GLOBAL SHAREHOLDER STEWARDSHIP CONFERENCE

Conference Report

HOSTED BY
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REPORT BY DIONYSIA KATELOUZOU AND HENNING JACOBSEN

Introduction

Post the global financial crisis of 2007-9, policymakers increasingly supported long-term shareholder engagement by institutional investors as the linchpin of good corporate governance. The policy ramifications were manifold ranging from promoting monitoring of managerial performance under the agency-theory-inspired formula of accountability to stimulating long-term investments and embedding sustainability into investment management. In the UK, in 2009 Sir David Walker noted that had there been more rigorous oversight by major investors, the director shortcomings that led to the crisis could have been more effectively tackled [1]. Coupled with the meteoric rise of institutional investor shareholdings – most notably in the US and the UK but also in many other countries around the world – this policy impetus has led to a wide scale, global adoption of stewardship codes or principles whose shared aim, broadly speaking, is to achieve responsible management and capital allocation across the investment community to create sustainable value for beneficiaries, the economy and society [2]. This movement started in 2010 in the UK when the Financial Reporting Council (FRC) enacted the first stewardship code of its kind. Many countries have since followed suit and adopted the UK Stewardship Code as an exemplar. Despite the apparent, global convergence of stewardship codes especially in terms of their form and content, they significantly differ in application and scope. What is more, the underlying, motivational purposes of the adopting countries vary considerably.

Because of this plethora of stewardship codes already in existence and more countries considering implementing such codes, it became necessary to convene the first-of-its-kind conference, co-hosted by the Dickson Poon School Law, King's College London, the Transnational Law Institute, King's College London and the European Corporate Governance Institute (ECGI) and co-sponsored by the Dickson Poon School of Law, King's College London, the Transnational Law Institute, King's College London, the British Academy's Partnership with the Department for Business, Energy and Industrial Strategy, and the ESRC Social Science Impact Fund.

[1] David Walker, A Review of Corporate Governance in Banks and Financial Institutions (November 2009).
[2] See, for instance: the 2010 and 2012 versions of the UK Stewardship Code available at: https://www.frc.org.uk/investors/uk-stewardship-code

The conference, entitled *The Global Shareholder Stewardship Conference*, took place at King's College London on 23-24 September 2019. The conference co-organisers Dr **Dionysia Katelouzou** (Dickson Poon School of Law, King's College London) and Dr **Dan Puchniak** (Faculty of Law, National University of Singapore) gathered a collection of academics, policymakers and market players to share experiences, enhance dialogue, disseminate good practice, guide scholarship, and shape future stewardship policy through evidence-based recommendations. As became apparent during the course of the conference, the presentations and panel discussions revealed deeper issues relating to the adoption and practice of stewardship, such as, the functional varieties of stewardship leading to what some may characterise as the 'stewardship puzzle', that is, the proliferation of stewardship principles around the world despite the different corporate governance systems and ownership structures.

The conference was held in panels with contributors as they appear in this report. The overarching aim of the panels was to examine and compare national, supranational, and international stewardship principles, elaborate institutions' investment practices, showcase the impact of soft and hard regulation on current and evolving stewardship practices and understand the interaction of private and public actors in generating public policy. The findings will, therefore, contribute to current corporate governance debates and policymaking at national, supranational and international levels and will inform a wide range of academic and non-academic beneficiaries, including institutional investors, companies, and other stakeholders.

Global Shareholder Stewardship: What, Who, Why & Where

Dr **Katelouzou** opened the conference by placing it within its larger context, namely the *Global Shareholder Stewardship* research group funded by the British Academy's Partnership with the Department for Business, Energy and Industrial Strategy, the ESRC Social Science Impact Fund, The Dickson Poon School of Law and the Transnational Law Institute, King's College London. The main academic output of the *Global Shareholder Stewardship* is to publish a handbook currently entitled *Global Shareholder Stewardship: Complexities, Challenges and Possibilities*, while the grander aim of the project – by extension, the conference – is to bring academics, policymakers and practitioners to discuss stewardship in practice and drive forward stewardship policy through evidence-based recommendations.

In her opening remarks, Katelouzou set the tone for the forthcoming conference by answering some basic questions concerning stewardship. Stewardship has been mainly perceived and exercised as a corporate governance mechanism for institutional investors to improve the performance of their investee companies and thereby creating financial returns for their beneficiaries. Stewardship, therefore, is centred on two relationships: one between the multiple actors of the long investment chain – asset managers, asset owners and beneficiaries – and the other between the investor who holds equity and the investee company. Both relationships have private and public aspects which need to be taken into account if stewardship is to be promoted and practiced. Katelouzou then identified the relevant players of the stewardship movement, that is the authors of the various codes, the stewards themselves and the 'for whom' stewardship activities should be undertaken. Most national stewardship codes were introduced by investor and industry associations themselves, so they are a form of self-regulation. The stewards, that are being referred to as signatories by some codes, depend on the scope of each code, which differs from country to country. Most of the codes mainly apply to asset owners, such as pension funds, insurance companies, investment trusts and other collective investment vehicles, and asset managers, while some others also apply by extension to entities providing services to the institutional investment community including investment consultants and proxy advisors. As for whom stewardship is undertaken, this is a more diffuse question, Katelouzou notes. This will invariably depend on the scope and content of each code. Most stewardship codes place the interests of investee companies and those of investors' beneficiaries at the centre stage of stewardship activities, but there is an increasing trend to emphasise on social and environmental issues and place stewardship as a response to market-wide and systemic risks.

After having set the basic foundations of the conference, Katelouzou cautioned that the over the past three years we have witnessed increasing regulatory complexity in the context of stewardship that goes beyond corporate governance. Consequently, the stewardship framework Katelouzou outlined above might not be as clear-cut. Katelouzou provided two examples to highlight this. First, never before companies and investors showed so much awareness about their role in society. In August 2019, the American Business Roundtable, an association of CEO's of large American companies endorsed the commitment of meeting the needs of all stakeholders [3]. This includes generating long-term value of the shareholders and a commitment to an effective engagement with companies. Even in countries with a traditionally shareholder-centred approach to corporate law and corporate governance, such as the UK and the US, the idea of stewardship specifically relating to environmental, social and governance (ESG) factors takes prominence. This, of course, has also an impact on how stewardship is perceived in stakeholder-oriented countries, such as Germany, Switzerland, Italy and the Netherlands, while countries like Norway, on the other hand, is more focused on incorporating social and ecological considerations into the stewardship equation. Another example of how the picture concerning stewardship codes gets more complicated over time is the varying enforcement approaches that the different codes have adopted. Some stewardship codes emanate from industry initiatives with rather toothless enforcement mechanisms, while other codes have been adopted by regulatory bodies like the FRC in the UK. In short, Katelouzou concludes, the whole stewardship theme is much more complex than it seems.

Dr **Dan Puchniak** followed with his opening presentation posing the question whether the UK Stewardship Code 2012 has indeed gone global or whether a phenomenon of 'faux convergence' is occurring. Having, for instance, investigated several Asian countries Puchniak found a patchwork of perspectives and underlying motivations in adopting stewardship codes. That begs the question: 'are we even talking about the same thing from jurisdiction to jurisdiction?' On its face, the UK Stewardship Code 2012 seems to be the gold standard followed in almost every country that has adopted such a code. For instance, the 2012 version of the UK Stewardship Code incorporates seven principles. Many countries have followed the same example both in terms of form and substance. Yet, not every country is like the UK; the countries' respective market structures, among other factors, differ. For instance, in the UK, the market and shareholder flow has been clogged with institutional investors, therefore, the stewardship code forms part of the larger toolbox at investors' disposal. Other countries, in contrast, have different market structures, such as concentrated shareholdings dominated by states, families and controlling shareholders that might necessitate other responses than a UK-style stewardship code. Even though the equity holdings of institutional investors are rising around the world, they cannot always act as stewards, especially in countries they make up only a small fraction of the market capitalisation. Given the differences in market and ownership structures worldwide, there must be some other factors driving the widespread adoption of UK-style stewardship codes. Puchniak posed the question whether there is an element of 'halo signalling' driving the development of stewardship codes, meaning that countries want to be a part of the 'good corporate governance club.'

[3] https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans

All this taken together seems to suggest that the UK model is turned on its head. In Singapore, for instance, the Stewardship Code is used to entrench family and state control – an occurrence beyond contemplation in the UK. On the surface, therefore, there are a lot of similarities between stewardship codes. However, with a deeper analysis, differences emerge. For Puchniak, this is a specie of 'faux convergence.' To further unpack this, more jurisdictions need to be examined, concluded Puchniak.

The first two conference panels focused on stewardship codes across Europe, moderated by **Monica Mee** (Pure Consulting) and **David Frick** (Nestlé S.A.), respectively.

Shareholder Stewardship in Europe (1): UK | Netherlands | Denmark

The natural starting point for the analysis of worldwide stewardship, the UK, was provided by Dr **Eva Micheler** (Department of Law, London School of Economics and Political Science). Her presentation, T*he UK Approach to Stewardship*, outlined the work the UK government has done in this field and investigated the case for stewardship in the UK in light of the 2019 Draft Stewardship Code [4]. As commonly known, the UK 2010 code (revised in 2012) was introduced in the wake of the financial crisis. The Code forms part of the bigger governmental agenda whose aim is to deliver long-term sustainable financial gains for the economy and society as well as providing oversight of businesses that operate in the UK. But there is a 'triple bottom line', according to Micheler, if it was to be believed that the UK Stewardship Code contributes to this bigger picture. There are three elements to this bottom line: (i) investors are interested in long-term sustainable growth; (ii) issuers are better off if they receive oversight, provided that it is orientated towards long-term sustainable goals; and (iii) the public which experienced the financial crisis of 2007-9 and the ensuing austerity is better off with a stable economy which can be achieved if business is conducted in a long-term sustainable way. From this, it is evident that stewardship in the UK is a market-driven concept in the sense that (i) the Code supplies the market with information which enables market participants to make better decisions; (ii) participants demand better decision-making from corporate boards; and (iii) as a result, companies, beneficiaries and society benefit.

Pursuant to the bigger picture agenda, the 2012 Code (in force at the time of the conference) has a broad catchment area and applies to institutional investors, including asset owners and asset managers. The main aim of the 2012 Code is to encourage institutional investors to engage in stewardship. While that aim remains the same, the 2019 Draft Code (and the now adopted 2020 Code) additionally attempts to stimulate the demand for stewardship. Firstly, the Financial Conduct Authority (FCA) and the FRC do this by staking out the case for stewardship claiming that stewardship is beneficial for investee companies financially. The regulatory bodies

[4] The revisions have now been adopted to the UK Stewardship Code 2020, available at https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Final2.pdf

do point towards to empirical evidence showing that where asset managers engage more deeply with investee companies, these companies are more likely to pursue more innovative strategies [5]. Micheler coined this the 'financial case' for stewardship. Nevertheless, her analysis shadows doubt over whether there is a financial case indeed and cites a study demonstrating there is no evidence that high-sustainability funds outperform low-sustainability funds.

In addition, the FCA and the FRC state that the responsible allocation which stewardship spurs, creates sustainable value not only for beneficiaries, but also for the economy and society [6]. Micheler identified this as the 'right thing to do' – a case which encompasses not just monetary gains, but also ethical rewards. While finding the financial case for stewardship unpersuasive, Micheler argues that there is a case for the latter. By way of example, large portfolio investors like the Norwegian Sovereign Wealth Fund invest not only for monetary gains, but also incorporate ESG considerations into their investment policy. Her analysis then raised the question of whether the UK government is 'barking up the wrong tree' by staking out a financial case for stewardship. However, at the same time, emphasising on ESG factors might drown out the corporate governance element – the cornerstone of stewardship – from the Code. Pension trustees, for example, operate within the boundaries of financial materiality. If the costs of engaging with ESG activity negatively affect returns, the figures will prevail. However, an important factor the market players care about is tax-efficiency. As a financial stakeholder, Micheler states, that perhaps the government has distorted the market and deprived it of oversight by handing out tax benefits. Micheler proposes a solution that these tax benefits already existing in the market should be contingent upon incorporating ESG factors into the stewardship and investment portfolios. This is likely to generate a stronger demand for stewardship in the already distorted 'market for stewardship'.

Professor **Christoph van der Elst** (University of Tilburg, University of Gent and ECGI) followed with his presentation: *Shareholder Stewardship in the Netherlands*. Van der Elst divided his presentation into three core elements: (i) stewardship in the legal framework; (ii) stewardship in action; and (iii) discussion and conclusion. Before entering into the substantive discussion on the topic, Van der Elst laid out the corporate governance framework in the Netherlands, pointing to the traditional stakeholder approach to corporate governance and the role of general shareholder meetings vis-à-vis the role of the two boards in Dutch companies. Van der Elst then moved to discussing the Dutch Stewardship Code which was introduced in 2018 by the corporate governance forum, Eumedion. The Dutch Stewardship Code is, therefore, a private initiative and unlike the Dutch Corporate Governance Code does not form a part of the mandatory corporate governance framework in the Netherlands. The Code contains 11 principles accompanied with a guidance much like the UK Stewardship Code of 2012. In crude terms, there are two key elements related to the stewardship role of investors (asset owners and asset managers): (i) voting; and (ii) engagement. The latter comprises of the responsibility of institutional investors to establish a meaningful dialogue with the board of the investee companies. With regards to voting at annual general meetings (AGMs), investors must exercise their voting rights in an informed manner, publicly disclose their votes, and explain their reasoning when they vote against a particular management resolution or withhold their votes.

[5] FCA and FRC, 'Building a regulatory framework for effective stewardship', Discussion Paper, DP 19/1, January 2019, para 3.7, available at https://www.fca.org.uk/publication/discussion/dp19-01.pdf
[6] Ibid.

After having set out the basics of the Dutch stewardship framework, van der Elst moved on to consider stewardship in action. Along with Dr **Anne Lafarre** (University of Tilburg), van der Elst studied the minutes for all AGMs and EGMs of 29 Dutch listed companies between 2015 and 2019. The study reveals stable, high turnouts in Dutch general meeting at around 70 per cent. In terms of voting items, investors take an active stance on issues like remuneration of board members and change of article associations. Van der Elst and Lafarre also studied the voting patterns of the Eumedion members and found that when it comes to the approval of remuneration policy the average number of opposing Eumedion members is significantly higher than the total number of institutional investors that voted against the policy. This may suggest that the Dutch Stewardship Code may have an impact on voting practices, but van der Elst points out that prior to these general meetings in which all the voting takes place there is much networking and collaboration between institutional investors. In sum, therefore, van der Elst draws the conclusion that even though institutional investors take their stewardship role seriously, a lot is going behind the scenes that cannot be accounted for in this empirical study. For instance, what regularly occurs in practice is that the board withdraws contentious items from the agenda between the publication of the meeting notice and the actual meeting, effectively preventing a discussion of the matter in plenary.

Professor **Hanne Birkmose** (Department of Law, Aarhus University) took the conference northbound with her presentation: *The Danish Stewardship Code – The Past, Present and the Future.* Similar to many other stewardship codes, the Danish version was introduced in the aftermath of the financial crisis. The Code's aim is – like most codes – to promote the long-term value creation in Danish listed companies, thereby maximising long-term returns for investors. From the outset, Birkmose noted that the success of the Danish Code is subject to two major factors, namely (i) the regulatory framework which should allow institutional investors to contribute to and maintain good corporate governance in their investee companies; and (ii) that the institutional investors pull stewardship close to their heart. Recent experience, however, suggests that the latter may be a long haul, Birkmose claims.

Starting with the Danish regulatory framework, Birkmose stated that the influence institutional investors can exert on the corporate governance practices of listed companies largely depends on their formal rights at AGMs. In short, Danish shareholders are granted significant powers which not only enable them to monitor and control the corporate governance arrangements of their investee companies but also to shape the internal corporate governance rules. Despite these considerable formal powers, however, shareholder engagement in Denmark has been traditionally at low levels. Against this backdrop, the adoption of the Danish Stewardship Code was a welcomed addition to the Danish corporate governance scene. Like its counterparts, the Danish Stewardship Code is aimed at institutional investors of listed companies in Denmark. Notwithstanding the lack of an established definition of the term, the drafter of the code – the Danish Committee on Corporate Governance – enlisted investment funds, insurance companies, investment firms, pension funds, financial institutions, asset owners and asset managers. Apart from the lack of fiduciary duties in Danish law (the obligation of institutional investors to manage funds on behalf of their clients is contractual in origin), the Danish Code closely resembles that of the UK. A key difference, however, between the two codes is the principle of proportionality which is not present in the UK Code. The principle provides that the exercise and the extent of stewardship activities must be considered in light of factors encompassed in the proportionality principle such as: the portfolio allocation, the investment strategy ranging from passive to active and the number of shares held in a given company.

Effectively, the principle acknowledges that undertaking stewardship activities might not always be a rational choice and should be assessed on a case-by-case basis. While the principle is not found in the UK Code, the UK 'comply or explain' principle carries an implicit element of proportionality, Birkmose states. In any event, it is clear that the Danish issuer intended not to overburden the institutional investors. Finally, Birkmose predicted that there would have been more mention of the beneficiaries had the Code carried a fiduciary element.

Assistant Professor **Marina Madsen** (Department of Law, Aarhus University) held a subsequent presentation on the application of the Danish Stewardship Code. To better understand the Code, it is necessary to examine the consultation preceding the introduction of the Code, Madsen claimed. Only 15 responses were received indicating that the Code initially gained little traction and enthusiasm from the industry. A review of the responses, however, demonstrates an overall positive attitude to the Code. The critical remarks made mainly revolved around the limited geographical scope (the Code only applies to Danish investors' investments in Danish listed companies) and Principles 5 and 6 concerning voting policy and conflict of interest respectively. In their joint study, Birkmose and Madsen examined the signatories' statements of years 2017 and 2018. Overall, they found a high level of compliance with the stewardship principles and reported that the consultation concerns have been put at ease by signatories as there was a decrease in the percentage of investors who only 'complies in part' with Principles 5 and 6. Therefore, on a general basis – and despite some initial reluctance – the Danish investment community had reacted positively to the Code. Having said that, Madsen envisages that the newly transposed Shareholder Rights Directive II (SRD II) throws the future of the Code into question. For instance, the target group, that is Danish institutional investors, is largely identical between the two regulatory initiatives. It is likely, therefore, that in the wake of SRD II, there will be little room for the Danish Stewardship Code.

Monica Mee (Pure Consulting), also moderator of this first panel, addressed some of the aspects of stewardship in Norway. Mee highlighted that stewardship in Norway is very fragmented, but the most important connecting factor is the idea of responsible ownership. Her co-authored study with Professor **Jukka Mähönen** (University of Oslo) and Professor **Beate Sjåfjell** (University of Oslo) identifies the 2003 'industry recommendation' issued by the board of the Norwegian Fund and Asset Manager Association, intended as an implementation of the EFAMA 2011 Code for External Governance [7], as a first, yet very tentative stewardship step. Admittedly, Norway is very much still influenced by the corporate governance thinking based on and reinforcing the norm of shareholder primacy. The true frontrunners of sustainable finance are, according to Mee, the board rather than the investors. In her critical approach Mee notes that stewardship must not be allowed to misdirect attention from core company law issues, including the duties of the board, if the aim is to ensure the contribution of companies to the necessary transition to sustainability. Stewardship has the potential to make a positive contribution but that requires that it clearly distances itself from shareholder primacy and supports the board's role as a driving force for sustainable business.

[7] EFAMA, 'EFAMA Code for External Governance' (2011), <https://www.efama.org/Publications/Public/Corporate_Governance/11-4035%20EFAMA%20ECG_final_6%20April%202011%20v2.pdf>

Shareholder Stewardship in Europe (2): Switzerland | Italy | Germany

Daniel Daeniker (Homburger AG) opened the second panel with his presentation on stewardship in Switzerland. The starting point for Daeniker's analysis, based on his co-authored study with Gerhard Hertig (ETH Zurich), is the proposition that Swiss law is embedded in the continental European 'controlling shareholder' tradition which by its very nature is centred around the long-term well-being of the company. On the one hand, the country embraces the stakeholder principle which is not as dominant as in the rest of the Continent. As a result, incumbent directors are largely protected from attacks by dissident shareholders and Swiss law largely places the board(s) as the strategy-planning body of companies. In terms of the interest(s) the board(s) should serve, Swiss law remains somewhat unspecific. It states that the board 'must safeguard the interests of the company' without specifying any particular constituency. But the stakeholder principle generally pervades Swiss corporate law and practice. By extension, Swiss corporations, such as Nestlé S.A., by and large incorporate entrepreneurial goals into their articles of association.

The Swiss corporate law regime generally favours majority control, protects legacy shareholder groups (by allowing dual-class shares) and incumbent corporate boards, and has a litigation system that deters rather than encourages minority shareholders' lawsuits. Most Swiss companies, listed and unlisted alike, are family-controlled. While institutional share ownership is generally increasing, the concentration of voting rights is much less pronounced than in the US. More importantly, voting participation in Swiss shareholders' meetings has increased substantially, especially in companies with no controlling shareholders. There is also evidence of improving shareholder engagement. For instance, there is increasing dialogue between institutional investors and Swiss corporate boards, spurred mainly by foreign rather than Swiss institutional investors. Having said that, Daeniker noted that Swiss institutional investors have been less prone to engage in an active stewardship role, either in the form of exercising voting rights or other active forms of engagement. In this regard, the 'Guidelines for Institutional Investors Governing the Exercising of Participation Rights in Public Listed Companies' issued by Economiesuisse, a Swiss corporate union, in 2013 is a watered-down version of the UK Stewardship Code with a very limited impact.




Following Daeniker's presentation, Professor **Giovanni Strampelli** (Department of Law, Bocconi University) provided an overview of Italy's approach to stewardship. Strampelli began by examining the holding structures in Italian companies. It is well known that Italy has high levels of concentrated ownership. Despite this and the limited size of the Italian capital market, institutional investors are on the rise and performing an increasingly prominent role in the Italian equity market. The rising weight of institutional investors – including activist funds – within the shareholder base of Italian listed companies has been accompanied by a tendency for investors to be more active in exercising their voting rights.

In response to the challenges that greater shareholder engagement and activism bring about, *Assogestioni*, a non-profit investment association, published in 2013 its first version of the Italian Stewardship Code, following the EFAMA 2011 Code for External Governance. After the adoption of the code – in 2018 particularly – there was a record high share capital represented at AGMs and increases in institutional investor participation [8].

[8] Consob, 'Report on corporate governance of Italian listed companies', 12 (2019) <http://www.consob.it/web/consob-and-its-activities/report-on-corporate-governance>.

Notwithstanding the high levels of voting turnout on the part of institutional investors, Strampelli pointed towards the tendency of institutional investors to side with the directors in say-on-pay votes. However, the voting evidence alone does not paint the full picture. Stewardship, Strampelli argues, encompasses more than just voting; engagement and monitoring must form parts of the 'stewardship equation'. According to Strampelli, empirical evidence – albeit limited – demonstrates that private discussions between boards and institutional investors has in recent years become one of the most popular forms of shareholder engagement.

So as far as the investment landscape goes, the conventional wisdom that Italy is a country where minority shareholders and institutional investors are inadequately protected is outdated. The distinctive Italian slate voting system whereby minority shareholders may appoint at least one director on the board evidences this. Strampelli highlighted that a significant number of minority directors have been appointed by institutional investors under the coordination of *Assogestioni.* Importantly, the engagement strategy adopted by *Assogestioni* and affiliated investors is less confrontational from that usually adopted by activist hedge funds. Strampelli concluded pointing out some future directions for stewardship in Italy, such as enforcement practices and the incorporation of ESG considerations.

Professor **Georg Ringe** (Faculty of Law, University of Hamburg and ECGI) followed Strampelli by introducing an outlier in the stewardship field – Germany – to the conference discussion. Ringe commenced with an analysis of the structure of the German equity market. Traditionally, the German corporate governance regime has been regarded radically different to the UK one. Ringe put down the paradigm of the co-ordinated market economy where there are strong links between firms and controlling shareholders. A closer examination of the current trends reveals that dispersed ownership is on the increase in Germany. However, factors that differentiate Germany from the rest, most notably the UK, are (i) its rigid, civil law system; (ii) its two-board system; and (iii) the legal requirements of employee representation on the supervisory board. What is more – and what makes Germany an outlier in this respect – is the country's lack of a stewardship code. For Ringe, that raises the important question of *why* Germany has yet to adopt a stewardship code. Ringe distinguished between legal, functional and political explanations. From a legal perspective, the lack of a German stewardship code may be due, for instance, to the German board-centred corporate governance system where shareholder influence is very weak. By way of example, monitoring of managerial performance – a key corporate governance mechanism – is the sole responsibility of the supervisory board. Other legal objections include fears of jeopardising shareholder 'equality' and the right to 'remain passive' under section 54 of the German Stock Corporation Act (Aktiengesetz). Functionally, the presence of controlling shareholders may not require a stewardship code. But Ringe, noted here, that the presence of controlling shareholders in Germany is declining. Finally, Ringe offered a more refined, political, story to this puzzle. In simple terms, institutional investors only hold a small fraction of the market capitalisation in Germany. Also, there is no strong tradition of pension funds in Germany; they are mostly located overseas. Had Germany adopted a stewardship code, there would not have been that many signatories that would need to comply with it.

Another issue Ringe highlighted is that most stewardship codes are national in their geographical scope. A German stewardship code could only target small domestic funds. The government's position could therefore be interpreted as that a stewardship code would end up having limited impact. To the German government, therefore, improving the domestic corporate governance code is a more important task. Moreover, following the transposition of SRD II, it could be questioned whether it is worthwhile introducing a stewardship code in addition to a directive that largely overlaps with it. Having said that, Ringe concluded by discerning some conceivable benefits of introducing a German Stewardship Code, such as standardising market practices, clarifying reporting requirements and improving the market culture in relation to specific themes, like striving to tackle the climate crisis.

Stewardship Conversations: What Policymakers are Saying

The Global Shareholder Stewardship conference then continued with a panel session, moderated by Professor Brian Cheffins (University of Cambridge and ECGI) featuring key policymakers, international standard setters and regional industry associations.

First, **Claudia Chapman** (Financial Reporting Council), signifying a break from the preceding jurisdictional analysis, focused on the more practical experiences the FRC witnessed post-adoption of the UK Stewardship Code 2010. Contrary to perceived thinking, Chapman clarified that the UK Stewardship Code did not have its origins in the FRC. Rather, the UK Code traces its origins from an industry initiative, the Institutional Shareholders' Committee (ISC)'s statement of best practices on the responsibilities of institutional shareholders. Since its inception the ISC's code has been left largely untouched and has come to serve as a code of practice for UK asset managers and asset owners under the auspices of the FRC. Claudia questioned whether this transition was the intention behind the original ISC code, but she nevertheless reported that the UK Code had a pleasing uptake to begin with. To improve stewardship reporting and practices, the FRC adopted in 2016 a tiered system by which signatories were assessed and ranked in accordance with the quality of reporting. Many developments in the field, including the Kay Review in 2012 which uncovered a misalignment of objectives across the investment chain [9], the Law Commission Report on fiduciary duties with its emphasis on ESG [10], the SRD II and the EU Green Finance Initiative [11] triggered the FRC to revise the Code first in 2012 and again in 2019 [12]. Moreover, the rise in beneficiaries' awareness of climate change was also a factor which prompted the review of the UK Code. While climate change is an important consideration, Chapman notes, that the UK Stewardship Code has not become an 'ESG code'. To further comfort potential sceptics who have concerns that ESG might water down the potency of the more traditional metrics like risk allocation, Chapman reassured, that the 'G' – for governance – is ever much present in the new Code.

In the closing stages of her presentation, Chapman drew the attention to some significant changes to the UK Code. First, the FRC redefines stewardship to encompass not only exit, voice and engagement in equity but also in other asset classes, such as fixed income. Second, while the previous versions of the UK Code were mainly written for asset managers, the new Code expands its guidance to asset owners and develops principles for service providers, such as proxy advisors. Third, the new Code emphasises on outcomes rather than on simply reporting policies. Fourth, the new Code has ten rather than seven principles and there is a renewed emphasis on ESG, but without losing the focus on governance. Finally, the new Code departs from the traditional comply-or-explain principles and adopts an apply-and-explain approach. Chapman expects that these changes will improve stewardship reporting and practices and enhance the still young 'market for stewardship'.

[9] The Kay Review of UK Equity Markets and Long-Term Decision Making, Final Report, July 2012, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf
[10] Law Commission, Fiduciary Duties of Investment Intermediaries (Law Com No 350) 2014, available at http://www.lawcom.gov.uk/app/uploads/2015/03/lc350_fiduciary_duties.pdf
[11] See further https://ec.europa.eu/info/business-economy-euro/banking-and-finance/green-finance_en
[12] Following the conference, the 2019 revisions led to the adoption of the UK 2020 Stewardship Code.




Toshitake Inoue (Financial Services Agency Japan) followed by offering his regulatory insights on the Japanese Stewardship Code which recently marked its 5-year anniversary. Contextually, the Japanese Code is part of a giant leap in the Japanese corporate governance reform. Prime Minister Shinzō Abe had at the time made it an important component of his economic revitalisation strategy. Japan is an outlier in this regard because it is the only country that introduced a Stewardship Code before a Corporate Governance Code. This is perhaps due to the fact that it was easier for the Financial Services Agency (FSA) to introduce a Stewardship Code because institutional investors are directly under its supervision. Like most codes, the Japanese one has seven principles. But despite some apparent similarities with its UK counterpart, the Japanese Code puts emphasis on 'constructive dialogue' between investors and companies and lacks the escalation principle of the UK code, while the 2017 version also makes reference to ESG. Since its introduction, the Japanese Code has seen an impressive rise in signatories from 127 in May 2014 to 256 in August 2019. While many signatories are overseas investors, they account for 46% of the total market participants in Japan; a high number compared to other jurisdictions. The impact of the Code is clearly discernible at proxy voting disclosure by institutional investors. Inoue presented evidence showing that while in 2016 most institutional investors were disclosing on an aggregate basis, after the revised 2017 Code, which stipulates disclosure of voting on an individual agenda item basis (Principle 5), there has been a dramatic increase in the number of investors disclosing individual voting items. Evidence also shows an increase in the 'against' voting rate of Japanese institutional investors on the takeover defence plan agenda following the introduction of the Japanese Corporate Governance and Stewardship Codes.

Despite these improved stewardship practices, Inoue noted that the quality of stewardship reporting varies widely by investor. There are some investors which disclose some good examples of actual engagement with investee companies, while others disclose their stewardship activities in a very abstract, superficial way, or disclose nothing. Inoue pointed out that the FSA is currently focusing, among others, on how to improve the quality of reporting. There is a plan to review the Stewardship Code in 2020 and the recommended directions target all participants of the investment chain. The issues currently considered include: (i) how asset managers can improve disclosure of voting decisions and stewardship activities; (ii) how asset owners (especially corporate pension funds) can support stewardship activities and collaborate with the business sector and other stakeholders; (iii) how proxy advisors can secure sufficient and proper organisational structures, disclose their processes for developing voting recommendations, and proactively engage with companies; (iv) and, finally, how investment consultants can manage conflicts of interests and disclose stewardship activities. The new Stewardship Code is expected to be published in spring 2020.

Chris Hodge (International Corporate Governance Network) who chairs the ICGN Global Stewardship Code Network in his presentation noted that clearly there are similarities and differences among the various stewardship codes. The ICGN itself introduced some preliminary stewardship principles in 2003 which after many revisions culminated to the ICGN Global Stewardship Principles in 2016. The authors of the various codes vary widely from industry associations to stock exchanges and regulators and this variation has an impact on the mechanics of the codes and on what can achieve in terms of objectives, Hodge noted. For instance, when a stewardship code forms part of a wider political agenda, as is the case with Japan, more stringent requirements on reporting can be imposed. But, on the other hand, the strength of industry-led stewardship initiatives lies in the level of commitment one can get from signatories. The UK code has so far dealt with processes, not with outcomes, and this is why, according to Hodge, the UK model was adopted so easily by other countries. With regards to the codes' content and specificity, they broadly all cover the same themes. More fundamentally, Hodge argued that the underlying motives for adopting stewardship codes are the same, namely providing a means of monitoring to shareholders by giving them a greater voice and a common agenda relating to corporate governance matters, while at the same time promoting greater accountability across the investment chain. However, this latter feature of stewardship is likely to be dysfunctional, according to Hodge, if there is no demand for stewardship. In the final stages of his presentation, Hodge pointed out the important strand of making 'responsible investment' an integral part of stewardship codes, citing South Africa as the obvious example.

As a representative of the industry, **Aleksandra Palinska** (European Fund & Asset Management Association) from the outset of her presentation emphasised that one of the key EFAMA's aims, on behalf of asset managers, is to establish constructive dialogue with regulators on how to finesse stewardship activities. EFAMA adopted in 2011 the Code for External Governance, but later revised it to a Stewardship Code so as to encompass monitoring, engagement and exercise of voting rights and bring it in line with SRD II. The aim of the EFAMA's code, Palinska noted, is to help asset managers to engage to a greater extent with investee companies and promote environmental and social considerations when exercising stewardship activities on behalf of their clients. Palinska observed that adherence to this industry code has been varied, but in recent months there has been a progressive uptake, in part because of the new obligations imposed by SRD II.

Shareholder Stewardship in North America and Australia

Professor **Jill Fisch** (University of Pennsylvania Law School and ECGI) opened up the first panel concerning stewardship outside Europe, moderated by **Rebecca Christie** (Bruegel, European Think Tank). Fisch, in her presentation, *The Overstated Stewardship Potential of Index Funds*, focused on the specific role of index funds and the compatibility of their business model with firm-specific stewardship. First, Fisch set out the stewardship background in the US, a market where institutional investors own approximately 70% of the stock of large public companies. Similar to Germany, the US does not have a stewardship code. Rather the Investor Stewardship Group (ISG), a private group of institutional investors was formed in 2017 for the purpose of establishing 'the Framework for US Stewardship and Governance' [13]. Whether the ISG framework will stimulate a meaningful change in the stewardship function of asset managers in the US remains to be seen, however, particularly because, although the signatories include several major asset managers, to date, the total number of signatories is limited.

Fisch underscored that although the business models of institutional investors vary considerably, the calls for more stewardship activities by these investors do not distinguish between different investor types. Fisch observes that index funds are ill-equipped to undertake firm-specific stewardship roles for two main reasons. The first is that, because the investment model of index funds is to track an index passively, the advisers of the fund, unlike active managers, have no reason to engage in firm-specific research and analysis to inform their investment decisions. As a result, their knowledge base of the individual firms in their portfolio is relatively limited. The second reason is that the fees charged by index funds to investors are very low, limiting the funds available for stewardship. Despite these two deterring factors, index funds can, and increasingly do, engage in some level of stewardship that is cost-effective within their existing business model. Notably, even this level of engagement may present challenges. For instance, one problem with broad-based governance initiatives is the possibility that one size does not fit all, and determining whether a governance reform will enhance value at a particular company may require firm-specific knowledge. Further, to the extent that stewardship requires investors to pursue broad societal goals or to balance economic and non-economic objectives, index funds lack the tools to do so in a way that is faithful to the interests of their beneficiaries. Fisch noted that one possible solution is empowering mutual fund beneficiaries to determine or oversee the stewardship objectives of their asset managers but highlighted reasons that this approach may not be efficient or cost-effective. She concluded, overall that mandated investor stewardship should be handled with care.

Tim Bowley (Law School, University of Sydney) succeeded Fisch by taking the audience across the Pacific with his presentation: *Collective Activism and Shareholder Stewardship – The Australian Experience.* Bowley highlighted that the financial crisis gave rise to two competing narratives about shareholders and their engagement in corporate governance: (i) the US narrative postulating that shareholders were the instigators of the crisis by fostering excessive risk-taking; and (ii) the UK (more positive) narrative which perceived the real problem to be the lack of shareholder engagement in corporate governance affairs. The latter narrative inspired around 20 countries to adopt stewardship codes, Australia being one of them. By international standards, Australia was late in adopting a stewardship code. Bowley puts that down to the fact that the Australian economy was left relatively unscathed from the 2007-9 financial crisis. Two industry-led stewardship codes, one by the Financial Services Council (FSC), the principal representative body for asset managers, and the other by the Australian Council of Superannuation Investors (ASCI) were published in 2017 and 2018, respectively. The FSC code is non-prescriptive in its format and merely lays down a disclosure approach related to stewardship activities on an 'if not, why not' basis.

[13] Investor Stewardship Group 'About the Investor Stewardship Group and the Framework for U.S. Stewardship and Governance' https://isgframework.org/ accessed 25 Nov. 2019.

The FSC code notes that asset managers should consider disclosing their approach to matters like collaborative action with other investors and ESG considerations but does not prescribe them to do so. Contrastingly, the ASCI code is more in line with the codes previously examined comprising of six, concrete principles and steering the pension fund investors towards considering ESG issues. Although they are non-mandatory and non-prescriptive, both the FSC code and the ACSI code assume they will improve stewardship practices by requiring investors to disclose their approach to stewardship.

Bowley then moved to examining collective shareholder action in Australia. While in principle Australia offers a collective action-friendly environment due to its high levels of institutional shareholders and strong minority shareholder rights, the study conducted with Professor **Jennifer Hill** (Faculty of Law, Monash University) reveals that the Australian stewardship codes have not contributed to higher levels of shareholder collection action. None of the Australian stewardship codes prescribe in detail what is expected of investors in terms of collective action and the institutional investors' stewardship statements suggest that they reserve direct forms of collective action for serious governance concerns only. Instead, investors wield the power through intermediaries like industry bodies and engagement firms, the study claims. Unsurprisingly to Bowley, in such cases the investor does not bear the cost of direct engagement related to initiating and co-ordinating the intervention.

Shareholder Stewardship in Asia (1): Japan | Korea | Taiwan

Subsequently the conference embarked on a fascinating journey throughout Asia. Assistant Professor **Alan Koh** (Nanyang Business School) opened the first Asian panel with his presentation on stewardship in the Japanese context. Koh started by highlighting that Japan is unique in terms of corporate governance. Japanese companies are cash rich, risk-averse and long-term in focus. This phenomenon is supported by employment management and the stable shareholding system. To change the status quo, Prime Minister Abe – with his Revitalisation Strategy – aimed to mobilise institutional investors to more effectively discipline management for the purpose of meeting shareholders' interests. In this context the Japanese Stewardship code was introduced in 2014 and revised in 2017. The structure of the Japanese code resembles that of the UK 2010/2012 Code: it has seven principles with guidance to each principle, but its content is more company-friendly. The Japanese code is a soft-law instrument: it adopts the 'comply-or-explain' principle and is, therefore, less coercive. The Code encourages institutional investors to engage companies in the long-term. This enables investors to exert pressure on management to put the cash reserves in circulation to boost productivity and earnings. So, oddly enough, while being much like the UK Code in terms of its content, the Japanese Code comes from a completely different starting point, that is promoting shareholder-oriented corporate governance and short-termism rather than aiming for long-termism as with other stewardship codes around the world.

Succeeding Koh was Professor **Sang Yop Kang** (School of Transnational Law, Peking University and ECGI) with his *Stewardship in Korea and Corporate Governance Implications* presentation. After underscoring that shareholder stewardship and shareholder activism bear almost the same meaning in Korea, Kang laid down the basic groundwork for the Korean stewardship framework. Korea is dominated by family-controlled groups – Samsung is an obvious example here. In addition, the National Pension Service (NPS), which is a quasi-governmental agency, is the largest institutional investor in the country. NPS makes up such a large proportion of the public equity market in South Korea that Kang chose to term the agency as 'a whale in a well'. As an effect, other institutional investors do not undertake any stewardship activities because they only make up a small fraction of the market capitalisation. In addition, the corporate law in the country impedes shareholder activism and stewardship in many ways. For instance, there is very weak private enforcement, very little derivative actions and shareholder collective action is almost non-existent.

Kang then focused on the potential stewardship role of NPS. The government agency frequently advocates shareholder wealth maximization as a principal corporate-governance norm. However, since the beneficiaries of NPS are virtually the entire Korean population, it is often – implicitly or expressly – assumed that the NPS' investment objective is the promotion of shareholder value maximization. Kang demonstrated that the deviation from profit maximization could be amplified by numerous factors including, but not limited to (i) the NPS fund managers' low level of compensation, (ii) the NPS' lack of political independence from the government, and (iii) its strong emphasis on ESG factors. ESG-related activism can be a means to minimize externalities and market failures. However, Kang warned that due to the open-ended scope of ESG, NPS has much discretion to guide stewardship action into directions of its choosing. NPS also suffers from an inherent corporate governance problem, that is the lack of independence from the government as well as the high chance of the blind support of a specific political creed and ideology that may substantially hurt the financial performance of NPS. Shareholder stewardship, he concluded, may therefore be a rather farfetched idea in Korea.

Professor **Andrew Jen-Guang Lin** (College of Law, National University of Taiwan) concluded the opening panel on stewardship in Asia with his presentation on *An Assessment of Taiwan's Shareholder Stewardship Code*. In 2016 the country, after having closely monitored the stewardship developments globally, adopted the *Stewardship Principles for Institutional Investors*. Not unlike many other codes, the Taiwan Stewardship Code was modelled after the UK Code. The impetus behind the adoption of the Taiwan Stewardship Code was to encourage institutional investors to play their corporate governance roles as good stewards. The current ownership structure of the Taiwanese market may support this choice. While the majority of listed domestic companies have a rather concentrated structured, domestic and foreign institutional investors have increased their presence especially in large listed companies. As of November 2019, foreign institutional investors hold roughly 40.6 per cent of stock market value. In 2018, domestic and foreign institutional investors together accounted for 40.2 per cent of trading value.

The code lays down several ‘major duties’ of institutional investors but following the UK Code it adopts the ‘comply or explain’ approach. The code contains six principles and supporting guidance. As of 10 September 2019, Lin reported that 149 domestic and foreign investors have signed the Code, many of whom have announced to launch sustainable investment policies as a response to the adoption of the Code. Lin concluded his presentation looking at the potential role of the Securities and Futures Investors Protection Centre (SFIPC), a nonprofit and nongovernmental organization, that provides investor protection services, such as class actions and derivative suits, as an alternative model for stewardship. For instance, SFIPC, being a shareholder in almost every public company, can get involved in general meetings acting as a good steward. Lin, however, poses the question of *who monitors the stewards*. Lin underscores that, unlike the corporate governance code where there are many mechanisms to ensure that a company complies with and implements good governance standards, there is no effective mechanism to ensure that institutional investors comply with the stewardship code after becoming a signatory. SFIPC, therefore, may be a functional substitute for stewardship worth promoting.

Shareholder Stewardship in Asia (2): Singapore | Hong Kong | Malaysia

The second day of the conference commenced with the second panel on Asian stewardship codes, moderated by SAU-Wing MAK (Securities and Futures Commission, Hong Kong).

First, **Samantha Tang** (Faculty of Law, National University of Singapore) considered shareholder stewardship in Singapore. Economically speaking, the country has experienced a meteoric rise in the past 20 years that has made it rich on human resources. However, being a leading, yet small economy poses its own problems. Central in this context is the dilemma between providing a strong signal to the market players and other countries that Singapore takes corporate governance seriously, yet avoiding imposing too onerous requirements on market players which may hamper economic development. This led Tang to explore what she and Professor Dan Puchniak term in their study, *Singapore’s Puzzling Embrace of Shareholder Stewardship: A Successful Secret*, as the three puzzles to why Singapore has adopted a stewardship code.

Firstly, Singapore faces none of the corporate governance problems that triggered the development of the UK stewardship code, like institutional investors holding the majority of shares. As opposed to the Anglo-American paradigm, concentrated shareholding dominates in Singapore. Controlling shareholders naturally have the mandate to more readily intervene, like dismissing directors, which illustrates that they are capable of acting like stewards themselves. Singaporean institutional investors, on the other hand, play a minor role. As aptly pointed out by Tang: 'they are neither the problem nor the solution'. Instead, Temasek Holding which is wholly owned by the Singapore government is the controlling shareholder of most of Singapore's largest listed companies and drives stewardship in Singapore writing the rules for how institutional investors should engage with controlling shareholders (i.e., Stewardship Asia). With regards to the first puzzle, Singapore does not need the stewardship code, rather its publication is a measure of 'halo signaling', Tang concluded. Following on from that to the second puzzle, Singapore has made a stewardship code without any teeth. There is (i) no regulatory authority overseeing its operations like in the UK; and (ii) there is no signatory system. Tang suspected such a toothless Code aims to prevent undue disruption of an already well-functioning corporate governance system. The final puzzle, which incidentally highlights that Singapore is a hub for corporate governance, is the development of the Singapore Family Stewardship Code – the first of its kind. Directed at family controlling shareholders, the Code encourages them to be good 'stewards' of their companies. The Code, for instance, encourages family controllers to preserve the corporate heritage of the company and pass it on to future generations. As mentioned, in the Singaporean context this makes sense as family firms make up 60.8 per cent of public listed companies. But the vision of 'stewardship' endorsed by this Code seems dramatically different from the concept of institutional investor 'stewardship' that lies at the heart of the UK Code.

So, linking it back to the initial question – why does Singapore have a carbon-copy of the UK Code? Explained in short, Singapore has a strong incentive to create a code that allows institutional investors (and family firms) to comply with it effortlessly which helps promote Singapore as a jurisdiction where it is easy to do business. The Singapore Stewardship Code is not designed to disrupt management or promote powerful shareholder activism, Tang along with Puchniak concluded.

Professor **David Donald** (Faculty of Law, Chinese University of Hong Kong) followed with his take on stewardship in Hong Kong. From the outset Donald made a distinction between (i) the capital-seeking shareholder; and (ii) the 'entrepreneurial owner', families or very large holding companies who are active, informed and long-term and thereby meet the responsible ownership ideal. By virtue of Hong Kong being a former British colony, Donald was not surprised to see its Principles of Responsible Ownership closely resembling the UK Stewardship Code. One reason – Donald discerns – is because investors in Hong Kong expect to see something akin to what they receive in the better-known UK market. The market structure in Hong Kong differs, however, as dominated by family- and state-owned firms.

The business model of the International Financial Centre (IFC) explains, according to Donald, why a Hong Kong market – in which listed companies are dominated by entrepreneurial shareholders strongly committed to the long-term success of their companies - still adopts 'principles of responsible ownership' on a voluntary, comply-or-explain basis. This layer of stewardship rules will in all probability not improve shareholder engagement in Hong Kong. Given the type of shareholder controlling Hong Kong listed companies, it can be expected that responsible ownership will indeed be practiced. However, one possible side effect could be to supply institutional investors an excuse to seek more collaboration with the entrepreneurial shareholders. In that case, the Stewardship Principles could push Hong Kong shareholding toward a more financialised, short-term interest – precisely the opposite of what stewardship rules are meant to achieve. Thus Hong Kong did not adopt the Stewardship Principles to improve governance, but rather because the Principles will signal the type of rules expected internationally, even if they do not touch the substance of the market. IFC Hong Kong in this way, Donald concluded, buys into the network of leading Western law in order to protect its image, customer base and ranking, and the effect is real despite the fact that the stewardship code lacks all substance.

Concluding the second panel on stewardship in Asia with *Institutional Investor Stewardship in Malaysia: Code, Context & Challenges*, **Petrina Tan Tjin Yi** (Faculty of Law, National University of Singapore) brought her perspectives of Malaysian stewardship to the discussion. In 2014 the Malaysian Code for Institutional Investors was launched ostensibly mirroring the UK Code apart from the missing principle concerning collective action with other investors. The Code is overseen by the Institutional Investors Council Malaysia, an industry body comprising representatives from statutory bodies, government linked companies (GLCs), government linked fund managers and private funds, which was formally established in December 2017.

Even though the development of the Institutional Investors Council Malaysia was consciously tagged to industry, what constitutes industry in Malaysia is inextricably linked to the state by means of its ownership and control of GLCs, which make up a total of 42 per cent of the market capitalization in Malaysia. The Malaysian stewardship code, therefore, lacks a strong comply-or-explain approach because the GLCs are sizeable enough to handle governance issues without resorting to extreme forms of shareholder activism. Nevertheless, there is the critical question as to whether the interests of the state are aligned with those of the asset owners, the asset managers and more importantly, those of the ultimate beneficiaries or clients which are at the end of the investment chain. Tan submitted that agency conflicts exist between these parties as contrasted with the typical conceptualisation of agency conflicts between managers-shareholders and majority-minority shareholders in the extant literature. As such, Tan argued that apart from concerns about the quality of stewardship statements and ownership engagement of institutional investors, structural issues such as the prevalence of the state in the ownership and control of GLCs represents an embedded factor which significantly challenges effective stewardship practice in Malaysia. In three short words, Tan concluded that Malaysian stewardship is still a 'work in progress'.

Shareholder Stewardship in Asia (3): Thailand | India

The last panel on Asia was moderated by **Guy Jubb** (The University of Edinburgh Business School). **Patanaporn Kowpatanakit** (Faculty of Law, Chulalongkorn University) opened the panel with her *Activation of Stewardship Cultures for Institutional Investors in Thailand* presentation. Perhaps unsurprisingly, Thailand has adopted a voluntary stewardship code, titled *Investment Governance Code for Institutional Investors*, that mirrors the 'magic' seven UK stewardship principles. In terms of capital market structure, institutional investors are the driving force in Thailand along with family companies that account for 41 per cent of the market capitalisation. So far there have been 51 Thai institutional investors that have signed to the Code, most of whom are government pension funds. The Thai Code has so far mixed results, Kowpatanakit noted. Even though most of the signatories have adopted their own investment governance policies and provided reports on their compliance, it is still questionable whether they have taken active roles in implementing the principles set out in the Code. Seemingly, then, Thailand, like Malaysia, constitutes an Asian case study for a 'work in progress'.


Succeeding Kowpatanakit and concluding the journey through Asia was Professor **Umakanth Varottil** (Faculty of Law, National University of Singapore). His analysis focused on three key reasons as to why a UK-style stewardship code would not work in India. First, while the prominence of institutional investors in the UK in the context of companies with dispersed ownership inspired the UK-style stewardship code, the roles and challenges that institutional investors experience in India in the context of concentrated shareholding are considerably different. Indian companies largely display concentrated shareholdings with the dominance of either business families or the state as controlling shareholders. Yet, market and legal developments over the past decade have spurred a considerable rise in institutional shareholder activism. But still the influence of institutional investors, while gradually increasing, is insufficient to bring about the level of engagement witnessed in companies with dispersed shareholding. Second, the goals of stewardship vary from the UK, where the focus is on the long-term financial sustainability of institutional investors' beneficiaries, to India, which follows a pluralistic stakeholder approach to corporate law. Third, the traditional mode in the UK of using voluntary code-based soft law approach to implementation of stewardship is unsuitable to the Indian circumstances that steadfastly rely on mandatory rules in the area of corporate law. Given the above reasons, Varottil opposes the wholesale adoption of the UK-style stewardship code in India. Against the background of the fragmented stewardship codes introduced by the Indian insurance and pension fund regulators, the Indian regulators would do well to introduce a *sui generis* stewardship model that would fit with the Indian corporate ownership structure, legal and institutional mechanisms and corporate culture.

Shareholder Stewardship in Developing Countries Brazil | South Africa | Kenya

The subsequent panel, moderated by **Rosemary Hunter** (Fasken Attorneys), focused on stewardship in developing countries. Dr **Bruno Bastos Becker** (School of Law, São Judas University) commenced his presentation, drawing upon his paper with **Viviane Muller Prado** (Fundação Getúlio Vargas (Direito SP)); *Stewardship Codes in Brazil: Are they for Englishmen to see?* – by posing a question whether the adoption of a UK-style stewardship code in Brazil is merely for sake of appearance. Becker first provided an overview of the Brazilian market. There are currently 384 public listed companies, which are still largely concentrated. Yet, ownership concentration has significantly diminished over the last two decades and the presence of institutional investors in public equity is increasing. Investment funds, which are the focus of stewardship codes, however, do not hold a large percentage of the market capitalisation and there is therefore little space for minority shareholder activism. In addition, not many industry organisations had the clout to put forward a stewardship code. *Associação de Investidores no Mercado de Capitais* (AMEC), a small association representing 60 members, published in 2016 a stewardship code to which 18 asset management companies signed (from which 11 are domestic ones). In terms of content, like many others, the code is largely a copy-paste of the UK Code. With regards to actual stewardship there has been little reporting of stewardship activities from institutional investors. In that sense, perhaps the Brazilian Stewardship Code is only there for ‘the Englishmen to see’ which Becker argues is because of a limited capital market and high levels of market concentration in the hands of few investors.

The crucial component to the next presentation, *Encouraging Sustainable Investment in South Africa: CRISA and Beyond*, by Dr **Natania Locke** (Swinburne University of Technology and University of Johannesburg) was the emphasis on the unique social realities in the country. It is common ground that South Africa has significant socio-economic problems, including considerable inequality, crime, poverty and unemployment currently standing at 29 per cent. Grasping this unique South African context is necessary for understanding the role of shareholder stewardship in the country. In her presentation, Locke focused on the pension fund industry which accounts for 24.4 per cent of the market capitalisation. Making up a large portion of that industry is the South African Government Employees Pension Fund, one of the founding signatories of the UN Principles for Responsible Investment. The regulatory framework on stewardship in South Africa encompasses mainly two soft-law instruments, namely the Code of Responsible Investing in South Africa (CRISA) and the King IV Report on Corporate Governance for South Africa (King IV).

CRISA was the product of the Committee on Responsible Investing in South Africa, which was convened by the Institute of Directors in South Africa, a private industry body also responsible for King IV. For CRISA sign-up is completely voluntary, whilst for Johannesburg Stock Exchange listed companies, sign-up to King IV is mandatory. CRISA contains five principles, on an apply-or-explain basis, which are replete with references to sustainability, including ESG. Stewardship in South Africa is therefore directly concerned with the promotion of sustainable investment practices. King IV, on the other hand, is a corporate governance code with an innate ‘apply and explain’ principle, which applies also to institutional investors. King IV provides that the governing body of an entity that is an institutional investor must ensure that responsible investment is practiced to promote good governance and value creation, while it also includes specific guidance for retirement funds. In addition to these soft law measures, hard-law instruments, such as the Pension Funds Act of 1956, support responsible investing. South Africa, however, has a fragmented retirement fund industry. This leads to an over-reliance on investment consultants and investment managers. But beneficiaries of South African pension funds are generally passive and often ill-informed. Adding the light-touch supervision over compliance of CRISA, Locke concluded that CRISA is in need for an update.



Austin Auko (Law School, Stanford University) closed the conference’s jurisdictional segment with his *Stewardship Code in Kenya: Is the Nigh here?* presentation. Kenya’s capital market, by ways of comparison, is relatively small with only 66 listed companies and with a total market capitalization of $10m. Ownership concentration, especially in the hands of domestic institutional and individual investors, is also a notable facet to the Kenyan market. Despite having revealed the modest size of the Kenyan capital market, Auko went on to point out that minority shareholder activism, especially at AGMs, is taking place in recent years mainly due to media reports of market misconduct. In 2017 the Kenya Capital Markets Authority promulgated a stewardship code for institutional investors with the aim to encourage the institutional investment community to take action to serve as responsible stewards for their beneficiaries. The Kenyan Code unsurprisingly mirrors the UK 2012 Code but it operates on the apply and explain principle. Two years after the adoption of the Code, however, none of the 27 licensed asset managers have signed up to the Code and there has been little engagement among institutional shareholders. Auko attributed this to the lack of awareness of the statutory shareholder rights and powers and the high cost of involvement. Auko argued short-termism prevails in the Kenyan market and investors prefer not to be locked into underperforming assets and choose to exit rather than acting actively as owners. To conclude, Auko stated that even though shareholder engagement is still virtually non-existent since the Code has been launched, there is more participation to be expected.

Stewardship Conversations: What Firms and Investors are Saying

The moderator, Professor **Marco Becht** (Solvay Brussels School, Université libre de Bruxelles), opened the next panel comprising of stewardship practitioners. From the outset, Becht stated that without a collaboration between public and private sector the stewardship initiatives cannot reach fruition. Having said that, Becht made a cautionary note that in the case of asset managers, engaging with stewardship activities is a very complex issue which involves a lot of individuals and moving parts and a lot of action takes place in private.

While engaging with stewardship is generally perceived positively among the investment community, **Euan Stirling** (Aberdeen Standard Investments) clarified that no institutional investor buys shares to hold them in perpetuity. The root of their activity is capital allocation. This is why stewardship necessarily involves interaction across many teams. Stirling highlighted that for the large number of investors that operate in a passive, index-based, way stewardship is fundamentally different. Even the companies' response to passive investors is different to the response to active investors. Yet there are a number of strategies ranging between activism and complete passivity, Stirling noted. For instance, speaking up at AGMs is usually not something Stirling or his firm do. Rather they prefer to engage privately but they sometimes speak out publicly to gain the requisite traction for the issue in question.

In the same vein, **Andy Jones** (Hermes EOS)reported that they engage with all their investee companies on an annual basis. To Jones' mind, stewardship means deploying all shareholder rights available in investee firms. Topics on the stewardship agenda, in his experience, range from assessing the votes and give clients guidance based on their principles of his firm. But there are different cultures and institutional environments across the world. Jones, therefore, pointed out to the need for a global set of stewardship principles which can balance global consistency while recognising local contexts. Also, Jones highlighted that there are specific criteria for choosing their investment approach, including materiality, 'engageability' of the issue and expertise/ability to add value via engagement.

With regards to investors acting collectively, **Andy Griffiths** (Investor Forum) stated that the criteria for success are complex; there is no set recipe. However, Griffiths does find that clarity of objectives underlying the planned intervention is a crucial factor for success. Bearing this in mind, his organisation and himself engage with investors of UK listed companies. He noted that when there are a dozen investors, it is often difficult to find issues that they all agree on. Most of the time, Griffiths observed, shareholders talk in terms of symptoms and how the corporate trend within a company is shifting. If for instance a group of investors, say a dozen, complain of the same issues, it is easier to find some common ground and engage in collective action to remedy the underlying causes.

Even though every single panel of the conference was followed up by interesting and engaging conversations among the conference attendees, the nature of this panel, involving private sector participants, led to rigorous questioning and debate. A question that stood out to which the panellists offered fascinating insight concerned the specific strategy they pursue when they get a call from a client who is concerned about an investee company. In concert, Griffiths and Stirling stated that the first step is to arrange a phone call or a meeting with the chairman, or to send him/her a letter. Those sorts of mediums, in Stirling's experience, iron out the tension of the situation. Another engaging topic was regarding the effectiveness of ESG engagement. Jones gave a qualified answer stating that as Hermes EOS operates globally, different markets with a variety of priorities are at play. But like Griffiths, Jones noted that clarity of objectives is crucial to make any changes on the ESG front in investee companies. Finally, the panellists were asked what the demand-side of stewardship is like from their point of view. Stirling said it is hard to discern a distinct market pressure, so no unequivocal answer can be provided. However, Stirling suspected that clients will endeavour to build up stewardship capabilities in-house. Consequently, the demand for external stewardship services will not persist for ever, Stirling predicted. Jones, on the other hand, was more positive and noted that SRD II is likely to promote the market for stewardship in the EU.

Stewardship, Enforcement and Comparative Approaches

A panel on stewardship enforcement and comparative perspectives closed the conference. **Katelouzou** started by elaborating the relationship between SRD II and the EU Member States' stewardship codes. The former, in essence, asks institutional directors to develop and disclose an engagement policy, while also imposing certain disclosure obligations on institutional investors and asset managers. Although SRD II does not use the stewardship terminology it tacitly goes close towards the concept. Katelouzou noted that SRD II becomes a normative source in open competition, in terms of persuasiveness and attractiveness with pre-existing, national soft law instruments and highlighted that EU Member States have largely copied out the SRD II engagement and disclosure provisions without depicting any national idiosyncrasies and investor demands. This points out to the need to multiply soft law stewardship tools across the EU and nudge actors to look beyond SRD II by adding additional features of stewardship, such as ESG, via soft law.

Professor **Konstantinos Sergakis** (School of Law, University of Glasgow) contributed to this conversation by stating that it would be a shame for EU member states to kill off market initiatives, such as stewardship codes, and should instead allow the two norms to complement each other. Also, since many of these stewardship codes pre-date SRD II, they can – due to slow transposition of SRD II from the EU Member States – prepare market actors for the SRD II's eventual implementation. Sergakis concluded pointing out to the merits of refining the social enforcement of stewardship, rather than resorting to public enforcement which will shift attention to liability rather than stewardship practices.

Puchniak followed by expanding on the 'faux convergence' theory. What all the jurisdictional panels have demonstrated is that ostensibly 'seven' is the 'magic number' in terms of stewardship principles. On the face of it, there is a formulaic transplant taking place. A closer investigation of the codes, however, reveals that every jurisdiction has different motivations for adopting a stewardship code. To Puchniak, therefore, stewardship is a malleable concept. Japan, for instance, did not deploy the stewardship code to tackle short-termism which was the problem the 'founder' of the stewardship code, the UK, intended to solve, but to encourage more risk-taking. Based on all the available evidence uncovered during this two-day conference, there seems be a clear distinction between 'stewardship form' and 'stewardship function'. While, the stewardship codes might look the same, they fulfil different functions across the globe. Culture, to Puchniak at least, seems to be a key underlying driver. Take India, for example, a comply-or-explain approach has not historically worked effectively, and this has an impact on the stewardship agenda there. In South Korea, on the other hand, stewardship is utilised as a mechanism for supporting the role of the state in the equity market; this is a completely different narrative from that of India. In conclusion, Puchniak highlighted that despite ostensible convergence, stewardship is turned on its head leading to 'faux convergence' which calls for more legal and empirical analysis.

Some empirical insights on stewardship were then provided by Professor **Mathias Siems** (EUI/Durham University and ECGI). His presentation, *Textual Analysis & Networks*, drawing upon empirical work undertaken with Katelouzou, presented some key findings on whether 'formal' diffusion of stewardship norms has taken place worldwide. Using the method of content analysis to examine the text of 40 stewardship codes around the world between 1991 and 2019, Siems reported that there is some evidence that the UK is acting as a stewardship norm exporter, especially in former British colonies in Asia. But there is also evidence of diffusion from transnational stewardship initiatives, such as the EFAMA and ICGN codes and some regional clusters, such as Korea and Japan.

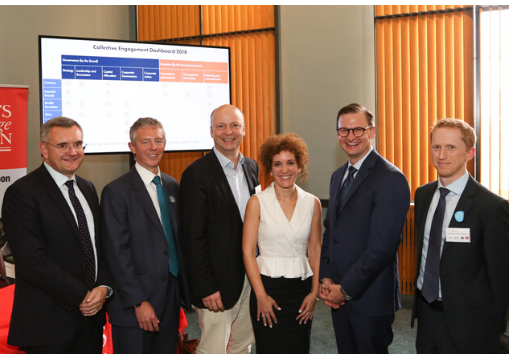



Closing Remarks

Some concluding remarks were made by Katelouzou and Puchniak. The conference provided clarity on the worldwide expansion of stewardship codes bringing together academics, national, regional and international standard setters and practitioners. Among others, it became clear through the two-day conference that even though stewardship was originally about the corporate governance role of institutional shareholders, this view is not universal. On the contrary, the broader scope of stewardship associated with the conduct of controlling shareholders appears to interestingly be more relevant and important in non-Anglo-American jurisdictions. The conference and the edited book which will emerge from it significantly contribute to the agenda of keeping stewardship research in motion through a vivid exchange of ideas, practices and policies.

Authors:

Dionysia Katelouzou is a Senior Lecturer in Law at King's College London and **Henning Jacobsen** is a student in at BPP University London.



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Contact

membership@ecgi.org

Prof. Marco Becht
Executive Director and Fellow
European Corporate Governance Institute
Tel: +32 2 550 2340
GSM: +32 478 406156
marco.becht@ecgi.org
www.ecgi.global

c/o The Royal Academies of Belgium
Palace of the Academies
Rue Ducale 1 Hertogsstraat
1000 Brussels
Belgium

Dr. Dionysia Katelouzou
Senior Lecturer in Law
King's College London
dionysia.katelouzou@kcl.ac.uk

Project website:

https://www.kcl.ac.uk/research/global-shareholder-stewardship