Shareholder Stewardship Enforcement

Law Working Paper N° 514/2020
May 2020

Dionysia Katelouzou
Kings College London

Konstantinos Sergakis
University of Glasgow

ECGI Working Paper Series in Law

Shareholder Stewardship Enforcement

Working Paper N° 514/2020
May 2020

Dionysia Katelouzou
Konstantinos Sergakis

We thank the participants of the 1st Global Shareholder Stewardship Conference at KCL (https://www.kcl.ac.uk/research/global-shareholder-stewardship) for helpful comments on an earlier version of this work. The research towards this publication has been supported by the British Academy's partnership with the Department for Business, Energy and Industrial Strategy.

Abstract

One of the central problems of shareholder stewardship around the world is rendering institutional investors good monitors of their investee companies and improving their accountability to both companies and their own beneficiaries and clients. The co- existence of soft norms (stewardship codes or principles) as well as semi-hard and hard law rules across the globe raises important questions about the future of shareholder stewardship frameworks and their enforcement. In this paper, we investigate this problem focusing on the availability (or not) of strategies to enforce shareholder stewardship. We adopt a broad approach to enforcement mechanisms in the area of shareholder stewardship and set out a simple conceptual taxonomy based on three dimensions. The proposed taxonomy takes into account the nature of the norm enforcer and distinguishes between self-enforcement and third-party enforcement. In the latter we consider public, quasi-public, private, market and social norm-enforcers. These actors may or not be the standard setters of the relevant norms. We then distinguish between formal – in the sense of either (quasi)judicial proceedings or membership/adherence sanctions within stewardship networks – and informal enforcement mechanisms. Finally, we take into account the temporal dimension of enforcement and distinguish between ex ante (monitoring and deterrence) and as ex post compliance.

Our starting point is that, for market actors to be able to absorb bottom-up or, most importantly, top-down regulation, flexibility in adapting to best shareholder stewardship practices is needed. Indeed, examining the enforcement mode of shareholder stewardship across 25 countries we confirm that informal enforcement by market actors is the preferred option. Looking forward, we sketch the broad contours of an optimal shareholder stewardship enforcement framework based on our proposed taxonomy. We caution against administrative sanctions and support instead a facilitating role for public and quasi-public actors in two distinct ways. First, public and quasi-public actors can facilitate shareholder stewardship enforcement via membership/adherence sanctions taking place within stewardship networks (such as public tiering) or informal mechanisms (including public information diffusion through annual reports and guidelines, public reputational mechanisms, such as 'name and shame', and private dialogue). Secondly, where ultimate investors have suffered damages from deficient disclosure of engagement policies, we support the introduction of a facilitating system of civil claims initiated by public or quasi-public authorities that can serve both restorative-compensatory objectives and public interests. We also advance the importance of promoting and refining enforcement by market and social actors. Our proposed enforcement framework is not intended to be applied in a uniform fashion around the world. Rather its multi-actor, multi-modal and temporally continuous fashion can adjust to any national or supranational framework.

Keywords: shareholder stewardship, corporate governance, institutional investors, enforcement, formal enforcement, informal enforcement, Shareholder Rights Directive

JEL Classifications: K22, G30

Dionysia Katelouzou*
Senior Lecturer
Kings College London, The Dickson Poon School of Law
Somerset House East Wing, Strand
London WC2R 2LS, United Kingdom
e-mail: dionysia.katelouzou@kcl.ac.uk

Konstantinos Sergakis
Professor of Capital Markets Law and Corporate Governance
University of Glasgow
Stair Building, 5-8 The Square
Glasgow, G12 8QQ, United Kingdom
e-mail: Konstantinos.Sergakis@glasgow.ac.uk

*Corresponding Author

TLI *Think!*

A Dickson Poon Transnational Law Institute, King's College London
Research Paper Series

Shareholder Stewardship Enforcement

Dionysia Katelouzou and Konstantinos Sergakis

An edited version of the paper will be published as a chapter in
Global Shareholder Stewardship: Complexities, Challenges and Possibilities
(Dionysia Katelouzou & Dan W. Puchniak eds, Cambridge University Press, Forthcoming)

TLI *Think!* Paper 7/2020

Founding Editor: Peer Zumbansen, Co-Director Transnational Law Institute
Production Editor: Farnush Ghadery

The Dickson Poon School of Law, King's College London
W: http://www.kcl.ac.uk/law/tli E: tli@kcl.ac.uk

ABSTRACT: One of the central problems of shareholder stewardship around the world is rendering institutional investors good monitors of their investee companies and improving their accountability to both companies and their own beneficiaries and clients. The co-existence of soft norms (stewardship codes or principles) as well as semi-hard and hard law rules across the globe raises important questions about the future of shareholder stewardship frameworks and their enforcement. In this paper, we investigate this problem focusing on the availability (or not) of strategies to enforce shareholder stewardship. We adopt a broad approach to enforcement mechanisms in the area of shareholder stewardship and set out a simple conceptual taxonomy based on three dimensions. The proposed taxonomy takes into account the nature of the norm enforcer and distinguishes between self-enforcement and third-party enforcement. In the latter we consider public, quasi-public, private, market and social norm-enforcers. These actors may or not be the standard setters of the relevant norms. We then distinguish between formal – in the sense of either (quasi)judicial proceedings or membership/adherence sanctions within stewardship networks – and informal enforcement mechanisms. Finally, we take into account the temporal dimension of enforcement and distinguish between ex ante (monitoring and deterrence) and as ex post compliance.

Our starting point is that, for market actors to be able to absorb bottom-up or, most importantly, top-down regulation, flexibility in adapting to best shareholder stewardship practices is needed. Indeed, examining the enforcement mode of shareholder stewardship across 25 countries we confirm that informal enforcement by market actors is the preferred option. Looking forward, we sketch the broad contours of an optimal shareholder stewardship enforcement framework based on our proposed taxonomy. We caution against administrative sanctions and support instead a facilitating role for public and quasi-public actors in two distinct ways. First, public and quasi-public actors can facilitate shareholder stewardship enforcement via membership/adherence sanctions taking place within stewardship networks (such as public tiering) or informal mechanisms (including public information diffusion through annual reports and guidelines, public reputational mechanisms, such as 'name and shame', and private dialogue). Secondly, where ultimate investors have suffered damages from deficient disclosure of engagement policies, we support the introduction of a facilitating system of civil claims initiated by public or quasi-public authorities that can serve both restorative-compensatory objectives and public interests. We also advance the importance of promoting and refining enforcement by market and social actors. Our proposed enforcement framework is not intended to be applied in a uniform fashion around the world. Rather its multi-actor, multi-modal and temporally continuous fashion can adjust to any national or supranational framework.

KEYWORDS: shareholder stewardship, corporate governance, institutional investors, enforcement, formal enforcement, informal enforcement, Shareholder Rights Directive

Shareholder Stewardship Enforcement

Dionysia Katelouzou* and Konstantinos Sergakis**

May Draft

An edited version of the paper will be published as a chapter in Global Shareholder Stewardship: Complexities, Challenges and Possibilities (Dionysia Katelouzou & Dan W. Puchniak eds, Cambridge University Press, Forthcoming)

I. INTRODUCTION

'Shareholder stewardship', in the sense of institutional shareholders' monitoring and engaging with companies in such a way that both companies and the ultimate providers of capital prosper,[1] has gained importance across the globe as the new normative means of ensuring sound *modus operandi* of institutional investors and asset managers in listed equity and more recently in other assets.[2] Shareholder stewardship on the part of institutional shareholders, being strongly associated with both good corporate governance and socially approved responsible investing,[3] has been mainly promoted in recent years through voluntary, soft, and flexible stewardship *norms* (stewardship codes and best practice principles) which are most of the times

* Senior Lecturer, The Dickson Poon School of Law, King's College London
** Professor of Capital Markets Law and Corporate Governance, University of Glasgow

We thank the participants of the 1st Global Shareholder Stewardship Conference at KCL (https://www.kcl.ac.uk/research/global-shareholder-stewardship) for helpful comments on an earlier version of this work. The research towards this publication has been supported by the British Academy's partnership with the Department for Business, Energy and Industrial Strategy.

[1] This term is borrowed from Dionysia Katelouzou, *Institutional Shareholders and Corporate Governance: The Path to Enlightened Stewardship* (CUP, 2021 forthcoming) which provides a comprehensive analysis of the broader concept of stewardship and its corporate governance as well as investment management aspects.
[2] Note however that in recent years a new trend appears which expands stewardship to other assets, such as infrastructure and fixed income. See e.g. the Financial Reporting Council (FRC), UK Stewardship Code 2020, <https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf> accessed 13 February 2020. For such activities, the term 'stewardship' (rather than 'shareholder stewardship') is more accurate. See further Katelouzou (n 1).
[3] For an overview of the growing public interest in stewardship codes, see Dionysia Katelouzou, 'Shareholder Stewardship: A Case of (Re)Embedding Institutional Investors and the Corporation?' in Beate Sjåfjell and Chris M. Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019) 581-595.

self-regulatory in nature.[4] In some contexts, these soft-law norms attempted to formalise what previously consisted of entirely 'social norms'[5] and expectations about shareholder engagement[6] and socially approved responsible investing.[7] Other times, the creation of soft stewardship norms was an attempt to prevent top-down regulation of investment practices,[8] or simply a form of 'halo signalling' demonstrating commitment to good corporate governance standards.[9]

Against this mainstream approach of designing and enforcing shareholder stewardship via soft-law norms, the revised EU Shareholder Rights Directive (SRD II)[10] elevates the operability framework of shareholder stewardship to higher standards of transparency and promotes long-term shareholder engagement on the part of institutional investors and asset managers through the imposition of semi-hard rules.[11] At the same time, hard law, in the form of disclosure obligations or expansive fiduciary duties, are being increasingly introduced to address certain aspects of the broader stewardship role (related to both corporate governance and investment management aspects) of specific market actors.[12] This co-existence of soft-law and semi-hard and hard law across the globe raises important questions about the future of stewardship frameworks[13] and their enforcement. The twofold function of stewardship, as a

[4] In this study we use the term 'norm' in the sense of *legal* norms, either soft or hard in nature and we do not refer to non-legal norms. But see Martha Finnemore, 'Are Legal Norms Distinctive' (2001) 32 (3) Journal of International Law and Politics 699 (questioning the distinction between legal and non-legal norms).
[5] The literature on social norms is voluminous. See e.g. Amir N. Licht, 'Social Norms and the Law: Why Peoples Obey the Law' (2008) 4 Review of Law and Economics 715, 717 (defining social norms as 'behaviors that are seen as desirable or legitimate in the shaped view of societal members and whose violation elicits at least informal disapproval').
[6] See e.g. Paul Davies, 'The UK Stewardship Code 2010-2020 From Saving the Company to Saving the Planet?' in Dionysia Katelouzou and Dan W. Puchniak (eds), *Global Shareholder Stewardship: Complexities, Challenges and Possibilities* (CUP 2021 forthcoming), also available at <https://ssrn.com/abstract=3553493> assessed 6 May 2020.
[7] See e.g. Natania Locke, 'Encouraging Sustainable Investment in South Africa: CRISA and Beyond' in Katelouzou and Puchniak ibid.
[8] This is the case in the UK. See Katelouzou (n 1).
[9] See Dan W. Puchniak and Samantha S. Tang, 'Singapore's Embrace of Shareholder Stewardship: A Puzzling Success' in Katelouzou and Puchniak (n 6).
[10] Directive 2017/828/EU of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/1.
[11] On the hardening of stewardship through the SRD II see Iris H.-Y. Chiu and Dionysia Katelouzou, 'From Shareholder Stewardship to Shareholder Duties: is the Time Ripe?' in Hanne Birkmose (ed), *Shareholders' Duties* (Kluwer Law International 2017), 131-52.
[12] In the UK, see e.g. The Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018 and The Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019 requiring trustees to set out and disclose stewardship of scheme investments. Further on the co-existence of these multiple regulatory layers of stewardship, see Katelouzou (n 1).
[13] On the symbiosis of soft law and semi-hard law stewardship norms in the EU, see Dionysia Katelouzou and Konstantinos Sergakis, 'When Harmonisation is not Enough: Shareholder Stewardship in the European Union' (working paper).

corporate governance monitoring mechanism in the benefit of investee companies' shareholders and wider stakeholders and as an internal investment management tool on behalf of ultimate investors,[14] may not be equally evidenced across the different stewardship codes,[15] but has important ramifications for legal and regulatory frameworks attempting both to encourage, or less often to impose, day-to-day stewardship practice at the national and international levels.

One of the central problems of shareholder stewardship around the world is rendering institutional investors good monitors of their investee companies and improving their accountability to both companies and their own beneficiaries and clients.[16] In this Chapter we investigate this problem focusing on the availability (or not) of strategies to enforce shareholder stewardship around the world. We adopt a *broad* approach to enforcement mechanisms in the area of shareholder stewardship and set out a simple conceptual taxonomy based on three dimensions. Our taxonomy takes into account the *nature of the norm-enforcer* and distinguishes between self-enforcement and third-party enforcement. In the latter we consider public, quasi-public, private, market and social norm-enforcers. These actors may or not be the standard setters of the relevant soft or hard rules. We then distinguish between formal and informal enforcement *mechanisms* so as to highlight the wide variety of enforcement options that all these actors have at their disposal. Finally, we take into account the *temporal* dimension of enforcement and distinguish between ex ante (monitoring and deterrence) and ex post (compliance).[17]

We then turn to an in-depth analysis of the current enforcement mode in the context of shareholder stewardship. We find that the overwhelming majority of stewardship norms are incorporated in soft stewardship 'codes'[18] which unlike corporate governance codes are completely voluntary in nature relying solely on market and social enforcement mechanisms. An exception to this trend has been the implementation of Article 14b of the SRD II in the EU

---

[14] Dionysia Katelouzou, 'Reflections on the Nature of the Public Corporation in an Era of Shareholder Activism and Shareholder Stewardship' in Barnali Choudhury and Martin Petrin (eds), *Understanding the Company: Corporate Governance and Theory* (CUP, 2017), 117-44 and Katelouzou (n 1).
[15] An aspect of investment management often incorporated in stewardship codes is the management of conflicts of interests and the supply of relevant disclosures. See Katelouzou (n 1). For differences across 41 stewardship codes in incorporating this principle, see Dionysia Katelouzou and Mathias Siems, 'The Global Diffusion of Stewardship Codes' in Katelouzou and Puchniak (n 6).
[16] See also Dionysia Katelouzou and Dan W. Puchniak, 'Introduction' in Katelouzou and Puchniak (n 6).
[17] But see John C. Jr Coffee, 'Law and the Market: The Impact of Enforcement' (2007) 156 University of Pennsylvania Law Review 229, 254 (distinguishing between 'regulation', that is 'ex ante' enforcement and enforcement which always operates 'ex post').
[18] Similar to Katelouzou and Siems we define stewardship codes broadly as including stewardship 'preliminary initiatives'. See, further Katelouzou and Siems (n 15).

by some Member States in a rather formalistic fashion and the introduction of administrative sanctions and measures for the breach of the semi-hard engagement rules of the SRD II. However, the EU example co-exist within a wider international framework that largely opts for enforcement by market actors in reflection of the largely soft-law nature of the underpinning shareholder stewardship norms.[19]

Looking forward, we outline the broad contours of an enforcement framework in the context of shareholder stewardship employing our proposed enforcement taxonomy. Our starting point is that, for market actors (specifically institutional investors and asset managers)[20] to be able to absorb bottom-up or, most importantly, top-down regulation, flexibility in adapting to best shareholder stewardship practices is needed. We therefore caution against formal public enforcement when shareholder stewardship norms are hard-law in nature,[21] and illustrate, as a way of example, the defects of administrative penalties imposed by national competent authorities (NCAs) in the EU. Nevertheless, we are not agnostic to the enforcement abilities of public or quasi-public actors. We, therefore, see a facilitating role for such actors in two distinct ways. First, where ultimate beneficiaries have suffered damages from deficient disclosure of engagement policies (where hard-law stewardship norms have been established), we support the introduction of a facilitating system of civil claims initiated by public or quasi-public authorities that can serve both restorative-compensatory objectives and public interests. Secondly, and irrespective of the hard- or soft-law nature of the underpinning stewardship norm(s), public and quasi-public actors can support shareholder stewardship enforcement via informal mechanisms (such as public information diffusion, reputational mechanisms such as 'name and shame', ongoing dialogue and private meetings). We also advance the importance

[19] There are, however, cases where hard law (disclosure) duties are imposed on institutional investors via investment management law. This is, for instance, the case in the US, where in 2003 the Securities and Exchange Commission (SEC) imposed an obligation on investment management companies (the managers of mutual funds) and their advisors to disclose proxy voting policies and proxy votes. For a thorough analysis of the voting disclosure obligations of mutual funds in the US, see Edward Rock, 'Institutional Investors in Corporate Governance' in Jeffrey N. Gordon and Wolf-Georg Ringe (eds) *The Oxford Handbook of Corporate Law and Governance* (OUP, 2018) 363, 376. Such mandatory disclosures, however, deal with a specific aspect of stewardship, that of voting which is not the only form that stewardship engagement can take. For a comprehensive analysis of the stewardship ecosystem and the co-existence of soft- and hard-law rules relating to both the corporate governance and the investment management aspects of stewardship in the UK, see Katelouzou (n 1).

[20] In this chapter, we do not examine stewardship aspects and duties applicable to service providers. Nevertheless, we argue that the enforcement rationales, challenges and perspectives analysed hereinafter apply to a considerable extent *mutatis mutandis* to service providers.

[21] Even though we are not aware of any completely mandatory shareholder stewardship regime around the world, there are academics that support the introduction of such regimes under certain circumstances. See Umakanth Varottil, 'Shareholder Stewardship in India: The Desiderata' in Katelouzou and Puchniak (n 6), also available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3538037> accessed 13 April 2020.

of promoting and refining (formal and informal) enforcement by market and social actors, especially through voluntary networks.

Our proposed enforcement taxonomy is multi-actor and multi-modal along a time-continuum, and essentially pertains to a single key point: to enforce shareholder stewardship effectively, various actors, mechanisms and timing in enforcement need to work together. But there is no global 'one-size-fits-all' approach to shareholder stewardship enforcement. Rather the specifics will depend on the soft/hard-law nature of the stewardship norm that is to be enforced and on the country's quality of institutions, economic history and culture.

The remainder of the Chapter proceeds as follows. Part II lays the groundwork for a general understanding of the existing enforcement rationales and methods in the area of corporate governance and stewardship and presents a new taxonomy as a way to understand the complex system of enforcement. Part III turns its focus on the current enforcement mechanisms of shareholder stewardship norms and points out their weaknesses and dissonance. Part IV builds on the proposed enforcement taxonomy and advances a multi-actor enforcement system consisting of a continuum of largely complementary formal and informal mechanisms which include all involved – public, quasi-public, private, market and social – actors. While we generally caution against formal public enforcement (namely administrative penalties) in an area mainly comprised of soft-law norms, we support a refinement of informal enforcement mechanisms by both public, quasi-public and market actors and a mobilisation of voluntary networks and social actors. Finally, where hard-law stewardship norms exist, we see a potential for formal enforcement mechanisms initiated by public or quasi-public actors to facilitate civil claims, especially when public interests are at stake. Part V concludes.

II. Enforcement Mechanisms in Corporate Governance: A Broad Approach

The implementation and enforcement of corporate governance norms, especially those found in corporate governance codes or guidelines, has always received considerable – but frequently contradictory – attention.[22] In general, enforcement mechanisms have traditionally

[22] See e.g. Eddy Wymeersch, 'The Enforcement of Corporate Governance Codes' (2006) 6 Journal of Corporate Law Studies 113-138.

served the laudable objectives of accountability of regulatees[23] and of inculcation of a sound compliance culture.[24] The seminal work of Armour in 2010 on corporate law enforcement distinguished between 'public' and 'private' enforcement and between 'formal' and 'informal enforcement, on the basis of two criteria: the nature of the enforcer and the nature of the proceedings (court or non-judicial proceedings) respectively.[25] This four-way categorisation of corporate law enforcement has served as a good starting point for understanding the enforcement strategies in the area of corporate law, but has certain limitations. First, non-public (private) enforcement cannot be confined anymore to 'parties who contract with firms – their investors, customers, and suppliers', as Armour contends.[26] Other norm-enforcers, such as market and social actors are equally important. Second, in the specific area of corporate governance, which is mainly comprised of soft (non-binding) law,[27] 'formal' enforcement confined to judicial control and administrative sanctions is only one of the available enforcement mechanisms and not always the most important one. Rather in an area mainly comprised of soft-law norms, which are increasingly promoted through 'stewardship networks' formed by quasi-public or market actors, 'formal' enforcement can take place within such networks in the form of 'membership sanctions' (including the suspension or expulsion of a member) and 'adherence procedures' that target a single member (such as rating the network members' quality of adherence to a set of norms).[28] In addition, self-enforcement[29] and 'informal' enforcement of corporate governance and stewardship norms play an equally important role. To better understand shareholder stewardship enforcement we take a *broad* approach and start with a simple conceptual taxonomy based on three dimensions (Table 1).

Table 1: A Broad Enforcement Taxonomy

Enforcement Mechanisms

[23] Iain MacNeil, 'Enforcement and Sanctioning' in Eilís Ferran, Niamh Moloney and Jennifer Payne (eds), *The Oxford Handbook on Financial Regulation* (OUP, 2015) 280.
[24] Dan Awrey, William Blair and David Kershaw, 'Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?' (2013) 38 (1) Delaware Journal of Corporate Law 191.
[25] John Armour, 'Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment', ECGI - Law Working Paper No. 106/2008, <https://ssrn.com/abstract=1133542> accessed 17 February 2020.
[26] ibid, 5.
[27] For the varying coerciveness of corporate governance norms, see Dionysia Katelouzou and Peer Zumbansen, 'The Geographies of Corporate Law Production' (2020) _ Pennsylvania Journal of International Law _ (forthcoming), also available <https://ssrn.com/abstract=3575009> assessed 5 May 2020.
[28] For a detailed analysis of the formation of voluntary networks that promote stewardship standards and their enforcement parameters, see Katelouzou (n 1).
[29] For an early study on the potential of self-enforcement in the area of corporate law see Bernard Black and Reinier Kraakman, 'A Self-Enforcing Model of Corporate Law' (1996) 109 Harvard Law Review 1911.

		Formal	Informal
Norm enforcer	Self		Ex ante
	Public	Ex post	Ex ante / Ex post
	Quasi-public	Ex post	Ex ante / Ex post
	Private	Ex post	Ex ante / Ex post
	Market	Ex post	Ex ante / Ex post
	Social	Ex post	Ex ante / Ex post

The first dimension we take into account is the nature of the *norm-enforcer*.[30] We consider a broad range of enforcers and distinguish between *self-enforcement* and *third-party enforcement*. Self-enforcement has been defined as norm adherence 'even if no one else can observe or punish a violation'.[31] In the area of corporate governance (and shareholder stewardship as we will see below), however, this element of 'invisibility of adherence'[32] is lacking and self-enforcement is usually associated with *unilateral* enforcement through reputation (e.g. a company unilaterally improves its corporate governance and through costly advertising is rewarded by the stock market).[33] It is also important to note that in the case of self-enforcement the norm-enforcer is the same as the norm-follower (i.e. the board of directors in the case of a corporate governance code or an institutional investor in the case of a stewardship code). But self-enforcement of corporate governance and stewardship norms is not a 'genuine' one as the compliance with the relevant norms is assisted by the 'comply-or-explain'[34] principle, a cornerstone of corporate governance, whereby the concerned parties can either comply with a set of best practices or explain the reasons for deviating. However the obvious problem with self-enforcement is that it relies on both self-interest and morality of the

[30] It should be borne in mind that not all norm-enforcers are *standard setters* of the soft- or hard-law norms subject to enforcement mechanisms.
[31] On the costs and benefits of self-enforcement, see Amitai Aviram, 'Path Dependence in the Development of Private Ordering' (2014) 30 Michigan State Law Review 29.
[32] For an analysis of self-enforcement in the area of corporate governance and stewardship see Katelouzou (n 1).
[33] See also Eirk Berglöf and Stijn Claessens, 'Enforcement and Corporate Governance' (2004) World Bank Policy Research Working Paper No. 3409, available at <https://ssrn.com/abstract=625286> accessed 10 April 2020.
[34] On the 'comply-or-explain' principle, see Andrew Keay, 'Comply or Explain: In Need of Greater Regulatory Oversight?' (2014) 34(2) Legal Studies 279; Iain MacNeil and Xiao Li, 'Comply or Explain: Market Discipline and Non-Compliance With The Combined Code' (2006) 14(5) Corporate Governance: An International Review 486; Konstantinos Sergakis, 'Deconstruction and Reconstruction of the "Comply or Explain" Principle in EU Capital Markets' (2015) 5(3) Accounting, Economics and Law: A Convivium 233.

norm-follower (boards in the context of corporate governance codes and institutional shareholders in the context of shareholder stewardship), which may not always track socially efficient standards.[35] This is why third-party enforcement has relative advantages especially when the norms subject to enforcement are adversarial.

Our approach to norm-enforcers is a broad one and we include in third-party enforcement public, quasi-public, private (contractual), market and social actors (Table 1). Starting with public actors, traditionally public enforcers have only played a minimal role in the context of corporate governance,[36] but their role is complemented by quasi-public bodies that pursue a monitoring or facilitating function in providing information about the quality of compliance with corporate governance codes and alerting the market of non-compliance. [37] Similarly, private actors, in other words parties who contract with the norm-followers (that is companies in the case of corporate governance norms and investors in the case of stewardship norms) have not generally occupied a key role in enforcing corporate governance norms.[38] For instance, even though a deficient (incomplete or misleading) corporate governance statement, included in periodic accounts, could give rise to civil claims for damages,[39] apathy, collective action problems and procedural hurdles (especially outside the US) make it very difficult for shareholders to bring litigation.[40] Rather, shareholders and other market actors (not contractually related with the norm-follower) can – and do – engage in informal enforcement. In the UK, for instance, all the corporate governance codes since the Cadbury Report specifically call upon investors (especially institutional ones) to play a decisive role in monitoring the companies' corporate governance statements through shareholder engagement

[35] See Aviram (2014) (n 31) and Katelouzou (n 1).
[36] See also Armour (2010) (n 25) 213.
[37] For instance, in the Netherlands, the Dutch Corporate Governance Code Monitoring Committee. See further <https://www.mccg.nl/english> accessed 24 March 2020.
[38] For the lack of formal private enforcement in the UK see Armour (2010) (n 25).
[39] Konstantinos Sergakis, *The Law of Capital Markets in the EU* (Palgrave Macmillan Corporate and Financial Law series, 2018) 86, 97; For a similar argument in the area of deficient disclosure of notification of major shareholdings and ensuing civil claims by shareholders, see Véronique Magnier and Michel Germain, *Les Sociétés Commerciales* (LGDJ, Lextenso, 2014) 992-93.
[40] See generally Bernard S. Black, 'Shareholder Passivity Reexamined' (1990) 89 Michigan Law Review 520, 584-91; Christopher Gulinello, 'The Retail-Investor Vote: Mobilizing Rationally Apathetic Shareholders to Preserve or Challenge the Board's Presumption of Authority' (2010) Utah Law Review 547, 573-574; Sergakis (2018) (n 39) 43-45. On Asia, see Dan W. Puchniak, 'The Derivative Action in Asia: A Complex Reality' (2012) 9(2) Berkeley Business Law Journal 1.

and dialogue.[41] But empirical evidence suggests that investors do not generally monitor sufficiently the provided explanations unless there is poor performance.[42]

Finally, social actors, such as the media and various civil society groups (workforce,[43] consumers,[44] public-interest groups and NGOs), are a key device for promoting good corporate governance norms, especially in the context of sustainability.[45] International NGOs have been successful in pushing companies to respect human rights and the environment, organising demonstrations to protest against perceived unsustainable behaviour as well as advocating frameworks and standards to promote sustainability.[46] Other NGOs have been active as a response to corporate greed[47] or to the protection of shareholders.[48] Being part of corporate 'meta-regulation',[49] enforcement conducted by social actors is often more efficient than legal enforcement especially when the norms are self-regulatory in nature as it is mostly the case in the context of corporate governance.[50]

---

[41] See e.g. FRC, UK Corporate Governance Code 2018, 2: 'The ability of investors to evaluate the approach to governance is important … In line with their responsibilities under the UK Stewardship Code, investors should engage constructively and discuss with the company any departures from recommended practice.'

[42] Sridhar R. Arcot, Valentina G. Bruno and Antoine Faure-Grimaud, 'Corporate Governance in The UK: Is The Comply or Explain Approach Working?' (2010) International Review of Law & Economics 193.

[43] See, e.g., the high profile shaming campaign launched by Amazon employees in relation to climate change: 'Hundreds of Amazon Employees Publicly Attack its Climate Record' *Financial Times* (27 January 2020), <https://www.ft.com/content/33dce38e-4128-11ea-bdb5-169ba7be433d> accessed 17 February 2020.

[44] Consumers start showing increased levels of awareness and demonstrate their preference for companies that respond to climate and social change: Salesforce Research, 'Ethical Leadership and Business' (2020) <https://c1.sfdcstatic.com/content/dam/web/en_us/www/documents/research/salesforce-research-ethical-leadership-and-business.pdf> accessed 17 February 2020.

[45] On corporate shaming see generally David A. Jr. Skeel, 'Shaming in Corporate Law' (2001) 149 University of Pennsylvania Law Review 1811.

[46] See e.g. the No Dirty Gold campaign: <https://earthworks.org/campaigns/no-dirty-gold/> accessed 10 April 2020 and the pressures by Rainforest Action Network on major financial institutions including Citicorp: <https://www.ran.org/press-releases/> accessed 10 April 2020.

[47] For example, in Japan and Korea the Occupy Wall Street protests: Timothy W. Martin and Na-Young Kim, 'Snapshot of a South Korean Boycott: This Mart Doesn't Sell Japanese Products' *The Wall Street Journal* (18 July 2019) <https://www.wsj.com/articles/boycott-of-everything-japanese-mushrooms-across-south-korea-11563461208> accessed 10 April 2020.

[48] For example, in South Korea the NGO 'Solidarity for Economic Reform' brings derivative actions on behalf of shareholders via minority shareholder campaigns and shareholder activism: Hyeok-Joon Rho and Kon-Sim Kim, 'Invigorating Shareholder Derivative Actions in South Korea' in Dan Puchniak, Harald Baum and Michael Ewing-Chow (eds), *The Derivative Action in Asia* (CUP, 2012) 194. Another South Korean NGO named 'People's Solidarity for Participatory Democracy' has filed a number of lawsuits in partnership with minority shareholders. In Japan, the Non-Profit Organisation (NPO) *Kabunushi Onbuzuman* (Shareholders Ombudsman) initiates derivative actions on behalf of shareholders with a very high success rate: see, Dan W. Puchniak and Masafumi Nakahigashi, 'Japan's Love for Derivative Actions: Irrational Behavior and Non-Economic Motives as Rational Explanations for Shareholder Litigation' (2012) 45(1) Vanderbilt Journal of Transnational Law 1, 46.

[49] On the role of meta-regulation in enforcing CSR, see Amiram Gill, 'Corporate Governance as Social Responsibility: A Research Agenda' (2008) 26 Berkeley Journal of International Law 452.

[50] But for the increasing legalisation of corporate governance norms following the GFC, see Marc T. Moore, *Corporate Governance in the Shadow of the State* (Hart Publishing 2013).

The second dimension we take into account is related to enforcement *mechanisms*; we distinguish between *formal* and *informal* enforcement mechanisms.

Formal enforcement includes the obvious (judicial or quasi-judicial) mechanisms, such as state-emanated administrative or criminal proceedings[51] and civil litigation,[52] traditionally coined as formal public and formal private enforcement, respectively. Academic literature has been divided between formal public and formal private enforcement systems, some arguing in favour of the incentives that private parties have to bring a civil claim against a non-compliant behaviour,[53] others sustaining the idea that formal public enforcement is better suited to protect public interests.[54] But in our taxonomy, formal enforcement mechanisms also include *membership sanctions* and *adherence procedures* that target an individual norm-follower which is a member of a network. Such a network may be more or less institutionalised, and membership may or may not be completely voluntary.[55] This broadening of what can be perceived as formal enforcement in the corporate governance context is due to the expansive reach of soft-law norms which often operate within networks with enforcement capacities.

Informal enforcement is also a highly valuable element in securing compliance with both hard- and soft-law norms. [56] There is no other way to define informal enforcement than

---

[51] In the area of corporate law, such measures have mainly dominated the area of securities regulation. Administrative measures include the issuance of a public statement indicating the nature of the infringement and the identity of the (legal or natural) person concerned, as well as the publication of an order requiring the concerned persons to cease the conduct constituting an infringement and to avoid repetition of similar activities. They may also refer to the withdrawal or suspension of the authorisation of an institution (e.g., an investment firm, market operator or regulated market), temporary or permanent ban of investment firms or any member of their management body. See, e.g., Market Abuse Regulation (art. 30), Transparency Directive (art. 28), Prospectus Regulation (art. 38). Criminal sanctions have been largely marginalised due to the high standard of proof and the lack of harmonisation across the EU. At the international level, they are also relatively scarce except in Australia where they have been particularly prominent in securities regulation violations. On this, see Michelle Welsh and Vince Morabito, 'Public vs Private Enforcement of Securities Laws: An Australian Empirical Study' (2014) 14 Journal of Corporate Law Studies 39.

[52] On the difficulties of civil litigation in the area of corporate governance due to collective action problems, see Alfred F. Conrad, 'Beyond Managerialism: Investor Capitalism?' (1988) 22 Journal of Law Reform 117, 152-163; Bernard S. Black, 'Shareholder Passivity Re-examined' (1990) 89 Michigan Law Review 520. But US-style actions have allowed private enforcement to gain considerable prominence in Asia, Australia and Canada but not in Europe. See e.g. Coffee (2007) (n 17); Puchniak (2012) (n 40) 9.

[53] Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What Works in Securities Laws?' (2006) 61 Journal of Finance 1.

[54] Bernard S. Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2001) 48 UCLA Law Review 781. On the coexistence and the distinctive features of private and public enforcement, see Guido Ferrarini and Paolo Giudici, 'Financial Scandals and the Role of Private Enforcement: The Parmalat Case' (2005) ECGI – Law Working Paper No. 40/2005, 42, <http://ssrn.com/abstract=730403> accessed 17 February 2020; Howell E. Jackson and Mark Roe (2009), 'Public and Private Enforcement of Securities Laws: Resourced-based Evidence' 93 (2) Journal of Financial Economics 207–238.

[55] See further Katelouzou (n 1).

[56] For the role of social enforcement in promoting social and economic development, see Joseph E. Stiglitz, 'Participation and Development: Perspectives from the Comprehensive Development Paradigm' (2002) 6 Review of Development Economics 163, 173.

negatively, as enforcement mechanisms that cannot be considered as formal ones. Informal enforcement mechanisms consist of information diffusion mechanisms such as annual reports and guidelines, reputational mechanisms such as public shaming and public warning, and measures taking place in private such as dialogue and private meetings. Such informal mechanisms can accentuate compliance via reputational mechanisms and continuous dialogue with the relevant parties and serve educational purposes through information diffusion for the improvement of the compliance culture and mindset. An example of such informal enforcement is the case of the Dutch Corporate Governance Code Monitoring Committee,[57] a quasi-public actor, which reports annually on the compliance of Dutch listed companies to the Dutch corporate governance code to the Minister of Economic Affairs, the Minister of Security and Justice and the Minister of Finance. Even though these annual reports take place within a network consisting of companies following a corporate governance code and are adherence-related procedures, they do not qualify as formal enforcement mechanisms in our taxonomy since they do not target individual companies in a *sanctioning* way but analyse and provide information about general compliance trends in relation to a set of norms.

The third dimension we take into account is a *temporal* one: we distinguish between *ex ante* enforcement aiming to nudge the norm-followers to comply with a set of soft- or hard-law norms (monitoring and deterrence) and *ex post* enforcement taking place after an action has (not) taken place (compliance).[58] All the mechanisms falling under the formal category of our taxonomy take place ex post since they come into play once the norm-follower has declared its stance to a set of norms. Informal mechanisms take place before but also after such declaration has been made. Ex ante informal enforcement mechanisms can vary from advertising adherence (in the case of self-enforcement) to private meetings and from behind-the-scenes dialogue to public reputational campaigns. All the ex ante informal mechanisms initiated by third parties can also take place ex post. In addition, ex post informal enforcement can be undertaken by standard setters through information diffusion (such as annual reports).[59]

We believe that the three dimensions we take into account – nature of enforcers, type of enforcement mechanisms and temporal application of enforcement – in this new taxonomy are clearer than other commonly used distinctions in this field and have the advantage of allowing a distinction between various norm-enforcers and mechanisms which often take place in overlapping and

[57] See footnote n 37.
[58] This is consistent with the previous literature: La Porta, Lopez-de-Silanes and Shleifer (2006) (n 53); Coffee (2007) (n 17); Armour (2010) (n 25).
[59] On the ongoing continuum running from ex ante to ex post enforcement and back to ex post, see Part IV.A

complementary ways.[60] Let us now turn our attention to the enforcement of shareholder stewardship around the world.

III. Shareholder Stewardship Enforcement Around the World

A. Charting the Mainstream

Stewardship codes and principles around the world are generally non-binding, either completely voluntary in nature or sometimes with some coercive elements, such as an expectation that the comply-or-explain or apply-and-explain approach will be followed on either a voluntary or mandatory basis.[61] Table 2 shows that from the 25 stewardship codes studied, 20 are voluntary in nature.[62] From these 13 include an expectation that a defined group of investors will adopt the code based on a comply-or-explain system, but this is on a voluntary basis. This means that both the adoption of the stewardship principles and the expectation to disclose and explain any non-adoption is voluntary and enforcement relies either on the part of the institutional investors themselves (self-enforcement) or the market. This is completely different from their corporate governance codes counterparts, almost all of which are mandatory for public listed companies, but on a comply-or-explain basis.[63] This distinction between corporate governance codes and stewardship codes on the basis of enforcement parameters is extremely important as it reflects the lighter touch of stewardship codes and a hesitancy (at least for now)[64] to place hard law rules on institutional investors in their role as minority shareholders. This is not the case with boards of directors, management or companies in their corporate governance obligations – which have a longer history of hard law obligations, which are still at their core. It is worth-noting, however, that corporate governance codes

[60] Earlier literature has already underscored some overlaps between public and private enforcement mechanisms, see e.g. Simeon Djankov, Edward L. Glaser, Rafael La Porta, Florencio Lopez-de-Silanes and Adrei Shleifer, 'Courts' (2003) 118 Quarterly Journal of Economics 453-517; Berglöf and Claessens (2016) (n 33).
[61] On the varying coercive elements of soft legal norms, see Katelouzou and Zumbansen (n 26).
[62] These are data based on Katelouzou and Siems (n 15). Here we only take into account codes that are under force in the time of writing this chapter with the exception of the UK where we consider both the 2012 and the 2020 versions.
[63] See e.g. the UK Listing Rule 9.8.6R(5) and (6) and in Canada the National Instrument 58-101 Disclosure of Corporate Governance Practices, as adopted by the Canadian Securities Administrators, <https://www.bcsc.bc.ca/58-101_[NI]_12312016/> accessed 17 February 2020.
[64] For the likely hardening of stewardship obligations, see Chiu and Katelouzou (2017) (n 11).

themselves started as self-regulatory measures, completely voluntary in nature and it was only after a decade or so from the first corporate governance initiative (the Cadbury Code 1992) that the coerciveness of corporate governance codes started to pick up. Nothing, therefore, excludes the possibility that stewardship codes will become more coercive in the future following the enforcement trends of their corporate governance codes counterparts.[65]

Indeed, Table 2 shows that five stewardship codes have a mandatory element in ensuring enforcement. The Australian Code 2017 for asset managers (FSC) is mandatory for its members on a comply-or-explain basis.[66] Similarly, the two Indian codes (PFRDA and SEBI) are mandatory for their members, even though a concrete enforcement mechanism is still lacking.[67] Finally, the UK 2012 and UK 2020 stewardship codes adopt the comply-or-explain and the apply-and-explain principle respectively, which is mandatory for FCA-authorised asset managers.[68] From the five codes with a mandatory element, all but the Australian FSC code have been introduced by public (including quasi-public) actors.[69] But Table 2 reveals that most of the codes introduced by a (quasi)public standard-setter have no enforcement coerciveness.

Table 2: Setting and Enforcing Shareholder Stewardship Codes Around the World

Code	**Standard Setter**	**Enforcement *Modus Operandi***
Australia (ACSI) 2018	market[70]	voluntary
Australia (FSC) 2017	market	mandatory element
Brazil 2016	market	voluntary
Canada 2017	market	voluntary
Denmark 2016	public	voluntary comply or explain

[65] For a detailed analysis of the likely enforcement trends in the area of stewardship, see Katelouzou (n 1).
[66] See Tim Bowley and Jennifer G. Hill, 'Stewardship and Collective Action: The Australian Experience' in Katelouzou and Puchniak (n 6), also available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530402> accessed 13 April 2020.
[67] For a critical analysis see Varottil (n 21).
[68] FCA Handbook, Code of Conduct, Rule 2.2.3. For a detailed analysis of the enforcement parameters of the UK stewardship codes and their transformation from completely voluntary codes to more coercive ones, see Katelouzou (n 1).
[69] On the nature of the stewardship codes' issuers, see Katelouzou and Siems (n 15) defining a public issuer as an issuer 'entirely composed of persons representing the state, including state-owned entities'. In other words, a public issuer (standard-setter) can include both public or quasi-public actors.
[70] We use the term 'market' standard setter to include all but the 'public' standard setter. Note that Katelouzou & Siems in their chapter use the term 'private' for exactly the same category. But given the terminology we adopt in this chapter for the norm-enforcers, market rather than private has a better denotation.

EFAMA 2018	market	voluntary comply or explain
Hong Kong 2016	public	voluntary comply or explain
ICGN 2016	market	voluntary
India (IRDAI) 2017	public	voluntary comply or explain
India (PFRDA) 2018	public	mandatory element
India (SEBI) 2019	public	mandatory element
Italy 2016	market	voluntary comply or explain
Japan 2017	public	voluntary comply or explain
Kenya 2017	public	voluntary comply or explain
Korea 2016	market	voluntary comply or explain
Malaysia 2014	public	voluntary
Netherlands 2018	market	voluntary comply or explain
Singapore 2016	quasi-public	voluntary
South Africa 2011	market	voluntary comply or explain
Switzerland 2013	market	voluntary comply or explain
Taiwan 2016	public	voluntary comply or explain
Thailand 2017	public	voluntary comply or explain
UK 2012	public	mandatory element
UK 2020	public	mandatory element
US 2017	market	voluntary

Notwithstanding the variety of approaches in setting and enforcing shareholder stewardship codes across the world, which depict different cultural, market, or political features and incentives,[71] Katelouzou explains that 'private ordering' in the sense of self-enforcement or third-party enforcement by market actors (at times standard-setters), interested in either completely voluntary compliance or comply-or-explain disclosures, has been the main vehicle for the shaping and implementation of shareholder stewardship norms, at least until recently.[72] Whilst the effectiveness of voluntary mechanisms to ensure compliance with shareholder stewardship codes, instil stewardship awareness and promote shareholder stewardship practices

[71] See Dionysia Katelouzou and Dan W. Puchniak, 'Global Diversity of Stewardship' in Katelouzou and Puchniak (n 6).

[72] For a comprehensive analysis of private ordering in stewardship, see Katelouzou (n 1).

is controversial,[73] Table 2 confirms this world-wide trend of enforcing shareholder stewardship through the market.

B. The Revised Shareholder Rights Directive: An Exception that Proves the Rule

Notwithstanding the predominance of private ordering in the context of stewardship, the SRD II, aiming, among others, at encouraging effective and sustainable shareholder engagement and improving transparency along the investment chain, could be seen as a tentative step towards top-down stewardship 'rules' which can be potentially enforced in more formal ways by public actors. Under the SRD II institutional investors and asset managers are expected to develop an engagement policy, which would describe, among others, how the financial and non-financial performance of investee companies are monitored, how dialogue is conducted, how voting rights are exercised, how other shareholders or stakeholders have been engaged with and how actual and potential conflicts of interests are managed.[74] This engagement policy along with its implementation needs to be annually disclosed on a comply or explain basis.[75] Be that as it may, the degree of flexibility offered by the comply-or-explain principle is considerable and not uncommon in EU company law and corporate governance. [76]

However, the SRD II is not far of imposing a 'duty to demonstrate engagement'[77] on grounds of public interests relating to sustainable, long-term shareholder behaviour.[78]

---

[73] For the UK Code, see e.g. Arad Reisberg, 'The UK Stewardship Code: On the Road to Nowhere?' (2015) 2 Journal of Corporate Law Studies 217. In countries dominated by blockholders, voluntary compliance and market enforcement is even weaker. See e.g. Puchniak and Tang (n 9) and Petrina Tan Tjin Yi, 'Institutional Investor Stewardship in Malaysia: Code, Context and Challenges' in Katelouzou and Puchniak (n 6).

[74] SRD II, Article 3g(1)(a).

[75] SRD II, Article 3g(1)(b).

[76] See, e.g., article 46a of the 4th company law Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings [2006] OJ L 224/1; article 20(1) of Directive 2013/34/EU of the European Parliament and the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L182/19. Both Directives adopt the 'comply-or-explain' principle for corporate governance statements of listed companies, allowing for different company law frameworks and governance systems to co-exist harmoniously while allowing for information to be disclosed across the EU.

[77] Chiu and Katelouzou (2017) (n 11).

[78] See, further, Katelouzou (n 3).

Additionally, institutional investors and asset managers are expected to disclose annually their investment strategies (including how their investment strategy contributes to the medium to long-term performance of their assets) and their arrangements with each other.[79] These provisions are indicative of a gradual shift from a purely private company law agenda (with enabling rules between shareholders and companies) to a top-down capital markets law agenda (with stricter and based on increased disclosure obligations for all market actors in the investment chain) and the development of semi-hard stewardship duties.[80]

These semi-hard law rules do not operate in a normative *vacuum* in the EU since, four Member States, i.e. the UK,[81] the Netherlands,[82] Italy[83] and Denmark,[84] had introduced measures to increase the level and quality of institutional shareholders' engagement with investee companies and facilitate a stewardship orientation among institutional investors before the introduction of SRD II. The importance of such normative competition between pre-SRD II soft law norms and SRD II semi-hard rules[85] becomes apparent when enforcement of the latter is at stake. While Article 3g of the SRD II operates on a comply-or-explain basis and is therefore mostly faithful to the tradition of most stewardship codes,[86] Article 14b that deals with enforcement, enables – but not obliges – Member States to provide for effective, proportionate and dissuasive measures and penalties for violations of the SRD II transposed provisions into national law. The transposed engagement and transparency disclosure obligations applicable to institutional investors and asset managers are therefore potentially subject to formal enforcement by public authorities.

Perhaps surprisingly, the transposition of Article 14b across the Member States reveals two different trends. On the one hand, there are Member States that have not imposed any

[79] SRD II, Articles 3h-3i.
[80] Chiu and Katelouzou (2017) (n 11).
[81] See Dionysia Katelouzou and Eva Micheler, 'Stewardship in the UK: The Demand Side' in Katelouzou and Puchniak (n 6). The UK left the EU on 31 January 2020. A transition period is in place until 31 December 2020. EU law continues to apply to the UK until the end of the transition period.
[82] In the Netherlands, a stewardship code was introduced in 2018 by Eumedion, an institutional investors' forum, to replace the 2011 Eumedion 10 Best Principles for Engaged Share-Ownership. See Christoph Van der Elst and Anne Lafarre, 'Shareholder Stewardship in the Netherlands: The Role of Institutional Investors in a Stakeholder Oriented Jurisdiction' in Katelouzou and Puchniak (n 6), also available at <https://ssrn.com/abstract=3539820> accessed 13 April 2020.
[83] In Italy, Assogestioni, an association of asset managers, adopted stewardship principles in 2013 and revised them in 2015 and 2016. See Giovanni Strampelli, 'Institutional Investor Stewardship in Italian Corporate Governance' in Katelouzou and Puchniak (n 6).
[84] See Hanne S. Birkmose and Marina B. Madsen, 'The Danish Stewardship Code – The Past, The Present and The Future' in Katelouzou and Puchniak (n 6), also available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3533834> accessed 13 April 2020.
[85] For an in-depth analysis of such normative competition, see Katelouzou and Sergakis (n 13).
[86] Article 3g imposes requirements to institutional investors and asset managers to develop and publish an engagement policy. See Chiu and Katelouzou (2017) (n 11) on the coerciveness of Article 3g (SRD II).

public enforcement mechanisms in relation to investors' engagement policies. These include Member States with pre-existing stewardship norms, such as the UK where, upon transposition of the SRD II stewardship-related rules, the FCA did not specify any enforcement action, acknowledging the fact that these actors will need to gradually adapt to the new rules.[87] This *reticent enforcement approach* matches the self-regulatory character of pre-existing stewardship norms in the UK and serves the preservation of a national stewardship space. The same reticent approach is also noticeable in Member States with no pre-existing stewardship norms, where a certain level of reticence to impose ex post, formal, public enforcement mechanisms (administrative sanctions) may be due to the novel and emerging character of shareholder stewardship rules.[88] For instance, Belgium does not specify the enforcement mechanism but merely mentions that NCAs, namely the Financial Services and Markets Authority (FSMA) in Belgium, will be in charge of ensuring the good implementation ('*bonne application*') of the transposed SRD II rules, opting thus for enforcement by a public body.[89] Sweden has also opted for a public enforcement approach by mentioning that the Swedish Financial Supervisory Authority (Finansinspektionen) will be in charge in ensuring compliance with the transposed provisions.[90] Luxembourg[91] and Spain[92] do not provide for any formal

---

[87] FCA, 'Proposals to Promote Shareholder Engagement: Feedback to CP19/7 and Final Rules' (2019) Policy statement PS19/13, available at <https://www.fca.org.uk/publication/policy/ps19-13.pdf> accessed 5 April 2020.

[88] On the different transposition trends of the other stewardship-related articles of SRD II see, further, Katelouzou and Sergakis (n 13).

[89] *Proposition de loi portant transposition de la directive (UE) 2017/828 du Parlement européen et du Conseil du 17 mai 2017 modifiant la directive 2007/36/CE en vue de promouvoir l'engagement à long terme des actionnaires, et portant des dispositions en matière de société et d'association*, DOC 55 0553/01, *4 Octobre 2019*.

[90] Proposition 2018/19:56, Section 6.4, 61-62, available at <https://www.regeringen.se/remisser/2018/05/remiss-av-ds-2018-15-direktivet-om-ett-okat-aktieagarengagemang--forslag-till-genomforande-i-svensk-ratt/> accessed 17 February 2020. Nevertheless, the administrative penalties that can be potentially imposed by the Swedish NCA are considerably high (€5M maximum), along side with remark, public warning and issuance of administrative order: Security Founds acts (2004:46) ch. 12 sec. 8–9. Sweden does not further specify which formal or informal mechanisms should be used in this framework.

[91] The law that transposed the SRD II rules provides for joint and several liability of directors in the case of damages resulting from violation of the obligations resulting from these rules: *Loi du 1er août 2019 modifiant la loi modifiée du 24 mai 2011 concernant l'exercice de certains droits des actionnaires aux assemblées générales de sociétés cotées aux fins de transposer la directive (UE) 2017/828 du Parlement européen et du Conseil du 17 mai 2017 modifiant la directive 2007/36/CE en vue de promouvoir l'engagement à long terme des actionnaires, Journal Officiel du Grand-Duché de Luxembourg, N° 562 du 20 août 2019*, art. 7.

[92] For example, Spain provides that the NCA (*Comisión Nacional del Mercado de Valores*) will be competent for imposing any sanctions in light of violations of the transposed SRD II rules in relation, among others, to the identification of shareholders (art. 3a), the transmission of information (art. 3b), the facilitation of the exercise of shareholder rights (art. 3c) and the information to be provided in and right to vote on the remuneration report (art. 9b): *Anteproyecto de Ley por la que se modifica el texto refundido de la Ley de Sociedades de Capital, aprobado por el Real Decreto Legislativo 1/2010, de 2 de julio, y otras normas financieras, para adaptarlas a laDirectiva (UE) 2017/828 del Parlamento Europeo y del Consejo, de 17 de mayo de 2017, por la que se*

public enforcement mechanism in the area of stewardship rules, although they do provide for formal public sanctions in relation to other SRD II rule violations.

On the other hand, there are Member States that have taken a strict, *formalistic enforcement approach* by opting for ex post, formal public enforcement through the imposition of highly dissuasive administrative sanctions. For example, Italy provides for administrative penalties that can go from €2.500 to €150.000 for the breach of disclosure obligations in relation to the engagement policies of institutional investors and asset managers.[93] This is even though market actors in Italy have already expressed serious concerns about the inability of the 'extraordinarily draconian and disproportionate' sanctions to promote the SRD II's goal of improving relationships between companies and investors and their likely negative impact upon small-size investors.[94] A similar range of fines is also found in violations of other SRD II transposed rules in Italy,[95] denoting a general preference for high fines across the board. Greece has taken an even stricter stance by providing for maximum administrative penalties up to €5M for all types of violations of the SRD II transposed rules.[96] Surprisingly however, the draft bill provides for reprimand as an alternative to the administrative penalty giving to the NCA a

---

modifica la Directiva 2007/36/CE en lo que respecta al fomento de la implicación a largo plazo de los accionistas, art. 19 (24 May 2019).

[93] *Articolo* 193-bis.1 *del decreto legislativo* 24 *febbraio* 1998, n. 58 (*Decreto Legislativo* 10 *maggio* 2019, n. 49).

[94] See Minerva Analytics Ltd's response to the Italian consultation of the transposition of SRD II, <http://www.dt.tesoro.it/export/sites/sitodt/modules/documenti_it/regolamentazione_bancaria_finanziaria/regolamentazione_bancaria_finanziaria/consultazione_828/MINERVA_ANALYTICS.pdf> accessed 17 February 2020.

[95] For example, among many examples, the *Decreto Legislativo* 10 *maggio* 2019, n. 49 provides for administrative sanctions that range from €10.000 to €150.000 for the breach of disclosure obligations in relation to the remuneration policy (*articolo* 192-bis *del decreto legislativo* 24 *febbraio* 1998, n. 58) and to obligations with regard to related party transactions (RPTs) (*articolo* 193-bis.1 *del decreto legislativo* 24 *febbraio* 1998, n. 58) applicable to natural and legal persons. A new *Decreto Legislativo* was proposed on 29 January 2020, increasing the maximum administrative sanctions from €150.000 to €10M for listed companies and for natural persons to €2M for the breach of disclosure obligations in relation to the remuneration policy and to €1.5M with regard to RPT breaches. Even though there is no similar proposal for the stewardship-related provisions of SRD II, we find such measures as raising the same concerns expressed in this Chapter about accentuating public enforcement mechanisms in stewardship and corporate governance more generally. Indeed, the lack of clarity on the criteria of applicability of the proposed sanctions does not only increase NCAs' discretionary space but it does so in an area that is dependent upon malleable and qualitative governance criteria (such as remuneration policy objectives and the evaluation methods of RPTs). This can only create further unpredictability and legal uncertainty. See: <http://www.senato.it/service/PDF/PDFServer/BGT/1142682.pdf> accessed 17 February 2020.

[96] *Σχέδιο νόμου για την εταιρική διακυβέρνηση ανωνύμων εταιριών, σύγχρονη αγορά κεφαλαίου και ενσωμάτωση της οδηγίας (ΕΕ) 2017/828 του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου*: Art. 36 (under public consultation).

considerable freedom in the choice between informal and formal enforcement mechanisms.[97] The Netherlands also provides for administrative sanctions, but, unlike Italy and Greece, it has chosen a much lower maximum for the same types of violations, namely €20.000.[98] France, on the other hand, has opted for an injunction request to the President of the Tribunal with a potentially applicable fine that seeks to force the concerned parties to respect the SRD II transposed rules.[99] The French focus on the role of courts to enforce the stewardship-related obligations of the SRD II denotes a rather different perception of the severity of shareholder stewardship violations and does not put emphasis on the punitive character of enforcement mechanisms for not having respected such obligations. The French transposition remains nonetheless attached to formal ex post public enforcement mechanisms in the area of shareholder stewardship.

These two diametrically opposed approaches – namely the introduction or lack of formal enforcement mechanisms by public actors – to secure compliance with the stewardship-related provisions of the SRD II depict different national legal traditions in enforcing corporate governance norms. Most importantly, they indicate in some cases a lack of familiarity and understanding of the complexities of stewardship responsibilities and of the inherent difficulty to address stewardship deficiencies with strict, formal public enforcement.[100] We, therefore, argue in the next Part that the future of stewardship enforcement cannot be confined to ex post, formal enforcement imposed by public actors (in the form of administrative penalties), currently promoted at the EU level, but needs to remain in the sphere of a multi-layered interaction among all (public, quasi-public, private, market and social) actors who are interested in or affected by shareholder stewardship activities (including the norm-followers) and make use of both formal and informal means in both an ex ante and ex post dimension.

IV. The Future of Stewardship Enforcement

C. The Enforcement Taxonomy as a Roadmap for the Future

[97] It is noteworthy that the enforcement option of a reprimand is newly introduced and may imply a tacit recognition of the efficiency of the use of informal enforcement mechanisms by public actors as an alternative to the disproportionately high (compared to other jurisdictions) administrative penalties.
[98] Article 1, section 2° of the *Wet giraal effectenverkeer*: 4th category of penalties, available at <https://www.rijksoverheid.nl/onderwerpen/straffen-en-maatregelen/vraag-en-antwoord/hoe-hoog-zijn-de-boetes-in-nederland> accessed 10 April 2020.
[99] Article 533-22 *Code monétaire et financier*.
[100] See also Katelouzou and Sergakis (n 13).

As we have seen above, our enforcement taxonomy is three-dimensional.[101] It takes into account: (i) the nature of the norm-enforcer (self, public, quasi-public, private, market and social); (ii) the nature of the enforcement mechanisms (formal and informal); and, (iii) the temporal dimension of enforcement actions. In the context of shareholder stewardship, (non)compliance can refer to either a hard-law norm, as it is the case with the SRD II rules that have been transposed into national law, or a soft-law norm, such the ones incorporated in a stewardship code.

In terms of norm-enforcers, starting with self-enforcement, asset owners or asset managers can build a good reputation advertising their voluntary (unilateral) adherence to sound shareholder stewardship standards. A characteristic example is BlackRock, the world's largest asset manager, whose CEO Larry Fink has addressed several letters to company CEOs announcing BlackRock's drastic change in shareholder stewardship practices.[102] Of course, one can see Blackrock's unilateral advertising as part of informal market enforcement taking place within the voluntary normative framework set up by the Investor Stewardship Group (ISG),[103] to which Blackrock is a key member. But Blackrock's professed principles seem to go beyond the ISG stewardship principles in an effort to build a strong stewardship reputation unilaterally. Self-enforcement in the area of shareholder stewardship can be an efficient and cost-effective way to publicise a new shareholder stewardship mantra but serious concerns have been raised as to whether the reputational incentives to portray stewardship in a favourable way can overcome the index fund managers' incentives to underinvest in stewardship.[104] As for third-party enforcement, we distinguish in Table 3 between public actors, such as NCAs in the EU; quasi-public actors, such as non-profit organisations, companies or other entities created with the involvement of public actors; private actors, i.e. contractually-related parties with the norm-followers, such as investors' clients and beneficiaries; market actors, including national, EU or international investor associations and any other market actor interested in shareholder stewardship activities; and social actors, including consumers,

[101] See Part II above.
[102] For the most recent one in January 2020, related to BlackRock's commitment, *inter alia*, to divest from companies engaged in coal production, see <https://www.blackrock.com/sg/en/larry-fink-ceo-letter> accessed 6 April 2020.
[103] See <https://isgframework.org/> accessed 6 April 2020.
[104] See Lucian Bebchuk & Scott Hirst 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 Columbia Law Review, 2029, 2119 (reporting that each of the Big Three index funds 'allocates to stewardship less than 0.2% of their estimated fees and devotes, on average only a few thousand dollars in stewardship costs to large positions').

investee companies employees, media, NGOs, ultimate beneficiaries when not contractually related to the norm-followers etc.

Table 3 also distinguishes between formal and informal enforcement mechanisms. In our taxonomy formal mechanisms are not confined to judicial control and administrative sanctions but they also include membership sanctions and adherence procedures (directed at individual norm-followers) within stewardship networks. The last enforcement dimension of our taxonomy refers to temporal traits. Ex ante mechanisms aim to nudge parties to comply with a set of soft- or hard-law norms, while ex post mechanisms intervene after an action has (not) taken place.

What is not articulated in Table 3, but will become clearer as the analysis evolves is that the various formal and informal mechanisms are part of an enforcement continuum. Ex ante informal enforcement by social and market actors can be seen as the one end of the enforcement continuum (deterrence) while public formal enforcement is at the opposite pole (compliance). But between these two polar extremes various enforcement strategies take place often in a symbiotic way.

Table 3: The enforcement taxonomy applied to shareholder stewardship

		Mechanisms	
		Formal	Informal
Actors	Self-enforcement		Advertising Development of joint initiatives (to promote self-adherence)
	Public (NCAs)	Administrative sanctions (penalties) and measures (injunctions etc.) Restitution orders	Public information diffusion (annual reports, guidelines etc.) Public reputational procedures (public warning, name & shame, name & fame etc.) Private measures (warning notice, meetings and dialogue)
	Quasi-public	Membership sanctions and adherence procedures (within networks) Restitution orders	Public information diffusion (annual

			reports, guidelines etc.) Public reputational procedures (public warning, name & shame, name & fame etc.) Private measures (warning notice, meetings and dialogue)
	Private	Civil claims	Public reputational procedures (name & shame, name & fame etc.) Private measures (meetings and dialogue)
	Market	Membership sanctions and adherence procedures (within networks)	Public information diffusion (annual reports, guidelines etc.) Public reputational procedures (public warning, name & shame, name & fame, benchmarking/ ratings etc.) Private measures (warning notice, meetings and dialogue)
	Social		Public reputational procedures (public campaigns, name & shame, name & fame etc.) Private measures (meetings and dialogue)

Let us now examine in more detail this multi-actor, multi-modal shareholder enforcement framework based on our taxonomy.

B. The Challenges and Opportunities of Formal Enforcement

1. The limits of public enforcement

Shareholder stewardship occupies a multi-layered, decentred regulatory space[105] where 'authority over enforcement' is fragmented between public, quasi-public, private, market and social actors (see also Table 3). In this context, formal public enforcement is only marginally important – being applicable only in the context of (semi)hard-law norm in the EU – and could be even seen as 'pathological', an indicator that self-regulation and compliance is problematic.[106] This may explain why in the EU only four Member States (Italy, Greece, the Netherlands and France) have opted for formal public enforcement in the form of administrative sanctions when transposing the SRD II's stewardship-related rules. Fortunately, formal public enforcement in the area of shareholder stewardship still remains the exception rather than the rule, but its occurrence demands continuing caution for various reasons.

First, formal public enforcement is likely to transform the whole shareholder stewardship agenda to merely a liability concern. Stewardship norm-followers, that is asset owners and asset managers, will perceive public formal enforcement mechanisms as a general operational hurdle and the far-reaching effects of sanctions will render shareholder stewardship practices unattractive and perhaps unorthodox.[107] In turn, as the norm-followers will be more focused on the liability aspects of the disclosure statements, rather than on promoting good shareholder stewardship practices across the investment chain, the educational benefits that are expected to occur through shareholder stewardship disclosures will be inevitably weakened.[108] Moreover, formal public enforcement may have a general distorting effect both ex ante (monitoring and deterrence) but also ex post (compliance). For instance, private, market and social actors or other relevant stakeholders may mechanistically rely upon NCAs to safeguard from poor or

---

[105] Further on the fragmentation of corporate governance regulatory spaces, see Dionysia Katelouzou and Peer Zumbansen, 'Transnational Corporate Governance: The State of the Art and Twenty-First Century Challenges' (2020) TLI Think! Paper 06/2020 <https://ssrn.com/abstract=3536488> accessed 13 April 2020.
[106] See generally William Richard Scott, *Institutions and Organizations* (Sage, 4th ed., 2014).
[107] Konstantinos Sergakis, 'Legal Versus Social Enforcement' in Hanne Birkmose and Konstantinos Sergakis (eds), *Enforcing Shareholder Duties* (Edward Elgar 2019) 143.
[108] Mark Fenwick and Erik P.M. Vermeulen, 'Institutional Investor Engagement: How to Create a 'Stewardship Culture'' (2018) Lex Research Topics in Corporate Law & Economics Working Paper No. 2018-1; TILEC Discussion Paper No. 2018-006 14-18, <https://ssrn.com/abstract=3098235> accessed 17 February 2020, 43.

non-compliance risks and might not be motivated to initiate third-party informal or formal enforcement themselves.[109]

The second series of concerns relate to the challenges around the applicability of formal public enforcement mechanisms in an area mainly regulated through disclosure of stewardship statements based on the comply-or-explain principle.[110] Compliance with principles-based regulation is not an objective matter and its assessment becomes even more difficult when compliance with a comply-or-explain regime is mandatory as is the case with Article 3g (SRD II). For instance, an investor who believes that it complies with the prescribed engagement policy, but in reality, does not, will not provide any non-compliance explanations, and therefore the public actors (and consequently the market and social actors) cannot discover non-compliance as it occurs. Moreover, NCAs will be faced with significant challenges in exercising their formal enforcement mechanisms due to the inherent difficulty to decipher the extent to which parts or the entirety of the engagement disclosure statement(s) are non-compliant and whether adequate explanation is given. Further monitoring and interpretation hurdles may arise from the fact that the regulated investors may produce and divulge more than one disclosure statement to comply with different stewardship obligations.[111] The multiplication of such statements will inevitably produce a plethora of information that may be arduous to evaluate and decipher before taking further enforcement action.

This becomes more difficult to cope with because commonality of shareholder stewardship expectations between investors (norm-followers) and regulators (norm-enforcers) as well as between different investors (such as active or passive asset managers, pension funds, index finds etc.)[112] in the same or different jurisdictions is still lacking. In a regulatory area where expectations are not crystallised, a formal public enforcement regime is arguably unattainable for both the public enforcers and the norm followers.

2. Facilitating Private Claims via Public and Quasi-Public Actors

[109] Sergakis (2019) (n 107) 143.
[110] SRD II, Art 3g.
[111] For example, following the SRD II transposed rules, regulatees may well choose to issue a public policy statement on their engagement policy (Art. 3g) and another one on their investment strategy (Art. 3h or 3i). This is the case of Credit Suisse Asset Management (Schweiz) AG who explains in two different statements how it complies with Articles 3g and 3i, respectively. It is also noteworthy that in its engagement policy statement Credit Suisse also specifically mentions its adherence to the EFAMA Stewardship Code, thereby confirming the symbiosis of different stewardship rules. See <https://www.credit-suisse.com/ch/en/asset-management/regulatory/shareholder-engagement.html> accessed 19 February 2020.
[112] See e.g. Jill Fisch, 'The Uncertain Stewardship Potential of Index Funds' in Katelouzou and Puchniak (n 6) on how index funds perceive stewardship, also available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3525355> accessed 13 April 2020.

While we caution against formal public enforcement, we see some space for facilitating an ex post, formal role of public (or quasi-public) enforcers when the objective is restorative or compensatory, that is to remedy damages caused by shareholder stewardship-related violations. Here, we have to go a step back and consider the practicalities of ex post formal enforcement role by private parties who are contractually related to the followers of stewardship norms, that is asset managers and asset owners. The potential of formal enforcement by private (contractual) actors becomes apparent if one considers the investment management aspect of stewardship, namely the relationship between asset managers, institutional investors and ultimate investors.[113] Here the ultimate investors (beneficiaries and clients) are becoming increasingly aware of the ramifications of their investment and can influence institutional investors towards sound shareholder stewardship. Indeed, many institutional investors have attracted in recent years a considerable clientele by responding to ESG concerns.[114] Yet, the incentives of ultimate investors to initiate (formal) litigation are in general weak.[115] In the specific context of shareholder stewardship, additional difficulties relate to incomplete or inaccurate shareholder stewardship statements.[116] For example, proving the violation of a shareholder engagement duty or how it caused damage to a contractual party may not be a straightforward task for potential claimants.[117]

Even though there are some academic voices claiming that beneficiaries of pension funds, mutual fund clients and life insurance policyholders can control UK asset managers over shareholder voting rights,[118] besides their obvious contractual rights, expanding such arguments in non-voting aspects of shareholder stewardship, such as engaging in dialogue with companies and monitoring is difficult.[119] Reservations in relation to the efficiency of such initiatives can be formulated in light of the absence of a common engagement denominator that could facilitate the classification of claims and achieve legal certainty in the design of formal private

[113] On the investment side of stewardship, see Katelouzou (n 1) and Roger M. Barker and Iris H.-Y. Chiu, 'Investment Management, Stewardship and Corporate Governance Roles' in Katelouzou and Puchniak (n 6).
[114] See e.g. Ron Lieber '3 Steps to a Socially Conscious Portfolio' *The New York Times* (14 February 2020); Suzette Viviers and Johan Steyn, 'Asset Managers Can Stand Out by Being Truly Responsible Investors' *Business Day* (8 August 2019).
[115] See text accompanying (n 39-41) above.
[116] Christoph Van der Elst, 'Shareholder Engagement Duties: The European Move Beyond Stewardship' in Birkmose and Sergakis (2019) (n 107) 79-80.
[117] Despite the procedural hurdles, some inspiration in this context can be taken by the introduction of a civil liability regime on Credit Rating Agencies under Article 35s of the CRA EU regulation. See Regulation (EU) No 462/2013 the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies [2013] OJ L146/1.
[118] See e.g. Ewan McGaughey, 'Does Corporate Governance Exclude the Ultimate Investor?' (2016) 16 Journal Corporate Law Studies 221-240.
[119] For a comprehensive analysis in the UK context, see Katelouzou (n 1).

enforcement mechanisms. Additional problems arise out of the disempowerment and disaggregation of ultimate investors within a collective investment vehicle that prevents them from developing initiatives to hold other market actors accountable.[120]

Despite the obvious hurdles of a formal enforcement regime initiated by private actors, there is undoubtedly a political impetus to protect the legitimate interests of ultimate investors as well as wider public interests.[121] We, therefore, provide a first exploratory approach on how civil claims for disclosure-related violations of shareholder stewardship requirements, as the ones imposed via the transposed SRD II rules in relation to the development and disclosure of an engagement policy, can be facilitated by public or quasi-public enforcers. [122]

Unblocking collective action problems[123] in the area of civil claims could be the crucial thrust for the introduction of a dissuasive ex post formal enforcement mechanism that can cut across the boundaries of private and (quasi)public enforcers.[124] In general, we contend that public and quasi-public enforcers have a facilitating role to play in protecting ultimate beneficiaries from damages from deficient shareholder stewardship statements issued by institutional investors who are in charge of their assets.[125] Public enforcers, such as NCAs, should be given the power to ask civil courts to order the violator to pay a sum to the NCA which will then distribute among the ultimate beneficiaries. Such restitution schemes are not unknown. For example, in the UK the FCA has power to apply to the court for a restitution order, under section 382 of the Financial Services and Markets Act 2000 (that provides the regulatory framework of financial services), against any person contravening relevant requirements of this Act, related to both misconduct and general prohibitions. The FCA needs to consider on a case by case basis if this is the best course of action, taking into account a

[120] Iris H.-Y. Chiu and Dionysia Katelouzou, 'Making a Case for Regulating Institutional Shareholders' Corporate Governance Roles' (2018) Journal of Business Law 67, 79.
[121] Katelouzou (n 3).
[122] We do not consider a generalised formal private enforcement framework nor address legal traits that govern the contractual relationships between ultimate investors and their institutional investors, deriving from trust law, or contractual arrangements between institutional investors and asset managers.
[123] On this notion, see Chiu and Katelouzou (2018) (n 120) 79; John Armour, Dan Awrey, Paul Davies, Luca Enriques, Jeffrey N. Gordon, Colin Mayer and Jennifer Payne, *Principles of Financial Regulation* (OUP, 2016) 218. For an early analysis, see Hanne Birkmose, 'The Transformation of Passive Institutional Investors to Active Owners-Mission Impossible?' in Hanne Birkmose, Mette Neville and Karsten E. Sørensen (eds), *The European Financial Market in Transition* (Kluwer Law International 2011) 107; Stefan Krasa and Anne P. Villamil, 'Monitoring the Monitor: An Incentive Structure for a Financial Intermediary' (1992) 57(1) Journal of Economic Theory 197.
[124] See also Iris H.-Y. Chiu, 'Private vs Public Enforcement of Shareholder Duties' in Birkmose and Sergakis (2019) (n 107) 126 (arguing in favour of granting enforcement power to regulatory bodies).
[125] Of course, the issuing of stewardship statement is only a small part of investment management stewardship. See Katelouzou (n 1).

series of factors, such as the identifiable character of losses, the number of harmed investors, the availability of other redress mechanisms and if harmed investors can bring their own proceedings.[126]

Outside Europe, innovative models have arisen so as to allow quasi-public actors, such as government-founded, non-profit organisations to facilitate civil claims on behalf of harmed investors. For example, in Taiwan the Securities and Futures Investors Protection Centre (SFIPC) has the power to bring such compensation claims and has already achieved an impressive record in filing civil cases. During the years, the SFIPC has been given additional powers to instigate class actions also for securities fraud cases related to breaches of trust or breaches of the duty of care and/or loyalty.[127] The SFIPC's status and successful activity denote the non-negligible role that quasi-public actors can perform, in an ex post formal enforcement spectrum, in facilitating civil claims and can inspire the introduction of restitution orders for losses caused by the violation of hard-law shareholder stewardship norms.

Granting such restitution order powers to public or quasi-public actors (see also Table 3) can overcome the collective action problem and the complexities of financial intermediation that have dissociated ultimate investors from institutional investors. While it is not in our intention to provide here all the details of such public (or quasi-public)-driven schemes that aim to facilitate civil claims, it is important to debate around the rationales of introducing such schemes in the presence of losses that are due to the violations of hard-law shareholder stewardship norms. Furthermore, our proposal of attributing to public or quasi-public actors a facilitating role in providing redress for harmed parties is easily justified when other enforcement means by ultimate beneficiaries are impracticable.

3. Strengthening formal enforcement within stewardship networks

Our taxonomy extends the definition of formal enforcement to membership sanctions and adherence procedures that target a single member within stewardship networks. Such networks are usually developed by stewardship standard-setters, as is the case of the FRC's signatory list to the UK stewardship code.[128] Yet not all enforcement measures taking place within such a

[126] FCA Handbook: Enforcement Guide, Section 11.3, <https://www.handbook.fca.org.uk/handbook/document/EG_Full_20140401.pdf> accessed 17 February 2020.
[127] Wang R. Tseng and Wallace W. Y. Wang, 'Derivative Actions in Taiwan: Legal and Cultural Hurdles With a Glimmer of Hope for the Future' in Puchniak, Baum and Ewing-Chow (2012) (n 48) 215, 240-241.
[128] On a comprehensive analysis of the role of such networks and investors' associations in the UK, see Katelouzou (n 1).

network are considered as formal enforcement mechanisms in our taxonomy. For instance, information diffusion measures such as publishing a list of signatories to a stewardship code or an annual report do not qualify as formal enforcement mechanisms in our taxonomy because they lack a sanctioning character directed at a specific member of the network.

A characteristic example of such a membership and adherence sanction relates to the UK stewardship code which is subject to a tiering exercise. The FRC introduced a three-tier system in 2016, arranging the signatories' statements to three categories (Tier 1, Tier 2 and Tier 3) depending on their overall quality and engagement with the UK stewardship code's principles.[129] The FRC gave to Tier 3 asset managers a period to improve their statements to Tier 1 or Tier 2 standard or be removed from the list of signatories to the code. [130] In August 2017 Tier 3 was removed and about 20 asset managers were completely removed from the list of signatories.[131] This is a characteristic example of a membership sanction targeting specific norm-followers within an organizational and cognitive stewardship network. The removal from a signatory list has a clear impact upon the targeted norm-followers with reputational effects and loss of legitimacy.

While the FRC's tiering exercise is currently the only example of a formal (but not judicial) enforcement mechanism,[132] similar membership sanctions and adherence procedures can be developed in the future by other stewardship standard-setters within established stewardship networks, such as the Italian Assogestioni or Dutch Eumedion, or even public actors, such as the Financial Service Agency in Japan, or take place within newly developed stewardship networks.[133] Such a network is the Association of Responsible Investors (Assodire)

---

129 See further <https://www.frc.org.uk/news/november-2016/tiering-of-signatories-to-the-stewardship-code> accessed 17 February 2020.

130 It is noteworthy that the FRC has clarified that Tier 1 is not synonymous to perfection; it only signals the provision of a good overview of stewardship practices: see FRC, 'Developments in Corporate Governance and Stewardship 2016' (2017) 26, <https://www.frc.org.uk/getattachment/ca1d9909-7e32-4894-b2a7-b971b4406130/Developments-in-Corporate-Governance-and-Stewardship-2016.pdf> accessed 17 February 2020. To maintain and promote the reporting quality we suggest a further refinement of tiering mechanisms in the form of additional sub-tiers within Tier 1 to enable clients and other interested parties to better understand the quality of stewardship statements. A possible way forward in this respect can be the creation of a 'standard Tier 1' and a 'premium Tier 1', the latter offering an additional layer of competitive and reputational advantage compared to the rest Tier 1 signatories.

131 <https://www.frc.org.uk/news/august-2017/frc-removes-tier-3-categorisation-for-stewardship> accessed 6 April 2020.

132 The transition of the quasi-public body FRC to the Audit, Reporting and Governance Authority (ARGA) in 2020 is likely to have implications to this tiering exercise. See, further, Katelouzou (n 1).

133 A comparable mechanism has been introduced in 2020 within the organisational framework of the Principles for Responsible Investment (PRI). PRI announced that it will delist parties who do not engage with principles and make the necessary changes in their statements. Such delisting options were introduced in 2018 as a potential option for deviant parties but with a discretional period until 2020. Once a signatory party is delisted, it will not be allowed to re-join the PRI for a year. See further <https://www.unpri.org/pri-blog/moving-the-needle-on-pri-membership/5494.article> accessed 17 February 2020.

in Italy formed by three institutional investors (Inarcassa, Cassa Forense and Enpam) with the aim, inter alia, to define a best practice policy for their members and to issue an ex post judgement so as to align shareholder stewardship activities with such policy.[134] While Assodire has yet to propose the introduction of membership or adherence sanctions, it is clear that investors' networks have a key role to play in promoting shareholder stewardship. Within the polycentric and multi-actor regulatory space of stewardship, and provided that an active market for stewardship exists,[135] it is expected that such networks will seek to establish interconnections with other (public, quasi-public, private, market and social) enforcers and gain visibility, prominence, and legitimacy portraying themselves as good stewards through the lens of market discipline and peer pressure both at the national, regional and international levels.[136] This is also supported by the applications of network theory in corporate governance, and specifically in the role of institutional shareholders.[137] Enriques and Romano have argued that network-level competition might increase the incentives of institutional investors to collect information and cooperate within a formal network, a geographic area or a clique.[138] The public disclosure of shareholder stewardship policies and outcomes, the membership in a network or the inclusion in a signatory list can further advance such cooperative behavioural patterns.

Of course, we are not agnostic of individualistic or opportunistic motives when aiming to enter and remain as a member in such a network. Indeed, institutional investors or asset managers may sign up to stewardship codes or principles in a purely formalistic fashion so as to extract reputational benefits by publicising their supposed avant-garde or sustainable stewardship strategies and to attract more clients or attempt to conceal dubious practices. Even if such actors may instrumentalise shareholder stewardship norms to their own benefit, membership or adherence sanctions, such as exclusion from a signatory list or relinquishing of a membership, can eliminate such abuses.

C. The Importance of Informal Enforcement

A significant aspect of shareholder stewardship enforcement consists of informal mechanisms, defined in the negative as not including any (quasi)judicial proceedings or

[134] '*Assodire: L'unione delle Casse a difesa degli investitori*' *Il Messaggero* (11 February 2020).
[135] On the problems, however, of the demand side of this market, see Katelouzou and Micheler (n 81).
[136] See Katelouzou (n 1).
[137] Luca Enriques and Alessandro Romano, 'Institutional Investor Voting Behavior: A Network Theory Perspective' (2019) 1 University of Illinois Law Review 223.
[138] ibid, 266.

membership sanctions and adherence procedures directed at an individual norm-follower within stewardship networks. Informal enforcement can take place both ex ante and ex post (see also Table 1).

Starting with self-enforcement, here informal mechanisms rely upon the advertising of voluntary adherence to shareholder stewardship norms.[139] Additionally, a group of institutional investors may proceed to the formation of a group so as to signal the self-adherence to high standards of shareholder stewardship (see also Table 3). For example, in 2020 various Italian institutional investors announced the formation of a group (Assoprevidenza) so as to better exercise their shareholder stewardship activities and to aspire to their own high standards via the increase of awareness, research studies, training courses, assistance of institutional investors in their activities.[140]

Turning to third-party enforcement, a wide range of informal mechanisms is available to public, quasi-public, private, market and social enforcers.

Public enforcers can diffuse public information publicly through the publication of annual reports, guidelines etc. [141] Such measures (often taking place within a stewardship network) do not target any individual party but provide an overarching view of the enforcer's activity during a specific period.[142] Such measures are highly informative since they provide insights to compliance trends, to any action that the enforcer has taken or intends to take and to further guidelines for improving statements in the future. These measures can also provide concrete examples of good or bad shareholder stewardship practices and enable norm-followers to better align their practices with the enforcer's expectations. Public enforcers can also use public reputational mechanisms (such as public warnings, 'name and shame' etc.) or engage in private dialogue. Such informal mechanisms can operate on either an ex ante or ex post basis, depending on the release of shareholder stewardship statements and any consequent action (discrepancy of a practice from the statement) that can raise compliance concerns.

Private enforcers are also expected to adopt informal enforcement mechanisms (independently from any civil claims) such as public reputational mechanisms (public

[139] See, for example, BlackRock's letters to CEOs: footnote 101 and accompanying text.
[140] See for example, the 'Centro di tutela dei diritti degli azionisti istituzionali' created by Associazione Italiana per la Previdenza Complementare (Assoprevidenza) in collaboration with the Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili (CNDCEC), available at <https://assoprevidenza.it/chi-siamo/> accessed 10 April 2020.
[141] See for example, the 2018 Report of the Dutch Monitoring Committee: <https://www.mccg.nl/?page=5787> accessed 10 April 2020. For an example of guidelines, see FRC, "What Constitutes an Explanation under 'Comply or Explain'" (2012) <https://www.frc.org.uk/getattachment/a39aa822-ae3c-4ddf-b869-db8f2ffe1b61/what-constitutes-an-explanation-under-comply-or-exlpain.pdf> accessed 10 April 2020.
[142] See further Katelouzou (n 1).

warnings, ‘name and shame’ and ‘name and fame’ etc.) or measures taking place in private (private meetings and dialogue) so as to exert pressure or reward institutional investors.

Informal enforcement can be also exercised by market actors with some variations. Starting with investors’ associations, a characteristic example of an informal enforcement mechanism is the ICGN’s Global Stewardship Awards[143] that operate as a public reputational mechanism via ‘name and fame’ (see Table 3). For instance, the ICGN category of Stewardship Disclosure Awards aim ‘to recognise those investors who provide genuine insight into their shareholder stewardship policies and how they are implemented and, whose approach to disclosure provides a model that others might follow.’[144] We consider such public reputational mechanisms very valuable in incentivising norm-followers to further enhance their shareholder stewardship profile and benefit from positive reputational effects (see also Table 3).

An additional reputational mechanism taking by market actors publicly can be third-party ratings. Such ratings can perform a monitoring function by classifying investors based not only on the general adherence to shareholder stewardship norms (e.g. the issuance or not of a stewardship statement) but on the information provided in a stewardship statement, thereby enabling the issuance of a rating that values specific components of stewardship, such as active engagement or ESG-focused engagement.[145] Such ratings can provide additional reputational advantages for market actors who are particularly interested in the topics covered by the ratings. Norm-followers would therefore be incentivised to adopt a more transparent disclosure stance for competition and overall reputational benefits. Of course, such third-party ratings are not without their own set of problems. For instance, one-size-fits-all stewardship checklists may have harmful effects by pressuring investors to adopt a homogenised set of stewardship practices.[146]

Going beyond the use of rating systems, it is worthwhile to note that followers of stewardship norms will eventually need to reach a broadly common consensus about the different features of ‘good’ and ‘bad’ shareholder stewardship policies, and most importantly engagement outcomes so as to use the full spectrum of informal enforcement mechanisms at their disposal.[147] Without delving into the specificities and varieties of shareholder stewardship

---

[143] See <https://www.icgn.org/events/icgn-2019-global-stewardship-awards> accessed 17 February 2020.
[144] See <https://www.icgn.org/events/global-stewardship-awards-2019/stewardship-disclosure-awards> accessed 17 February 2020.
[145] In the context of Italy, see Simone Alvaro, Marco Maugeri and Giovanni Strampelli, ‘*Investitori istituzionali, governo societario e codici di stewardship*’ (2019) 19 *Quaderni Giuridici Consob* 59.
[146] In the broader area of corporate governance, see Paul Rose, ‘The Corporate Governance Industry’ (2007) 32 Journal of Corporation Law 887.
[147] John Kingman, Independent Review of the Financial Reporting Council, December 2018, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387

strategies that can be legitimately developed by different types of investors,[148] we argue that public, quasi-public, private and market enforcers need to maintain an ongoing dialogue on general shareholder stewardship expectations and provide more details to the concerned parties regarding the expectations of best practice shareholder stewardship.

Informal enforcement by social actors can also play a beneficial role in enforcing shareholder stewardship. Various stakeholders (such as NGOs, employees of investee companies, consumers, and others) may wish to understand what kind of informational exposure is matched with a 'certified', awarded or sanctioned shareholder stewardship disclosure statement so as to mount pressure for change. Social actors can engage in informal enforcement mechanisms by exerting pressure on norm-followers via public reputational procedures (public campaigns, name & shame, name & fame etc.) or private measures (meetings and dialogue) with parties with whom they are related (e.g. ultimate beneficiaries of a fund managed by another asset owner) or whose activities have an impact on their activities (e.g. employees of investee companies or NGOs).

Signs of such informal enforcement trends by social actors are already visible through shaming campaigns against investors avoiding to integrate ESG factors[149] or purporting to serve ESG agendas but doing so in a ambiguous way.[150] Indeed, NGOs are increasingly interested in holding not only companies but also investors into account as they legitimately consider the latter as the enablers, in their 'capital provider' capacity, of unsustainable corporate strategies that contribute to climate change. The same trends may be manifested by issuers themselves or even their employees who have been seen as a credible social enforcer against income inequality, in light of their capacity to contribute to corporate governance and aim to redistribute wealth maximisation within corporations.[151] Buoyed by the increasing potential of

---

/frc-independent-review-final-report.pdf> accessed 17 February 2020. It should be also noted that the characterisation of the quality of policies and of their outcomes will also differ greatly between the two worlds of corporate governance and investment management stewardship. See further Katelouzou (n 1).

[148] For instance on how activist hedge funds approach stewardship, see Dionysia Katelouzou (2020) 'Hedge Fund Activism and Stewardship: Incompatible, Reciprocal or Something in Between?' (Working paper).

[149] See, for example, Greenpeace's latest intervention during the 2020 World Economic Forum held in Davos, accusing pension funds for contributing to climate change by investing in fossil fuels: <http://www.climatenetwork.org/sites/default/files/can_wef_press_release_0.pdf> accessed 17 February 2020.

[150] For example, climate activists (such as Sierra Club campaign and Sunrise Project) have expressed serious doubts to BlackRock's commitment in January 2020 to divest from companies engaged in coal production, launch funds that ban fossil-fuel shares and vote against managers who fail to make progress on climate change: <https://www.cnbc.com/2020/01/16/activists-respond-to-blackrocks-plan-to-tackle-climate-change.html> accessed 17 February 2020.

[151] Andreas Kokkinis and Konstantinos Sergakis, 'A Flexible Model for Efficient Employee Participation in UK Companies' (2020) Journal Corporate Law Studies forthcoming.

such stakeholders in monitoring stewardship statements and ensuing practices, we argue that formal and informal enforcement by social actors can complement more established enforcement mechanisms by public, quasi public, private and market actors and act as a social 'safety valve' in the presence of deviant stewardship practices.

D. Mobilising a Multi-Actor and Multi-Modal Enforcement System

Leaving aside the juridification of stewardship via the transposition of the SRD II, it remains a reality that shareholder stewardship around the world still consists of largely soft-law norms that maintain the merits of flexibility and adaptability to market actors' profiles and needs. Our taxonomy recognises this reality and offers a multi-actor and multi-modal perspective designed to deal with the complexity of shareholder stewardship along a continuum of ex ante and ex post enforcement mechanisms (see also Table 3).

We are of the view that any future regulatory design of enforcement mechanisms shall not merely depict the regulatory objectives of transparency across the investment chain in a 'top-down' fashion, which if excessive can also harm engagement,[152] but shall be reflective of the dynamic and decentralised enforcement stewardship processes by multiple actors from (quasi)public ones (such as the FRC in the UK) to national, regional and international market actors (such as the Italian Assogestioni or EFAMA) and from private (contractual) actors to social actors (such as the South Korean NGO named 'People's Solidarity for Participatory Democracy')[153].

As far as enforcement mechanisms are concerned, we lay out several formal (i.e. the ordinary enforcement channels that aim to enforce a compliance stance, such as administrative penalties and measures, restitution orders, civil claims as well as membership sanctions and adherence procedures within stewardship networks) and informal (i.e. other mechanisms relating to information diffusion, public reputational procedures and private means) mechanisms (see also Table 3). But the preferred enforcement mechanism essentially depends on the nature of shareholder stewardship norms in a jurisdiction and the nature of standard setters. When stewardship norms are soft in nature, informal enforcement mechanisms have a key role to play, but their efficiency also depends on formal membership sanctions taking place within stewardship networks. When soft-law stewardship norms coexist with hard-law ones, as

[152] On the risks of over-regulation and its impact upon engagement, see Rock (2018) (n 19) 371, 373.
[153] See footnote 47 and accompanying text.

is the case in the EU, the role of public enforcers cannot be disregarded. In such cases of symbiotic norms a shareholder stewardship enforcement can take some aspiration from the approach the FCA adopts in the area of proxy advisors, that is a gradual escalation of enforcement mechanisms from informal (warning notice, public statement) to formal (administrative penalty) mechanisms, depending on the reaction of the regulatee following the initial warning notice.[154] The adoption of such a gradual escalation of public enforcement from informal to formal mechanisms can provide a beneficial alternative to Member States that have shown a monolithic preference for formal enforcement in relation to Article 3g (SRD II) and leave space for enforcement by market actors.[155]

Finally, the temporal aspect of our taxonomy (ex ante and ex post mechanisms) highlights a continuum of actions by enforcers of norms (from private guidance and advice to sanctioning a breach) that all aim to attain good stewardship standards. But this distinction based on the time of the intervention is a thin one. An ex post enforcement mechanism that takes place after an action has (not) been taken such as a formal sanction or an informal 'name and shame' campaign can trigger future ex ante enforcement: parties subject to ex post enforcement will have to reflect upon the consequences of their past actions and potentially alter their compliance stance for the next (annual) engagement and disclosure exercise. For instance, while a tiering exercise taking place within a stewardship network operates ex post taking place after the disclosure of shareholder stewardship statements, it also has an ex ante function in deterring deviant parties from repeating their non-compliant stance in the future (see also Table 1). In turn, ex ante and ex post enforcement – despite functioning in parallel temporal dimensions – are not completely autonomous (see also Table 1).

Our temporal, multi-actor and multi-modal enforcement taxonomy essentially pertains to a single key point: to enforce shareholder stewardship effectively, various actors, mechanisms and timing in enforcement need to work together. But it needs to be born in mind that all these monitoring, deterrence and compliance trends are still developed with variable levels of success and sophistication around the world. This is due to the various national specificities that may facilitate or impede the valuable contribution of public, quasi-public, private, market and social actors in enforcing shareholders stewardship. While we do not envisage to include in Table 3 all the hypothetical constructs, the exact continuum of mechanisms, from behind the scenes meetings and dialogue to administrative sanctions, depends on the nature of the norm subject to enforcement (soft versus hard law), on whether the enforcer is also the standard setter and on national, legal, market and cultural specificities. We do not thus expect countries to apply our enforcement taxonomy in a uniform fashion; this

[154] Proxy Advisors (Shareholders' Rights) Regulations 2019, Sections 11-15, available at <http://www.legislation.gov.uk/uksi/2019/926/made/data.pdf> accessed 6 April 2020.
[155] The FCA itself recognises the role of market enforcement. See paras 7.11 and 7.12 of the Explanatory Memorandum to the Proxy Advisors (Shareholders' Rights) Regulations 2019, available at <http://www.legislation.gov.uk/uksi/2019/926/pdfs/uksiem_20190926_en.pdf> accessed 6 April 2020.

is due to the 'one size does not fit all' mantra in corporate governance and shareholder stewardship. For instance, the efficiency of formal and informal enforcement actions by social actors may be disproportionately variable across the globe, since it is mostly dependent upon civil society traits. Thus our humble aim is to advance a multi-actor and multi-modal enforcement system that offers flexibility and variety in enforcement actions that can be adjusted to any national or supranational framework.

V. Conclusion

In this Chapter we have attempted to decipher the enforcement of shareholder stewardship around the world. We adopt a *broad* approach to enforcement mechanisms in the area of shareholder stewardship and set out a simple conceptual taxonomy based upon three pillars: (i) the nature of the enforcer (self, public, quasi-public, private, market and social); (ii) the nature of the enforcement mechanisms (formal and informal); and, (iii) the ex ante or ex post timeliness and responsiveness of enforcement mechanisms to (in)actions. We support more partnership between formal and informal enforcement mechanisms in light of the emerging symbiosis of semi-hard and soft law (national and supranational) shareholder stewardship norms. In overall, we view enforcement as having *blurred boundaries*, often comprised of both rules- and principles-based regulation,[156] enforced by different public, quasi-public, private, market and social actors at different timings. This echoes Park's comparative advantage theory of enforcement in the context of securities laws, whereby '[d]ifferent enforcers have different advantages, and a decentralized system allows for specialization in enforcement approaches'.[157]

Using the recent EU efforts as a case study we underscore the weaknesses of introducing formal public enforcement in an area traditionally enforced informally through market actors. But while we caution against public enforcement, we support a role for public (or quasi-public) enforcers in facilitating civil claims and the ensuing award of damages to the ultimate investors.

[156] For a regulatory proposal to introduce stewardship duties under investment management law and mixing them with stewardship principles under soft law, see Chiu and Katelouzou (2018) (n 120) 98. In such a scenario, the rules-based regulation would be enforced by public regulators, whilst the principles-based regulation by market ones.
[157] James J. Park, 'Rules, Principles, and the Competition to Enforce the Securities Law' (2012) 100 California Law Review 115, 181.

We recognise, however, that the latter may seem as a premature initiative for further legal reform, given the soft law nature of most stewardship duties around the world.

Due to the nature of shareholder stewardship norms and their overlap with the corporate governance aspects of the shareholder role of institutional investors, we support formal membership sanctions and adherence procedures taking place within stewardship networks as well as informal mechanisms by public, quasi-public, private, market and social enforcers through public information diffusion, public reputational procedures and private measures. We acknowledge, however, that some refinement is necessary through tiering, ratings and benchmarking, ongoing guidance and dialogue. It is also important to highlight that informal enforcement should not be exclusively seen as a facilitative measure for the maintenance of flexibility and adaptation to best stewardship standards but also as a revived form of enabling the 'crank in the window'[158] through which market and social discipline will allow the continuous representation of a series of private and public interests, including those of the ultimate investors.

Our proposed enforcement taxonomy is multi-actor and multi-modal along a time-continuum, and essentially pertains to a single key point: to enforce shareholder stewardship effectively, various actors, mechanisms and timing in enforcement need to work together. But there is no global 'one-size-fits-all' approach to shareholder stewardship enforcement. We are, however, optimistic that market and social discipline, provided that an active market for stewardship exists, can have additional layers of influence upon stewards promoting the continuous interaction between public, quasi-public, market and social actors. As such, informal enforcement is needed as a 'safety valve' – but not as the only one – for achieving high shareholder stewardship standards.

[158] Chiu has used this metaphor to denote the potential of the ideological transformation of stewardship as an enabling spectrum for the visibility and promotion of 'stakeholder interests and communitarian values': Iris H.-Y. Chiu, 'Institutional Shareholders as Stewards: Toward a New Conception of Corporate Governance' (2012) 6 Brooklyn Journal of Corporate, Financial & Commercial Law 387, 431.

Electronic Access to the Working Paper Series

The full set of ECGI working papers can be accessed through the Institute's Web-site (https://ecgi.global/content/working-papers) or SSRN:

Finance Paper Series	http://www.ssrn.com/link/ECGI-Fin.html
Law Paper Series	http://www.ssrn.com/link/ECGI-Law.html