1. Introduction

Hanne S. Birkmose and Konstantinos Sergakis

The discussion on shareholders' duties has increasingly gained momentum in the EU and has given rise to the adoption of duties in both company law and capital markets law. However, this discussion must be extended further if the duties that are increasingly imposed on shareholders are to have a genuine effect on the viability of the recent regulatory developments in this area. Enforcement mechanisms are crucial to this discussion as they are vital to preserving the credibility of markets, to ensuring compliance with regulatory objectives and with sound corporate governance practices, as well as to holding accountable persons who are supposed to fulfil the vast range of shareholders' duties. This volume presents a series of contributions touching on enforcement mechanisms that are already in place, as well as emerging or hypothetical mechanisms that will be at the centre of debate for the years to come. The overall objective of this volume is to provide a reliable overview of enforcement frameworks and to reflect on their efficiency, adaptability to market developments and suitability to the current challenges we face in company and capital markets law. This introductory chapter gives a concise presentation of the various arguments raised and focuses on the numerous rationales for enforcement and the various types of enforcement (legal and social) in the area of shareholders' duties.

I. THE SUITABILITY AND EFFICIENCY OF ENFORCEMENT

The increased emphasis on shareholders' duties has been strong at both EU and national levels. Legislators and academics have discussed which roles shareholders should have in an efficient corporate governance framework and how to ensure sensible market practices by the investor community.

In her contribution, Hanne S. Birkmose employs an analytical framework based on concepts borrowed from agency theory and economic theories of market failure to offer an understanding of why the law imposes duties

on shareholders in general.¹ She argues that most often duties address the principal-agent problem that may arise between majority and minority shareholders, but also that market failure may justify imposing duties on shareholders in order to ensure the efficiency of the market. Most of the duties found in company and capital market law can be regarded as regulatory strategies² employed by legislators to constrain the agent's undesired behaviour. Moreover, this framework may also explain why some duties only apply to a subset of the shareholder population.³

However, Birkmose finds that there are exceptions as some duties can hardly be explained by the reduction of agency costs or the elimination of market failure, but seem to serve wider purposes, such as social or political objectives. This is particularly the case when it comes to the revision of the Shareholder Rights Directive⁴ and the disclosure duties imposed on institutional investors. The arguments presented in the preamble of the directive in support of the imposition of special duties on institutional investors are rather vague and do not seem to be based either on the premise of agency problems or on concerns about market failure. Rather, the arguments seem to support a political agenda that has gained momentum in the wake of the financial crisis,⁵ whereby legislators not only aim to constrain the actions of institutional investors in specific ways, but also to change the behaviour of institutional investors without clearly specifying what the expectations are. Consequently, enforcement becomes essential to assist this transformation. While Birkmose concludes that it is yet to be seen whether the chosen enforcement regime – which partly relies on private enforcement – will suffice, Christoph Van der Elst expresses serious concern that the European regulatory developments on institutional investors may even have counterproductive consequences for shareholder engagement. In particular, Van der Elst warns that the mandatory 'comply or explain' framework may endanger the current flexible relationship

¹ Chapter 3, sec. II.

² On the concepts of different legal strategies, see John Armour, Henry Hansmann and Reinier Kraakman, 'Agency Problems and Legal Strategies' in Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann and Gerard Hertig (eds), *The Anatomy of Corporate Law. A Comparative and Functional Approach* (OUP 2017) 31.

³ Chapter 3, sec. III.

⁴ Directive 2017/828/EU of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJL132/1(Shareholder Rights Directive).

⁵ Hanne S. Birkmose, 'Forcing Shareholder Engagement – Theoretical Underpinning and Political Ambitions' (2018) *Eur. Bus. L. Rev.* 4, 639ff.

between investors and listed companies, and may result in a more rigid engagement practice by institutional investors.⁶

As discussed by Van der Elst, the changing investor landscape, while having created momentum for engagement duties for institutional investors in the EU,⁷ may not be as strong a motivation for increased engagement as has been emphasised. While institutional investors have increased their ownership in European companies,⁸ Van der Elst argues that not only is the actual influence of these investors in the individual companies relatively small, but the European Commission has failed to provide evidence that this group of shareholders causes the identified market failures.⁹ Moreover, he finds that the prescribed duties may not necessarily be the proper remedy to solve the problems. Similar to the discussion of a fiduciary duty, the duties in the Shareholder Rights Directive may have negative side-effects in some situations. In particular, Van der Elst argues that not only may it be difficult to prove a breach of the duties in some situations, but the mandatory ‘comply or explain’ shareholders’ duties may have a rigidifying effect on the practices of institutional investors and their relationships with investee companies.¹⁰

Interestingly, while the increase in institutional ownership has occurred in other jurisdictions as well – such as the US and Canada – the reliance on shareholders’ duties seems to be stronger in Europe than elsewhere. Canada is particularly noteworthy in this respect because Canadian markets, as well as most European markets, are characterised by a high degree of concentrated ownership. Thus, there may be more opportunities for opportunistic conduct there, and we could expect a similar development on shareholders’ duties in Canada. Nonetheless, such a development is absent.

Duties can take on different forms,¹¹ and a well-known debate in company law is whether or not shareholders, in particular those with a controlling interest, owe fiduciary duties to other shareholders. In their contribution, Anita Anand and Christopher Puskas find that, in a Canadian context, shareholders’ fiduciary duties lack a persuasive rationale despite the growing importance of shareholders in corporate governance and, moreover, that fiduciary duties are inefficient from an enforcement perspective.

⁶ Chapter 4, sec. IV.

⁷ See Chapter 4, sec. III.

⁸ Chapter 4, Table 4.1.

⁹ Chapter 4, sec. III.B.

¹⁰ Chapter 4, sec. IV.

¹¹ Hanne S. Birkmose and Florian Möslin, ‘Introduction: Mapping Shareholders’ Duties’ in Hanne S. Birkmose (ed), *Shareholders’ Duties* (Kluwer Law International 2017) 1.

In particular, they state that a fiduciary duty may have negative effects as it may disincentivise investments by imposing costs and obligations on shareholders.¹² Furthermore, with reference to the Canadian company law and capital markets law framework, sufficient *ex ante* and *ex post* protection may, in the authors' view, provide a more efficient protection of minority shareholders than could be provided by a fiduciary duty. The different approaches to institutional ownership found in different countries offer proof that this discussion is highly politicised.

We will now turn our attention to the specific types of enforcement applicable to shareholders' duties to examine their merits and limitations in this specific area. This will in turn allow us to draw some conclusions and reflect on future regulatory steps.

II. LEGAL ENFORCEMENT

Legal enforcement can be broken down into private and public enforcement. Private enforcement has not been harmonised in an increased fashion across the EU due to national idiosyncrasies and different legal traditions. Moreover, for private enforcement mechanisms to counterbalance any violation of shareholders' duties, private parties need to exercise their rights by having the necessary information, interest, resources and time to perform such a role. These conditions are not always met, especially taking into account the ever-increasing financial intermediation in the investment chain, the communication gap between market actors and the predominant governance role exercised by funds in their day-to-day management of beneficiaries' assets. These factors have gradually disempowered beneficiaries and other affected parties from exercising their role.

Public enforcement has received much more political and legislative attention, especially in the area of administrative sanctions and measures given the increased powers awarded to regulatory bodies that are progressively being seen as more fit to exercise such powers and more adaptable to market developments and strategies. Criminal sanctions nevertheless remain largely dependent on national laws in the absence of harmonisation efforts in the area of shareholders' duties and, more generally, of capital markets law violations.¹³ In the area of shareholders' duties, criminal sanctions are particularly modest or even non-existent. In his contribution, Konstantinos Sergakis explains this

¹² Chapter 2, sec. III.B.

¹³ With the exception of a modest harmonisation effort introduced by the Market Abuse Directive: Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for insider dealing and market manipulation [2014] OJ L173/179.

situation in light of the traditional and long-standing predominance of private enforcement in this area since the violation of shareholders' duties is primarily seen as an internal company matter.

The two main and most common objectives of legal enforcement are the protection of minority shareholders in an intra-shareholder relationship and a wider protection of other parties potentially affected by the breach of shareholders' duties (including investors, stakeholders, etc.). The first category mainly operates within a company law spectrum, with a series of difficulties that make enforcement problematic (with proof of the damage and quantification of damage being the most notable hurdles). The second category is driven by capital markets law considerations and has attracted more attention given the ever-wider powers granted to regulatory bodies for handling breaches of shareholders' duties.¹⁴

In her chapter, Iris H-Y. Chiu argues that the boundaries between private and public enforcement in the area of shareholders' duties cannot be clearly identified. This can be explained in the light of the emergence of regulatory standards in an area of law that has traditionally been seen as a private matter between company constituencies (enabling company law rules) but has more recently been seen in a public interest perspective (more constraining and overarching securities regulation rules). Chiu notes that granting enforcement powers to regulatory bodies can be seen as a form of private enforcement since the regulatory intervention constitutes a form of collective action taken by an authority that is desired by market participants. At the same time, this type of enforcement can be seen as public in nature since the regulator seeks to protect the wider public interest. Most interestingly, in this respect, Chiu questions whether private and public enforcement should be 'clearly delineated in accordance with the nature of persons carrying out the enforcement, or the nature of the causes sought to be addressed'.¹⁵ The following sections aim to highlight the various facets and trends that private and public enforcement have shown in shareholders' duties.

A. Private Enforcement

1. Types of private enforcement

Private enforcement of shareholders' duties forms an important pillar of company law regimes as it enables private parties to secure their rights against other shareholders who violate or abuse them. Nevertheless, enforcing duties

¹⁴ For a more in-depth analysis of this dichotomy in the area of financial sanctions, see Chapter 9, sec. IV.

¹⁵ Chapter 6, sec. I.

against shareholders is not always a straightforward task. Under a general scope of analysis, the enforcement mechanisms for the violation of shareholders' duties can be numerous. For example, as analysed in Corrado Malberti's chapter, these can include pecuniary sanctions and damages, invalidation of decisions taken within the company (for example, suspension of voting rights¹⁶), invalidation of companies' or shareholders' actions, exit options for harmed shareholders, or even exclusion of the shareholders in breach.¹⁷

In her chapter, Chiu notes the traditional resistance of company law to impose and enforce duties on shareholders, who are considered to hold quasi-proprietary rights in companies.¹⁸ Christian A. Witting also acknowledges this tradition by referring, more specifically, to the well-known limited liability principle. Witting argues that shareholders hold a very important role at the top of the hierarchy in the corporate governance structures and that the 'governance function belongs to them and to no one else'.¹⁹ He therefore proposes a residual pro rata strict shareholder liability solely in the case of unsatisfied personal injury claims from corporate wrongdoing. This new regime would, in his view, incentivise and constrain shareholders to assume their responsibilities in the governance of companies. This approach may unlock shareholders' capacity to influence corporate governance in order to avoid corporate wrongdoing that may result in personal injuries.²⁰ Witting also recognises that strict liability in this framework would go against the well-known limited liability principle in company law, and he therefore proposes a series of applicability criteria and conditions for such a regime to be adopted and enforced appropriately. Enforcement of such regimes may not be straightforward, hence the need to carefully design all possible ways that will make these proposals achievable. Deterrence of wrongdoing is key, according to Witting, given the hierarchical structure and formalised decision-making processes of companies that may allow them, with the input of incentivised shareholders who bear liability, to constrain behaviour and avoid wrongdoing.

Deterrence is also a central theme in the chapter on suspension of voting rights by Mette Neville and Karsten Engsig Sørensen. Suspension of voting rights was introduced at EU level through Directive 2013/50/EU²¹ but it is a sanction that was already present in several Member States prior to the adoption of the directive. As some Member States have first-hand experience

¹⁶ Discussed in detail in Chapter 8.

¹⁷ Chapter 5, sec. III. See also Chapter 9, sec. IV.A.

¹⁸ Chapter 6, sec. II.

¹⁹ Chapter 10, sec. IX.

²⁰ Chapter 10, sec. VII.

²¹ Directive 2013/50/EU amending the Transparency Directive (Directive 2004/109/EC) [2013] OJ L294/13. The amendments were to be implemented by November 2015.

with suspension and others do not, Neville and Engsig Sørensen enumerate the merits and shortfalls of the suspension of voting rights based on the available experiences. They find that suspension of voting rights may have wider potential, not only as a sanction, but also as a preventive measure, in particular in cases where the shareholders value the influence they gain through their voting rights and the shareholders have misused, or are likely to misuse, their influence within the company.²² While they discuss the potential of suspension of voting rights in relation to duties imposed by law as well as by the private ordering of shareholders, they conclude that the greatest potential for suspension as a sanction exists in relation to the many different duties found in either the company's articles of association or in shareholders' agreements.²³ However, they also set out a number of relevant issues – including the sanctioning procedure, the duration of the sanction and which rights should be suspended²⁴ – that Member States and shareholders should consider if suspension is to become an efficient sanction for the infringement of duties.

Turning our attention to the various sources of private enforcement, a company's constitution may be a more feasible way to enforce duties against shareholders, mainly thanks to its contractual nature, since it binds both the company and the shareholders in a relationship. However, as Chiu notes, majority rules may prevail and impede such enforcement.²⁵

Jennifer Payne and Elizabeth Howell further argue that enforcement of duties arising from the statutory contract may also be a complex task since courts perceive some issues as mere internal irregularities, potentially ratifiable by the majority, or require shareholders to bring actions in their capacity as members of the company and not in any other capacity. The authors also note the rarity of financial sanctions in this framework.²⁶ An alternative way to secure enforcement against majority rules can be found in the unfair prejudice petition, which aims to protect minority shareholders in an equitable fashion.²⁷

Another option that may facilitate private enforcement is via a shareholders' agreement that requires the consent of all participating parties in order to bind them. Such agreements usually refer to shareholders' rights and they are less attractive in relation to shareholders' duties. As Payne and Howell note, such agreements may be more relevant in small companies and less important in larger companies with an anonymous and frequently changing

²² Chapter 8, sec. III.A.

²³ Chapter 8, sec. IV.A.

²⁴ Chapter 8, sec. III.B.

²⁵ Chapter 6, sec. II.A.

²⁶ Chapter 9, sec. III.B.

²⁷ See Chapter 6, sec. II.B and Chapter 9, sec. III.B.

shareholder base.²⁸ Moreover, the award of financial remedies due to a breach of duty under a shareholders' agreement may not be straightforward. Indeed, it would be difficult to prove or quantify the losses suffered by the breach of some shareholders' duties or, more simply, the loss may have been suffered by the company and not by a shareholder, therefore barring shareholders from enforcing the breach of duties. The inclusion of agreed damage clauses in shareholders' agreements could, according to Payne and Howell, be a viable alternative in light of the above-mentioned difficulties.²⁹ Other means to ensure performance of shareholders' duties may also be available, such as injunctions, court orders, specific performance and equivalent enforcement.³⁰

Bylaws constitute another source of enforcement of shareholders' duties. They do not require the unanimous consent of all shareholders and, as such, they may have negative effects on minority shareholders. The differences that they may have from shareholders' agreements are numerous and relate to the effects on third parties, the modalities of their adoption and modification, and their relationship with mandatory law provisions.³¹ It must also be borne in mind that national laws adopt different approaches in relation to the effects of shareholders' agreements and bylaws; this further complicates enforcement features in this area of duties.

2. Barriers to enforcement

The enforcement of shareholders' duties arising from national law frequently involves a cross-border aspect as shareholders often invest in companies that are not governed by their own jurisdiction. Thus, the potential for private litigation may not be fully explored by private parties because of the litigation problems caused by jurisdictional barriers, as discussed by Justin Borg-Barthet.

The relationship between shareholders and company stakeholders that attempt to enforce shareholders' duties will be characterised by the absence of a choice-of-court agreement. This may reduce predictability, delay proceedings and increase costs of litigation.³² There is an inherent risk that the room for jurisdictional challenge that is found in numerous situations may be abused by the stronger party in a dispute. Shareholders at risk of being sued for not fulfilling their duties will often, if not always, be large or professional investors who can take advantage of the lack of legal clarity. Consequently, Borg-Barthet argues that common classification of claims against shareholders

²⁸ Chapter 9, sec. II.

²⁹ Chapter 9, sec. II.C.

³⁰ For a more general discussion of these issues and further implications for affected parties, see Chapter 5, sec. IV.C.

³¹ For a more general discussion of these differences, see Chapter 5, sec. IV.B.

³² Chapter 13, sec. II.A.

by non-shareholder constituents could lead to more optimal enforcement.³³ However, due to the even greater uncertainty in cases connected to jurisdictions outside the European jurisdiction area, Borg-Barthet also argues for the need for coordination of state intervention to minimise the judicial barriers to private enforcement.³⁴ According to Borg-Barthet, these arguments are based on a premise that shareholders owe duties to the state, whereas the state has an interest in monitoring the activities of shareholders. This could lead to actions against shareholders by state authorities *ex officio*, or state intervention could support traditional private international mechanisms leading to a more efficient private enforcement regime.

Barriers may also flow from primary EU law, as discussed by Christoph Teichmann and Lothar Wolff, and measures regulating and enforcing shareholders' duties will have to be assessed in the light of EU primary law. Primary law is important to the feasibility of the enforcement of shareholders' duties: investors making cross-border investments may rely on the free movement of capital or on the freedom of establishment. But companies formed in accordance with the law of a Member State may also enjoy freedom of establishment in their own right, and the shareholders' position as members of the company is also protected in relation to corporate mobility.³⁵ If shareholders' duties prevent or deter foreign investments, e.g. by imposing fines on larger shareholders for misconduct by the investee company,³⁶ they may be incompatible with EU primary law as discussed by Teichmann and Wolff. Furthermore, cases of golden shares show that the obligation for states to exercise their rights in a specific manner may have a deterrent effect on investments.³⁷

Teichmann and Wolff also discuss other duties imposed on shareholders that originate in the company's legal framework (membership-related duties), including the *lex societatis*. When companies exercise their freedom of establishment, it is the law of the state of incorporation that applies to shareholders' duties. However, Teichmann and Wolff argue that recent developments show that the host Member State may override the *lex societatis* by applying its own tort law and insolvency law provisions. As a result, the barriers to the enforcement of shareholders' duties flowing from EU primary law that they identify may be restricted to areas that concern the formation of a company in a given Member State or the subsequent establishment in another Member State.³⁸

³³ Chapter 13, sec. II.A.

³⁴ Chapter 13, sec. III.

³⁵ Chapter 12, sec. II.F.

³⁶ See the discussion on the *Idrima Tipou* case, Case C-81/09, in Chapter 12, sec. III.A.

³⁷ Discussed in Chapter 12, sec. III.A.

³⁸ Chapter 12, sec. IV.C.2.

Another series of difficulties in relation to enforcement arises out of barriers to shareholder identification, as analysed by Matteo Gargantini.³⁹ Characteristic examples include the increased intermediation between the final account holders and the settlement system, or the use of omnibus accounts that prevents upper-tier intermediaries and issuers from identifying shareholders at lower-tier levels. These difficulties further exacerbate identification problems in a cross-border context since holding systems usually operate on a national basis. Differences in legal traditions complicate things even more since the ultimate beneficiaries will be considered mere beneficiaries in some countries, whereas intermediaries that participate in the settlement system will hold the status of shareholders.⁴⁰

More generally, shareholder identification mechanisms exist in only about half of EU Member States and their implementation at national level remains dependent on national specificities that do not yet allow for a truly satisfactory position. The 'centralised' identification system provided in the revised Shareholder Rights Directive⁴¹ may allow for some improvements in identifying shareholders although its features may continue to create difficulties for issuers and fellow shareholders. Gargantini analyses all these issues to demonstrate that issuers, other shareholders and regulatory bodies may find it difficult to detect violations of shareholders' duties and to react to such conduct via various enforcement mechanisms.⁴²

B. Public Enforcement

Public enforcement is a traditional mechanism for dealing with violations of some well-known shareholders' duties, such as notification of major shareholdings, but is less evident for the shareholder conduct and corporate governance duties applicable to shareholders.

Interestingly, suspension of voting rights, which was introduced by Directive 2013/50 (as discussed above), may also result in a public enforcement regime as the directive requires that Member States implement rules that provide for the suspension of voting rights if shareholders fail to declare major shareholdings but leaves it up to Member States to decide on the procedure. In this and other situations, as discussed by Neville and Engsig Sørensen, national supervisory authorities are empowered to impose the suspension of voting rights.⁴³ According to the authors, a sanction established by EU law, but which is

³⁹ Chapter 11.

⁴⁰ Chapter 11, sec. II.

⁴¹ Article 3a(3) in the Shareholder Rights Directive (n 4).

⁴² Chapter 11, sec. VI.

⁴³ Chapter 8, sec. III.B.1.

applied very differently on a number of parameters in different Member States, may have adverse implications for the effects of the directive.

On a more general note, securities ownership has met with unprecedented changes, notably via the massive accumulation of shares by institutions and the correlative decline in the importance of retail investors. The presence of a ‘fiduciary capitalism’ that gives funds the power to manage ultimate beneficiaries’ savings has been regarded as means for making investment more mainstream and ‘democratic’ but at the same time, it is seen as a growing concern for issuers, markets and beneficiaries when their conduct fails to comply with sound corporate governance practices. Public interest concerns have been enshrined in the debate, purporting to safeguard this new age of investment. By focusing, *inter alia*, on a particular category of shareholders’ duties related to shareholder conduct and corporate governance, Chiu analyses the gradual emergence of regulatory law and soft law around these duties and the implications for their enforcement. It has been said that we are witnessing a legalisation of stewardship via the introduction of a duty to demonstrate engagement, which is based on public interests that aim to re-regulate this area.⁴⁴ On the one hand, stewardship codes and, more generally, the new disclosure obligations imposed across the EU by the revised Shareholder Rights Directive are not currently subject to any type of enforcement,⁴⁵ an assumption that brings private parties back to the centre of attention as the ultimate enforcers of debatable shareholder conduct practices. On the other hand, public enforcement is beginning to take on a ‘public-private’ nature since it serves as a representative means for private parties that would want to enforce such duties on their own while also aiming to protect public interest considerations at large.

Chiu characterises the directive’s position as ‘anomalous’⁴⁶ given the current co-existence of private enforcement (as the only source of pressure) and the public interest prerogatives that are supposedly preserved under these new disclosure duties as included in the directive. Sergakis further notes that Article 14b of the directive enables Member States to provide for effective, proportionate and dissuasive measures and penalties for violations of its transposed provisions into national law. Nevertheless, this provision is very broadly formulated and can be interpreted in many different ways, raising concerns about

⁴⁴ Iris H-Y. Chiu and Dionysia Katelouzou, ‘From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?’ in Hanne S. Birkmose (ed), *Shareholders’ Duties* (Kluwer Law International 2017) 143.

⁴⁵ Notwithstanding some indirect monitoring mechanisms present in some Member States. See, for example, the FRC’s tiering exercise, which aims to categorise Stewardship Code signatory parties into two tiers (more or less robust adherence to the code, respectively): Chapter 6, sec. IV.

⁴⁶ Chapter 6, sec. IV.

its applicability across the EU and the future framework of public enforcement in this area. Attempting to envisage a public enforcement framework for these shareholder conduct duties, Sergakis warns against a generalised approach whereby regulators would be given extensive powers to decipher shareholder conduct statements and enforce their overall compliance with the applicable provisions. Thus, this conclusion is aligned with Van der Elst's warning that rigorous enforcement may lead to a suboptimal engagement environment.⁴⁷

Turning our attention to the market actors who will have to fulfil such duties, Sergakis argues that the imposition of administrative sanctions and measures for these emerging duties will create an overly complex and very burdensome environment for investors, given the variety of engagement strategies already in place, by forcing them to 'reprioritize their disclosure mindset'.⁴⁸ Moreover, legal enforcement will sit uncomfortably with the very nature of these duties whose purpose is not primarily to ensure formalistic compliance with standardised regulatory objectives⁴⁹ but to enhance engagement and to fight shareholder apathy by nurturing dialogue within the investment chain.

In light of the above-mentioned limitations and complexities, Sergakis argues that, upon the transposition of the Shareholder Rights Directive, public enforcement should be solely confined to the imposition of sanctions and measures for the pure and formal compliance with disclosure duties. In other words, it is only the complete omission to produce a statement or to explain non-compliance, following the 'comply or explain' principle, that should trigger regulatory sanctions and not the content of such declarations. This stance will enable shareholders to feel constrained to produce the required statements and to continue to nurture the dialogue and engagement with other parties without further liability or exposure concerns.

Chiu adopts the view that it would be preferable for 'points of reconciliation' to be 'constantly redrawn [between private and public enforcement] as the publicisation of norms and enforcement develops in the future in relation to shareholder conduct'.⁵⁰ This position is justified, according to Chiu, in light of the regulator's role that may have to be introduced given the lack of monitoring by dispersed saver-beneficiaries. Indeed, minority shareholders and stakeholders could, according to the same author, be protected more efficiently via the standardisation of shareholder conduct rules.

⁴⁷ Chapter 4, sec. IV.

⁴⁸ Chapter 7, sec. V.

⁴⁹ Such standardisation is also very unlikely to be achieved given the plethora of adopted strategies in the investment chain, of the various profiles of investors and of the different facets of shareholder engagement and conduct at large.

⁵⁰ Chapter 6, sec. V.

As becomes apparent, public enforcement encompasses private and public features in shareholders' duties, and the co-existence of different sources, types and aims of enforcement makes the construction of an efficient system rather complex. As Chiu mentions, 'the merging of "private shareholder conduct" with the expectations of institutions as socially representative investors has created an ambivalent issue area whose nature remains unresolved'.⁵¹ The difficulty in deciphering the current or future regulatory steps becomes more obvious if we take into consideration the importance of social enforcement against shareholders, to which our attention will now turn.

III. SOCIAL ENFORCEMENT

Aside from the growing reliance on duties found in company law or capital markets law, social norms may form a parallel framework that specifies legitimate or desired behaviour among shareholders or other company stakeholders. In their contribution, Anand and Puskas refer to the work of Amir N. Licht⁵² and stress that social norms may act as an important driver to ensure compliance with the underlying values found in various regulations. Thus, there is a symbiotic relationship between regulation and social norms, as laws can encourage the development of social norms, but the social norms that place value on subscribing to those laws are important to ensure that the laws have an effect. The interplay between legislation and social norms is interesting in relation to corporate governance in general but also in relation to institutional shareholders in particular, where the emerging stewardship agenda can be seen as a tangible sign of social norms. Moreover, Anand and Puskas argue that even in the absence of legal constraints, these norms may have a disciplining effect on the behaviour of institutional investors.⁵³

The development of social norms may not be the result of legislation alone, but also of sophisticated and indirect practices of public enforcers and market participants. In his contribution, Sergakis argues that, in order to envisage the feasibility and efficiency of enforcement in the area of shareholders' duties, a distinction must be made between traditional duties (i.e. well-known duties imposed by company and capital markets law) and emerging ones (i.e. the new disclosure duties imposed by the revised Shareholder Rights Directive related to engagement, conduct, etc.). For the former, public enforcement has served for many years as a credible means to ensure compliance and deter

⁵¹ Ibid.

⁵² Amir N. Licht, 'Social Norms and the Law: A Social Institutional Approach' (2005) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710621, 5.

⁵³ Chapter 2, sec. V.C.

violations⁵⁴ but, for the latter, the imposition of legal sanctions could have counterproductive effects in the area of shareholder engagement, which is one of the highest priorities of the corporate governance regulatory agenda at EU level. Sergakis therefore argues that for shareholder conduct duties, social enforcement⁵⁵ should be preferred since it is currently the only mechanism that can preserve their educational aspects and not transform them into liability risks for investors.

Social enforcement also presents two other advantages in relation to the role that national regulators can play in this area and their relationship with the investor community and the public at large. Sergakis underlines the importance of social enforcement so as to avoid a mechanistic reliance on regulators, which would result if market actors expected regulators to sanction such duties, thus considering themselves relieved of an ongoing engagement task. On a parallel level, he warns of the risks of regulators creating an '*ex post* certification'⁵⁶ effect for dubious or borderline investor practices in the absence of any sanctions imposed. Indeed, abstaining from sanctions could convey the message to the market that the fulfilment of these duties is presumed and that the underlying strategy is acceptable. This certification could then enable market actors to stop engaging with other parties by claiming that their policies are acceptable and that there is no scope for further engagement in the investment chain.

Notwithstanding the difficulties that arise from social enforcement, notably in light of the exclusive reliance on private parties to sanction the lack of compliance with shareholders' duties, Sergakis believes that it represents the most credible way forward, at least at this embryonic stage during which a common understanding of the content and the various facets of such duties is of utmost importance.

IV. CONCLUSION

This introductory chapter has endeavoured to gather together the various contributions in this volume on the enforcement of shareholders' duties. Well-known and emerging duties have been subject to considerable debate, with mixed views on their rationale, impact and feasibility. The enforcement of such duties is even more critical given the various rationales for the numerous

⁵⁴ See, for example, the analysis by Jennifer Payne and Elizabeth Howell in Chapter 9, sec. IV.B. about the merits of financial sanctions imposed by regulators in the area of shareholders' duties.

⁵⁵ The expected reputational sanctions on shareholders triggered by other private parties who will react to the idea that their conduct is not adequate, compliant with their duties or optimal.

⁵⁶ Chapter 7, sec. V.

enforcement mechanisms that come into play in this area. In the absence of market failure or agency problem considerations, the politicisation of shareholder engagement and the role that institutional investors exercise seem to be at the origin of the multiplication of duties.

The various enforcement mechanisms also reflect the difficulty in deciphering the respective rights of the parties harmed by violations of such duties and the legal instruments for their protection. Private enforcement has traditionally been seen as the preferred way of resolving issues arising from shareholders' duties but, as shown in this volume, the specificities of company law and intra-shareholder relationships may well prevent parties from achieving a satisfactory solution to their claim. The volume also highlights further barriers to private enforcement, related to primary EU law, shareholder identification issues and jurisdictional barriers against the background of the constant increase in cross-border investments and intermediation.

Public enforcement seems to be more prominent in the violation of duties related to capital markets law issues, therefore going beyond the private law agenda of companies and being associated with public interest considerations in capital markets, aiming to preserve investor confidence and market stability. National regulators are increasingly being granted enforcement powers, aiming to defend a 'private-public' role to the benefit of harmed private parties and the market at large. Notwithstanding the current regulatory trends in public enforcement, various authors have questioned the feasibility of such initiatives in the area of shareholder engagement duties, as provided in the Shareholder Rights Directive, by examining either the possibility of a constant dialogue between legal and social enforcement or by questioning legal enforcement as a whole in this area.