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Shareholder stewardship: autonomy and sociality

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ABSTRACT



Notwithstanding the prevalent facets of shareholder stewardship as a market concept, this paper advances the argument that there is another constitutive - though well hidden - element that is more apt to fully grasp its distinctive features and better inform market and public policy initiatives. This element regards stewardship's essence as a social norm. Indeed, what this article calls the 'stewardship sociality' offers original insights into the dynamics developing between different stewards. In parallel, building upon the premises of a real entity theory of company law, this paper explores the social interactions within and between stewardship groups, by demonstrating that their autonomous action requires a minimally coercive response from law. It is thus 'stewardship autonomy', as it is called in this paper, that suggests that any legal reform needs to be confined in soft law instruments that depict the sociality of stewardship within a constantly evolving global landscape.

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KEYWORDS Corporate governance; shareholder stewardship; social norms; soft law

Introduction

The concept of shareholder stewardship (hereafter stewardship)¹ has become one of the main pillars of any contemporary debate in corporate governance.

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¹The term 'shareholder stewardship' is used to denote stewardship as projected and exercised within the life of public companies by shareholders. For the 'shareholder stewardship' concept, see D. Katelouzou and D.W. Puchniak, *Global Shareholder Stewardship* (eds) (Cambridge University Press, 2022); H. Kaur, C. Xi, C. Van der Elst and A. Lafarre (eds), *The Cambridge Handbook of Shareholder Engagement and Voting* (Cambridge University Press, 2022). For other types of stewardship, such as the debtholder stewardship, see S. Gomtsian, 'Debtholder Stewardship' (2022) *Modern Law Review* (early online publication). Debtholder stewardship is gradually becoming complementary to shareholder stewardship, in light of its tools and its potential to holistically ameliorate investor studentship; this is possible by filling the gaps in markets and firms where shareholder stewardship is less prominent: *ibid.*, 5. Both types of stewardship are crucial to the study of 'autonomy' and 'sociality' concepts in this area but focus is dedicated

Market actors are expected to adhere to stewardship's facets in primarily two aspects: the corporate governance facet that expects institutional investors and asset managers to promote good governance standards in investee companies; and the investment management one, which focuses on the embodiment of stewardship as a safeguard for the interests of the stewards' clients and ultimate beneficiaries.² Both private and public actors have traditionally conceived, diffused and accepted stewardship as a market-driven concept,³ based on the centrality of fiduciary duties and of agency costs in a highly intermediated investment chain.

Under this conceptualisation, market actors have embarked upon the stewardship mantra in an instrumentalised fashion, aiming to embrace and constantly project themselves as part of a wider stewardship investment trend that purports to ensure the delivery of high-quality services and financial returns to clients and beneficiaries, and the avoidance of operational deficiencies, such as conflicts of interest, which can compromise the quality of such services. Indeed, the advent of agency costs as the central paradigm of the shareholder-manager convivium within the 'nexus of contracts' theory⁴ has shaped the relationships between asset managers, institutional investors and their clients or beneficiaries. The reconcentration of ownership within institutional investment schemes (mostly in the UK and the US⁵) and, more generally, 'agency capitalism'⁶ have solidified an instrumental facet within market and policy maker circles, while nurturing the view of profit maximising behaviour as investors' sole appetency. This is coupled with the primary role that agents exert within corporations that enable the various contractual relationships among shareholders as 'legal fictions which serve as a nexus for

to the 'shareholder stewardship' dimension in light of its more well-known and distinctive presence in relation to the social dynamics and autonomy that are the key concepts of this study. Future research is needed to address collectively all types of stewardship under the notions of autonomy and sociality.

²Between the various levels of investment intermediation, we specifically refer to the relationship between asset managers and asset owners and between asset owners and ultimate beneficiaries. On this topic, see R. Barker and I. H.-Y. Chiu, *Corporate Governance and Investment Management* (Edward Elgar, Cheltenham, 2017).

³D. Katelouzou and K. Sergakis, 'Shareholder Stewardship Enforcement' in Katelouzou and Puchniak (n 1) 572.

⁴M.C. Jensen and W.H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305. See also E. Fama, 'Agency Problems and the Theory of the Firm' (1980) 88 *Journal of Political Economy* 288; E. Fama and M.C. Jensen, 'Agency Problems and Residual Claims' (1983) 26 *Journal of Law and Economics* 327.

⁵Institutional investors hold 43% of the listed companies' share capital at the global scale: OECD, *Corporate Governance Factbook 2021* (2021), <https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf>, 13. Nevertheless, such a reconcentration is far from universal and is only dominant in the UK and in the US: see D.W. Puchniak, 'The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense out of the Global Transplant of a Legal Misfit' (2021) *American Journal of Comparative Law* forthcoming. Elsewhere, the typical ownership structure has a dominant shareholder plus minority holdings re-concentrated in the hands of institutions. The phenomenon as regards institutions is the same, the difference is in the presence or absence of dominant shareholders.

⁶R.J. Gilson and J.N. Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Reevaluation of Governance Rights' (2013) 113 *Columbia Law Review* 863.

a set of contracting relationships among individuals'.⁷ This *modus operandi* has accentuated the need to ensure sound standards of stewardship within an exclusively financially driven perspective, which is oblivious of market actors' inherent preferences, social traits, and the dynamics of social interactions.

Most of the academic literature has focused on the market facet of stewardship, aiming to explore its complexity and constant evolution through market mechanisms.⁸ Nevertheless, the ramifications of stewardship can no longer be seen under a merely financially oriented investment lens, since they spread across a wide range of issues that are nowadays also captured by Environmental, Social and Governance (ESG) factors.⁹

Notwithstanding the notable and undoubtedly prevalent facets of stewardship as a market concept, this paper advances the argument that there is another constitutive – and admittedly well hidden – element of stewardship that is more apt to fully grasp its distinctive features and to better inform market and public policy initiatives. This element regards stewardship's essence as a social norm that precedes and operates outside of any soft or hard law initiatives.¹⁰ Indeed, what this article calls 'stewardship

⁷Jensen and Meckling (n 4) 310.

⁸Among an abundant literature, see n 1. Another strand of academic literature has nonetheless highlighted political forces and, more recently ESG considerations, driving stewardship. For example, politics in Japan and 'halo signalling' in Singapore are seen as significant drivers of stewardship: G. Goto, A.K. Koh and D.W. Puchniak, 'Diversity of Shareholder Stewardship in Asia: Faux Convergence' (2020) 53(3) *Vanderbilt Journal of Transnational Law* 829, 872–73. See also, on ESG considerations, G. Goto, 'The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code', in Katelouzou and Puchniak (n 1) 236; on 'halo signalling', D.W. Puchniak and S.S. Tang, 'Singapore's Embrace of Shareholder Stewardship: A Puzzling Success', 305–06; in Katelouzou and Puchniak (n 1) 8–9 and A.K. Koh, D.W. Puchniak and G. Goto, 'Shareholder Stewardship in Asia: Functional Diversity within Superficial Formal Convergence', in Katelouzou and Puchniak (n 1) 626. See also D. Katelouzou, 'Investor Stewardship: The State of the Art and Future Prospects' in J.N. Gordon and W.G. Ringe, *The Oxford Handbook of Corporate Law and Corporate Governance* (eds.), (Oxford University Press, 2nd ed., forthcoming), <https://ssrn.com/abstract=4470704>.

⁹Nevertheless, it should be borne in mind that ESG is not entirely divorced from economic considerations as it is often seen as financially oriented or at least not contrary to shareholder wealth maximization in the long-term. For example, in relation to its environmental facet and climate change related initiatives from market actors, one of the justifications that are frequently put forward is that pursuing ESG will maximize shareholder value in the long-term. However, seen in its totality and bringing together all of its facets, ESG does result in a focus on things other than maximizing shareholder value and may sometimes be detrimental to maximizing shareholder value.

¹⁰Based on Eisenberg's seminal work, which refers to 'social norms' as 'all rules and regularities concerning human conduct, other than legal rules and organisational rules': M.A. Eisenberg, 'Corporate Law and Social Norms' (1999) 99(5) *Columbia Law Review* 1253, 1255. In our analysis, we do emphasise the important of organisational rules ('formal rules adopted by private organisations', *ibid.* 1255) but also refer to other elements and dynamics that influence actors' *modus operandi*. Indeed, Eisenberg distinguishes social norms to behavioural patterns, nonobligational norms and obligational norms (*ibid.*, 1256–1257). Institutional investors are seen as actors that have passed from the 'passivity norm' to the 'activity norm' in light of legal, economic and, most critically, demographic (size of institutional investment) and critical mass (propagation and wide acceptance of active institutional activity) factors: *ibid.*, 1285–87.

This paper also present similarities with the 'nonlegally enforceable rules and standards' (NLEERS) that trigger obligations to involved parties without legal enforcement. For example, profit maximisation as a corporate management strategy is a NLEERS, an area in which courts have traditionally abstained from intervening: E.B. Rock and M.L. Watcher, 'Islands of Conscious Power: Law, Norms and the Self-Governing

sociality¹¹ offers original insights into the dynamics developing between different stewards and elucidates stewardship's malleable and expansive nature. The sociality of stewardship is already manifested in the pursuit of profit, underpinned by conventional social norm traits and values that conceive investors as instrumental actors. But social dynamics can also orientate stewardship towards non-financial investment objectives. Sociality may not require non-financial objectives, but it can certainly enable them. Examining stewardship as a social norm also enables us to better anticipate and inform future market and public policy synergies in light of the global challenges that markets and societies face.

Taking forward the sociality of stewardship, there is a concomitant facet that needs to be unearthed. Based on the emergence of stewardship as a social norm, institutional investors and asset managers acquire an autonomous existence as a class outside of any soft or hard law initiative. More precisely, interactions between members of stewardship teams within the wider operational spectrum of investment schemes, as well as between investors themselves in the market, form a multi-modal ecosystem with its own distinctive traits.¹² Such traits dissociate themselves from both participants' ideas and interests as the shared cultural mindset that is both sustained through ongoing interactions and binds and influences stewardship team members. This mindset is nourished, fertilised, and transformed by individual contributions while surviving in time with its own core identity.

Corporation' (2001) 149 *University of Pennsylvania Law Review* 1619, 1644. Yet, our vision of stewardship as a social norm goes beyond rules and standards and includes several other facets, as it will be shown below, that denote a continuous evolution of behavioural patterns, according to stewardship an ever evolving nature. Moreover, contrary to NLEERS, legal enforceability is possible within the minimally coercive rules we advocate for: on the various facets of enforcement of shareholder stewardship, see Kate-louzou and Sergakis (n 3) 572.

¹¹Inspired by Fiske's seminal theory on sociality, focusing on people's fundamentally sociable nature and the organisation of their social life in accordance with their relations with others: A.P. Fiske, 'The Four Elementary Forms of Sociality: Framework for a Unified Theory of Social Relations' (1992) 99(4) *Psychological Review* 689. Fiske developed four relational models to explain human social life: 'communal sharing', 'authority ranking', 'equality matching' and 'market pricing'. Aiming to engage with these relational models, we argue that 'market pricing' seems the most vicinal model to institutional investor and asset manager patterns, being characterised by 'rational calculations of efficiency or expected utility' (regardless of social relationships amongst such actors being associated with money or not): *ibid.*, 691–92. As advanced by Fiske, individuals may value a model but apply another as well as disagree on which model to apply. Relationships between stewards thus manifest traits from the authority 'ranking category', with prestige, elements of rank, hierarchical structures and charismatic legitimation being frequently encountered amongst stewards, as it will be shown in the next section that examines isomorphic trends.

¹²Such interactions take place both from a corporate governance (synergies or social dynamics when exercising stewardship under a shareholder capacity) and an investment management (interactions between investors themselves and between investors and beneficiaries) perspective. Our analysis transcends both levels by shedding light on the interactions between stewards holistically, aiming to demonstrate the existence of a social norm at both levels. On stewardship's 'inward' facet, more generally, namely the interactions between institutional investors and their clients/beneficiaries that regard to investment management aspects, see D. Katelouzou and D. Puchniak, 'Global Shareholder Stewardship: Complexities, Challenges and Possibilities' in Katelouzou and Puchniak (n 1) 8–9.

Building upon the premises of a real entity theory of company law,¹³ this paper explores the social interactions within and between stewardship groups¹⁴ by demonstrating that their autonomous action requires a minimally coercive response from law. It is thus ‘stewardship autonomy’ that suggests that any legal reform needs to be confined in soft law instruments that purport to depict the sociality of stewardship and to promote its mission within a highly complex and constantly evolving global landscape. Semi-hard legal norms need to remain focused on disclosure obligations that are best fit to further nurture the social dynamics of stewardship, by inciting and enabling market actors to engage in multi-layered interactions with stewards in an informed fashion.¹⁵

The paper is structured as follows. The first part examines the theoretical underpinnings of real entity theories and addresses the question of whether the class of institutional investors can be thought of as constituting a social group. It is argued that such recognition flows naturally from the social interactions between individuals within stewardship teams and networks and between stewards themselves across national and international investment landscapes. The second part connects real entity theory with social norms by delving into the specificities of stewardship’s ‘sociality’. By unearthing stewardship’s identity as a social norm, the analysis disentangles stewardship from its ‘market trend’ facet and renders visible the dynamics between different stewards. The third part identifies stewardship’s potential as a social norm to efficiently encapsulate and address global challenges, with ESG becoming a particularly fertile ground for such contribution. The fourth part builds on stewardship’s ‘autonomy’ and ‘sociality’ to formulate proposals that can serve as a guide for future legal and regulatory reforms. A preference for minimally coercive legal provisions is advanced, focusing exclusively on disclosure obligations that are best suited to depict and further nurture stewardship’s sociality.

Stewardship groups and networks as a social group

Real entity theories

Real entity theories have focused on firms’ independent existence within the wider market ecosystem, by moving away from ‘fictionalist’¹⁶ and

¹³As it has been advanced by E. Micheler, *Company Law, A Real Entity Theory* (Oxford University Press, 2021).

¹⁴Stewardship groups can take any form, characterized by an agglomeration of individuals (internal teams within an institutional investor or asset manager, third parties to which stewardship activities may have been delegated, teams of stewardship consultants etc) as well as of groups of investors or managers forming coalitions. They can also take any legal form (e.g. corporate, trust, contractual or foundation), as mentioned in the next section.

¹⁵This paper does not examine the *raison d’être* of other hard law measures applicable to asset owners and asset managers, as it exclusively focuses on shareholder stewardship aspects related to corporate governance.

¹⁶Fictionalist theories consider firms pure legal fictions.

‘aggregationist’¹⁷ theories that, deriving from ontological individualism, have traditionally conceived firms and, more generally, groups, associations, and organisations as nothing more than an agglomeration of individuals, deprived of collectivised patterns and routines that enable them to persist through time.¹⁸ Firms survive by constantly evolving and adapting, not being solely based upon individuals but, more critically, upon the collectivisation of knowledge, skills,¹⁹ and values²⁰ that remain attached to the firm and become an integral part of its identity.

Overlooking the fact that soft law stewardship provisions adopted by firms capture – or descend from – a social norm amounts to a failure to grasp how firms operate. Firms are social structures that shape and are shaped by human behaviour and values.²¹ Inevitably, firms have real identities, which are real ‘not in a tangible way but rather in their consequences’.²² Stewardship groups, like any firm (and network of firms),²³ and regardless of their legal form (e.g. corporate, trust, contractual or foundation), exhibit relational elements and roles that progressively shape their distinctive emergent features, most notably ‘the powers of the collective as such to see, think, decide and act’.²⁴ This should not be taken to mean that groups are living creatures, but merely that, like firms, groups can become institutionalised

¹⁷Aggregationist theories simply conceive firms as aggregates of their parts, depicting the assemblage of individuals, contracts and assets.

¹⁸For a complete overview of different theories, see D. Gindis, ‘From Fictions and Aggregates to Real Entities in the Theory of the Firm’ (2009) 5 *Journal of Institutional Economics* 25. See also Freund’s three ‘salient characteristics of the body corporate: its unity, its distinctiveness and its identity in succession’ as a criterion for the recognition of a real entity: Ernst Freund, *The Legal Nature of Corporations* (University of Chicago Press, 1897), cited by Gindis, *ibid.*

¹⁹R.R. Nelson and S.G. Winter, *An Evolutionary Theory of Economic Change* (Cambridge, MA: Harvard University Press, 1982); S.G. Winter, ‘On Coase, Competence and the Corporation’ (1988) 4(1) *Journal of Law, Economics and Organization* 163. Gindis (n 18) 40 refers to the firms’ “ontological glue”, which is further broken down into: “institutional glue” created by legal entity status, constitutive rules, contracts, and norms; “organizational glue” manifested by structures, processes, functions and roles; “motivational glue” that ensures loyalty and adherence to common goals through a variety of means; “cognitive glue” accounting for identification, shared beliefs, and representations; and “capabilities glue” that relates to the complementarity between human assets such as knowledge and non-human assets, to productive routines, and so on’. See also D. Gindis, ‘Some Building Blocks for a Theory of the Firm as a Real Entity’ in Y. Biondi, A. Canziani and T. Kirat (eds), *The Firm as an Entity: Implications for Economics, Accounting and the Law* (London and New York: Routledge, 2007) 279.

²⁰K. Weber and T. Dacin, ‘The Cultural Construction of Organizational Life’ (2011) 22 *Organization Science* 286.

²¹Micheler (n 13) 28. For an empirical study demonstrating that norm-constrained institutional investors (e.g. pension funds, universities as well as religious, charitable and non-profit groups) engage in a value-driven (rather than profit-driven) positive screening in CSR issues and that social norms’ influence on stock market is non-negligible, see S.F. Cahan, C. Chen and L. Chen, ‘Social Norms and CSR Performance’ (2017) 145(3) *Journal of Business Ethics* 493.

²²Micheler (n 13) 28.

²³G. Teubner, ‘The Many-Headed Hydra: Networks as Higher-Order Collective Actors’, in J. McCahery, S. Picciotto and C. Scott (eds), *Corporate Control and Accountability* (Oxford University Press, 1993); B. Kogut, ‘The Network as Knowledge: Generative Rules and the Emergence of Structure’ (2000) 21 *Strategic Management Journal* 405.

²⁴R. Adelstein, ‘Firms as Social Actors’ 6(3) (2010) *Journal of Institutional Economics* 329, 339.

as 'active social units'²⁵ by developing, maintaining and performing a set of routines.²⁶

If we think of institutions as 'rules created through the strategic interaction of agents, held in the minds of agents and thus self-sustaining',²⁷ we can see that they are sustained not just by shared beliefs but also by 'acquired habits of thought and action'.²⁸ With the passage of time, routines emerge as a natural outcome of shared expectations about how to act in certain situations. Through interpersonal interactions and repetition, these become social phenomena enshrined in the firms' *modus operandi*. As such, a group's routines acquire a certain degree of independent existence, at least in the sense that they can survive the progressive change in the group's membership.

Social norms emerge and acquire a certain degree of independent existence in roughly the same manner, although they transcend group boundaries and are operational on a potentially much broader scale. The tendency to abide by social norm-driven practices may enter into conflict with the purely financially-driven strategies that tend to be predominant in the firm's *modus operandi*. Indeed, if at least some group's institutionalised rules are the result of broader and novel social norms rather than, strictly speaking, the group's own economic interests, conformity with such rules may conflict with economic efficiency,²⁹ with the implication that seeking efficiency may adversely affect the group's legitimacy in relation to the emerging social norm.³⁰ Further, formal structures and processes aiming to support or project a public image of adherence to the social norm to the firm's audience may conflict with internal organisational processes³¹ or even provoke efficiency-reducing inertia that limits the firm's adaptation capacity.³²

²⁵Micheler (n 13) 21.

²⁶Adelstein (n 24) 340.

²⁷M. Aoki, *Toward a Comparative Institutional Analysis* (Cambridge MA: MIT Press, 2011) 11. See also K. Basu, *The Republic of Beliefs: A New Approach to Law and Economics* (Princeton University Press, 2018).

²⁸W. McDougall, *Introduction to Social Psychology* (Meuthen, 1908) 37, cited in G.M. Hodgson, 'What Are Institutions?' 40 *Journal of Economic Issues* 1, 6.

²⁹As it has been critically argued, '[t]here is no financial gain from stewardship. But there are tremendous political stakes: J. Schwartz, 'Stewardship Theater' (2022) 100 *Washington University Law Review* 393, 432. On a similar argument regarding asset owners' and asset managers' openness to reputational benefits arising from adhering to the ESG agenda out of concerns related to a potential governmental initiative, see P. Davies, 'The UK Stewardship Code 2010–2020: From Saving the Company to Saving the Planet?' in Katelouzou and Puchniak (n 1) 65.

³⁰J. Meyer and B. Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1997) 83 *American Journal of Sociology* 340; A.R. Heugens and M.W. Lander, 'Structure! Agency! (And Other Quarrels): A Meta-Analysis of Institutional Theories of Organization' (2009) 52(1) *The Academy of Management Journal* 61.

³¹Heugens and Lander, *ibid*, 64.

³²Micheler (n 13) 24.

Regardless of the firm's ability to sustain stewardship-based promises, the very adoption of soft law stewardship provisions and the willingness to abide by them is a sign of a social norm. This observation does not apply in the case where the adoption of a soft law tool is not voluntary.³³ Seen through the real entity theory lens, the law's role is to recognise the socio-economic fact of a group's existence and accord to it legal capacity (in its existing or nascent form).³⁴ This enables the unification and reinvigoration of the socio-economic features of the group by further augmenting its collective action capabilities. The law's role can be seen from different angles, ranging from constituting a 'fundamental institutional fact about the firm',³⁵ without which a firm cannot be conceived as a real entity, to simply allowing firms to be regulated, without constituting them, since firms exist independently prior to such legal recognition.³⁶

Social action within stewardship groups

Even if new ideas for the development of stewardship activities can appear to be mere market trends (e.g. asset allocation strategies), when they are shared across the financial services industry and become routinised at the organisational level, they may acquire the character of a social norm that may be seen as having a certain degree of autonomous existence.

Stewardship groups operating within institutional investor and asset manager firms exhibit some of the features highlighted by institutional theorists. Stewardship teams are well structured, with clear objectives and operational standards, and comprise individuals demonstrating a degree of specialisation and expertise that allows them to operate autonomously and in conjunction with other teams. One of stewardship's facets is 'stewardship governance', encapsulating internal dynamics and ongoing collaboration between different departments, such as risk management structures and internal committees.³⁷ What makes stewardship groups 'real in a social sense'³⁸ is the gradual homogenisation of culture, structures, and outcomes across the industry. Organisational fields – defined as communities of organisations with 'shared cognitive or normative frameworks or a common

³³See, for example, the FRC's UK Stewardship Code (compulsory for asset managers), the Australian FSC's Standard 23: Principles of Internal Governance and Asset Stewardship (compulsory for FSC members) and the following instruments in India that are mandatory for their members: IRDAI's Guidelines on Stewardship Code for Insurers, PFRDA's Common Stewardship Code and SEBI's Stewardship Code.

³⁴Gindis (n 18).

³⁵Ibid, 39. S. Deakin, D. Gindis, G.M. Hodgson, K. Huang and K. Pistor, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' (2017) 45 *Journal of Comparative Economics* 188.

³⁶See, for example, Adelstein (n 24) 334.

³⁷D. Katelouzou, 'The Rhetoric of Activist Shareholder Stewards' (2022) 18(3) *New York University Journal of Law and Business* 665, 733.

³⁸Micheler (n 13) 21.

regulative system³⁹ – are organically driven towards industry standards once they become well established.⁴⁰ This isomorphic process, *alias* the progressive conformity to a stewardship-based landscape for the acquisition of legitimacy and social approval, is all the more likely when organisations within the field face similar environmental conditions.⁴¹ It is the existence of such conditions, as well as the modification of organisational characteristics so as to become compatible with these conditions, that elevate stewardship into a social norm that is more than a mere market trend.

Competitive isomorphism that leads to a race for perceived institutional legitimacy between actors in a field occurs via imitation patterns – as does innovation.⁴² Stewardship embodies this homogenisation via competitive isomorphism. The race to appear as adhering to soft law stewardship provisions – a form of status competition⁴³ – manifests a genuine sociality (and not a mere trend) since all signatories aspire to become part of a community publicly manifesting the embodiment of stewardship values (when of course such adherence is not compulsory, as explained above). The adoption of stewardship principles (*alias*, imitation) is only the indispensable means through which a new idea spreads out, especially in the case of the revision of a soft law instrument that conveys a new direction of stewardship's identity and mission.⁴⁴ The fact that this occurs is evidence of an existing social norm.

Similar imitation phenomena have been observed with the various bodies in charge of emitting soft law instruments around the world. The UK Stewardship Code has become an inspiration for the adoption of similar initiatives in many countries with divergent features. Although the various soft law instruments do not depict stewardship as it was originally portrayed in the UK, imitation dynamics led to the adoption of various instruments with the aim to attract foreign investment, respond to an economic crisis or indirectly pursue policy channelling.⁴⁵ Turning our attention to investors, imitation trends are not only observed amongst the competitors in the institutional

³⁹W.R. Scott, *Institutions and Organizations* (Sage, 1995) 56; See more generally M. Wooten and A.J. Hoffman, 'Organizational Fields: Past, Present and Future' in R. Greenwood, C. Oliver, K. Sahlin and R. Suddaby (eds) *The SAGE Handbook of Organizational Institutionalism* (Sage, 2008) 130–31. For applications of the related notion of 'strategic action fields' to law and corporate governance, see F. Partnoy, 'Law and the Theory of Fields' 39 *Seattle University Law Review* 579; N. Fligstein, 'The Theory of Fields and Its Applications to Corporate Governance' 39 *Seattle University Law Review* 237.

⁴⁰P. DiMaggio and W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48(2) *American Sociological Review* 147; see also D.L. Deephouse, 'Does Isomorphism Legitimate?' (1996) 39 *Academy of Management Journal* 1024.

⁴¹*Ibid.*, 149.

⁴²*Ibid.*, 150.

⁴³*Ibid.*, 154.

⁴⁴See, for example, the shifting focus of the latest version of the Stewardship Code, leading towards a reconceptualisation of stewardship as 'systemic': Davies (n 29).

⁴⁵Katelouzou and Puchniak (n 12) 29–31; see also D. Katelouzou and M. Siems, 'The Global Diffusion of Stewardship Codes' in Katelouzou and Puchniak (n 1).

investor and asset manager spheres but also between activist funds and large asset managers. Activists may well seek to gain legitimacy by aligning themselves with topics touched upon by asset managers.⁴⁶ Stewardship then extends as a social norm to all market actors seeking to partake in commonly shared engagement topics.

Mimetic isomorphism becomes particularly relevant in uncertain times, during which groups may model themselves on the image of other groups in order to address the ambiguity of goals, procedures or solutions.⁴⁷ The *modus operandi* of the Big Three are exemplars to be copied by others in the market, given the ongoing uncertainty at the global level. A characteristic example unfolded following the Russian invasion of Ukraine, with a massive suspension move of Russia-exposed funds across numerous asset managers, with some well-known institutional investors (e.g. the USS – the largest private pension fund in the UK) citing financial and moral incentives for such a move.⁴⁸ It is not a coincidence that large asset managers tend to vote in a similar fashion,⁴⁹ as this collectivised voting pattern reinforces their legitimacy.⁵⁰ Such imitation patterns may thus reveal a desire to partake in stewardship as a social norm. But concerns may be raised in relation to the substantive performance of organisations in this field, as many actors may simply behave in a specific fashion so as to be part of a wider ‘stewardship theatre’.⁵¹

From an institutional theory point of view, adherence to social norms brings to the group a social appreciation from interested parties. Nevertheless, groups may also seek to gain additional benefits.⁵² Indeed, concerns have been raised that the motives behind asset managers’ voting patterns in the US include pleasing political forces and mitigating political upheaval.⁵³ This is in line with a middle way view of sociality that is neither undersocialised (i.e. purely economic or individualistic) nor oversocialised (i.e. purely institutional or structural), but acknowledges instead a mix of determinant factors for actors’ behavioural patterns.⁵⁴ The

⁴⁶S. Gomtsian, ‘Different Visions of Stewardship: Understanding Interactions Between Large Investment Managers and Activist Shareholders’ (2022) 22(1) *Journal of Corporate Law Studies* 151, 188. Nevertheless, Gomtsian expresses reservations regarding such alignment trends that may have an adverse impact on the breadth and depth of shareholder stewardship.

⁴⁷DiMaggio and Powell (n 40) 151.

⁴⁸‘Russia-focused Funds with more than €4bn in Assets Freeze Redemptions’, *Financial Times*, 2 March 2022.

⁴⁹Schwartz (n 29), citing the empirical data provided by R. Bubb and E. Katan, ‘The Party Structure of Mutual Funds’ (2020) European Corporate Governance Institute Law Working Paper No. 560/2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3124039, 8.

⁵⁰More generally, on companies aiming to gain such legitimacy by mimicking ‘innovations’, see DiMaggio and Powell (n 40) 152.

⁵¹Schwartz (n 29).

⁵²Heugens and Lander (n 30).

⁵³Schwartz (n 29).

⁵⁴M. Granovetter, ‘Economic Action and Social Structure: The Problem of Embeddedness’ (1985) 91 *American Journal of Sociology* 481.

instrumentalisation of such partaking in stewardship as social norm cannot be disregarded.

Stewardship's dimension as a social norm is key to allowing us to grasp the complexities of isomorphic trends. Are such trends derived from mere organisational rules that depict a firm's business strategy or from sociality dynamics within stewardship groups? Agency and structuralist theories represent opposing poles in this debate.⁵⁵ We argue, in accordance with Micheler's theory,⁵⁶ that the organisational structure is the embodiment of pre-existing social structures and norms. In other words, as institutional investors come to exist as a social group, stewardship emerges as social norm affecting their vision and values in a manner that transforms them into stewards. Isomorphism thus becomes a social necessity and cannot amount to a fashion or a trend.

This does not exclude the concomitant appearance of divergent and unpredictable behavioural patterns within a group,⁵⁷ but the overall tendency to adhere to soft law stewardship instruments testifies to the core and solid stewardship sociality characteristics that shape a group's *modus operandi* as it conforms with the soft law instrument. Deviations will inevitably occur and the 'comply or explain' principle also serves for such deviations to remain.

We are cognisant of the financial incentives that will certainly be concomitant to social norm considerations within an isomorphic behavioural pattern. The lack of univocity, at the academic level,⁵⁸ on whether isomorphism takes place for financial or sociality reasons, is inevitably present at the stewardship level as well. The co-existence of both institutional factors and incentives indicates that social forces are necessarily present and that financial reasons should equally matter in the isomorphic perspective. The income-generating opportunities for a stewardship group are relevant forces, which prompt isomorphism. Thus, if stewardship strategies depict a mere market trend, market actors all move towards a certain direction because they are prompted by a trend. Yet, the adoption of stewardship descends from other mechanisms, which have to do with the fact that firms are, first and foremost, a 'real'⁵⁹ expression of values.

Social norms and stewardship

Social norm theories

Stewardship does not merely serve investment priorities⁶⁰ but denotes a wider social need to address a collective action problem. That is why it

⁵⁵Heugens and Lander (n 30) 63.

⁵⁶Micheler (n 13).

⁵⁷Heugens and Lander (n 30) 63.

⁵⁸See the relevant debate as explained by Heugens and Lander (n 30).

⁵⁹Micheler (n 13).

⁶⁰Which can be also seen under a 'sociality' spectrum: indeed, market pricing 'is not merely a pattern that happens to emerge out of the independent and unrelated actions of individuals [but] also a directive

extends beyond the 'market trend' concept and is elevated to the 'social norm'⁶¹ status. Collective action problems in the markets have been a long-standing issue that seems insurmountable yet persistent in addressing corporate governance deficiencies. Social norms have been seen as a way to address collective action problems,⁶² by inciting actors to engage in useful activity that they would not otherwise engage with in the absence of such norm.⁶³ Indeed, the very existence of a social norm presupposes the existence of a collective action problem, the change of peoples' expectations and the coordination of peoples' actions.⁶⁴

More generally, in order for a social norm to emerge, there need to be positive or negative externalities that trigger the necessary demand for such norms.⁶⁵ In such cases, the social norm may become a 'substitute for a multilateral agreement that restrains the actions of the involved parties in an efficiency-enhancing way'.⁶⁶ Taking into account market externalities, as manifested during the global financial crisis as well as in other crises,⁶⁷ it is not difficult to see how stewardship emerged as a necessity. It was expected to re-orientate institutional investors' strategies towards the fulfilment of a corporate governance role, aiming to address deficiencies in investee companies. Regardless of its 'market trend' features, stewardship managed to create a common consensus on what is *grosso modo* the expectation from institutional investors, while maintaining its divergent features in various national or regional contexts.⁶⁸

The literature on social norms has been traditionally divided between two strands of analysis. Social norms come into existence out of human interactions or out of expectations regarding other people's beliefs, or else out

force that guides coordinated action toward a goal': Fiske (n 11) 707. More generally, investment practices also depict a means to take into consideration social values and partake into markets' collective decision making processes: *ibid*.

⁶¹ Amongst an abundance of social norm theories, this article focuses on those that best depict stewardship's sociality.

⁶² *ibid*.

⁶³ C.R. Sunstein, 'Social Norms and Social Roles' (1996) 96(4) *Columbia Law Review* 903. See also, E. Ullmann-Margalit, *The Emergence of Norms* (Oxford University Press, 1997).

⁶⁴ J. Crowe and L. Agnew, 'Legal Obligation and Social Norms' (2020) 41 *Adelaide Law Review* 217, 229 citing C. Bicchieri, *Norms in the Wild: How to Diagnose, Measure, and Change Social Norms* (Oxford University Press, 2017) 111. The coordination of action is organically developed via the continuous interaction of the individual actors over time: *ibid*, 231.

⁶⁵ A. Falk, E. Fehr and U. Fischbacher, 'Driving Forces of Informal Sanctions' (2001) Zurich IEER Working Paper No. 59, https://www.econ.uzh.ch/static/wp_iew/iewwp059.pdf, citing J. Coleman, *Foundations of Social Theory* (The Belknap Press of Harvard University Press, 1990).

⁶⁶ *Ibid*, 5.

⁶⁷ J.N. Gordon, 'Systematic Stewardship' (2022) *Journal of Corporation Law* forthcoming, European Corporate Governance Institute Law Working Paper No. 566/2021, <https://ssrn.com/abstract=3782814>; see also A. Kokkinis, *Corporate Law and Financial Instability* (Abingdon: Routledge, 2018) 21–25, providing an overview of empirical evidence showing that in banks more powerful shareholders were associated with higher insolvency risk in the years leading up to the 2008 global financial crisis.

⁶⁸ Katelouzou and Puchniak (n 12).

of those norms' social connotation or of their ability to aid in the operability of the social structure.⁶⁹

Delving into the complexities of stewardship from a socio-legal norm perspective, there are three constitutive elements that define the nature of norms, as being '(a) normative statements that (b) are socially reproduced and (c) represent the individual's perception of the expectations surrounding their own behaviour'.⁷⁰ In the case of stewardship, the normative element is already present via soft and hard law provisions, as will be shown later in this article. The other two elements are also present since the sociality of stewardship is reproduced through numerous interactions between market actors and stewardship also represents individual perceptions on expected behavioural patterns. More specifically, stewardship soft law provisions manifest and reinforce all three elements, especially considering their voluntary nature and their pre-existence to the revised Shareholder Rights Directive (SRDII).⁷¹

Focusing on expectations of surrounding social actors, we delve into a key element that determines compliance trends to such social norm. Actors' actions are defined with respect to the element of conditionality – contrary to the compliance to moral norms that lacks such conditionality – which testifies to the dynamics built within the investment chain.⁷² This interdependent behaviour between actors is critical as they opt to conform to a specific behaviour by believing that the majority of peers in their network will do the same (empirical expectation)⁷³ or if they believe that the majority of actors in their field should conform to it as well (normative expectation).⁷⁴

The very existence of a norm can manifest two different dimensions, according to the various theories: a phenomenon or state of things already taking place in the everyday life (normality),⁷⁵ or what the majority of actors believe should be taking place.⁷⁶ As shown earlier in this article, stewardship can embrace both behavioural realities. The 'normality' facet has been gradually developed via the continuous and extra-legal interaction of market actors practicing stewardship,⁷⁷ even prior to its legal 'normification'.

⁶⁹S. Legros and B. Cislighi, 'Mapping the Social-Norms Literature: An Overview of Reviews' (2020) 15(1) *Perspectives on Psychological Science* 62, 66.

⁷⁰M. Svensson, 'Norms in Law and Society: Towards a Definition of the Socio-Legal Concept of Norms' in M. Baier (ed), *Social and Legal Norms* (2013, Ashgate) 39, 47.

⁷¹Directive 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.

⁷²C. Bicchieri and E. Dimant, 'Nudging with Care: The Risks and Benefits of Social Information' (2019) 191 *Public Choice* 443.

⁷³*Ibid.*

⁷⁴*Ibid.*

⁷⁵L. Eriksson, 'Social Norm Theory and Development Economics' (2015) Policy Research Working Paper No 7450, Washington, DC: World Bank, <https://documents1.worldbank.org/curated/en/999971468189875243/pdf/WPS7450.pdf>, 33–34.

⁷⁶R. Cooter, 'Expressive Law and Economics' (1998) 27(2) *The Journal of Legal Studies* 585.

⁷⁷Individuals also interact across networks for a series of incentives: career advancement, competition as well as membership in educational, employer or employee networks. For a network theory based

The expectation-driven conception of stewardship is advanced hand in hand with the shifting trends and constantly changing challenges in corporate governance that stewardship is called upon to address. No stewardship decision can be made in an isolated fashion⁷⁸ and expectations around peers' behavioural patterns, as well as the continuous interactions within the investor community,⁷⁹ are self-evident characteristics of a social norm.⁸⁰

Whichever form stewardship may take between these two realities, its main function as a social norm is to 'ensure socially beneficial outcomes in various types of cooperation games'.⁸¹ The distinction between empirical and normative expectations is not thus decisive to decipher stewards' behavioural patterns as the interdependence between market actors is what transcends any cognitive dichotomy in this field. Indeed, norms are not only formed out of the concomitant expression of self-interested actors towards a certain direction, as advanced by rational choice theories, but also based on such actors' self-perception as part of a wider group. Indeed, '[a] complete theory of norms must account for this dual understanding of self'.⁸²

Rational choice theories cannot therefore fully explain norm internalisation by actors, nor can they truly value the very existence of cooperation that takes place amongst them.⁸³ If it is true that group identification does not sublimate or overcome the individual sense of self and that a person, when member of a group, acts in accordance with both her self-interest and the group norm, it could be argued that the increasing involvement of investors through stewardship soft law norms and industry best practices simply amounts to an acknowledgment of the fact that investors are not just the sum of their individual preferences. Turning a blind eye on the

analysis of such interactions and the corresponding academic literature, see L. Enriques and A. Romano, 'Institutional Investor Voting Behavior: A Network Theory Perspective', in S. Grundmann and P. Hacker (eds), *Theories of Choice: the Social Science and the Law of Decision Making* (Oxford University Press, 2021) 227, 247–51.

⁷⁸Gomtsian (n 46) 152.

⁷⁹Interactions that are facilitated by various features, such as institutionalised investor networks (e.g. Council of Institutional Investors, the UK's Investor Forum or the British Local Authority Pension Fund Forum, to name a few), co-ownership or geographical links that enhance such interactions: on peer expectations and interactions amongst institutional investors in voting patterns. See Enriques and Romano (n 77) 246–47, 251. For investor networks with an ESG focus, see T. Bowley and J.G. Hill, 'The Global ESG Stewardship Ecosystem' (2022) European Corporate Governance Institute - Law Working Paper No. 660/2022, <https://ssrn.com/abstract=4240129>, 23.

⁸⁰A. Carrothers, 'Friends or Foes? Activist Hedge Funds and Other Institutional Investors' (2017) 3(17) *Economics and Business Review* 38; D. Cvijanović, A. Dasgupta and K.E. Zachariadis, 'Ties at Bind: How Business Connections Affect Mutual Fund Activism' (2016) 71(6) *Journal of Finance* 2933; V.K. Pool, N. Stoffman and S.E. Yonker, 'The People in Your Neighborhood: Social Interactions and Mutual Fund Portfolios' (2015) 70 *Journal of Finance* 2679. For empirical evidence, see G. Matvos and M. Ostrovsky, 'Heterogeneity and Peer Effects in Mutual Fund Proxy Voting' (2010) 98 *Journal of Financial Economics* 90, 97–100; A.D. Crane, A. Koch and S. Michenaud, 'Institutional Investor Cliques and Governance' (2019) 133 *Journal of Financial Economics* 175, 181–82.

⁸¹Eriksson (n 75) 9.

⁸²A. Geisinger, 'A Group Identity Theory of Social Norms and its Implications' (2004) 78(3) *Tulane Law Review* 605, 632.

⁸³*Ibid.*, 624.

dual notion of self would mean disowning the sociality that exists among investors, thereby negating principles that constitute social norm features.

The element of sociality is further reinforced in the shaping of norms, in light of the common view of societal members conceiving as desirable or legitimate a certain behaviour.⁸⁴ Nevertheless, the conceptualisation of, and focus on, the societal features has not widely emerged in the social norms' literature, driven mainly by neoclassical economics. This literature has largely obfuscated the 'nature and structure of societal preferences'.⁸⁵ The nature of stewardship as a social norm that cannot be reduced to incentives facilitates the departure from instrumental investment strategies, which narrowly focus upon financial returns, and the move towards non-instrumental ones, mixing financial and non-financial goals.⁸⁶ The sociality of stewardship may also facilitate the discussion of societal (or – for the purposes of this article – ESG) preferences and render them central to viewing stewardship as a social norm, as opposed to a mere market trend.

The sociality of stewardship

Stewardship has been frequently – but not exclusively – conceived as a market-driven concept.⁸⁷ Portraying stewardship as a means to ensure the delivery of services to beneficiaries with the aim of achieving financial returns resulted in the introduction of a monolithic vision of stewardship that shaped investment as a mostly instrumental activity, deprived of ancillary (e.g. non-financial) considerations.⁸⁸ Although this conceptualisation

⁸⁴A.N. Licht, 'Social Norms and the Law: Why Peoples Obey the Law' (2008) 4(3) *The Review of Law and Economics* 715, 717.

⁸⁵Licht turns to psychologists who have analysed structural links among social norms focusing on values; such values are '[a]t the individual level [...] internalised social representations or moral beliefs that people appeal to as the ultimate rationale for their actions. At the group level, values are scripts or cultural ideals held in common by members of a group; the group's 'social mind': *ibid*, 728, citing D. Oyserman, 'Values, Psychological Perspectives' in N. Smelser and P. Baltes (eds), 22 *International Encyclopedia of the Social and Behavioral Sciences* (Pergamon, 2002) 16150, 16151. On the notion of internalisation of an obligation, which triggers the creation of a social norm when such internalisation occurs among many actors in a community, see Cooter (n 76).

⁸⁶The distinction between instrumentality and non-instrumentality is based on Weber's categorisation between instrumentally rational and value-rational actions. We argue that stewardship's sociality is best apt to drive market actors from instrumentally rational action to a mix of instrumental and value rational action (herein instrumental and non-instrumental action respectively): Max Weber, *Economy and Society* (Bedminster Press 1921) 24–25. Stewardship as a social norm is able to offer a reconceptualised version of profits, by inculcating a different (aka long term) mentality in relation to reaching financial and non-financial objectives. As it has been advanced, social norms 'make for qualitative differences among human goods, and these qualitative differences are matched by ingenious mental operations involving qualitative differences among different 'kinds' of money': Sunstein (n 63).

⁸⁷Katelouzou and Sergakis (n 3) 572. On other non-market factors, see the academic literature focusing on politics and 'halo signalling' as significant drivers of stewardship at n 8 above.

⁸⁸See, for example, the UK Stewardship Code's focus on the creation of long-term value for clients and beneficiaries; see also the FRC's ambition to create a 'market for stewardship' by beneficiaries and end-investors aiming to extract more information from institutional investors on stewardship activities and

has been enriched with ESG considerations in the latest UK Stewardship Code,⁸⁹ a decisive move of stewardship towards a holistic dimension with a mixture of instrumental and non-instrumental premises is not blatantly evident at this early stage. The instrumentalisation of stewardship for commercial considerations may have allowed the discussion of its market trend and social norm facets predominantly under a financially driven prism. Stewardship can be a social norm even when purely financial agendas are being pursued, to the extent that it becomes a value and *modus operandi* that posits that stewardship is vital for the creation of financial value. The novel phase is the development of stewardship as a social norm for the inclusion of non-financial investment objectives.

Where can we draw a line between the market-trend and social-norm facets of stewardship? The answer may lie in the observation that even if stewardship actors want to formally portray themselves as meaningful adopters of stewardship ideals, driven by self-interest and instrumental reasons, the sociality of stewardship will eventually diminish the percentage of such actors, by gradually converting them into meaningful stewards. Notwithstanding the notably optimistic interpretation of stewardship's sociality, we argue that greenwashing (or other similar trends) are bound to last as long as sociality and enforcement mechanisms⁹⁰ remain dormant.

In the meantime, it will continue to be particularly arduous to decipher the underlying rationales of signalling mechanisms when used by stewards.⁹¹ Social norms function by definition as signalling devices since, by adhering to a norm, actors convey the message that they have particular traits. Actors may also be willing to adopt a conditional cooperation strategy by signalling their preference for ignoring immediate payoffs in favour of repeated cooperation with similarly minded parties.⁹² The introduction of soft law stewardship provisions in a country may denote its willingness to signal attractiveness.⁹³ Adherence to soft law stewardship provisions from investors

formulate demands for the provision of such services: for an overview of the FRC's and other initiatives' focus on the market for stewardship, see D. Katelouzou and E. Micheler, 'The Market for Stewardship and the Role of the Government' in Katelouzou and Puchniak (n 1) 67, 68–73.

⁸⁹See third part below.

⁹⁰On the various formal and informal enforcement mechanisms of shareholder stewardship as well as on a new enforcement taxonomy in this area, see Katelouzou and Sergakis (n 3).

⁹¹A notable example is signatory parties' motivations to join the Principles for Responsible Investment (PRI), which have been seen as driven by both societal and commercial motives. Signatories are also more likely to join the PRI network if social and environmental issues are considered more prominent in the countries where such signatories are based. R. Gibson, S. Glossner, P. Krueger, P. Matos and T. Steffen, 'Do Responsible Investors Invest Responsibly?' (2021) *Review of Finance* forthcoming, Swiss Finance Institute Research Paper No. 20-13, European Corporate Governance Institute – Finance Working Paper No. 712/2020, <https://ssrn.com/abstract=3525530>.

⁹²'Discount rates' refer to individuals' variable (high or low) tendency to discount the future by deciding to forego immediate benefits of defecting by favouring the benefit of future cooperation that will materialise at a later stage: E. Posner, *Law and Social Norms* (Cambridge, MA: Harvard University Press, 2000).

⁹³Katelouzou and Puchniak (n 12) 29.

can also function as a signalling mechanism, bringing reputational and commercial benefits to stewards with regard to their relationship with other investors, competitors, clients/beneficiaries, as well as investee companies' boards. Such signalling effects are thus able to vivify the demand side of the stewardship market.⁹⁴ Instrumentalisation strategies of such adherence purporting to promote an idealised and superficial image of stewardship cannot be excluded; moreover, the impact of competition between different stewards needs to be taken into account in this context. Asset managers may well use stewardship reports as 'promotional materials'⁹⁵ and marketing motives may also influence their voting patterns, aiming to be seen as meaningful stewards to regulators and investors.⁹⁶ Investors' positive feedback on such practices also denotes the growing normalisation of holistic stewardship, since they consciously reward asset managers' public image as good stewards.

With that being said, it cannot be argued that stewardship presents the characteristics of a mere market trend because it goes against the very interests of those organisations that abide by it. As a matter of fact, it is rhetorically argued that 'many norm entrepreneurs do not so much act against their interests as they act in accordance with a redefined understanding of their interests'.⁹⁷ It would, therefore, be a shortcoming to state that the real economic interest of stewardship is not traceable. In reality, the overarching interest in exercising stewardship *cannot* be a purely economic one. In our view of human nature and cognition, parties conceive their self-interest through a normative lens formed by the culture and values they espouse, which constitute their identity. Moralising waves and trends could overlap, leading policy makers and academic literature to state that stewardship is just a trend,⁹⁸ whilst, it could be said, it is *also* a trend.⁹⁹

Elevating the debate on stewardship's identity as a social norm, it is advanced that 'the market for stewardship' is only the surface beneath which another more critical ecosystem operates: the 'market for norms'.¹⁰⁰ Rational and self-interested actors may well choose to be part of this market for norms by adapting their own informal rules to the created

⁹⁴D. Katelouzou and K. Sergakis, 'When Harmonisation is not Enough: Shareholder Stewardship in the European Union' (2021) 22 *European Business Organization Law Review* 203, 228.

⁹⁵Schwartz (n 29) 53.

⁹⁶*Ibid.*

⁹⁷M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887, 898.

⁹⁸See, for example, the predominance of the 'market for stewardship' approach amongst policy makers and academics (n 88 above).

⁹⁹In this regard, 'there is a long-term trend toward humanizing the 'other', or 'moral progress', that helps to explain both the end of slavery and the end of colonization and could predict the demise of international war in the future': Finnemore and Sikkink (n 97) 907.

¹⁰⁰R. C. Ellickson, 'The Evolution of Social Norms: A Perspective from the Legal Academy' (1999) Yale Law School, Program for Studies in Law, Economics and Public Policy, Working Paper No 230, at http://papers.ssrn.com/paper.taf?abstract_id=191392.

conditions of the ‘normification’ process. The existence of social audience members is also crucial in conferring esteem or opprobrium to three categories of ‘change agents’:¹⁰¹ self-motivated leaders, norm entrepreneurs, and opinion leaders. The first ones challenge the existing norm at an early stage, in light of their significant ‘endowments and talents’, by expecting to reap significant benefits and by facilitating communication and coordination. The second possess highly technical norm-related knowhow in their field and are willing to be part of this ‘market for norms’ in light of the numerous experts in the field valuing the entrepreneurs’ contribution. The third are not pioneers in the norm change process but evaluate the other two actors by proceeding to an endorsement of the defended cause. Opinion leaders are thus critical in the amplification of the new norm across a wide range of actors in light of their social gravitas.¹⁰² Norm changes occur, *inter alia*, in light of an exogenous shock creating new economic conditions.¹⁰³

The nascent stewardship concept emerged after the global financial crisis, rendering investors subject to public opprobrium for their alleged contribution to several market failures, either by acquiescence or by active support of excessively risky decision-making processes.¹⁰⁴ Together with media and political actors, the members of the social audience consist of stewards’ clients, such as asset owners, ultimate beneficiaries of funds, or retail investors that have demonstrated in recent years a slow-paced yet steady manifestation of interest in topics dealt with by stewards, especially in non-financial matters.¹⁰⁵

Norm changers are easily identifiable in the area of stewardship. Self-motivated leaders are best embodied by activist hedge funds or one of the Big Three asset managers, which set the tone in the redirection of stewardship after major economic or social events.¹⁰⁶ Norm entrepreneurs are the large asset managers who aim to embark upon the stewardship bandwagon

¹⁰¹‘Change agents’ are the drivers behind the emergence of new social norms: *ibid*, 15.

¹⁰²*Ibid*, 17–20.

¹⁰³*Ibid*, 29.

¹⁰⁴I. H.-Y. Chiu, ‘Governing the Purpose of Investment Management: How the “Stewardship” Norm is being (Re)Developed in the UK and EU’ (2021) European Corporate Governance Institute - Law Working Paper No. 602/2021, <https://ssrn.com/abstract=3908561>; A. Dignam, ‘The Future of Shareholder Democracy in the Shadow of the Financial Crisis’ (2013) 36 *Seattle University Law Review* 639.

¹⁰⁵The percentage of retail investors wanting to contribute to corporate governance matters and to support ESG issues keeps rising. For some interesting empirical data, see EQ, ‘Shareholder Voice: Responding to Uncertain Times’ (2022) <https://equiniti.com/uk/shareholder-voice-2022/>; see also similar empirical evidence in sustainability preferences amongst different investor generations in A. Gelfand, ‘The ESG Generation Gap: Millennials and Boomers Split on Their Investing Goals’ (10 November 2022) Stanford Graduate School of Business, <https://www.gsb.stanford.edu/insights/esg-generation-gap-millennials-boomers-split-their-investing-goals>.

¹⁰⁶Moreover, notwithstanding the lack of transparency in relation to stewardship policy motivations, it has been alleged that the Big Three ‘take tentative steps before adopting rules’: D.S. Lund, ‘Asset Managers as Regulators’ (2022) 171 *University of Pennsylvania Law Review*, <https://ssrn.com/abstract=3975847>, 36. This may assist the market in predicting forthcoming actions based on soft engagement activities: *ibid*.

(by also signing up to stewardship soft law instruments) and embrace the new social norm. Lastly, opinion leaders can be any of the Big Three asset managers (if they have not triggered the norm change as self-motivated leaders) whose voice is influential and can create a cascading effect upon the global investor community via public announcements or other activities.¹⁰⁷

Economic (global financial crisis), geopolitical (Ukraine war and energy crisis) or social (BlackLivesMatter) phenomena are bound to recalibrate the various facets of stewardship by altering its current specificities and sociality. Stewardship then represents a wide normified ecosystem that constantly evolves and adapts to global challenges by testifying to a ‘market for norms’ in which various players want to partake.

The Big Three are also sensitive to how they are perceived by their own stakeholders and, more specifically, the public.¹⁰⁸ Bearing this pressure in mind, the temptation to engage in ‘the exercise of anti-social power ultimately depends on internal power dynamics within the institution.’¹⁰⁹ Therefore, real entity and social norm theories demonstrate that the interaction dynamics influence expectations of stewardship and are also relevant in enabling us to understand what can be realistically achieved by stewards.

Moreover, sociality elements – such as interaction or expression of preferences in relation to stewardship matters – have started arising from institutional investors’ clients and beneficiaries, with market¹¹⁰ and regulatory

¹⁰⁷See, for example, Larry Fink’s annual letter to CEOs: <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

¹⁰⁸See for example the anecdotal evidence provided showing that the Big Three are primarily concerned to be seen as having a positive impact on the world, being subject to a constant scrutinising of their market impact: Lund (n 106) 41.

¹⁰⁹*Ibid.* ‘Anti-social’ behaviour is intended as going against socially responsible patterns. This observation has been made in relation to the CEOs’ role within asset managers that is subject to such dynamics and cannot thus be the sole element for decision-making processes. See *contra* the opinion expressed by Congressional Republicans that the personal views and values of such CEOs are orientating stewardship decisions: Schwartz (n 29) 52. See also the view that the variegated governance philosophies expressed by different asset managers can explain voting patterns; leadership ideology and firm culture in the various stewardship groups can thus be relevant in shaping voting by asset managers: Bubb and Katan (n 49). As Fisch argues, ‘socially or politically responsible investing behavior may be consistent with the personal preferences of fund managers, who view their actions as in the best interests of society’: J.E. Fisch, ‘Mutual Fund Stewardship and the Empty Voting Problem’ (2021), European Corporate Governance Institute Working Paper Series in Law, Working Paper No. 612/2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939112, 7. See *contra* Enriques and Romano (n 77) 229, who argue that ‘the traditional atomistic focus on the incentives of individual investors is inadequate to understand institutional investors’ role in corporate governance’.

¹¹⁰Market actors, such as asset managers (e.g. Blackrock and DWS) and service providers (e.g. Minerva Analytics), have declared their commitment or developed software to facilitate the expression of voting or stewardship preferences in pooled funds, paving the way for the re-enfranchisement of shareholders at the asset owner level. In parallel, ultimate beneficiaries are increasingly given opportunities to express their views on a series of matters, by emitting advisory votes to asset managers ahead of AGMs via companies that offer voting API services to pension schemes (e.g. Tumelo). Principles for Responsible Investment (PRI) has also focused on guiding pension funds in the integration of ultimate beneficiaries’ sustainability preferences with specific solutions and survey templates: PRI,

support¹¹¹ aiming to develop this incipient agenda. The sociality dynamic from the bottom of the investment chain, with individuals engaging with institutional investors and asset managers to further nurture stewardship's role and mission, is still at an embryonic stage. Nevertheless, stewardship-related preferences from individuals denote stewardship's expanding social norm nature into non-financial territories.¹¹²

As previously mentioned, even a pure profit maximisation outlook can be perceived as a social good by those who equate such strategy with a prosperous efficient society. Even in that instrumentalised context, sociality may well occur and prosper. Both pure profit maximisation and the non-financial agenda (e.g. among other trends, ESG, that is not entirely divorced from economic considerations) can only be explained by reference to social norms. For example, the predominance of corporate greed and excessive focus on various emoluments in the UK and US in the 1980s and 1990s are also explained via the social norms prevailing at that time, which deified wealth as a signal of success and CEO social status.¹¹³ Our sociological analytical lens thus advances the argument that all behaviours are socially determined. Or, as previously said, no interest can be purely economic.

'Understanding and Aligning with Beneficiaries' Sustainability Preferences' (2021) at <https://www.unpri.org/strategy-policy-and-strategic-asset-allocation/understanding-and-aligning-with-beneficiaries-sustainability-preferences/7497.article>. Dutch pension funds have occasionally offered a real vote to ultimate beneficiaries on certain sustainability issues and executed the members' vote: for the empirical data as well as other examples of integration of individuals' preferences by funds, see R. Bauer and P. Smeets, 'Eliciting Pension Beneficiaries' Sustainability Preferences: Why and How?' (2021) Wharton Pension Research Council Working Paper 7–2021 at https://repository.upenn.edu/prc_papers/710/.

¹¹¹For example, the European Insurance and Occupational Pensions Authority (EIOPA), while acknowledging the challenging features of individuals' participation in this agenda, has expressed its support for Institutions for occupational retirement provision (IORPs) to gauge individual members' ESG preferences; such approximation to individual members is seen for IORPs as 'essential for justifying the integration of ESG factors' when complying with the Prudent Person Rule: EIOPA, 'EIOPA's response to the European Commission's consultation on the renewed sustainable finance strategy', 20/399, 15 July 2020 at https://www.eiopa.europa.eu/content/eiopa-responds-european-commission-consultation-renewed-sustainable-finance-strategy_en. EIOPA has also included in its 2022 objectives the obligation for insurers and pension funds to 'reflect policy holder and pension scheme members preferences for sustainable investments': EIOPA, 'Revised Single Programming Document 2022–2024', 22/042, 27 January 2022, 26 at https://www.eiopa.europa.eu/document-library/annual-work-programme/revised-single-programming-document-2022-2024_en.

¹¹²The desire to contribute to a collective good is palpably a function of social norms': Sunstein (n 63) 945. So even if stewardship-related preferences might be dismissed as merely a fashionable trend, the social norm element cannot be ignored. Given the fact that 'choices are a function of prevailing social meanings and roles, which can bring into effect a wide range of relevant norms' (ibid. 25), *mutatis mutandis*, investors' preferences already constitute embryonic evidence of a social norm for non-financial preferences. The fact that institutional investors and asset managers may be called upon to demonstrate how they take them into consideration in their *modus operandi* is a thus logical consequence.

¹¹³B.R. Cheffins, *The Public Company Transformed* (Oxford: Oxford University Press, 2019) 274, explaining that in the late 1990s in the US, CEOs were very highly paid and treated by the media as royalty and larger-than-life individuals: 'CEOs were increasingly being thought of as iconic symbols of corporate America's success, as such individuals logically would have been thought of as appropriate recipients of generous compensation'.

The perspective of enabling individuals to express their investment preferences in a highly intermediated chain, or having realistic expectations of their impact upon the exercise of stewardship by contributing to its *modus operandi*, has been met with some criticism.¹¹⁴ Yet we can argue that the growing interest that individuals have started showing in the area of ESG and stewardship's mission¹¹⁵ and the – perfectible yet present – means for engagement will not only transform stewardship but also offer a continuity in its social norm facet, with individuals willing to interact consistently with stewards.

Stewardship's transformative power as a social norm

A transnational social norm?

The proliferation of soft law stewardship instruments at the global scale, albeit within different conceptual and aspirational frameworks,¹¹⁶ as well as the cross-border activities of institutional investors,¹¹⁷ may also point to the emergence of stewardship as a transnational *social* norm.¹¹⁸ Borrowing elements from political science literature on international norms,¹¹⁹ we argue that stewardship embodies the three key lifecycle elements of a transnational social norm: a) its emergence through persuasion by entrepreneurs, that is apt to transform ideas into norms; b) its broad acceptance via imitation dynamics, which originate from pressure or self-legitimation motives; and c) its internalisation by various actors.

Although we can certainly observe the wide acceptance of the first element, doubts may be formed in respect of stewardship's broad acceptance at the global scale. An optimistic view can support such acceptance, while acknowledging that interpretative trends on stewardship's content and objectives will continue to vary. The initial facet of shareholder stewardship

¹¹⁴B.V. Reddy, 'The Emperor's New Code? Time to Re-Evaluate the Nature of Stewardship Engagement Under the UK's Stewardship Code' (2021) 84 *Modern Law Review* 842, 852. The difficulty in deciphering stewardship's concrete dimension and goals also stems from the heterogeneity of its target audience, which does not allow for an immediate grasp of its social norm identity. A better and detailed understanding of the target audience is thus necessary to start unveiling stewardship's sociality: see, more generally, on target audiences, Eriksson (n 75) 33.

¹¹⁵Especially in younger generations, such as Millennials and Generation Z, that demonstrate a more independent and active stance in corporate governance matters. These generation manifest different values, preferences (mostly sustainability ones in light of the global challenges affecting their generation) or circumstances compared to their predecessors, and seek to partake into corporate life via the use of advanced technological means, independently of financial intermediation: see S.A. Gramitto Ricci and C.M. Sautter, 'Corporate Governance Gaming: The Collective Power of Retail Investors' (2022) 22(1) *Nevada Law Journal* 51.

¹¹⁶Katelouzou and Puchniak (n 12).

¹¹⁷In relation to such activities in the area of ESG, see Bowley and Hill (n 79) 17.

¹¹⁸More generally, on shareholder stewardship as a transnational norm, see D. Katelouzou and P. Zumbansen, 'The New Geographies of Corporate Governance' (2020) 42 *University of Pennsylvania Journal of International Law* 1, 80.

¹¹⁹Finnemore and Sikkink (n 97).

has nevertheless been commonly accepted by and large as a way for stewards to act as universal owners, exercising their corporate governance and investment management duties, while contributing to social value.¹²⁰

Moreover, while one cannot yet observe internalisation across various national settings, the proliferation of soft law instruments across the globe, as well as global stewardship soft law instruments,¹²¹ have inevitably facilitated such process and will continue to do so. The SRDII has marked the normative territory for stewardship across the EU by rendering institutional investors and asset managers subject to a series of disclosure obligations regarding how they perform stewardship.¹²² In any case, the possible deviations from these three constitutive elements of a transnational social norm do not imply the absence of a social norm or the presence of a mere trend, but only signals the emergence of a nascent social norm into a new, still-in-the-process-of-being-internalised normative spectrum.

The realisation that stewardship is quintessentially a transnational social norm – prior to being acknowledged as a market trend and/or to be subject to any legal (soft or hard) ‘normification’ – necessitates the examination of its capacity to influence action based solely on its sociality and independently of external factors. Indeed, it could be argued that its sociality may not necessarily equate its capacity to – directly or indirectly – influence behavioural patterns and actively lead to action.¹²³ Nevertheless, if stewardships’ persuasive force may suffice to prompt stewardship groups to take initiatives, it may well stand as a credible alternative to any ‘normification’ in a certain jurisdiction.¹²⁴ Stewardship’s autonomous capability to pioneer

¹²⁰Katelouzou and Zumbansen (n 118) 86–87. See also the UK Stewardship Code’s highly influential definition of stewardship as ‘the responsible allocation, management and oversight of capital to create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society.’: Financial Reporting Council (FRC), The UK Stewardship Code (2020), https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf, 4.

¹²¹See, for example, International Corporate Governance Network (ICGN), ‘ICGN Global Stewardship Principles’ (2020) https://www.icgn.org/sites/default/files/2021-06/ICGN%20Global%20Stewardship%20Principles%202020_1.pdf; see also the European Fund and Asset Management Association (EFAMA)’s Stewardship Code: https://www.efama.org/sites/default/files/files/EFAMA%20Stewardship%20Code_FINAL.pdf.

¹²²See last part.

¹²³For a comprehensive overview of the divergent theories in this area, see S. Legros and B. Cislighi, ‘Mapping the Social-Norms Literature: An Overview of Reviews’ (2020) 15(1) *Perspectives on Psychological Science* 62.

¹²⁴As it will be shown in the last section, stewardship’s sociality provides sound arguments for the maintenance of soft law stewardship provisions and for an enabling and less interventionist approach from the law. The importance of social norms driving behavioural patterns and actions, independently of any legal framing that may facilitate such processes, has been highlighted in the area of shareholder primacy; seen first and foremost as a social norm in the business community, shareholder primacy has been conceived as the main driving force behind managers’ decisions. If this argument holds true, when the business community follows a certain widespread attitude, it could be seen as abiding by a social norm. This would be true, *a fortiori*, if social norms are understood as a behavioural standard that is commonly shared and with an authoritative or compulsory connotation for its members of

transformative initiatives at the national, regional, and international levels can thus offer original insights into its potential. It may also enlighten us with regard to (un)expected developments in the reorientation of stewardship goals, given the constantly evolving dynamics within stewardship's sociality spectrum.

There is also a 'strategic social construction' within which the various actors operate rationally to shape and reorient preferences, identities or social context.¹²⁵ In such a meticulously calculated process, these actors aim to maximise their utilities via the amendment of other players' utility function so that norm entrepreneurs can publicly portray their adherence to the social norm.¹²⁶ In essence, the proliferation of stewardship activities amongst institutional investors and asset managers, as well as of soft law instruments across the globe, depict – both on stewards' and regulators' side – the need to portray a commitment to a social norm by luring all possible counterparties to the same conceptual framework. In this way, signalling mechanisms can maximise the desired impact for the norm entrepreneur's benefit. Hence, stewardship as a spontaneous and disordered market trend does not exist. There is an underlying set of strategic and systematic social interactions connected to stewardship that are necessary for its social construction.¹²⁷ When social interactions lead to a successful internalisation by parties and become institutionalised, they constitute social norms.

Moreover, the transnational dimension of stewardship becomes relevant in light of the global challenges (climate change, wars, energy crisis etc), which demand a coordinated response from the investor community, so as not only to maximise their impact on investee entities but also to potentially address such challenges via stewardship practices. Social change is traditionally bound to occur in a new fashion, resulting from 'cooperation as an iterated and nonlinear, decentralized, and open-ended process that can have a transformative impact both on actors and on the operation of the international system'.¹²⁸ Within the wider 'agency-structure'¹²⁹ debate in international relations, non-state actors, such as international organisations,

the community that applies it: D. Rönnegard and N.C. Smith, 'Shareholder Primacy vs. Stakeholder Theory: The Law as Constraint and Potential Enabler of Stakeholder Concerns' in J.S. Harrison, J.B. Barney, R.E. Freeman and R.A. Phillips (eds), *The Cambridge Handbook of Stakeholder Theory* (Cambridge University Press, 2019) 117.

¹²⁵Finnemore and Sikkink (n 97) 888.

¹²⁶*Ibid.*, 910.

¹²⁷These synergies become particularly evident in the area of macro-stewardship, namely the engagement with 'governments, regulators and supranational organizations with the aim of seeking correction of market failures and mitigation of systemic risks to put markets on a more sustainable footing', see Aviva Investors, 'ESG Definitions Glossary', <https://www.avivainvestors.com/en-gb/capabilities/esg-definitions-glossary/>, cited by Katelouzou (n 37) 669.

¹²⁸K. O'Neill, J. Balsiger, S.D. VanDeveer, 'Actors, Norms, and Impact: Recent International Cooperation Theory and the Influence of the Agent-Structure Debate' (2004) 14(7) *Annual Review of Political Science* 149, 151.

¹²⁹Referring to the relationships between states (agents) and the international system (structure).

private industry, and social movements, have emerged as agents playing a significant role in international political events since the 1980s. Agency has shifted from states, and cooperation processes among state and non-state actors, which are now more embedded within the international relations status quo, demonstrate their capacity to have 'more than linear impacts on problems facing states'.¹³⁰

The content of stewardship, the type of stewards, as well as the expectations from the practice of stewardship, will continue to shift rapidly in different directions; the internalisation of stewardship is bound to evolve at a different pace across the globe but the collectivised realisation that stewardship has now become a mainstream *modus operandi* that safeguards investors' navigation in a highly uncertain world is no longer a utopian scenario. The multiplication of global challenges is inevitably accelerating the adaptation of (willing or reticent) stewards to a new investment philosophy. ESG is the current instantiation of this transformational journey, in which stewardship has a key role to play as a social norm and not a mere market trend.

The furtherance of non-instrumentality: the ESG paradigm

Stewardship's sociality can also be seen as the driving force behind the emergence of non-instrumental behavioural patterns, namely stewardship that adopts a more holistic approach in embracing the values of stewardship's non-financial sociality facets by conveying the message that, irrespective of financial goals that also depict underlying sociality traits and cooperation mechanisms for achieving such goals, stewardship is 'the right thing to do'.¹³¹ Such facets include not solely stewardship's original archetype, namely the corporate governance and investment management roles driven by financial considerations, but also its evolving non-financial aspects, which have become a more recent focus of actors and norm-setters in this field.¹³² It is thus a non-instrumental vision of stewardship that elevates it from a market trend to an expansive social norm, capable of grouping financial and non-financial traits.

Non-financial goals have been best and most recently encapsulated by the ESG agenda in an activist and coordinated fashion.¹³³ The Big Three have

¹³⁰Ibid, 170.

¹³¹Katelouzou and Micheler (n 88) 76.

¹³²On the evolution of institutional investor engagement from the traditional governance focus to the more recent ESG issues, see Fisch (n 109).

¹³³Lazard, '2021 Review of Shareholder Activism' (2021), https://www.lazard.com/media/452017/lazards-2021-review-of-shareholder-activism_vff.pdf; E. Pollman, 'The Making and Meaning of ESG' (2022) European Corporate Governance Institute - Law Working Paper No. 659/2022, <https://ssrn.com/abstract=4219857>; W.G. Ringe, 'Investor-led Sustainability in Corporate Governance' (2021) European Corporate Governance Institute Law Working Paper No. 615/2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3958960.

portrayed themselves as aligned with ESG sustainability, aiming to appease both the public and regulators,¹³⁴ without being immune to concerns about a potential ‘rational hypocrisy’.¹³⁵ Considerable scepticism has been expressed about ESG investment strategies (ranging from the prevalence of financial rewards to ESG’s premise and compatibility with trustees’ fiduciary duties¹³⁶ to greenwashing)¹³⁷ defying its fundamental premises of allocating assets with ESG criteria in mind. Soft law instruments have also embraced the ESG elements by including them in their provisions, with very few exceptions at the global scale.¹³⁸

The sociality of stewardship becomes crucial in the ESG operational spectrum for several reasons: first, ESG is transforming stewardship’s traditional focus by shifting it from the corporate governance and investment management prerogatives towards novel objectives.¹³⁹ The sociality element is thus capable of reinforcing such transformational journey for stewardship in light of the myriad interactions between investors and ongoing global conditions.¹⁴⁰ Second, it has the capacity to influence market actors to opt for the compliance to a social norm when exercising stewardship (by thus pursuing financial and non-financial goals) instead of exclusively pursuing financial rewards (by instrumentalising stewardship as a mere market trend). Third, in light of ESG’s transnational features, we argue that it is the sociality (and not the market trend) facet of stewardship that is best apt to unleash ESG investments’ potential to address global challenges via investors’ interactions and overall presence in the markets.¹⁴¹ Fourth, the transnational element of ESG

¹³⁴Ibid; see also Schwartz (n 29). More generally on the Big Three’s engagement with the ESG agenda, J. Azar, M. Duro, I. Kadach and G. Ormazabal, ‘The Big Three and Corporate Carbon Emissions Around the World’ (2021) 142 *Journal of Financial Economics* 674; A. Dyck, K.V. Lins, L. Roth and H.F. Wagner, ‘Do Institutional Investors Drive Corporate Social Responsibility? International Evidence’ (2019) 131 *Journal of Financial Economics* 693.

¹³⁵A. Christie, ‘The Agency Costs of Sustainable Capitalism’ (2021) 55 *University of California Davis Law Review* 875, 907.

¹³⁶M.M. Schanzenbach and R.H. Sitkoff, ‘Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee’ (2020) 72 *Stanford Law Review* 381 (2020).

¹³⁷Paccès argues that ‘institutional investors may not be entirely honest in pursuing ESG investment and, even if they are, their ESG labels may not correspond with what beneficiaries actually want’: A.M. Paccès, ‘Sustainable Corporate Governance: The Role of the Law’ (2020) European Corporate Governance Institute - Law Working Paper No. 550/2020, Amsterdam Law School Research Paper No. 2020–66, Amsterdam Center for Law & Economics Working Paper No. 2020-05, at <https://ssrn.com/abstract=3697962>, 7.

¹³⁸For a comprehensive analysis, see D. Katelouzou and A. Klettner, ‘Sustainable Finance and Stewardship: Unlocking Stewardship’s Sustainability Potential’ in Katelouzou and Puchniak (n 1) 549.

¹³⁹ESG also expands into new territories within the corporate governance realm of stewardship; from shareholder engagement, it starts covering – as it is the case in the revised UK Stewardship Code’s Principle 7 – investment policy at large: see Reddy (n 114) 849.

¹⁴⁰For example, food and energy security but also the role of the defence industry may put aside for a certain period of time other key ESG elements, such as the environmental one: Gomtsian (n 1) 41.

¹⁴¹More generally, on institutional investor interactions in the area of ESG at the global scale that start challenging the investor ‘rational reticence’ argument and demonstrate a ‘deliberate, strategic and coordinated behaviour’, see Bowley and Hill (n 79) 32. On the ‘rational reticence’ argument, see R.J. Gilson and J.N. Gordon, ‘The Agency Costs of Agency Capitalism: Activist Investors and the Revival of Governance Rights’ (2013) 113 *Columbia Law Review* 863.

resulting from such interactions will most probably have cascading normative effects on soft law instruments that will not simply include ESG elements in their provisions but might follow the UK Stewardship Code's shifting focus on ESG as an overarching prerogative for investors. Whether such reorientation of soft law tools will be decisive to achieve real change amongst investment strategies is a topic for further reflexion; what matters is the potential for signalling such a shift, which may well result in a transformational journey across the investor community.¹⁴²

In relation to the dynamics between financial rewards and social norms in markets, the academic literature has accepted the former as prevalent, while acknowledging that dilemmas between rewards and norms exist.¹⁴³ Transposing this observation in the stewardship spectrum, should the fact that some investors decide to continue investing without putting ESG prerogatives first constitute evidence that stewardship is nothing more than a market trend and a purely instrumental social norm? Any investment decision could simply depict the fact that social norms are not always capable of counteracting financial rewards. This does not negate the existence of norms or their influence. Nevertheless, if we accept that all behaviour is driven by social norms and that profit seeking is just the manifestation of a particular kind of social norm and rationalisation, then we can show how the gradual change in social norms will shift behaviour away from pure profit seeking towards non-financial (e.g. ESG) investment.

Mutatis mutandis, not adhering to certain principles of stewardship does not imply a disavowal of certain norms, but only that we are in the process of erroneously considering the financial advantages to be (at least in the short term)¹⁴⁴ more valuable compared to stewardship's different perception of sociality. The crucial matter under investigation is not how much profit

¹⁴²Calls for interventionist hard law and radical reforms to achieve ESG goals may find this approach implausible, given the pressing nature of global challenges. We nonetheless argue that interventionist measures may well create far-reaching and counter-productive effects that will impede innovation in the area of ESG initiatives; such innovation will materialise out of social dynamics in a much more prolific way.

¹⁴³See for example, Y. Liu, H. Lu and K. Veenstra, 'Is Sin Always a Sin? The Interaction Effect of Social Norms and Financial Incentives on Market Participants' Behavior' (2014) 39(4) *Accounting, Organizations and Society* 289. Nevertheless, as it has been argued in relation to EU sustainability risk-related disclosures on various market participants, 'it is clear that the EU does not view holistic-risk engagement as a lost cause, with an assumption that beneficiaries will encourage asset owners to exercise such stewardship based upon disclosures that clearly link such engagement (or the lack thereof) to the relevant portfolio's financial returns.': Reddy (n 114) 871. The evidence related to the effects of ESG activism on financial returns for investors and issuers remains mixed: for an overview of various empirical studies, see Katelouzou and Micheler (n 88) 73–75.

¹⁴⁴In fact, as it has been observed, shareholders and asset managers may opt for the pursuit of short-term goals instead of the long-term ones advocated by the UK Stewardship Code, due to the portfolio (instead of company) maximization focus and to the unpredictability of companies' long-term value. As such, and despite legal and factual capacity, market actors lack incentives to exercise stewardship in the expected way: Davies (n 29) 44. See also the analysis on the lack of economic incentives for institutional investors to invest in stewardship by L.A. Bebchuk, A. Cohen and S. Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 *Journal of Economic Perspectives* 89.

shareholders are content to sacrifice,¹⁴⁵ but that many of them are keen to pursue profit while espousing non-financial values.¹⁴⁶ The social norm aspect is well-hidden but provides a more holistic operational safeguard for the pursuit of both financial and non-financial goals,¹⁴⁷ thanks to the numerous cross-fertilising interactions between actors that depict stewardship's constantly evolving concept towards becoming a 'safety valve' for investors' influence on global challenges.¹⁴⁸

Bringing sociality to the forefront as a vital component for the proliferation of non-instrumental stewardship activities, the synergies between different stewardship actors and groups need to be unearthed. As a first layer of analysis, nascent synergies between activist and non-activist investors may well become the liberating factor¹⁴⁹ which will pave the way for the normalisation of non-instrumental stewardship activities. Such synergies will allow activist funds to demonstrate their stewardship aspirations and non-activist ones to embrace new and transformative agendas in ESG. If activist investors are seen in this capacity as 'information intermediaries' or 'arbitrageurs',¹⁵⁰ the way for a more purposeful and non-instrumental stewardship does not primarily lie within the prescriptive aspirations of soft or hard law stewardship provisions, but in the inherent sociality dynamics between different actors.¹⁵¹

¹⁴⁵Pacces opines that '[t]he question remains how much profit shareholders are prepared to give up to pursue sustainability': Pacces (n 137) 3. Critical theorists opine that 'many investors ... are unwilling to sacrifice profits for environmental gains' and that '[w]hatever environmental sensitivities investors may have, they function within a financial system whose aim is to mobilise capital [...] in order for it to deliver a profit': B. Sjøfjell and B.J. Richardson, 'Capitalism, the Sustainability Crisis, and the Limitations of Current Business Governance' in B. Sjøfjell and B.J. Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, 2015) 1, 3, 10.

¹⁴⁶Shareholders are the main drivers of the green transition, because they worry about the long-term prospects of the companies they invest in, as this is how their shares are valued': J. Lau Hansen, 'Unsustainable Sustainability', 8 March 2022, Oxford Business Law Blog at <https://www.law.ox.ac.uk/business-law-blog/blog/2022/03/unustainable-sustainability>.

¹⁴⁷ESG, after all, can be adopted so as to mitigate systemic risks and with a predominant financial focus that aims to protect financial returns' continuity: V.H. Ho, 'Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk' (2016) 41(3) *Journal of Corporation Law* 647; see also Katelouzou and Klettner (n 138).

¹⁴⁸This is perhaps the reason for which it has been argued that the acuteness of the lack of economic incentives to invest in stewardship may be less relevant in the ESG field: see Katelouzou and Puchniak (n 1) (2022) 24.

¹⁴⁹S. Kedia, L.T. Starks and X. Wang, 'Institutional Investors and Hedge Fund Activism' (2021) 10(1) *The Review of Corporate Finance Studies* 1; Christie (n 135) 921.

¹⁵⁰Gilson and Gordon (n 141).

¹⁵¹See, contra, the empirical data showing that, at least in relation to what is mentioned in stewardship statements in compliance with the UK Stewardship Code, the 'stewardship arbitrageur' role appears to be true; this may imply that such stewardship role can be exercised within and not outside the regulatory spectrum, as Gilson and Gordon (ibid) advocate: Katelouzou (n 37) 754. We argue that the sociality of stewardship is prevalent in the development of such roles and coalitions between actors and that stewardship norms are merely present to evidence such dynamics; even if such norms are able to further encourage the development of synergies, their role remains facilitative and cannot amount to a triggering factor. If stewardship statements align with such regulatory norms, this disclosure pattern may certainly demonstrate the willingness to display alignment and gain legitimacy and social approbation but is not sufficient to

The same synergies can be developed between minority and controlling shareholders, with the latter being nudged to follow more actively the ESG agenda with their associated power.¹⁵² Moreover, investors' 'naming and shaming' strategies against companies that do not embrace ESG elements may also contribute to 'norm creation through publicity'.¹⁵³ 'Wolf-pack' activism is also another notable sociality facet of stewardship, bringing together various hedge funds, with the activity being spurred by a lead activist.¹⁵⁴ Lastly, the various investor initiatives purporting to defend transnational ESG (mostly climate issues) also testify to stewardship's universal sociality.¹⁵⁵ In a nutshell, the sociality of stewardship may prove critical in constantly rejuvenating its features, offering new directions, and cementing its credibility in light of global challenges and continuity in its empowering role of a non-instrumental agenda. The instrumentalisation of stewardship by institutional investors and governments cannot be excluded, as it may also become a perfectly viable and cost-effective strategy to nurture an acceptable public image and maintain a reputational equilibrium without altering their self-interests.¹⁵⁶

Policy implications

Regulatory trends and the perils of normative coerciveness

The applicability of real entity and social norm theories to the concept of stewardship purported to demonstrate, on the one hand, its autonomous existence outside of the law and, on the other hand, its constantly evolving ecosystem in correlation with market and social challenges. Both facets lead us organically to the realisation that stewardship cannot be efficiently dealt with through the adoption of coercive legal tools, since there are

holistically represent the well-hidden sociality forces between investors that are independent of any 'normification'.

¹⁵²Katelouzou and Puchniak (n 12) 37. See also E. Dimson, O. Karakaş and X. Li, 'Coordinated Engagements' (2021) European Corporate Governance Institute – Finance Working Paper No. 721/2021, <https://ssrn.com/abstract=3209072>.

¹⁵³See Puchniak (n 5).

¹⁵⁴A. Brav, A. Dasgupta and R. Mathews, 'Wolf Pack Activism' (2021) 68(8) *Management Science* 5557. See also the empirical evidence regarding the compatibility of activist hedge funds with institutional investors, suggesting that this mutually beneficial relationship is linked to the creation of value and the improvement of performance and of corporate governance: A. Carrothers, 'Friends or Foes? Activist hedge Funds and Other Institutional Investors' (2017) 3(17) *Economic & Business Review* 38, 39. On the potential of stewardship's compatibility with hedge fund activism and on the ensuing risk of an adverse impact on the breadth and depth of shareholder stewardship, see Gomtsian (n 46).

¹⁵⁵See, for example, the following initiatives that have gained prominence: the Climate Change 100+, Net-Zero Asset Owner Alliance (supported by the UN), the Net Zero Asset Managers initiative, Race to Zero, the Investor Agenda and the Paris Aligned Investment Initiative.

¹⁵⁶E. Lim and D.W. Puchniak, 'Can a Global Legal Misfit be Fixed? Shareholder Stewardship in a Controlling Shareholder and ESG World' in Katelouzou and Puchniak (n 1) 599.

sociality elements that can be sufficiently supported by soft law and become more effective than hard law.

The conception of individuals as self-interested utility maximisers in pursuit of instrumentally rational goals implies that the only way to prevent them from behaving in a way that harms society (when there are externalities or other sorts of market failure) is to punish or reward them. But if we conceive of individual behaviour as shaped by values, norms and culture, then soft measures may be more effective than the threat of punishment or the promise of a financial reward, as they can nurture the growth of such social norms. Nevertheless, shareholder stewardship's autonomy and sociality elements have not yet been unearthed in policy considerations.

The originality of the approach put forward in this study lies in the realisation of inner dynamics within the investor community that, if neglected by legislators or policy makers, risk leaving shareholder stewardship in an 'operational limbo' or – even worse – perpetuating a monolithic vision of investment that becomes hostage of variable interpretations from legislators and policy makers. A characteristic example of such perils for the future of shareholder stewardship is the numerous US legislative anti-ESG initiatives that purport to impose a stringent operational framework upon institutional investors.¹⁵⁷ Indeed, investment strategies that are not purely profit-driven are seen as problematic, with the result of pension funds and asset managers being blocked from integrating ESG factors. Despite the uncertain future of some anti-ESG legislative bills, efforts to suppress the holistic vision of shareholder stewardship have succeeded in many US states.¹⁵⁸ The polarisation of the current debate on institutional investors' stewardship role and fiduciary duties does not only risk harming stewards and their clients/beneficiaries but also confining shareholder stewardship in a rigid and one-sided operational framework that neglects its social and autonomous dimension.¹⁵⁹

In the EU, the vision of shareholder stewardship has been less dogmatic compared to the US, in light of the different political trends, as well as the proliferation of ESG-related norms within various soft and hard law initiatives. Yet, the trend in the EU in relation to stewardship's sociality has been somewhat unorthodox, treating stewardship predominantly as a market-driven trend that ensures securing benefits for clients and beneficiaries. Stewardship has

¹⁵⁷See PRI, 'Anti-ESG Bills in the US will Only Create Confusion for Investors' (2023), <https://www.unpri.org/pri-blog/anti-esg-bills-in-the-us-will-only-create-confusion-for-investors/11077.article>.

¹⁵⁸As of June 2023, 165 anti-ESG pieces of legislation were introduced in 39 states, with 22 bills and 6 resolutions being approved by state governments and 12 pending. See all the data from Pleiades Strategy, '2023 Anti-ESG Statehouse Report: Right-Wing Attacks on the Freedom to Invest Responsibly Falter in the States' (2023), <https://www.pleiadesstrategy.com/state-house-report-bill-tracker-republican-anti-esg-attacks-on-freedom-to-invest-responsibly-earns-business-labor-and-environmental-opposition>.

¹⁵⁹For a critique of anti-ESG bills and on the risk of 'liability trap' for institutional investors, see D.J. Berger, D.H. Webber and B. Young, 'The Liability Trap: Why the ALEC Anti-ESG Bills Create a Legal Quagmire for Fiduciaries Connected with Public Pensions' (2023), <https://ssrn.com/abstract=4360119>.

thus become hostage to being exclusively depicted via its market *modus operandi* and not in terms of its wider social norm facet, that is able to produce more knowledge, interaction, and sociality within the investment chain.

In Europe, the SRDII came into force after a certain number of soft law tools had been already adopted at the national level in four (now three) EU Member States, i.e. the UK,¹⁶⁰ the Netherlands,¹⁶¹ Italy,¹⁶² and Denmark,¹⁶³ as well as Switzerland¹⁶⁴ and Norway.¹⁶⁵ Moreover, these soft law tools depicted, at the time they were introduced, pre-existing market trends, as their source consisted (in most cases) of market actor associations.¹⁶⁶ The intentions behind these soft tools were the fruit of shared social understandings of investors' stewardship role within the investment chain. The pre-SRDII market-driven initiatives constitute an example of recognition of an antecedent 'process' of stewardship's identity as a social act. The soft 'normification' of stewardship constitutes the ultimate 'product', by advancing 'social acts' into 'social objects'.¹⁶⁷ Indeed, social norms derive 'from social contract reasoning [...] employed by players in order to agree on basic principles and norms when equilibrium institutions are not already established',¹⁶⁸ as became the case not only with the soft law instruments in Europe but also across the globe.¹⁶⁹ The further act of elevating stewardship into a 'semi-hard' duty, as it will be shown below, became a mere recognition of its already existing essence as a social norm.¹⁷⁰

¹⁶⁰The first stewardship code was introduced by the UK Financial Reporting Council (FRC) in 2010 and it was revised in 2012 and again in 2019. For the most recent version see FRC, The UK Stewardship Code 2020, https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Final2.pdf.

¹⁶¹In 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, further, the Dutch Stewardship Code (20 June 2018), <https://www.eumedion.nl/en/public/knowledgenetwork/best-practices/2018-07-dutch-stewardship-code-final-version.pdf>.

¹⁶²In Italy, Assogestioni, an association of asset managers, adopted stewardship principles in 2013 and revised them in 2015 and 2016. For the latest version of the principles, see Assogestioni, Italian Stewardship Principles for the exercise of administrative and voting rights in listed companies (2016), https://www.assogestioni.it/sites/default/files/docs/principi_ita_stewardship072019.pdf.

¹⁶³See the Danish Committee on Corporate Governance, Stewardship Code (November 2016), https://corporategovernance.dk/sites/default/files/180116_stewardship_code.pdf.

¹⁶⁴In Switzerland, in 2013 Economiesuisse (a Swiss NGO representing the interests of the Swiss business community), associations of institutional investors, proxy advisers and regulatory authorities joined forces and published the 'Guidelines for institutional investors governing the exercising of participation rights in public limited companies', https://swissinvestorscode.ch/wp-content/uploads/2013/06/Richtlinien_16012013_e.pdf.

¹⁶⁵The Norwegian stewardship principles introduced by the Norwegian Fund and Asset Management Association in 2003 and revised in 2012 are available (in Norwegian) at <https://vff.no/assets/Bransjenormer/Bransjeambefalinger/Bransjeambefaling-ut%C3%B8velse-av-eierskap.pdf>.

¹⁶⁶The UK Stewardship Code originates from the Institutional Shareholders' Committee, *The Responsibilities of Institutional Shareholders in the UK* (1991), which was subsequently revised in 2002 and 2009.

¹⁶⁷According to J.R. Searle, *The Construction of Social Reality* (New York: Free Press., 1995) 35–36, cited by R. Adelstein, 'Firms as Social Actors' (2010) 6(3) *Journal of Institutional Economics* 329, 346.

¹⁶⁸L. Sacconi, 'Corporate Social Responsibility and Corporate Governance' (2012) 38 *Economica*, 20.

¹⁶⁹Katelouzou and Siems (n 45).

¹⁷⁰'Legal norms and not born 'out of nowhere'. As described by Basu, 'even for many positive laws, the origins often lie in the gradually hardening norms of the society. Thus the law can at times simply be the codification of norms': K. Basu, 'Social Norms and The Law' in Peter Newman (ed), *The New*

Even though the term ‘stewardship’ is used only once in the SRDII, there are engagement and disclosure obligations imposed under Article 3g:¹⁷¹ institutional investors (defined as insurance companies and pension funds) and asset managers are expected to develop an engagement policy that would describe, among other things: how shareholder engagement is integrated in their investment strategy; 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.¹⁷² This engagement policy is subject to an annual disclosure obligation, along with its implementation.¹⁷³ The overall disclosure framework is based upon the ‘comply-or-explain’ concept,¹⁷⁴ offering a certain degree of flexibility and moving away from a ‘one-size-fits-all’ approach in corporate governance.

Additionally, institutional investors and asset managers are expected to annually disclose 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.¹⁷⁵ These disclosure obligations denote the willingness to ensure the provision of social information so as to call forth social expectations out of the publicisation of the numerous and ongoing interactions between institutional investors and asset managers.¹⁷⁶ As a result, it is expected that activities will proliferate via increased cooperation and become transparent, by depicting the ‘multiple equilibria, thus providing an opportunity for lawmakers to create focal points’.¹⁷⁷ Indeed, stewardship as a social norm is a fertile ground for such equilibria to become visible to any party interested in such disclosures.

Palgrave Dictionary of Economics and the Law (London: McMillan, 1998). Social norms inevitably precede the normative action since the imposition of a certain conduct relies upon a shared understanding that an embryonic social norm already exists: Sunstein (n 63).

¹⁷¹SRD II, Recital 19: ‘A medium to long-term approach is a key enable of responsible stewardship of assets.’. See also European Commission, MEMO, Action Plan on European company law and corporate governance: Frequently Asked Questions, 12 December 2012, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_972) where the European Commission uses the term stewardship as synonymous to shareholder engagement.

¹⁷²SRD II, Art. 3g(1)(a).

¹⁷³SRD II, Art. 3g(1)(b). Additionally, institutional investors and asset managers are expected under Articles 3h and 3i 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.

¹⁷⁴SRD II, Art. 3g(1).

¹⁷⁵SRD II, Art. 3h and 3i.

¹⁷⁶Bicchieri and Dimant (n 72).

¹⁷⁷Cooter (n 76). On law as a focal point, see Basu (n 27). The existence of multiple equilibria and the fact that, apart from law, ‘history and chance determine where the system settles, [and that] [i]n the case of social norms, however, law can influence where the system settles by coordinating expectations’ could confirm that, if stewardship is not yet commonly accepted as a social norm it is because social norms are multiple as equilibria are. Therefore, it could be argued that a gradual intervention by legislators is symptomatic of expectations and – by consequence – of the existence *a form* of social norm: *ibid.*

Realising that the abovementioned provisions cannot be seen as mere disclosure tools, the SRDII is also not far from imposing a ‘duty to demonstrate engagement’¹⁷⁸ on grounds of public interests relating to sustainable, long-term shareholder behaviour. The imposed disclosure under Article 3 g leads to the conclusion that institutional shareholder engagement needs to be undertaken and that this ‘norm nudging’ aims to normalise this behavioural pattern, while rendering the sociality aspects between institutional investors and asset managers transparent. As has been argued, this testifies to a move towards ‘hardening’¹⁷⁹ shareholder stewardship, a trend that is not met in soft law stewardship tools (codes, principles or guidelines), which conceive stewardship as a voluntary practice.

The ‘comply or explain’ approach also testifies to the existence of stewardship as a social norm, since it provides indirect evidence that such norm exists. Indeed, it has been advanced that the ‘indirect evidence’ approach is accurate in verifying the existence of a social norm.¹⁸⁰ An institutional investor or asset manager that opts for ‘explain’ justifies the very existence of stewardship as a social norm, even if it disregards it, since it recognises this norm against its own practices. There is thus a de facto separation of the norm’s existence from a change in its operationalisation by the concerned party.¹⁸¹ The concerned party is also careful about not coming across as blatantly indifferent to the social norm by making use of the ‘explain’ option, since being observed as violating the ‘comply or explain’ principle (and thus stewardship in its entirety) would impose reputational costs and expose the party to informal enforcement mechanisms.¹⁸²

The importance of non-coercive legal norms

Soft law tools seem more appropriate to the variegated facets of stewardship and the preservation of core values around its operational mandate. These values have been categorised in the academic literature as flexibility, compliance, legitimacy, and signalling.¹⁸³ Among all four elements, whose importance need not to be reinstated in this study, *legitimacy* seems particularly relevant to the development of stewardship as a social norm and the lifeblood of real entities.

In the social dynamics ecosystem of stewardship, soft stewardship tools undoubtedly help institutional investors to seek legitimacy from

¹⁷⁸On the hardening of stewardship norms, see further I. Chiu and D. Katelouzou, ‘From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?’ in H. Birkmose (ed), *Shareholders’ Duties*, (Kluwer Law International, 2017) 131.

¹⁷⁹Ibid.

¹⁸⁰Finnemore and Sikkink (n 97).

¹⁸¹Ibid, 893.

¹⁸²For the pressure stemming from being observed in relation to adhering to social norms, see Eriksson (n 75) 11.

¹⁸³Katelouzou and Sergakis (n 94) 225.

constituencies interested in their activities, whether those are regulators or other market actors. SRDII provisions purport to reinforce the interaction between market actors within the investment chain, as well as between these actors and society (ranging from the ultimate beneficiaries to various stakeholders).¹⁸⁴ The above-mentioned disclosure obligations aim to move investors away from pure profit-maximisation goals by nudging them to concomitantly promote non-instrumental goals.¹⁸⁵ There is no doubt that, given their voluntary and constantly evolving nature,¹⁸⁶ soft tools can provide additional incentives to stewards to nurture further informational interactions with other market actors through their stewardship statements, going beyond the rather crystallised disclosure SRDII spectrum.¹⁸⁷ Indeed, soft law tools can integrate additional informational elements for stewards by offering several opportunities for more information interaction and conquering legitimacy within a multi-layered perspective. The role of legal tools should preferably become a facilitating force for more interaction and an incentivisation mechanism for seeking legitimacy from other constituencies.

Soft law measures also avoid problems that arise when knowledge about circumstances and opportunities is dispersed, which precludes successful 'central planning' of social life,¹⁸⁸ thus reclaiming space for individual experimentation. Coercive one-size-fits-all tools permit little room for genuine individualism, which is much needed in the area of stewardship not only in light of the myriad social interactions that need to take place within a flexible spectrum but also to create space for innovation. Experimentalism is the cornerstone of stewardship, which has been in constant mutation since its inception.

As has been accurately depicted in the literature, five shareholder stewardship meanings have already seen the light at different points and places. These are: a) engagement of active stewards in companies' corporate governance; b) active shareholder engagement for the monitoring of controlling shareholders; c) use of the controlling power by company controllers for the benefit of stakeholders and society; d) advancement of the ESG concept within the investment chain; and e) investment management dimension within stewards' *modus operandi*.¹⁸⁹ The importance of understanding such variegated visions and realities of stewardship, to fully grasp its past

¹⁸⁴F. Möslin and K.E. Sørensen, 'Nudging for Corporate Long-Termism and Sustainability? Regulatory Instruments from a Comparative and Functional Perspective' (2018) 24(2) *Columbia Journal of European Law* 391.

¹⁸⁵Katelouzou and Sergakis (n 94), also citing, in this framework, R.W. Scott, *Institutions and Organizations*, (2nd edn. Sage Publications, Thousand Oaks, 2001).

¹⁸⁶See, for example, the considerable expansion of the stewardship ecosystem in the new SC: Davies (n 29).

¹⁸⁷Katelouzou and Sergakis (n 94).

¹⁸⁸F.A. Hayek, *Law, Legislation and Liberty: Rules and Order* (Routledge, 1973) ch 1.

¹⁸⁹For an exhaustive analysis of these five meanings, see Katelouzou and Puchniak (n 12) 6–9.

and anticipate its future,¹⁹⁰ leads us to the acceptance that beneficial outcomes and innovation will more likely come to fruition within a coercion-free acceptance of stewardship's nature as a social norm that is best preserved via soft law tools. Imposing or even indirectly nudging stewards to exercise a one-sided version of stewardship will not only prevent them from developing new synergies but will also endanger the effective allocation of their efforts towards the realisation of pre-set (but not necessarily efficient) targets for the global challenges lying ahead. The same holds true for regulatory initiatives aiming to galvanise stewardship by specifically targeting some market actors while excluding others: the example of large institutional investors and hedge fund activists comes to mind, with the latter being excluded from the stewardship regulatory vision. As has been argued, both types of actors have different stewardship domains and priorities that do need to be sacrificed in the name of stewardship homogenisation, as advanced by current regulatory trends.¹⁹¹ The monitoring of corporate activities can be best served by the entire investor community, and not by some specific actors, as this would not only deny their importance and evolving role within markets but also diminish the synergies that can be built across stewards on a spontaneous basis for the betterment of corporate governance.

Another reason in favour of soft law instruments is the impetus of preserving the 'evolutionary stability'¹⁹² that stewardship can offer in its capacity as a social norm. Stewardship thus becomes the norm that keeps the different market actors aligned towards the realisation of a holistic mission of enhancing good corporate governance and investment management standards for the preservation of the global economy. The different actors do not need to be in perfect accordance in relation to the pursued interests, since self-interests will continue to be present insofar as stewardship functions as an 'equilibrium-selection' norm,¹⁹³ by assisting market actors to select such equilibrium within the global investment landscape. The adherence to this type of convention, which is also based upon self-interested beliefs, does

¹⁹⁰Ibid, 9.

¹⁹¹Gomtsian (n 46) 187.

¹⁹²Basu (n 170) 479; see also F.A. Hayek, *The Constitution of Liberty* (Ronald Hamowy edn, University of Chicago Press, 2011).

¹⁹³Basu (n 170) 477 distinguishes 'rationality-limiting norms', when they 'limit the domain over which the rationality calculus is applied', 'preference-changing norms', when they are internalised in such a way that they ultimately shape a person's preferences, and 'equilibrium-selection norms'. For the purposes of the current study, we argue that stewardship transcends all three categories: it can be conceived as a rationality-limiting norm, to the extent that it drives investors forego utilitarianism in their *modus operandi*, a preference-changing norm, since it organically drives investors towards the development and pursuit of different preferences, and an equilibrium-selection norm, because it assists stewards in finding a common point of reference in the overall investment landscape while maintaining a certain level of self-interest. Self-interest does not preclude social norms. 'There is no sharp dichotomy between rationality and social norms or between self-interest and social norms; what is rational and what is in an agent's self-interest are functions of social norms': Sunstein (n 63) 956.

not create any particular concerns.¹⁹⁴ It is the evolutionary aspect of the desired stability that is best preserved via soft law instruments that allows stewardship to develop within unbounded operational spaces and acquire novel characteristics and purpose.

Moreover, stewardship is not essentially against the self-interest of players. It is consistent with one interpretation of their self-interest, namely that engagement and ESG investment leads to long-term benefits. Soft law can normalise this interpretation of self-interest – whether it be factually correct or not – and thus be effective. To the contrary, hard law risks signalling that stewardship goes against the self-interest of players, which would lead to them perceiving it as a regulatory constraint. In that case, they would do anything they could to comply only in letter and not in spirit of the legal norm.

Normative frictions or complementarities?

Undoubtedly, discordances or frictions between legal (soft or hard) provisions and the exercise of stewardship will continue to persist.¹⁹⁵ The ‘law in books’ and the ‘law in action’ facets of stewardship will continue to mutually nurture each other, with soft law provisions aiming to depict with more expediency the ever-evolving stewardship trends compared to the SRDII provisions. Frictions are also inevitable between legal and social norms, without nonetheless putting at peril the sociality of stewardship.¹⁹⁶ Indeed, the rigidity of SRDII norms cannot confine stewardship within its specific and prescriptive limits, nor can the same happen with soft law provisions. Stewardship as a social norm continues to exist independently of any legal provision that attempts to frame its specificities in a finite and time-limited fashion. Nevertheless, more intrusive norms, such as the above mentioned anti-ESG bills in the US, may well impede sociality dynamics from proliferating.

There is also a complementarity element between legal and social norms, with the latter acting as driving forces for adherence and/or meaningful compliance to the former.¹⁹⁷ Even in the presence of legal constraints, social norms can fulfil a crucial role to ensure the proper compliance with such constraints and more generally societal adherence to legal provisions.¹⁹⁸ Nevertheless, in a business context, if the rule is seen as externally imposed, the tendency could also be for the social norm to develop against the rule to

¹⁹⁴Ellickson (n 100).

¹⁹⁵Svensson (n 70) 47.

¹⁹⁶On the coexistence of social and legal norms more generally, see *ibid*, 48. An example of such friction may be considered Germany’s reticence to adopt a soft law stewardship instrument, going against the international trend of proliferation of such instruments: G. Ringe, ‘Stewardship and Shareholder Engagement in Germany’ in Katelouzou and Puchniak (n 1) 202.

¹⁹⁷For the element of complementarity between legal and social norms in corporate governance, see L.A. Stout, *Cultivating Conscience* (Princeton NJ: Princeton University Press, 2011).

¹⁹⁸J.R. Macey, *Corporate Governance* (Princeton NJ: Princeton University Press, 2008).

minimise it, not to support it, hence the need for legal norms to be cognisant of investor needs and signal the legal reform's purpose as a concomitant depiction of their interests.

Another reservation about non-coerciveness could be soft law instruments' divergence across the globe as well as amongst stewardship groups in various national settings. This phenomenon could be seen as hardly convincing for the provision of a credible promise for stewardship's potential to contribute to the amelioration of various global challenges. Yet, the degree of stewardship's institutionalisation does not need to dispose of identical settings, as any form of act within this framework already constitutes a form of social norm.¹⁹⁹ The fact that some stewardship practices or new soft law norms may still be in a process of adoption and that, possibly, they sometimes present themselves as trends when initially expressed, does not mean that they do not already bear a certain degree of institutionalisation. They can be institutionalised acts in one context and only partly institutionalised in another. The degree of institutionalisation may vary without diminishing the existence of a nascent social norm nor its correlation with cultural understandings and individuals' role in further shaping it.

Based on this observation and expectation of stewardship sociality's continuous evolution, we find in calls for a 'purposeful' stewardship²⁰⁰ an organic burgeoning of its potential that is further supported – but not *ex novo* constituted – by soft law norms. The recent example of the revamped UK Stewardship Code is a testimony to such evolution: the novel focus on stewardship's purpose and the acceptance that policy statements cannot suffice anymore to fulfil interested parties' expectations from stewardship provide a fertile ground for the recognition of the sociality of stewardship as the key driver of its existence and continuous proliferation.

Moreover, the calls for a reconceptualisation of what constitutes stewardship, namely the need to look beyond issuer-specific engagement,²⁰¹ testify to the same evolutionary trend that acknowledges the sociality and the far-reaching effects of stewardship activities. The amendments made to the UK Stewardship Code's structure, scope, reporting requirements and overall focus demonstrate its alignment with wider societal changes (e.g. inclusion of systemic risks), with ESG elements indicating that 'the new UK Code is cutting with, not across, the grain of more general, if incipient, changes in

¹⁹⁹The greater the degree of institutionalization, the greater the generational uniformity of cultural understandings, the greater the maintenance without direct social control, and the greater the resistance to change through personal influence': L.G. Zucker, 'The Role of Institutionalization in Cultural Persistence' (1977) 42(5) *American Sociological Review* 726, 742.

²⁰⁰Chiu (n 104). More generally, see the Purposeful Company Project of the British Academy; this and similar initiatives could be seen as additional examples of a source for the emergence of a social norm: <https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business>.

²⁰¹*Ibid*, 29.

society.²⁰² The very expansion of the Code's focus is also seen as a way to save the Code itself, in light of criticisms regarding its effectiveness.²⁰³

From a regulatory point of view – to the extent that soft or hard law norms *may* be monitored and enforced by some bodies –²⁰⁴ maintaining a non-coercive approach also acknowledges and depicts stewardship's sociality and constant evolution. First of all, a flexible approach maintains and reinforces informal sanctions that are viewed as the basis of a social norm, being a crucial element in their enforcement.²⁰⁵ Most importantly, when in charge of monitoring such soft or hard law norms, policy makers can alter the signalling equilibrium to a norm by either rendering it more difficult to comply with the standards or easier for parties to avoid criticism for non-compliance.²⁰⁶ This is particularly important as the constant evolution of stewardship as a social norm, which is also subject (once legally 'normified') to monitoring and enforcement mechanisms, requires a constant adaptation of the enforcer's stance so as to avoid 'chilling effects' to its nascent features. This argument should not be interpreted as an indirect defence of hard law reforms once the evolutionary process has run its course, since sociality and autonomy will keep on transforming stewardship's various facets.

A characteristic example of such malleability is the Financial Reporting Council's abandonment of its tiering process²⁰⁷ and the choice for a more holistic approach based on disclosure and the mere accord of the signatory status to the UK Stewardship Code. This may testify to the FRC's willingness to decrease the costs associated with signalling shortcomings in its effort to acknowledge that, since the last revision and expansion of the Code, signatory parties are now expected to report on a considerably wider agenda, encapsulating greater complexities and elements of sociality. Nothing

²⁰²Davies (n 29) 66.

²⁰³Reddy (n 114) 866. See also Puchniak's argument on the FRC's willingness to maintain the UK's position as the disseminator of global norms of good corporate governance by revising the UK Stewardship Code in 2020, notwithstanding the criticism that had been expressed in the Kingman review: Puchniak (n 5). The Kingman Review had expressed concerns about the Code's lack of effectiveness and the risks of boilerplate reporting in the absence of a change of direction: John Kingman, 'Independent Review of the Financial Reporting Council' (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387/frc-independent-review-final-report.pdf.

This has also resulted in the new wave of ESG stewardship – which may be driven more by social norms than economics. On Kingman Review's criticism, see also Davies (n 29) 45.

²⁰⁴On the enforcement of shareholder stewardship, see Katelouzou and Sergakis (n 3).

²⁰⁵Falk, Fehr and Fischbacher (n 65) 3. This observation remains valid after a social norm has been subject to a legal 'normification' process since it constantly evolves and some novel aspects may not be fully encapsulated by soft or hard law provisions, making informal sanctions a more efficient and prompt enforcement method in light of a behavioural pattern that is non-conformant to the social norm.

²⁰⁶As it has been observed in the social norm literature, 'policy makers can change a particular signalling equilibrium by either increasing the cost of sending the signals (in which case fewer people will signal), or by decreasing the cost of failing to signal (that is, making it less likely that people who fail to signal will suffer ostracism or other sanctions because they are thought to be "bad" types)'; Eriksson (n 75) 32.

²⁰⁷On the tiering process as an enforcement mechanism, see Katelouzou and Sergakis (n 3) 591–2.

precludes the future of tiering, which may well return once compliance to this new disclosure spectrum is internalised. For the time being, allowing stewardship to access more space, while adapting to an entirely new agenda, not only respects stewardship's social norm features but also safeguards its espousal by signatory parties.

Conclusion

Shareholder stewardship has frequently been conceived, promoted and implemented as a market-driven concept. The provision of stewardship services has been mostly centred on ensuring financial returns to ultimate beneficiaries and clients in an instrumental fashion that is deprived of other (e.g. non-financial) considerations. While recognising the existence and importance of stewardship's 'market trend' aspect, this article aims to fill a gap in the academic literature by revealing two of stewardship's fundamental facets: 'autonomy' and 'sociality'.

On the one hand, by borrowing real entity theory concepts as they have been advanced in company law, the article argues that stewardship groups are autonomous, independent of any 'normification' process and the law, as well as 'real' in their consequences. This theorisation of stewardship groups' 'autonomy' contributes to the academic debate by providing a novel rationale for the adoption of non- (or minimally)coercive norms. On the other hand, the article unearths stewardship's 'sociality' as a novel element with academic and policy-making relevance. Social norm traits and dynamics encapsulate stewardship's malleable and evolving nature and justify not only a non-coercive normative stance but, most importantly, an all-encompassing approach in expecting all types of activities (financially and non-financially oriented) and actors to become part of shareholder stewardship.

We are not agnostic of the myriad complexities across market actors, regulators and stewardship soft and hard law norms that will continue to question and renew stewardship's content, mission and facets. The ongoing proliferation of actors, activities and challenges at the global scale requires further research to construe a wide-reaching real entity and social norm theory of stewardship. The pragmatic – and less ambitious – purpose of this article is to explain stewardship's autonomy and sociality in a manner that can inform policy initiatives based on the need to respect both of these well-hidden stewardship features. This approach justifies the maintenance of non-coercive legal norms and the need to embrace stewardship in relation to any unchartered territory (e.g. operational, such as ESG, or geographical, such as viewing stewardship as a transnational social norm) and from any potential actor (e.g. hedge funds and not solely institutional investors) that is capable of contributing to its autonomy and sociality.

This novel approach thus invites policy makers to reorient their activity and actor-based focus on a more holistic dimension and move away from rigid approaches, such as the anti-ESG bills in the US. Firstly, a holistic vision of stewardship activities that can include any attempt to embody stewardship's autonomy and sociality at the service of the goal of maintaining sound standards inside and outside the investment chain. Secondly, an overarching conceptualisation of stewardship actors that does not confine the exercise of stewardship to some categories by excluding others – instead, it gathers all potential stewards within the same operational spectrum by enabling them to keep exercising their sociality traits in improving stewardship standards and investee companies overall.

After all, 'a vast array of social behaviors [...] are not explained by the influence of law, but, instead, by the influence of social norms'.²⁰⁸ The time may have come for stewardship's autonomy and sociality to gain the prominence they deserve in the academic debate and inform policy making initiatives so that a more holistic and representative vision of stewardship can come forward.

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²⁰⁸Geisinger (n 82) 607.