose information on the due diligence processes also regarding its supply and

enterprises which are outside the perimeter of the mandatory disclosure requirements to publish a non-financial report on a voluntary basis, with the declaration of compliance with the decreto legislativo 30 December 2016 no 254, thus being able to demonstrate to stakeholders an active engagement in ESG strategies and objectives.

## V. ... To Small-Sized Companies: The Italian Benefit Corporation

It was noted above that there are rules, such as those on the communication of non-financial statements, that SMEs can follow on a purely voluntary basis in order to communicate their social commitment to stakeholders affected by the business activities and to the public as a whole. Recently, however, organisational models have been enriched in Italian company law with a qualification to a company's purpose, namely that of 'Società Benefit'. This concept aims to encourage companies to assume the obligation of creating or pursuing a general and one or more specific public benefits, assessed against a third party standard, in addition to the purpose of profit.<sup>45</sup>

The Italian 'Società Benefit' was inspired by the model of the North-American Benefit Corporation, first introduced into the Maryland legislation in April 2010, on the basis of a 'Model Business Corporation Act' proposed (and promoted) by B-Lab, a not-for-profit organisation that certifies as B-Corp for-profit companies which meet rigorous standards of social and environmental performance, accountability and transparency.<sup>46</sup> The intent, in the archetypical legal experience, was to build a safe harbor for directors, should they wish to take into consideration, as interests along which they run the company, concerns of other important constituencies, such as employees, customers, local or regional economy, local or global environment and other factors.<sup>47</sup>

subcontracting chains (Whereas 6, Directive 2014/95/EU). Recently, the European Parliament Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, available at <https://tinyurl.com/ykju68se> (last visited 30 June 2021) following a large study of European Parliamentary Research Service released in October 2020, available at <https://tinyurl.com/2xrcknw7> (last visited 30 June 2021) proposes the adoption of a hard law instrument aiming at strengthening corporate accountability for human rights and environment abuses while pursuing the objective of boosting good governance at the European and international level.

<sup>45</sup> Italy implemented the 'Società Benefit' legislation with legge 28 December 2015 no 208.

<sup>46</sup> For more information about the activity of B-Lab, which leads a community including three thousand nine hundred BCorp in seventy countries, providing for BCorp Certification and a B Impact Assessment which is widely used to measure and manage social and environmental performance of businesses, see <https://tinyurl.com/38tv43wu> (last visited 30 June 2021). Actually, 37 States have passed benefit corporation legislation and four are working on it.

<sup>47</sup> Compare W.H. Clark et al, 'The Need and Rationale for the Benefit Corporation', version of 18 January 2013, available at <https://tinyurl.com/y84an3km> (last visited 30 June 2021); H.K.

The model introduced by the Italian legislator fits into the European legal context with an economic model that is historically more institutional and intermediate than the Anglo-American one. Here, the provision of Benefit Corporation law responds to the need to enable shareholders to optimally pursue a balance between a purpose of profit and the achievement of social ends,<sup>48</sup> particularly by integrating stakeholders' needs into organisational activity and performance plans.<sup>49</sup> It is therefore an organisational model that pertains to the issue of CSR to the extent that it entrusts private autonomy, through the inclusion in the bylaws of a general and one or more specific public benefits, to strike a balance among societal interests and the profit purpose, which remains the typical objective of the company.

It is not easy to say whether this approach contradicts the voluntary nature of CSR, because there is the possibility that, according to the bylaws of a company, the public benefit pursued by a company could be delineated in a very generic form and therefore, in many cases, the pursuit of the general public benefit (acting responsibly, sustainably and transparently) and of the specific one (serving one or more specific purposes of common benefit) will be left to the exercise of administrative discretion by managers of the company.

But what is the relationship between SMEs and benefit corporations?

In Italy, most of the benefit companies are SMEs, as defined in the Commission Recommendation of 6 May 2003 no 361.<sup>50</sup> Therefore, it is to this size range of companies, rather than to larger public companies, that the benefit model seems to apply.<sup>51</sup> As with other nations that have introduced a similar

Lidstone et al, 'The Long and Winding Road to Public Benefit Corporations in Colorado'(2019), available at <https://tinyurl.com/asjn99ek> (last visited 30 June 2021).

<sup>48</sup> The meaning of 'social enterprise' concept is quite different between Europe and United States, R. Esposito, 'The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case of Benefit Corporation' 4(2) *William & Mary Business Law Review*, 639-714 (2013); R. Katz and A. Page, 'The Role of Social Enterprise' 35 *Vermont Law Review*, 59-103 (2010); B. Means and J.W. Yockey eds, *The Cambridge Handbook of Social Enterprise Law* (Cambridge: Cambridge University Press, 2019). It is worth mentioning that Italian Company Law provides for another figure, the 'Impresa Sociale' regulated by decreto legislativo 3 July 2017 no 112, in which the purpose of profits must not be the main objective of members, which should rather pursue the social mission underlined by Art 2, decreto legislativo no 112/2017. The substantial difference between 'Impresa sociale' and 'Società Benefit' under Italian Company Law, lies precisely in the fact that the functional impact of the public benefit purpose must not be higher than that of the profit purpose, G. Marasà, *Imprese sociali, altri enti del terzo settore, società benefit* (Torino: Giappichelli, 2019), 23-24.

<sup>49</sup> G. Riolfo, 'The New Italian Benefit Corporation' 21(2) *European Business Organization Law Review*, 279-317 (2020).

<sup>50</sup> [2003] OJ L124/36. See, on this topic, M. Bianchini and C. Sertoli, 'Una ricerca Assonime sulle società benefit. Dati empirici, prassi statutaria e prospettive' *Analisi giuridica dell'economia*, 201, 206 (2018) and, explaining a case study in the context of Italian SMEs, M. Del Baldo, 'Acting As a Benefit Corporation and a B Corp to Responsibly Pursue Private and Public Benefits. The Case of Paradisi Srl (Italy)' 4(1) *International Journal of Corporate Social Responsibility*, 1-18 (2019).

<sup>51</sup> M. Stella Richter jr, 'Corporate social responsibility, social enterprise, benefit corporation: magia delle parole?' *Vita notarile*, 953-968 (2017).

change in corporate law, it has been welcomed in Italy as a powerful tool that should stimulate SMEs to develop sustainable strategies and to enhance those already in place by aiming at boosting the transition of the entrepreneurial system towards sustainable development.<sup>52</sup> Even though Italian SMEs have a low intensity of CSR conduct, they have a great willingness to move toward sustainability practices, and to better formalise unstructured CSR processes already in place, in the presence of adequate incentives.<sup>53</sup>

By adopting the 'Società Benefit' model, companies that are mobilizable towards CSR aims could progress to more advanced cohesive organisational forms, where the areas of engagement and approach to CSR communication are systematic and creative, expressing themselves in a large variety of shapes. This can include the involvement of employees in decisions, a high level of transparency in decision-making processes, taking actions relating to sustainable manufacturing and extensive collaboration with local community and not-for-profit organisations.<sup>54</sup>

Dual mission management and common benefit communication are at the centre of the law relating to Italian Benefit Corporations. First of all, the provision of one or more specific benefits aims at fulfilling the objective of responsible, sustainable and transparent management, making the pursuit of the blended mission binding for shareholders and managers, who have the delicate task of balancing potentially antithetical interests.

Directors, therefore, have far greater discretionary powers, conforming in a similar way to that contemplated in the management of (profit) corporations according to team production theory,<sup>55</sup> where choices that reduce profits in favor of aims of stakeholders other than shareholders can only be prevented by the majority of shareholders threatening to revoke or not to reconfirm the appointment of directors.<sup>56</sup>

The introduction of the Benefit Corporation model into Italian company law has awakened an age-old debate on the purpose of the corporation, raising the question of whether the new legislation was intended to influence the main interpretation of Art 2247 Civil Code. This provision, in fact, provides that, in the exercise of an economic activity, companies must have an egoistic,<sup>57</sup> as well

<sup>52</sup> E. Giovannini, 'Prefazione', in F. Massa ed, *Sostenibilità* n 19 above, XIII-XIV.

<sup>53</sup> M.M. Molteni and M. Lucchini, *I modelli di responsabilità sociale nelle imprese italiane* (Roma: Franco Angeli, 2004), 121.

<sup>54</sup> *ibid.* For an explanation of the cohesive model of conduct, A.Y. Mermod and S.O. Idowu, *Corporate Social Responsibility in the Global Business World* (Berlin-Heidelberg: Springer, 2014), 177.

<sup>55</sup> M.M. Blair and L.A. Stout, 'A Team Production Theory of Corporate Law' 85(2) *Virginia Law Review*, 247, 248 (1999).

<sup>56</sup> F. Denozza and A. Stabilini, 'La società benefit nell'era dell'investor capitalism' *Rivista ODC*, 1, 14 (2017).

<sup>57</sup> Using the broader concept of egoistic purpose aiming to interpret the provision in Art 1, para. 376, legge no 208/2015, where it states 'in addition to the aim of split profits', we can easily

as a lucrative purpose. However, in the past it was never doubted, at least since the decline of the *ultra vires* acts theory, that companies were able to pursue public benefit purposes,<sup>58</sup> or move their activity towards environmental or social sustainability.<sup>59</sup>

Following the introduction of legge no 208/2015, there has been debate as to whether this interpretation is still plausible, or if the introduction of the ‘Società Benefit’ model has strengthened the lucrative (or egoistic) purpose of companies that do not have a public benefit mandate in their corporate charter. The question arises from the obscure formulation of Art 1, para 379, legge no 208/2015, where it is provided that ‘companies others than BC [Benefit Corporations], if they also intend to pursue public benefit purposes, are required to amend articles of association or bylaws’. Hence the counterintuitive conclusion is that only with a change to their bylaws can a company orient its strategies and objectives towards sustainable performance. However, this conclusion seems to be contrary to the regulation on non-financial information, which allows firms, both at a European (recital 14, Directive 2014/95/UE) and national (Art 7, decreto legislativo no 254/2016) level to adopt a non-financial statement on a voluntary basis. It would therefore be illogical to think that the adoption by management of sustainability strategies was subject to the condition of amendment of bylaws at a shareholders’ meeting.

It is important to underline that Italian law, unlike the American Model Business Corporation Act, requires the appointment of a benefit officer, which is typically a formal role useful for improving endo-managerial processes aimed at enhancing the hybrid and long-term orientation of the company, as is characteristic of cohesive enterprises. The main differences between the American Model Business Corporation legislation and the Italian model are set out in the following table.

	Model Business Corporation legislation	Italian ‘Società Benefit’ legislation
General public benefit (in the articles of incorporation)	Mandatory	Mandatory
One or more specific public benefit(s) (in the articles of incorporation)	Optional	Mandatory

resolve the question posed by the contradiction between § 376 – which seems to refer to companies with a lucrative purpose solely – and § 377, according to which the BC quality can be assumed by each of the types of companies mentioned in Book V, Title V and VI of the Italian Civil Code, including cooperatives. On the subject, G. Riolfo, n 49 above, 287-288, considers that the second provision is absorbent with respect to the first one.

<sup>58</sup> M. Stella Richter jr, n 51 above, 957, 961-962.

<sup>59</sup> G. Marasà, n 48 above, 18-20.



Third-party standard	Mandatory	Mandatory
Directors' standard of conduct	Board of Directors (BoD) must <i>consider</i> conflicting factors	BoD must <i>balance</i> pecuniary interests of shareholders and GPB-SPBs
Benefit director	Mandatory for listed companies; optional for the others. They 'shall be an individual who is independent' (§302 (b))	Not provided
Benefit officer	Optional	Mandatory
Benefit report	Mandatory	Mandatory
Benefit name	Not provided	Optional
Stakeholders' forum (or similar tools)	Not provided	Not provided

Until recently, the Italian 'Società Benefit' did not enjoy any fiscal benefit, tax relief or other financial advantages. Only with the approval of the recent legge 17 July 2020 no 77, which has introduced a new rule entitled 'Promotion of the Società Benefit system', can an organisation which adopts the Benefit Corporation model obtain a tax credit equal to fifty per cent of the costs of incorporation or transformation (*recte*: amendment of bylaws). It is therefore quite clear that reputational advantages serve as the main incentives for the adoption of the 'Società Benefit' form. This is why the communication of the social responsibility involved in the benefit model adoption remains crucial and it is mentioned in a series of rules relating to them. The denomination 'Società Benefit' can be used in the name of the company – although this is not mandatory – only if a public benefit purpose has been inserted into the articles of incorporation or in the bylaws of the company.

As pointed out above, a Benefit Corporation is obliged to draw up an annual report which constitutes its main accountability tool. It also represents the only useful means for stakeholders and the supervisory authority, which in Italy is the AGCM (Autorità Garante della Concorrenza e del Mercato), to evaluate the pursuit of programmed not-for-profit benefits and the non-deceptive nature of related communications, within the framework of the regulation of unfair commercial practices.

The adoption of integrated reporting methods, which the non-financial disclosure practice is also moving towards,<sup>60</sup> represents a further point – albeit

<sup>60</sup> G. Nigri and M. Del Baldo, 'Sustainability Reporting and Performance Measurement Systems: How do Small- and Medium- Sized Benefit Corporation Manage Integration?' 10(12) *Sustainability*, 4499 (2018).

a voluntary one – in the strategic improvement of multi-purpose business models, since it manages to favor the integration of social responsibility into management functions, fostering greater cohesion of objectives and protection from the risk of opportunism.

## VI. Conclusions

Even though in Italian Company Law there are no rules similar to those outlined above in Art 1833 of the French Code Civil or by section 172 of the UK Companies Act relating to CSR considerations, the issue of CSR has come to the centre of the corporate law discourse and interesting schemes are offered within the Italian sphere for the development of sustainable management strategies by SMEs.

The Italian legal system, thanks to the guiding force of constitutional values (like the ‘social utility’ of Art 41 of the Constitutional Charter) and the EU adhesion to the highly competitive social market economy model under Art 3 of European Union Treaty, already hold all the tools for developing the discourse on business purpose in a modern way. Moreover, EU harmonisation has introduced, and is still developing, information obligations and compliance duties that are likely to affect the behaviour of companies, especially in a context in which access to finance may depend on a more attentive awareness about sustainability. However, if the Italian legislator wants to extend issues concerning social responsibility beyond the traditional field of large multinational companies and involve SMEs, whose contributions are essential for achieving the ambitious goals of sustainability,<sup>61</sup> it needs to provide incentives and support for the adoption of cohesive organisational forms, rather than just develop more prescriptive legislation, which could overburden small businesses with excessive costs.

Virtuous entrepreneurial realities are already widespread in the Italian business environment. They are characterised by the strong personal imprint of the owner of a business and by the transmission of family and personal values by the owner in the value chain. These firms are defined as ‘spirited businesses’.<sup>62</sup> They arise from personal and family values as well as from the attachment to local communities and find ever greater legitimacy in the sensitivity of communities. This is also due to the direct communication and spontaneous convergence of businesses on issues of environmental and social emergency.

The provision of the Benefit Corporation model is not an enabling measure

<sup>61</sup> See, European Commission, Communication ‘An SME Strategy for a Sustainable and Digital Europe’ [COM( 2020) 103 final], available at <https://tinyurl.com/54rt3fuy> (last visited 30 June 2021), 1: ‘Europe’s 25 million small and medium enterprises (SMEs) are the backbone of the EU economy’.

<sup>62</sup> M. Del Baldo, ‘Corporate Social Responsibility and Corporate Governance in Italian SMEs: The Experience of Some “Spirited Businesses”’ 16(1) *Journal of Management and Governance*, 1-36 (2012).

– as it is clear that even profit companies can carry out single acts and activities with a public benefit purpose. However, companies can perform a promotional role in providing CSR organisational tools such as the appointment of a benefit officer, complying with an obligation to file a yearly report on its non-financial performance using an independent third-party standard, the enlargement of the discretionary management powers to allow for the consideration of non-financial stakeholders and the balancing of conflicting interests. This can all lead to blending social impact with competitive advantage. If we intend to take CSR seriously,<sup>63</sup> the role of the ‘Società Benefit’ model may also be used to enhance a progressive approach towards improving sustainability strategies in SMEs and to lead to a widespread adoption, also in the corporate field, of real and not just fictitious forms of CSR.

<sup>63</sup> According to the valuable suggestion of M. Libertini, ‘La comunicazione pubblicitaria e l’azione delle imprese per il miglioramento ambientale’ *Giurisprudenza commerciale*, I, 331, 334 (2012). The risk that the public declaration of a benefit purpose by the corporation becomes the premise of opportunistic behaviors could be just around the corner, if one considers that (general and special) benefit purposes are defined by most statutes in a very vague form and the equilibrate achievement of societal and lucrative aims are not fully guaranteed in practice: G. Mion and C.R. Loza Adai, ‘Understanding the Purpose of Benefit Corporations: An Empirical Study on the Italian Case’ 5(4) *International Journal of Corporate Social Responsibility*, 1, 12 (2020).