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ENCOURAGING INSTITUTIONAL SHAREHOLDERS TO UNDERTAKE DOUBLE-MATERIALITY-MINDED ENGAGEMENT PRACTICES THROUGH REGULATION - MUCH TO DO AND LOTS TO CONSIDER

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ABSTRACT

The European Commission's announcement in its 2021 Sustainable Finance Strategy that it will review EU stewardship and engagement suggests that it longs to see double materiality permeating engagement practices; and that it may be planning to instrumentalise the law to stimulate their undertaking analogously. This Article argues that the Commission should recommend reforming the law from the frameworks regulating institutional shareholders for their engagement practices if it aspires this law to steer them towards governing and undertaking "double-materiality-minded engagement practices". For institutional shareholders to do the former, the effect of several factors on their treatment of engagement practices and the challenges involved with governing and undertaking double-materiality-minded engagement practices must be mitigated and overcome. The efficacy of this law in helping to address these as it interacts with key EU sectoral laws lies in facilitating market-led regulation about them. However, such market-led regulation will not enable the governance and undertaking of double-materiality-minded engagement practices without changing the structures guiding institutional shareholders' treatment of engagement practices and the legal imperative for it. Care, though, should be exercised in reforming the law, for the reform must be mindful of the issues mentioned. In light of this, the Article proposes introducing forward-looking rules centred on stewardship teams and regulatory tools allowing experimentation with double-materiality-minded engagement practices.

Key words: *shareholder engagement, sustainable development, sustainable business, sustainable finance.*

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1. INTRODUCTION

Against the backdrop of realising the European Green Deal, the European Commission issued in 2021 its renewed strategy for ensuring the financial sector's contribution to financing sustainable development.[1] As part of the strategy, the Commission announced it would review the frameworks governing stewardship and engagement practices, particularly the Shareholder Rights Directive II ('SRDII'),[2] to determine the possibility of amending them to echo the EU's sustainable development objectives better.[3] Two inferences about engagement practices and the law regulating them can be drawn from the review's announcement. First, the Commission likely envisions engagement practices to be permeated by double materiality,[4] presumably to encourage the take-up of sustainable business practices. Second, the Commission may be planning to further the law's instrumentalisation to stimulate the governance and undertaking of such 'double-materiality-minded engagement practices.'[5]

This Article argues that the Commission should recommend reforming the law from these frameworks that regulate institutional shareholders for their engagement practices if the Commission aspires this law to steer them towards governing and undertaking double-materiality-minded engagement practices. Assuming their contours are fully delineated, the emergence of double-materiality-minded engagement practices governed and undertaken by institution-

[1] See European Commission: Communication from the Commission, Corporate Sustainability Reporting, Sustainability Preferences and Fiduciary Duties: Directing Finance Towards the European Green Deal (COM/2021/188 final), 21.04.2021; European Commission: Communication from the Commission, Strategy for Financing the Transition to a Sustainable Economy (COM/2021/390 final), 06.07.2021.

[2] Directive (EU) 2017/828 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 (SRDII), (OJ L 132, 20.05.2017).

[3] European Commission: Strategy for Financing (n. 1), p. 15.

[4] This refers to the imperative the Commission longs to see financial institutions following. See ibid, p. 11.

[5] The likelihood of the Commission considering the latter should not be surprising. The renewed strategy builds on the Commission's 2018 Sustainable Finance Action Plan and the 'sustainable finance framework' it aided in instituting. The Action Plan states that sectoral law's post-financial-crisis reform should be the platform upon which financial institutions should evolve to become key cogs in the transition to a 'sustainable economy,' with the sustainable finance framework amending sectoral law further to this end. See European Commission: Communication from the Commission, Action Plan: Financing Sustainable Growth (COM/2018/097 final), 08.03.2018, p. 1. The post-financial-crisis reform arguably comprises the SRDII. Since the sustainable finance framework will continue orienting sectoral law, the attention would have turned at some time to engagement practices under the SRDII.

al shareholders hinges on their eagerness and capacity to do both. However, several factors affecting institutional shareholders' treatment of engagement practices and the challenges in measuring the contribution of business into sustainable development can dampen such initiatives.[6] The efficacy of the law in question as it interacts with key EU sectoral laws in helping to address these issues lies in paving the way for the outworking of market-led regulation about them. However, such market regulation will not likely follow to the point of enabling double-materiality-minded engagement practices to occur without drastic changes in the structures guiding institutional shareholders' treatment of engagement practices and in the law's imperative about it.

Any attempts to reform the law, however, should be made prudently. EU regulators should establish key standards and criteria for double-materiality-minded engagement practices. Furthermore, they should engender the channels which will allow institutional shareholders to appraise their governance and undertaking. The Article proposes enacting procedural rules centred on institutional shareholders' stewardship teams' composition and responsibilities, and regulatory tools permitting experimentation with engagement practices.

Before proceeding forward, some reflexive remarks must be made. This Article's analysis is framed around appreciating engagement practices as a potentially positive phenomenon vis-à-vis sustainable development, provided that systemic changes in how they are treated occur. Any laws discussed are regarded as agents of causing said changes and are analysed through said framing.[7] References to 'institutional shareholders' denote asset owners and asset managers as defined in the SRDII.[8] The term 'engagement practices' encompasses several methods for exercising 'shareholder engagement' and their monitoring once delegated. Double materiality is comprehended as calling financial institutions to foster 'sustainable and inclusive growth' by meeting socio-economic wants; and safeguard their stability by incorporating the contemplation and action on ESG considerations in their decision-making and

[6] Both points were raised previously in the literature. See Balp, G., Strampelli, G.: Institutional Investor ESG Engagement: The European Experience, *European Business Organisation Law Review*, 23(4) 2022.

[7] For an insight into this positionality see Katelouzou, D.: Shareholder Stewardship: A Case of (Re)Embedding Institutional Investors and the Corporation?, in: Sjåfjell, B., Bruner, C. M. (eds.): *Cambridge Handbook of Corporate Law and Sustainability*, Cambridge: Cambridge University Press, 2019.

[8] See SRDII, Art.1.

governance.[9] The term 'ESG considerations' refers to all environmental, social, and economic matters impacting businesses or are produced by them at a rate that impacts others. Sustainable development is comprehended as a global mandate for creating a 'safe and just space' to accommodate developmental needs while responding to eco-social degradation. Comprehended like so, sustainable development necessitates developing within the planet's biophysical limits and ensuring equitable global consumption, production, and resource allocation.[10] Finally, any references to 'sustainable business practices' are signposts to corporate practices and governance furnishing or at least not harming sustainable development.[11]

The Article proceeds as follows. Following its overview in Section 2, Section 3 demonstrates the shortcomings of the EU-derived law regulating institutional shareholders for their engagement practices as it interacts with EU sectoral law in directing the governance and undertaking of double-materiality-minded engagement practices. Section 4 cogitates on reforming this law. Section 5 concludes.

2. THE EU-DERIVED LAW REGULATING INSTITUTIONAL SHAREHOLDERS FOR THEIR ENGAGEMENT PRACTICES

Though imperfect, the law examined arguably strives to sow the seeds for institutional shareholders to at least reflect on their treatment of engagement practices vis-à-vis promoting business practices which avoid causing undue harm.[12] A perusal of the law and its interaction with EU sectoral law reveals this.

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[9] European Commission: Strategy for Financing (n. 1), p. 11. The roots of double materiality date before the Sustainable Finance Strategy. See EU High-Level Expert Group on Sustainable Finance: Financing a Sustainable European Economy (Final Report), 2018.

[10] Comprehending sustainable development like so is done with a nod and a wink to corporate law studies espousing a 'strong' version of sustainable development. See, for example, Sjåfjell, B.: Taking Finance Seriously: Understanding the Financial Risks of Unsustainability, in: Alexander, K., Gargantini, M., Siri, M. (eds.): *The Cambridge Handbook of EU Sustainable Finance: Regulation, Supervision and Governance*, Cambridge: Cambridge University Press (forthcoming).

[11] Comprehending sustainable business practices like so arguably taps into understandings of 'corporate sustainability' closer to the concept of 'strong corporate sustainability'. See on this, Dyllick, T., Muff, K.: Clarifying the Meaning of Sustainable Business, *Organisation and Environment*, 29(2) 2016.

[12] Cf Johnston, A. et al.: Governing Institutional Investor Engagement: from Activism to Stewardship to Custodianship?, *Journal of Corporate Law Studies*, 22(1) 2022.

2.1. THE MAIN OBLIGATIONS

The law in question mainly comprises several obligations imposed on institutional shareholders post-SRDII's transposition.[13] The principal obligation derives from Article 3g's transposition, requiring institutional shareholders to develop, disclose publicly, and report annually on implementing an engagement policy describing the integration of shareholder engagement in their investment strategy.[14] The obligation is imposed on a comply-or-explain basis. Institutional shareholders not complying or partially complying with the obligation must disclose a statement explaining 'clearly and sufficiently' the reasons for this.[15] Full compliance entails developing, disclosing publicly, and reporting on implementing an engagement policy which captures everything the obligation states.[16] Save for these qualifications, the obligation affords institutional shareholders considerable discretion to configure their statements' and engagement policies' content. The content of their annual reports also stays at institutional shareholders' discretion.[17]

Shareholder engagement for the obligation is undefined, though Article 3g's first paragraph, as transposed, indicates several practices engagement policies must cover. They range from the methods used to monitor investee companies to how institutional shareholders exercise voting rights, communicate with directors and stakeholders, cooperate with other shareholders, and manage conflicts of interest.[18] Descriptions of monitoring must elaborate on how institutional shareholders monitor investee companies' financial and non-financial performance, strategy, governance, and impact on the environment and society.[19] However, no

[13] The analysis of the obligations in this Article is made on a high-level, cross-jurisdictional manner based on the observation that the SRDII's transposition vis-à-vis institutional shareholders' obligations was made in a 'literal' and 'minimalistic' fashion. See about this, Katelouzou, D., Sergakis, K.: When Harmonization is Not Enough: Shareholder Stewardship in the European Union, *European Business Organisation Law Review*, 22(1) 2021.

[14] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the Exercise of Certain Rights of Shareholders in Listed Companies (SRDI), (OJ L 184, 14.07.2007) - as amended by the SRDII, Art. 3g.

[15] ibid.

[16] Birkmose, H. S.: Article 3g: Engagement Policy, in: Birkmose, H. S., Sergakis, K. (eds.): *The Shareholder Rights Directive II: A Commentary*, Cheltenham: Edward Elgar Publishing Limited, 2021, p. 148.

[17] Note must be made, though, that institutional shareholders must describe their voting behaviour and report on, inter alia, how they have cast votes. See SRDI (as amended by the SRDII), Art. 3g(1)(b).

[18] ibid, Art. 3g(1)(a).

[19] ibid.

definitions are affixed to these practices. The other types of engagement practices cited and the information requiring disclosure are equally undetermined. The obligation does not demand disclosing the policies or strategies about them. Engagement policies, though, can summarise these, if not elaborate on them fully.[20] Dialogue with investee companies and relevant stakeholders may involve discussing several matters privately or publicly. However, what is specifically expected to be described about both is unclear.

The definition of stakeholders and what makes them 'relevant' to communicate with are also undetermined. Typically, stakeholders are defined as interested parties who can hold sway on or be swayed by investee companies.[21] Whether it is wise to use this typology to profile the stakeholders with whom institutional shareholders will communicate in their engagement policies and actual practice is a matter left to them to decide. Using this typology, though, is prone to exclude stakeholders lacking any 'voice' or the medium to voice themselves. Several communities across supply chains are good examples of such stakeholders.[22]

The rest of the obligations originate from the transposition of Articles 3h and 3i. These obligations are anticipated to generate, inter alia, information about the investment management intricacies dictating engagement practices' governance and undertaking.[23] The Article-3h obligation requires asset owners to disclose publicly how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, particularly long-term liabilities, and how they contribute to the medium-to-long-term performance of their assets.[24] It is not designated which investment strategy elements are or should be classified as the 'main' ones.[25] It is also up to asset owners' resolve to classify engagement practices as such an element. As seen below, the obligations implicitly raise an expectation for institutional shareholders at

[20] Birkmose (n. 16), pp. 152-159.

[21] This definition is usually based on Freeman's stakeholder theory. See Freeman, R. E.: *Strategic Management: A Stakeholder Approach*, Boston: MA Pitman, 1984.

[22] The transposition of the Corporate Sustainability Due Diligence Directive may shed light on such stakeholders, See Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Due Diligence Directive), (OJ L 2024/1760, 05.07.2024), Art. 3(1)(n).

[23] SRDII, [19] – [20].

[24] SRDI (as amended by the SRDII), Art. 3h(1).

[25] Birkmose, H. S.: Article 3h: Investment Strategy of Institutional Investors and Arrangements with Asset Managers, in: Birkmose, H. S., Sergakis, K. (eds.): *The Shareholder Rights Directive II: A Commentary*, Cheltenham: Edward Elgar Publishing Limited, 2021, p. 172.

least to consider whether engagement practices should be undertaken as part of their investment strategy.[26] If enforced, the expectation may lead to disclosing information about engagement practices under the Article-3h obligation.

It is unclear which liabilities are supposed to be 'long-term' for the obligation.[27] The meaning of the 'medium-to-long-term performance of assets' and what amounts to 'contributing' to it is also unclear. The former may be interpreted as the market value estimate of assets. Reflecting on the SRDII's Recitals and the second Article-3h obligation, the contribution to the medium-to-long-term performance of assets may cover, inter alia, promoting the betterment of investee companies' financial and non-financial performance and their handling of ESG considerations.[28]

Where arrangements with asset managers exist, the Article-3h obligation additionally demands asset owners to disclose key information about them and a clear and reasoned explanation for the absence of any of the elements stated if they do not make up the arrangements.[29] The requirement to disclose information about the incentives the arrangements confer asset managers for engaging with investee companies to improve their medium-to-long-term performance is noteworthy.[30] The value gained from the information disclosed arguably lies in understanding how the arrangements influence asset managers to undertake engagement practices seeking to improve investee companies' medium-to-long-term performance.[31] The medium-to-long-term performance of investee companies is, however, undefined. Considering the obligation's wording in Article 3h, the term may mean the companies' medium-to-long-term financial and non-financial performance as shaped by several factors, including ESG considerations.[32]

The Article-3i obligation requires asset managers to disclose annually to asset owners how their investment strategy and its execution is proximate to their

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[26] See Section 2.2. below.

[27] Sectoral law may be influential in defining them. See Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the Activities and Supervision of Institutions for Occupational Retirement Provision (IORPs) (recast) (IORP Directive), (OJ L 354, 23.12.2016), Art. 19; and Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the Taking-up and Pursuit of the Business of Insurance and Reinsurance (Solvency II) (recast) (Solvency II Directive), (OJ L 335, 17.12.2009), Art. 132.

[28] SRDII, [14]-[18].

[29] SRDI (as amended by the SRDII), Art. 3h(2).

[30] ibid, Art. 3h(2)(a).

[31] A point in Birkmose (n. 25), p. 179.

[32] The SRDII's recitals corroborate this conclusion. See SRDII, [15] – [19].

agreed-upon arrangements and contribute to the medium-to-long-term performance of the asset owners' assets or the collective fund they are pooled into.[33] Asset managers must report on several aspects; for instance, the valuation of investment decisions based on investee companies' medium-to-long-term financial and non-financial performance.[34] Many terms stated, such as the assets' medium-to-long-term performance, bear the same definitional gaps as the ones traced above. Thus, the preceding assumptions and unclarities about these terms are echoed in this obligation. Asset managers must include in their reporting the information about the use of proxy advisors and the effect of asset managers' securities lending policy on engagement practices.[35] Disclosures about both may outline their influence on asset managers' treatment of engagement practices. But ultimately, it is up to asset managers' discretion to identify what information must be disclosed.[36]

The transposition of EU sectoral law created additional obligations for UCITS management companies and AIF managers ('AIFMs') regarding engagement practices.[37] Specifically, these asset managers must develop strategies for when and how voting rights will be exercised. These strategies must institute measures for monitoring investee companies, warranting the exercise of voting rights in line with investment objectives, and introducing conflicts-of-interest policies about their exercise.[38] Both asset managers may use the strategies to formulate their engagement policies but are not obliged to. Deciding not

[33] SRDI (as amended by the SRDII), Art. 3i(1).

[34] ibid.

[35] ibid.

[36] Gomtsian, S.: Article 3i: Transparency of Asset Managers, in: Birkmose, H. S., Sergakis, K. (eds): *The Shareholder Rights Directive II: A Commentary*, Cheltenham: Edward Elgar Publishing Limited, 2021, pp. 205-213.

[37] As with the SRDII obligations, this Article considers and discusses these obligations on a high-level, cross-jurisdictional basis.

[38] Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards Organisational Requirements, Conflicts of Interest, Conduct of Business, Risk Management and Content of the Agreement between a Depositary and a Management Company (2010 UCITS Directive), (OJ L 176, 10.07.2010) – as amended by Commission Delegated Directive (EU) 2021/1270 of 21 April 2021 Amending Directive 2010/43/EU as regards the Sustainability Risks and Sustainability Factors to be Taken into Account for Undertakings for Collective Investment in Transferable Securities (UCITS), (OJ L 277, 02.08.2021), Art. 21; Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to Exemptions, General Operating Conditions, Depositaries, Leverage, Transparency and Supervision (AIFM Delegated Regulation), (OJ L 83, 22.03.2013) – as amended by Commission Delegated Regulation (EU) 2021/1255 of 21 April 2021 amending Delegated Regulation (EU) No 231/2013 as regards the Sustainability Risks and Sustainabil-

to exercise voting rights is not contrary to the obligations either. Regardless, the obligations arguably substantiate that clients and beneficiaries must benefit from exercising voting rights. The substantiation for UCITS management companies is arguably oblique; the requirement demands developing the strategy to the exclusive benefit of the funds managed, benefiting hence end investors proportionately.[39] The AIFM sectoral requirement, on the other hand, is more direct, requiring the development of strategies benefiting both the funds managed and end investors.[40]

2.2. IMPLICIT EXPECTATIONS DERIVING FROM THE OBLIGATIONS

The obligations discussed give rise to implicit normative expectations about the measures and principles institutional shareholders should take and adhere to when complying with them and handling their practices respectively.[41] Self-regulation is the main means of enforcing these expectations, although market regulation enforcing them is also possible.[42] The reports and policies developed and disclosed can give clients and beneficiaries an eloquent account of institutional shareholders' investment and engagement practices and their governance. Clients and beneficiaries can rely on said information to promote the adoption of specific courses of action. If this leads to creating a demand to abide by these expectations, institutional shareholders may become compelled to live up to them.[43]

Several of those expectations pertain to engagement practices. Undoubtedly, the obligations invite institutional shareholders to ponder on whether and how engagement practices should be undertaken, whether they should create en-

ity Factors to be Taken into Account by Alternative Investment Fund Managers, (OJ L 277, 02.08.2021), Art.37.

39 2010 UCITS Directive (as amended), Art. 21(1) - (2)(b).

40 AIFM Delegated Regulation (as amended), Art. 37(1) - (2)(b).

41 The argument about the obligations giving rise to implicit expectations is not new. See Chiu, I. H-Y, Katelouzou. D.: From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?, in: Birkmose, H. S. (ed.): *Shareholder Duties*, Alphen aan den Rijn: Kluwer Law International, 2017.

42 On enforcing the obligations as well as national Stewardship Codes see Katelouzou, D., Sergakis, K.: Shareholder Stewardship Enforcement, in: Katelouzou, D., Puchniak, D. (eds.): *Global Shareholder Stewardship*, Cambridge: Cambridge University Press, 2022.

43 This idea of a 'market for stewardship' is not entirely clear in the context of enforcing the obligations. Regardless, jurisdictions such as the UK have marked it as the primary enforcement mechanism of the obligations and any expectations deriving from it. See Financial Reporting Council: Financial Conduct Authority, Building a Regulatory Framework for Effective Stewardship: Feedback to DP19/1 (FS19/7), 2019, pp. 11-16.

gagement policies, and what their content could be.[44] The Article-3g obligation and the voting strategy obligations create an implicit expectation for these thought processes to transpire. Compliance with the obligations is awaited to highlight institutional shareholders' reflection and decision on whether and how engagement practices should be undertaken.[45] Furthermore, it creates an expectation to present the reasoning behind not complying with the Article-3g obligation.

Should they believe engagement practices must be undertaken and develop engagement policies and relevant strategies, institutional shareholders must consider their dedication to undertaking engagement practices by implementing them. Compliance with the obligation to report annually on implementing the engagement policy developed is awaited to reveal the extent of institutional shareholders' dedication to implementing their engagement policy. Additionally, compliance with the obligation prompts a complementary expectation to demonstrate that institutional shareholders 'walk the talk' on engagement practices.

The Article-3h and Article-3i obligations may reinforce the urgency to govern and undertake engagement practices seeking to improve investee companies' medium-to-long-term performance. The requirement to disclose how arrangements incentivise asset managers to engage with investee companies about this purpose allows asset owners to avoid disclosing such information only when the arrangements do not do so. If the arrangements involve undertaking engagement practices, the requirement can influence the infusion of arrangements with such incentives.[46] Alongside the reports on implementing engagement policies, the information disclosed under the Article-3i obligation can allow asset owners to act on the arrangements by monitoring asset managers' quality of engagement practices for its proximity to the preceding. It may also pressure asset managers to engage with investee companies accordingly.[47]

Compliance with the Article-3g obligation is projected to describe the engagement practices elected, their use and outcomes. The Article-3g obligation seemingly raises the expectation for institutional shareholders to consider

[44] SRDII, [14] – [15].

[45] Chiu and Katelouzou on this point argued that the obligations are arguably not far from imposing a duty to engage because of the expectation they raise. See Chiu, Katelouzou (n. 41), p.143.

[46] Johnston et al. (n. 12), p. 62. But see, Section 3, below.

[47] Gomtsian (n. 36), pp. 205-213.

whether to govern and undertake the engagement practices stated.[48] Full compliance with the Article-3g obligation makes this expectation more imposing, for it connotes developing policies providing descriptions about using the engagement practices stated as if institutional shareholders should have provisions to undertake them. Institutional shareholders must know the minutiae of undertaking certain engagement practices and the investment management issues they may cause. None of the provisions have key answers to circumventing any of these issues, yet institutional shareholders are anticipated to find solutions to them.[49]

Most of the matters stated in the Article-3g obligation for institutional shareholders to describe how they monitor them are for investee companies' directors to manage them. It is unclear if monitoring is expected to assess directors' competence in managing them by going beyond what is reported about them. Since the Commission has perennially seen engagement practices as complementary to board authority, this is not likely.[50] The transposition of the Corporate Sustainability Reporting and Corporate Sustainability Due Diligence directives may assist institutional shareholders with monitoring connected to ESG considerations.[51] It remains to be seen whether such monitoring will increase because of them. Equally unclear is whether asset owners' disclosures on monitoring are expected to cover monitoring engagement practices once delegated. The Article-3g obligation does not provide anything on the matter.[52]

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[48] Birkmose, H. S.: Institutional Investors and Sustainable Finance – Developing the Shareholder Engagement Framework in Light of the Emerging Sustainable Finance Regime in the EU, in: Chiu, I. H-Y, Hirt, H-C. (eds): *Investment Management, Stewardship and Sustainability: Transformation and Challenges in Law and Regulation*, Oxford: Bloomsbury Publishing, 2023, pp. 108-109.

[49] Guidance provided by UK regulators to trust-based pension funds raised the need for them to identify those solutions and craft their policies and strategies analogously. See Department of Work and Pensions: Consultation Outcome - Reporting on Stewardship and Other Topics through the Statement of Investment Principles and the Implementation Statement: Statutory and Non-Statutory Guidance (Updated 17 June 2022), 2022, paras 40-55, 68-71.

[50] See, for reference, European Commission: Green Paper: Corporate Governance in Financial Institutions and Remuneration Policies (COM/2010/284 final), 02.06.2010, p. 8.

[51] See generally, Due Diligence Directive; and Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting (CSRD), (OJ L 322, 16.12.2022).

[52] The guidance provided in the UK to trust-based pension funds advises pension funds to take 'ownership' of their engagement policies by monitoring asset managers' quality of engagement practices and report on them. See Department of Work and Pensions: Consultation Outcome (n. 49), paras 42-43.

These expectations are seemingly founded on the overarching expectation to govern and undertake engagement practices as part of executing institutional shareholders' investment strategy benefiting clients and beneficiaries. As stated above, the voting strategy obligations substantiate exercising voting rights to benefit UCITS management companies' and AIFMs' clients and beneficiaries.[53] The SRDII's enactment, on the other hand, was partly established on seeing engagement practices as a cornerstone of corporate governance venturing to secure companies' long-term viability and performance; and on appreciating engagement practices promoting the latter as improving investment value, making them hence worthy to be undertaken.[54] The link this thesis makes between engagement practices and investment management is resounded in the Article-3g obligation through its requirement for engagement policies to describe shareholder engagement's integration into investment strategies. The requirement confirms engagement practices should be considered an investment strategy element, thus implying the envelopment of their undertaking and governance therein.[55]

This expectation, though, comes arguably with qualifications. Engagement practices are awaited to improve investee companies' medium-to-long-term performance. The requirement to disclose information about the incentives asset owners' arrangements engender for asset managers to engage with investee companies to improve their medium-to-long-term performance denotes expecting asset owners to be mindful of the former and create arrangements involving engagement practices which secure it.[56] The requirement to describe how monitoring is done on matters like investee companies' financial and non-financial performance also implies institutional shareholders should at least consider monitoring investee companies for them, presumably with a medium-to-long-term perspective.[57]

Additionally, engagement practices and their governance are implicitly expected to contribute to the medium-to-long-term performance of assets. To reiter-

[53] 2010 UCITS Directive (as amended), Art.21; AIFM Delegated Regulation (as amended), Art. 37.

[54] One can see the imperative in the SRDII's recitals and policy communications before its adoption. See, inter alia, SRDII, [14]; European Commission: Green Paper (n. 50), p. 2; European Commission: Green Paper: the EU Corporate Governance Framework (COM/2011/164), 05.04.2011,p. 5; European Commission: Communication from the Commission: Action Plan: European Company Law and Corporate Governance – a Modern Legal Framework for More Engaged Shareholders and Sustainable Companies (COM/2012/740), 12.12.2012, pp. 9-11.

[55] SRDI (as amended by the SRDII), Art. 3g(1)(a).

[56] ibid, Art. 3h(2)(b).

[57] ibid, Art. 3g(1)(a).

ate, the Article-3h and Article-3i obligations require disclosing respectively how the main elements of asset owners' investment strategies and asset managers' investment strategies contribute to the medium-to-long-term performance of the assets.[58] The obligations do not provide room to deviate from confirming the elements of asset owners' investment strategies and asset managers' investment strategies are causative to assets' medium-to-long-term performance. Both obligations presume institutional shareholders abide by this standard and will disclose information accordingly. It could thus be submitted that institutional shareholders are implicitly expected to provide the information the obligations require as if they should live up to the standard the obligations pose. If institutional shareholders regard engagement practices as an investment strategy attribute of theirs, the latter presumption arguably carries over to engagement practices and their governance.[59]

2.3. THE OBLIGATIONS' INTERACTION WITH EU SECTORAL LAW

The obligations' interaction with sectoral law may influence institutional shareholders to consider undertaking and governing engagement practices concerned with ESG considerations.[60] The argument is made on the strength of the overarching duties and principal governance requirements enacted following the transposition of EU sectoral frameworks, and the rules introduced under the recently instituted 'sustainable finance framework.'[61]

The EU-derived overarching duties have been laid down to guide institutional shareholders' investment decisions or business conduct.[62] Yet despite none of them referring to engagement practices, their nature presupposes that institutional shareholders should uphold them when undertaking and governing them.[63] It could be argued that the duties carry over to engagement practices, in the sense of discharging the duties when governing and undertaking en-

58 ibid, Arts. 3h(1) and 3i(1).

59 Savva, R.: Regulating Institutional Shareholders in the Medium to the Long-term: An Analysis of the 2017 Shareholder Rights Directive's Shareholders' Duties, *International Company and Commercial Law Review*, 14(1) 2020, pp. 2-3.

60 Kelly, T. G.: Institutional Investors as Environmental Activists, *Journal of Corporate Law Studies*, 21(2) 2021, p. 469.

61 As above, the discussion herein is conducted on a high-level, cross-jurisdictional basis.

62 Typically, those duties are referred to as institutional shareholders' fiduciary duties. See, for example, UNEP Finance Initiative, PRI: Fiduciary Duty in the 21st Century: Final Report, 2019, p. 10. However, it must be noted that not all institutional shareholders' duties are 'fiduciary' in nature.

63 Birkmose (n. 48), pp. 116-118.

gagement practices.[64] Although this may hold for asset managers' duties – their application spans across asset managers' conduct of business – it is less clear for asset owners' duties, for they refer to investing decisions. This notwithstanding, if engagement practices are regarded as investing decisions, there is little to counter the argument.[65]

The content of the overarching duties, however, is unclear.[66] Few, if any, would disagree with interpreting the duties as creating returns and benefits for clients and beneficiaries or the funds commensurate to the wants, horizons, risks and factors shaping them.[67] The factors to consider can comprise all those affecting value creation or concerning clients and beneficiaries.[68] However, the differences between the overarching duties suggest institutional shareholders should give explicit weight to considering certain factors.[69]

These differences are apparent when it comes to ESG considerations. Whereas UCITS management companies *must* now integrate 'sustainability risks' when managing funds,[70] pension funds *can*, yet are not obliged to, consider the potential long-term impact of investment decisions on 'environmental, social, and governance factors' when making investment decisions.[71] 'Sustainability risk'

64 ibid.

65 The EU High-Level Expert Group on Sustainable Finance indicated them as investment decisions at times, see EU High-Level Expert Group on Sustainable Finance: Financing a Sustainable European Economy – Interim Report, 2017, pp. 25-26.

66 UNEP Finance Initiative, PRI (n 62), pp. 13-16.

67 This is a point raised consistently in the literature. See, for example, Richardson, B. J.: From Fiduciary Duties to Fiduciary Relationships for Socially Responsible Investing: Responding to the Will of Beneficiaries, *Journal of Sustainable Finance and Investment*, 1(1) (2011).

68 International reports have long concluded on the permissibility of ESG considerations' integration in decision-making. See UNEP Finance Initiative, PRI (n 62); and UNEP Finance Initiative: A Legal Framework for the Integration of Environmental, Social and Governance issues into Institutional Investment, 2005.

69 For example, UCITS management companies and AIFMs should conduct their business in the best interests of the funds they manage and the market's integrity. See Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS) (recast) (UCITS Directive), (OJ L 302, 17.11.2009), Art. 14(1); and Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (AIFM Directive), (OJ L 174, 01.07.2011), Art. 22(1). The content of the latter requirement is not defined. It is also missing from the overarching duties of the rest of institutional shareholders.

70 2010 UCITS Directive (as amended), Art. 5a.

71 IORP Directive, Art. 19(1)(b).

is defined as per the definition found in the Sustainable Finance Disclosure Regulation ('SFDR'), being an environmental, social or governance event or condition capable of causing an actual or potentially material negative impact on investment value.[72] However, 'environmental, social, and governance factors' are undefined.[73] On the other hand, insurers must consider sustainability risks as defined in the SFDR and the long-term impact of investment decisions on 'sustainability factors' when managing investment risks.[74] Where relevant, insurers must also confirm their strategic decisions reflect the 'sustainability preferences' of their clients.[75] The overarching duties of the rest of the institutional shareholders do not refer to ESG considerations.[76] Regardless, the sustainable finance framework's reform of EU sectoral law points to considering sustainability risks when these institutional shareholders develop their governance functions and policymaking. When conducting their due diligence, UCITS management companies and AIFMs can also consider the principal adverse impacts of investment decisions on sustainability factors ('PAIs').[77]

[72] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector (SFDR), (OJ L 317, 9.12.2019), Art. 2(22).

[73] EIOPA has provided technical advice on the issue, suggesting amendments to the IORP Directive to align with changes made to other frameworks. See EIOPA: Technical Advice for the Review of the IORP II Directive, 2023, p. 197.

[74] Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the Taking-Up and Pursuit of the Business of Insurance and Reinsurance (Solvency II) ('Solvency II Delegated Regulation'), (OJ L 12, 17.01.2015) – as amended by Commission Delegated Regulation (EU) 2021/1256 of 21 April 2021 amending Delegated Regulation (EU) 2015/35 as regards the Integration of Sustainability Risks in the Governance of Insurance and Reinsurance Undertakings, (OJ L 277, 02.08.2021), Art. 275a.

[75] ibid. Sustainability preferences are defined now in ibid, Art.1(55e).

[76] AIFM Directive, Art. 12; AIFM Delegated Regulation, Arts. 17(1), 21, 23, and 24; Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (MiFID II Directive), (OJ L 173, 12.06.2014), Art. 24(1)-(4); Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (MiFID II Delegated Regulation), (OJ L 87, 31.3.2017) - as amended by Commission Delegated Regulation (EU) 2021/1253 of 21 April 2021 amending Delegated Regulation (EU) 2017/565 as regards the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms, (OJ L 277, 2.8.2021), Art 65.

[77] 2010 UCITS Directive (as amended), Art. 23(5)-(6); AIFM Delegated Regulation (as amended), Art. 18(5)-(6).

PAIs are not defined, but 'sustainability factors' encapsulate a wide array of ESG considerations not necessarily 'financially material'.[78]

The general governance requirements transposed from EU sectoral regulation do not touch on engagement practices either. Regardless, the obligations require having efficacious governance systems factoring sustainability risks, PAIs, and environmental, social and governance factors (as specified differently for each institutional shareholder). These can buttress governing engagement practices with ESG considerations in mind which fit the definitions found therein.[79] Specifically, pension funds must establish adequate systems of governance that consider environmental, social and governance factors related to investment decisions.[80] Similar requirements exist for UCITS management companies, AIFMs, and investment firms, with the difference being they must consider sustainability risks.[81]

Besides the amendments referred to above, the sustainable finance framework, through the SFDR and the Taxonomy Regulation, introduced new disclosure requirements.[82] Unlike the SRDII obligations, these obligations are governed by detailed definitions. In addition to defining sustainability risks and factors, the SFDR defines 'sustainable investment' as an investment made in an economic activity aiding an environmental or social objective and not significantly harming any stated objectives.[83] The definitions, qualifications, and criteria introduced by the Taxonomy Regulation and delegated legislation are in turn planned to fathom out 'environmentally sustainable' activities.[84] An

[78] The definition of sustainability factors in those regulations bears the same definition as the one found in the SFDR. See 2010 UCITS Directive (as amended), Art. 3(12); and AIFM Delegated Regulation (as amended), Art. 1(7). For the definition, see SFDR, Art. 2(24).

[79] A similar point was made in Gosling, T., MacNeil, I.: Can Investors Save the Planet? NZAMI and Fiduciary Duty, *Capital Markets Law Journal*, 2023, pp. 1-3.

[80] IORP Directive, Arts. 21(1).

[81] 2010 UCITS Directive (as amended), Arts. 4(1), and 9(2); AIFM Delegated Regulation (as amended), Art. 57(1); MiFID Delegated Regulation, Art. 21(1).

[82] SFDR, Arts. 3(1), 4(1) – (4), 5(1), 6(1) – (2), 7(1) – (2), 8(1), 9(1) – (3), 10(1), 11(1); Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088 (Taxonomy Regulation), (OJ L 198, 22.6.2020), Arts. 5 – 7.

[83] SFDR, Art. 2(17).

[84] Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 Supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by Establishing the Technical Screening Criteria for Determining the Conditions under Which an Economic Activity Qualifies as Contributing Substantially to Climate Change mitigation or Climate Change Adaptation and for Determining whether that Economic Activity Causes No Significant Harm to any of the Other Environmental Objectives, (OJ L 442, 9.12.2021); Commission Delegated

investment is 'environmentally sustainable' only when the economic activities invested in qualify as 'environmentally sustainable'.[85] Economic activities will be environmentally sustainable if they contribute substantially to at least one of the objectives the Taxonomy Regulation outlines.[86] The economic activities must also do no significant harm to these objectives.[87]

These disclosure requirements may affect compliance with the Article-3h and Article-3i obligations. As already seen, these obligations require disclosing information connected to ESG considerations.[88] However, the obligations do not require institutional shareholders to be transparent about their contemplation and action on ESG considerations per se, whereas ESG considerations are not defined therein. The sustainable finance framework's disclosure requirements can produce detailed insight into the preceding. They can also supplement any information disclosed in compliance with the Article-3h and Article-3i obligations.[89]

Interestingly for engagement practices, SFDR's Recital 18 states the information disclosed may describe the way 'sustainability-related stewardship responsibilities or other shareholder engagements' are discharged.[90] The SFDR does not require disclosing such information. The only remark about engagement practices is made in SFDR's Article 4.[91] Under it, institutional shareholders must include a summary of their engagement policy (if one exists) in the statement they may disclose on the due diligence policies developed for considering and managing PAIs.[92] An engagement policy may cover the use of engagement practices for managing PAIs. However, the SRDII obligations do not require such information to be made available, and it cannot be argued the obligations

Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards Economic Activities in Certain Energy Sectors and Delegated Regulation (EU) 2021/2178 as regards Specific Public Disclosures for those Economic Activities, (OJ L 188, 15.7.2022).

85 Taxonomy Regulation, Art. 3.

86 ibid. The objectives are outlined in Article 9, and elaborated in detail in Articles 10 to 16 of the Taxonomy Regulationg. These are climate change mitigation; climate change adaptation; the sustainable use and protection of water and marine resources; the transition to a circular economy; pollution prevention and control; and the protection and restoration of biodiversity and ecosystems.

87 ibid, Art. 3. This is subject to Art. 17. Minimum safeguards are also outlined in Art. 18.

88 See Section 2.1 above.

89 Birkmose (n. 48), pp. 132-133.

90 SFDR, [18].

91 SFDR, Art. 4(1).

92 ibid, Art. 4(2)(c).

hint its coverage. Furthermore, a summary of the engagement policy developed does not necessarily connote disclosing information of the type aspired.[93]

Regardless, the SFRD's Recital 18 arguably raises the expectation to see such information disclosed and institutional shareholders to consider using engagement practices to manage PAIs. The wording of Articles 4 and 7 of the SFDR creates the expectation for institutional shareholders to at least consider acting on PAIs and develop policies dealing with them. The statements made are also awaited to describe the methods devised to address them or explain the contrary.[94] The wording of SFDR's Recital 18 arguably notes engagement practices to at least be considered as a mode of handling PAIs when developing their policies for managing them and providing information about them in case they do. The expectation's enforcement can compel institutional shareholders to create measures for using engagement practices to this end. Yet their definite use relies on institutional shareholders' discretion.

3. THE LAW'S SHORTCOMINGS IN ENCOURAGING DOUBLE-MATERIALITY-MINDED ENGAGEMENT PRACTICES

As it interacts with EU sectoral law, the EU-derived law regulating institutional shareholders for their engagement practices invites them to consider undertaking and governing engagement practices conscious of ESG considerations and corporate welfare. Nevertheless, it may not direct institutional shareholders to govern and undertake double-materiality-minded engagement practices. There is a practical and normative dimension to this argument, discussed in this Section sequentially.

3.1. DOUBLE-MATERIALITY-MINDED ENGAGEMENT PRACTICES: A HERCULEAN TASK

To put context to the discussion, it is fitting to first grasp what it entails for institutional shareholders to govern and undertake double-materiality-minded engagement practices. Simply put, one will not witness institutional shareholders governing and undertaking double-materiality-minded engagement practices if they cannot do both. To this end, knowing the content of double-materiality-minded engagement practices is apposite. Must engagement practices contribute positively to undertaking sustainable business practices to be double-materiality-minded or does any opposition to unsustainable business prac-

[93] Birkmose (n. 48), pp. 132-133.

[94] SFDR, Art. 7.

tices suffice? It is further queried whether double-materiality-minded engagement practices should be recognised as only those addressing adverse impacts compared to positive contributions to sustainable development. To the author's knowledge, no proxy indicators connecting engagement practices with positive contributions to sustainable development exist to ascertain whether engagement practices positively contribute to corporate governance. Developing such indicators may be under development. Yet it is uncertain what timeframe or variables they may consider for counterbalancing engagement practices' effects and side effects to derive solid conclusions.

Even if one assumes that the nature of double-materiality-minded engagement practices can be ascertained, their emergence hinges on institutional shareholders' ability to govern and undertake them. Several issues apropos to measuring the contribution of business to sustainable development, however, may impede this outlook. There is, first, an issue with the availability of credibles to inform the governance and undertaking of double-materiality-minded engagement practices. Measuring contribution to sustainable development goes beyond accounting for resources to capture, among other things, resource allocation and management. The kind of ESG considerations factored for these and the methodologies used to assess and weigh them credibly and prudently still perplex academia and practice.[95] In examining what a collection of current metrics tells, Kotsantonis and Serafeim found most of them measure the contemplation and action on ESG considerations based on the inputs made into processes, i.e. any intentions and efforts made to achieve an outcome, instead of the outcomes themselves.[96] Concentrating on inputs, however, may prove problematic, for it is uncertain if inputs can produce the desired outcomes. Measuring inputs also means it is harder to trace 'goodwashing', since they may not indicate action or inaction on achieving particular outcomes.[97]

Another major impediment is the lack of consensus on what constitutes a strong contribution to sustainable development and its impact on risk and returns. Practices classified as 'sustainable' are valued to be so per se. Such practices may act as proxies for attaining specific sustainable development objectives. Nevertheless, they cannot be used as metrics for determining whether investee companies or investments contribute to sustainable development, or wheth-

[95] Grewal, J., Serafeim, G.: Research on Corporate Sustainability: Review and Directions for Future Research, *Foundations and Trends® in Accounting*, 14(2) 2020, p. 79.

[96] Kotsantonis, S., Serafeim. G.: Four Things No One Will Tell You About ESG Data, *Journal of Applied Corporate Finance*, 31(2) 2019, p. 53.

[97] ibid.

er they create better returns or hedge ESG-related risks.[98] The current rating and measuring practices about these vary in terms of the data they factor, the weighting of different variables and their layering of judgment to the scores assigned to specific practices.[99] Evidence also shows a low correlation between the scores metrics and ratings assigned to investee companies regarding ESG considerations.[100] There is, furthermore, a considerable lack of transparency about the rationale behind the scores assigned.[101]

It is also difficult to trace comparable information about ESG considerations to inform those metrics and any actions made by relying on them.[102] Relevant regulation has been adopted, and time will tell if it can help generate such information.[103] In the meantime, ESG ratings and data products have become surrogates for informing investment and engagement practices. However, they are far from being flawless. There have been noted deficiencies in the quality of the information they make available, making it hard for decisions to be made on the strength of their reliability.[104] It may also prove hard to process and interpret information without possessing the expertise and know-how of both.

Additionally, it is unclear whether present and future metrics are and will be consistent with double materiality. The metrics available seem to have been developed based on 'single materiality' assessments, related thus to the financial materiality of ESG considerations.[105] Albeit consistent with investors' familiar playbook of conducting risk management and due diligence (and informing engagement practices), it is unclear whether single-materiality-minded metrics can inform double-materiality-minded practices. Single-materiality-minded metrics developed may relevantly inform double-materiality-minded practices. Whether this holds, though, remains at present uncertain.[106]

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98 Chiu, I. H-Y: The EU Sustainable Finance Agenda: Developing Governance for Double Materiality in Sustainability Metrics, *European Business Organisation Law Review*, 23 2022, pp. 95, 97.

99 Christensen, D. M. et al.: Why is Corporate Virtue in the Eye of The Beholder? The Case of ESG Ratings, *The Accounting Review*, 97(1) 2022, pp. 148-149, 151.

100 OECD: ESG Investing: Practices, Progress and Challenges, OECD Publishing, Paris, 2020, pp. 21-23.

101 ibid, p. 27.

102 For an account of the challenges, issues, and possible solutions to addressing this issue see, generally, Unerman, J. et al.: Corporate Reporting and Accounting for Externalities, *Accounting and Business Research*, 48(5) 2018.

103 See CSRD, and Due Diligence Directive.

104 OECD (n. 100), pp. 27-32.

105 Chiu (n. 98), p. 101.

106 ibid.

Beyond aptitude, institutional shareholders must be eager to undertake and govern double-materiality-minded engagement practices. Looking at their current treatment of engagement practices, one should not be optimistic about them having this quality. Except in some instances,[107] institutional shareholders appear reticent to undertake any engagement practices.[108] Alternatively, they seem inclined to undertake 'box-ticking' engagement practices or engagement practices seeking to create better financial returns for them in recklessness as to whether their upshot has deleterious effects.[109]

The literature has noted several factors inducing such behavioural patterns vis-à-vis engagement practices, amplified by several structures guiding them. Cost and resource constraints are mainly cited to explain institutional shareholders' reticence and box-ticking engagement practices.[110] Evidence confirms some institutional shareholders' underinvestment in engagement practices. Their stewardship teams are significantly small compared to the task at hand, making it difficult to govern and undertake well-informed engagement practices across the portfolio.[111] Resultantly, these institutional shareholders are noted for applying pre-determined voting policies or relying heavily on proxy advisors' advice. The accuracy of both, however, remains debatable.[112]

Competition, organisational structures, and the business models employed are argued as pushing institutional shareholders to underinvest in engagement practices.[113] Most institutional shareholders reportedly favour a 'trading' in-

[107] See evidence from Sørensen, K. E., Birkmose, H. S.: Engagement policies and the promotion of sustainability, *Nordic & European Company Law Working Paper No. 23-01.*

[108] Several barriers are noted as precluding institutional shareholders from being more engaged shareholders, at least regarding voting. See, Better Finance, DSW: Barriers to Shareholder Engagement – SRD II Revisited, 2022.

[109] There are, though, considerable differences in trends. See Lafarre, A.: Do Institutional Investors Vote Responsibly? Global Evidence, *TILEC Discussion Paper No. DP2022-001, Tilburg Law School Research Paper.*

[110] Gilson, R. J., Gordon, J. N.: The Agency Costs of Agency Capitalism: Activist Investors and the Reevaluation of Governance Rights, *Columbia Law Review*, 113 2013, p. 867. This point was also made in the context of using engagement practices to promote sustainable corporate practices. See Balp, Strampelli, (n. 6), pp. 886-888.

[111] See by reference to 'Big Three' institutional shareholders, Bebchuk, L. A., Hirst, S.: Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy, *Columbia Law Review*, 119 2019, pp. 2077-2080.

[112] ibid. See also on this, Lund, D.: The Case against Passive Shareholder Voting, *Journal of Corporation Law*, 43 2018. Cf Rock, E. B., Kahan, M.: Index Funds and Corporate Governance: Let Shareholders be Shareholders, *BU Law Review*, 100 2020.

[113] The literature on the matter is as convoluting as voluminous. Majorly, the study of institutional shareholders' incentives has been conducted in the periphery of agency-theory-related

vestment approach for creating the yield to meet liabilities and attract clients and beneficiaries cost-effectively.[114] In this environment, asset managers assuming 'active' investment strategies seemingly struggle to deliver competitive returns.[115] The urge to keep investment costs low and increase said returns can disincentivise these asset managers to govern and undertake costly engagement practices.[116] The incentives of asset managers implementing 'passive' investment strategies may be similar. These asset managers' primary income source is subscription fees. Compounded with the urgency to keep costs low to attract clients, their fee structure allows limited expenditure for funding complex, firm-specific, engagement practices.[117] Asset owners, on the other hand, are optimally positioned to oversee asset managers' treatment of engagement practices. Nevertheless, resource constraints and liquidity requirements may prohibit expenditure for it.[118]

Cost and resource constraints are seemingly less of an issue for institutional shareholders like hedge funds. Nevertheless, they are not completely immune from them; only some hedge funds may be incentivised to undertake engagement practices, and cost considerations will determine their capacity.[119] Hedge funds, though, are accused of pressuring companies to create short-term financial gains.[120] The literature remains polarised about whether 'hedge fund

studies, focusing on the US context. Nevertheless, the discussion now extends to considering ESG considerations. For an overview, see Christie, A.: The Agency Costs of Sustainable Capitalism, *UC Davis Law Review*, 55(2) 2021.

114 Johnston, A.: From Universal Owners to Hedge Funds and Indexers: Will Stewardship Drive Long-Termism and Sustainability?, in: Chiu, I. H-Y, Hirt, H-C. (eds.): *Investment Management, Stewardship and Sustainability: Transformation and Challenges in Law and Regulation*, Oxford: Bloomsbury Publishing, 2023, pp. 53-54.

115 Barker, R. M. Chiu, I. H-Y: Investment Management, Stewardship and Corporate Governance Roles, in: Katelouzou, D., Puchniak, D. (eds.): *Global Shareholder Stewardship*, Cambridge: Cambridge University Press, 2022, p. 537, citing Fama, E. F., French, K.: Luck Versus Skill in the Cross-Section of Mutual Fund Returns, *The Journal of Finance*, 65 2010.

116 Gilson, Gordon (n. 110), pp. 889-895.

117 Christie (n. 113), p. 906; Kahan, Rock, (n. 112), pp. 1797, 1800-1801. Cf Fisch, J.E. et al.: The New Titans of Wall Street: A Theoretical Framework for Passive Investors, *University of Pennsylvania Law Review*, 168 2019, pp. 33-37, 38-40.

118 See on this issue, by reference to the UK context, Barker, R. M., Chiu, I. H-Y: *Corporate Governance and Investment Management: The Promises and Limitations of the New Financial Economy*, Cheltenham: Edward Elgar Publishing Limited, 2017, Ch 4.

119 Kraik, A.: Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm, *Vermont Law Review*, 44 2020, pp. 515.

120 Anabtawi, I., Stout, L.: Fiduciary Duties for Activist Shareholders, *Stanford Law Review*, 60(5) 2008; Greenfield, K.: The Puzzle of Short-termism, *Wake Forest Law Review*, 46(3) 2011.

activism' represents a positive or negative force of nature in corporate governance.[121] Regardless, evidence shows companies significantly cutting expenditure on areas like research and development after hedge funds engage, which may influence other companies to do the same.[122]

While hedge funds attract the blame for being 'short-termist', their engagement practices cannot succeed without other shareholders' support. Hedge funds can identify strategic and governance aspects with important valuation implications, and they may engage with investee companies to address them and reap the benefit from fluctuations in shares' market value. However, the success of hedge funds' engagement practices hinges on shareholders' support. Hedge funds may thus be incentivised to adjust their engagement practices to the likings and interests of other shareholders.[123] Competition and the current structuring of investment management contracts can lead to institutional shareholders supporting a hedge fund campaign irrespective of its implications. Investment management contracts may ascertain preferences on engagement and investment practices. Regardless, institutional shareholders may easily conclude from them that financial underperformance is non-negotiable, especially when investment management contracts can immediately be terminated.[124] Hence, institutional shareholders may double down on chasing benchmarks and short-term performance indicators. If supporting a hedge fund can help do both, support for hedge fund activism can be favoured.

Cost and resource constraints may not completely preclude the governance and undertaking of engagement practices. Some institutional shareholders, particularly those implementing active investment strategies, can undertake meaningful ex-post engagement practices concerned with specific occurrences affecting their portfolio.[125] The same attributes arguably hold for institutional shareholders whose investment strategy is more passive. Although there is a debate about their incentives to undertake such engagement practices – outspreading to engagement practices concerned with ESG considerations – cost constraints may still be a significant impediment.[126] These institutional shareholders should theoretically become involved with such engagement practices,

[121] For an overview of the literature, see Coffee, J., Palia, D.: The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance, *Journal of Corporation Law*, 41 2006.

[122] ibid, pp. 576-577.

[123] Gilson, Gordon (n. 110), pp. 895-896.

[124] Johnston et al. (n. 12), pp. 53-54.

[125] Christie (n. 113), pp. 900-906.

[126] Contrast Kahan, M., Rock, E. B.: Systemic Stewardship with Tradeoffs, *NYU Law and Economics Research Paper No. 22-01*; with Gordon, J. N.: Systematic Stewardship: It's Up to

but their undertaking depends on the benefits received. The costs involved in governing and undertaking them and the incentive to free-ride other engagement campaigns can preclude institutional shareholders from undertaking them.[127]

The incentive to attract clients and beneficiaries is also noted to explain institutional shareholders' tendency to create the appearance of undertaking engagement practices despite the contrary. Being perceived as 'responsible' investors can bring equal or greater benefits to them — translated into assets under management — compared to actually governing and undertaking engagement practices.[128] Considerable conflicts of interest also strike at the core of institutional shareholders' incentives to undertake substantive engagement practices. With engagement practices sometimes comes being antithetical to corporate management. However, investee companies are both an investment and a business opportunity. Institutional shareholders may refrain from opposing corporate managers in the hope of receiving business from them, such as managing investee companies' pension funds,[129] or for fear that other securities in their portfolio will be adversely affected.[130]

3.2. PRACTICAL CONSIDERATIONS

The enactment of the EU-derived law regulating institutional shareholders for their engagement practices and the sustainable finance framework laws discussed above was done in cognisance of the majority of the preceding and as a means of introducing measures to counter them.[131] Yet the way these frameworks seek to do the latter seems indirect. The disclosure of the required information, coupled with meeting the standards and implicit expectations posed and arising respectively, are hoped to stimulate institutional shareholders' self-regulation to alleviate the impact of the factors and overcome the issues mentioned.[132] The disclosed information is furthermore sought to enhance

the Shareholders a Response to Profs. Kahan and Rock, *Columbia Law and Economics Working Paper No. 666*.

127 Condon, M.: Externalities and the Common Owner, *Washington Law Review*, 2020, p. 10. But see also p. 61 (discussing the possibility of certain institutional shareholders holding passive investment power to hold the incentives to engage with investee companies on firm-specific issues).

128 See Christie (n. 113), p. 907.

129 ibid, pp. 910-911.

130 ibid.

131 SRDII, [14] – [24]; SFDR, [9]; Taxonomy Regulation, [9] – [13]

132 ibid.

transparency about the governance and undertaking of engagement and investment management practices.[133] Transparency can surge demand for practices tallying with the expectations and standards raised about them, compelling institutional shareholders to abide by the standards set, meet the expectations raised, and respond to those issues and factors.

However, it is unlikely that such initiatives will transpire to the point of enabling the governance and undertaking of double-materiality-minded engagement practices without changes in the structures guiding institutional shareholders' treatment of engagement practices preceding them. Metrics development for 'sustainable finance and business' is still a work in progress, and the same likely applies to developing know-how for utilising said metrics to guide engagement practices.[134] In the meantime, governing the development of such metrics and know-how remains an open field.[135] Should the efforts bear fruit, accessing and using these tools to undertake and govern double-materiality-minded engagement practices will entail costs, which will be additional to the cost associated with governing and undertaking double-materiality-minded engagement practices individually or collectively.[136]

Should they remain unaltered, most institutional shareholders' investment strategies and organisational arrangements may limit the scope of incurring these costs. This may preserve their current treatment of engagement practices, even though regulation endeavours to push them in the opposite direction.[137] Of course, this is a contestable point. Some scholars argue that institutional shareholders may be motivated to undertake ESG-considerations-related engagement practices to mitigate their exposure to systematic risks.[138] Others argue the desire to prevent asset outflow and preserve a positive reputation can be drivers for undertaking ESG-considerations-related engagement practices.[139]

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133 SRDII, [17]; SFDR, [18].

134 Caution, therefore, must be employed because of this issue when reforming the law further in this field and in sustainable finance. See Section 4, below.

135 Chiu (n. 98), p. 96.

136 For an analysis of the incentives to participate in collective actions see, Balp, G., Strampelli, G.: Institutional Investor Collective Engagements: Non-Activist Co-operation Vs Activist Wolf Packs, *Ohio State Business Law Journal*, 14(2) 2020, pp. 153-166, 168-184.

137 Johnston et al. (n. 12), pp. 60-63; 65-68; 70-72, and 74-75.

138 Gordon, J. N.: Systemic Stewardship, *Journal of Corporate Law*, 47 2022, pp. 645-658.

139 Enriques, L., Strampelli, G.: The Dialogue Between Corporations and Institutional Investors: An Introduction, *European Corporate Governance Institute - Law Working Paper No. 725/2023*, p. 14.

Albeit plausible, these arguments are equally refutable in the context of double-materiality-minded engagement practices. Institutional shareholders may be inclined to govern and undertake ESG-considerations-related engagement practices, but it is not certain they will be double-materiality-minded. Furthermore, reducing exposure to systematic risks through engagement practices can be a credible means of responding to them, albeit costly.[140] Undertaking and governing such engagement practices may still be prohibitive for some institutional shareholders without adjusting investment strategies and organisational structures, and divesting may still be more attractive. Moreover, appearing as undertaking 'responsible' engagement practices can equally help win over clients and reach reputational gains.[141] A 'market for engagement practices' can dispel such actions. However, it is unclear if such a market exists for double-materiality-minded engagement practices.[142] Furthermore, distortions within it may not signal the avoidance of symbolistic engagement practices.

One may propose engagement practices by hedge funds as the solution to other institutional shareholders' reluctance to undertake and govern double-materiality-minded engagement practices.[143] Scholars contend that changes in perspectives on 'value creation' and the integration of contemplating and acting on ESG considerations in investment management can change hedge funds' attitudes to engagement practices to become palatable to such changes. This shift, it is argued, can build coalitions for engagement practices concerned with ESG considerations, transforming hedge funds' engagement practices into a mechanism for promoting sustainable business practices.[144]

However, hedge funds undertaking double-materiality-minded engagement practices may likely stay limited, and it is unclear if and to what extent the law in place will change this. Hedge funds welcoming engagement practices concentrating on ESG considerations appear as the exception to the norm, and it is opaque if they will surge without cogent intervention.[145] One reason may be hedge funds' limited incentives to rationalise expenditure to govern and undertake such engagement practices. Hedge funds' remuneration depends on the rate of above-market investment returns made. The time constraints in making

[140] Kahan, Rock (n. 126), pp. 6-7.

[141] Christie (n. 113), pp. 907-911.

[142] See on this, Katelouzou, D., Micheler, E.: The Market for Stewardship and the Role of the Government, in: Katelouzou, D., Puchniak, D. (eds.): *Global Shareholder Stewardship*, Cambridge: Cambridge University Press, 2022.

[143] Kraik (n. 119), pp. 542-59.

[144] Katelouzou, D.: The Rhetoric of Activist Shareholder Stewards, *New York University Journal of Law and Business*, 18(3) 2022, pp. 751-762.

[145] ibid, pp. 758-759.

said returns may incentivise hedge funds to refrain from time-consuming and costly engagement practices.[146] Additionally, hedge fund managers are evaluated on their performance in absolute or relative terms, often quarterly.[147] If the benefits gained from such engagement practices take years to materialise, opting to undertake them may become less attractive. Cost considerations may also be a factor. To minimise marginal costs, hedge funds are incentivised to initiate engagement campaigns on matters generalisable enough to replicate them across other investee companies. However, promoting sustainable business practices may require firm-specific engagement practices, whose particulars may not be captured by standardised engagement campaigns.

Moreover, capital markets sending mixed messages about sustainable business practices may hinder the undertaking and governance of double-materiality-minded engagement practices. There is still sharp polarisation in capital markets about the value of sustainable business practices, and it is uncertain when it will subside, or whether it will subside with double materiality prevailing as an ethos. Institutional shareholders thinking of undertaking and governing double-materiality-minded engagement practices may thus face backlash for both just as they may face backlash for the contrary.[148] Hence, a cost-benefit analysis for double-materiality-minded engagement practices and their governance may be applied by institutional shareholders, the outcome of which may dictate avoiding them.[149]

A market for engagement practices can theoretically mitigate the preceding's effect on the strength of the disclosures made to them. Notwithstanding, it is perhaps unrealistic to expect a surge in demand for double-materiality-minded engagement practices from it or a capacity to dictate methods to address the factors and issues mentioned.[150] Relying on demand for double-materiality-minded engagement practices to spur their emergence implies its existence or the potential to exist.[151] Although there is a demand to avoid adverse eco-social and economic impacts when making investment allocations,[152] it is

146 Kraik (n. 119), pp. 542-559.

147 Balp, Strampelli (n. 136), p. 163.

148 Kelly (n. 60), p. 486.

149 Johnston et al. (n. 12), p. 74. It is possible that asset managers may also receive conflicting instructions from clients and beneficiaries about engagement practices. They may thus adopt this approach to avoid conflicts of interest flowing from their arrangements with clients.

150 See on this, Pacces, A. M.: Will the EU Taxonomy Regulation Foster Sustainable Corporate Governance?, *Sustainability*, 13(21) 2021.

151 Katelouzou, Micheler (n. 142), pp. 76-83.

152 See, for example, Stanford University Rock Center for Corporate Governance, 2022 Survey on Investors, Retirement Savings, and ESG, 2022.

not universally shared, and it certainly differs from demanding like-minded engagement practices. To the author's knowledge, there is limited evidence of a specific demand for ESG-conscious engagement practices, let alone double-materiality-minded engagement practices. Clients and beneficiaries may or may not be open to allowing specific ESG considerations to inform investment management and engagement practices.[153] Clients and beneficiaries also have different time sensitivities and financial interests, which may affect their perception of ESG considerations' materiality.[154]

It has been argued that the incentive to undertake engagement practices encouraging sustainable business practices may increase as the effect of sustainable finance regulation becomes more prevalent and the preferences of younger clients and beneficiaries become predominant.[155] Some institutional shareholders must now capture clients' and beneficiaries' sustainability preferences and factor them across multiple investment management facets.[156] However, as the regulation for sustainable business and finance is nascent, the effect aforementioned will take years to appear. Moreover, the demand for engagement practices may not necessarily be double-materiality-minded. As for the younger investors, assuming they share pro-sustainable-development convictions which can morph into demanding like-minded engagement practices overlooks that younger investors, like previous generations, share diverse views concerning sustainable development and business practices. Assuming they can voice themselves along the chain of investment intermediation, there may likely be mixed noise from younger investors about the quality of engagement practices, amplified by their heterogeneous investing interests.

Moreover, the chain of investment intermediation may make most clients and beneficiaries indifferent to institutional shareholders' engagement practices. Clients' and beneficiaries' relationship with institutional shareholders is structured around separating their assets from their management through

[153] Davies, P.: The UK Stewardship Code 2010–2020 - From Saving the Company to Saving the Planet?, in: Katelouzou, D., Puchniak, D. (eds): *Global Shareholder Stewardship*, Cambridge: Cambridge University Press, 2022, p. 61.

[154] The cyclicality of market demand may potentially diminish the prospect of matching clients' and beneficiaries' interests with specific ESG considerations as well. See Zetzsche, D., Anker-Sørensen, L.: Regulating Sustainable Finance in the Dark, *European Business Organisation Law Review*, 23(1) 2022, p. 65.

[155] Ringe, W-G.: Investor-led Sustainability in Corporate Governance, *Annals of Corporate Governance*, 7(2) 2022, p. 93.

[156] Solvency II Delegated Regulation (as amended), Art. 275a; MiFID Delegated Regulation (as amended), Arts. 33, 54(2)(a), 54 (5), 54(9)-(13).

complex intermediation chains.[157] Disaggregated and reposed as investment management currently is, most clients and beneficiaries cannot 'voice' themselves about it, let alone for engagement practices. Even if they can, several clients and beneficiaries may see themselves as having no place to have a say in both.[158] Exiting the fund, therefore, will be a better alternative if they feel dissatisfied with institutional shareholders' quality of practices. Such exit may theoretically motivate the governance and undertaking of engagement practices, but it is hard to see practically how it may impact institutional shareholders' approach to engagement practices. Undertaking and governing engagement practices will still be costly and unattractive to institutional shareholders without changing their investment management tactics and organisation.[159]

Even if one supposes that clients and beneficiaries will demand double-materiality-minded engagement practices, their enforcement may be puzzling. Detecting clients' and beneficiaries' preferences over engagement practices and translating them into engagement policies and strategies that will be disclosed back to clients and beneficiaries to police them accordingly is an arduous task. The ability to undertake engagement practices per the preferences expressed may vary, and so will institutional shareholders' aptitude to undertake double-materiality-minded engagement practices in response to them.[160] Problems may also appear when using the information disclosed to demand double-materiality-minded engagement practices. Second-guessing institutional shareholders' standard of engagement practices and demanding specific actions requires detailed accounts of institutional shareholders' operations, information showing more positive outcomes from alternative approaches, and expertise to compute both. Although some asset owners may possess such expertise, resource and cost constraints may disincentivise them to employ it.[161]

Finding information about engagement practices and assessing the information against different scenarios to demand different engagement practice standards can also prove elusive. The absence of definitions in the terms used in the SRDII obligations allows institutional shareholders to take liberties in defining them when complying with them. This can muddy the comparability between disclosures to make informed choices and demand specific actions. The absence of granular criteria for those disclosures also means significant

[157] Chiu, I. H-Y, Katelouzou, D.: Making a Case for Regulating Institutional Shareholders' Corporate Governance Roles, *Journal of Business Law*, 2018, pp. 76-78.

[158] Barker, Chiu (n. 118), pp. 67-72.

[159] See on this, Lund, D. S.: Asset Managers as Regulators, *University of Pennsylvania Law Review*, 171 2022.

[160] Davies, (n. 153), pp. 50-57.

[161] Barker, Chiu (n. 118), Chs 2 and 3.

liberties can be taken with the content of their disclosures, reducing the possibility of relying on them to enforce any expectations.[162] Institutional shareholders can also defend the quality of their engagement practices and governance by presenting the benefits conferrable to clients and beneficiaries.[163] Since engagement practices are expected to be encompassed in investment strategies adopted to benefit clients and beneficiaries, there may be little, if anything, to suggest their decisions go contrary to the latter.

3.3. NORMATIVE CONSIDERATIONS

Causing changes in the structures guiding institutional shareholders' treatment of engagement practices may warrant that private initiatives dealing with the factors and issues discussed will facilitate the undertaking and governance of double-materiality-minded engagement practices. Nonetheless, such changes may prove inadequate if the imperative the laws examined create for engagement practices does not change in tandem to advance them.

To be clear, the laws examined do not seem to oppose governing and undertaking double-materiality-minded engagement practices. As demonstrated in Section 2, institutional shareholders must uphold and comply with their overarching duties and governance obligations examined when they govern and undertake engagement practices. Despite their in-between disparities, these overarching duties and governance obligations indicate that institutional shareholders should take all necessary measures to manage investments and conduct their business prudently. If institutional shareholders believe undertaking and governing double-materiality-minded engagement practices is the best way of managing investments or conducting business, there is little in these laws to counter their discretion's exercise.

Albeit in varying terms, these overarching duties and governance obligations require most institutional shareholders to integrate the contemplation and action on financially material ESG considerations in their decision-making processes, governance, or both. These qualifications, though, do not seem to preclude contemplating and acting on 'doubly material' ESG considerations, allowing thus room to undertake and govern double-materiality-minded engagement practices. Nor can it be said EU regulators intended to restrict such

[162] Och, M., Shareholder Stewardship and Sustainability – the Current European Legal Framework and Possible Ways Ahead, in: Van Hoe, A., Vos, T. (eds.): *Shareholder Activism in Belgium - Boon or Curse for Sustainable Value Creation?*, Cambridge: Intersentia Belgium, 2023, pp. 94-95.

[163] Gosling, McNeil (n. 79), pp. 15-16.

an outcome.[164] If anything, EU regulators have arguably legitimised practices permeated by double materiality through the sustainable finance framework.[165] The implicit expectation for institutional shareholders to at least consider undertaking engagement practices to manage PAIs arguably legitimises decisions to undertake and govern double-materiality-minded engagement practices.[166] Managing PAIs via engagement practices demands going beyond ESG considerations' financial implications. Governing and undertaking double-materiality-minded engagement practices can achieve this.

The EU-derived law regulating institutional shareholders for their engagement practices does not appear antithetical to double-materiality-minded engagement practices either. Thanks to it, institutional shareholders are implicitly expected at least to consider whether and how to undertake engagement practices, especially those stated in the obligations, and develop engagement policies about them. The engagement practices mentioned in the SRDII obligations comprise monitoring investee companies for their financial and non-financial performance and impact on the environment and society.[167] No definitions articulate the content of these engagement practices. Regardless, their literal interpretation may mean monitoring investee companies' performance as measured by financial and non-financial indicators and their eco-social and economic impact. Governing and undertaking these engagement practices based on double materiality seems consistent with the interpretations just posed.[168] Institutional shareholders considering whether and how to undertake and govern these engagement practices with double materiality permeating them will thus most likely meet the expectations. The same may arguably hold for other engagement practices as well.

Institutional shareholders are also implicitly expected to undertake and govern engagement practices as part of their investment strategy for the benefit of their clients and beneficiaries.[169] The undertaking and governance of engagement practices are also expected to contribute to the medium-to-long-term performance of the assets and improve the medium-to-long-term performance

[164] See on this, Taxonomy Regulation, [9] – [17]; and SFDR, [3].

[165] Zetzsche, Anker-Sørensen (n. 154), pp. 62-63.

[166] SFDR, [18].

[167] See Section 2.1 and 2.2 above.

[168] Several authors have argued that SRDII is underpinned by such considerations. See, for example, Katelouzou, D., Klettner, A.: Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability Potential, in: Katelouzou, D., Puchniak, D. (eds): *Global Shareholder Stewardship*, Cambridge: Cambridge University Press, 2022.

[169] See Section 2.2 above.

of investee companies.[170] There are, again, no definitions for any of those terms. As noted, though, the medium-to-long-term performance of assets can be interpreted as the estimate of their market value, and the investee companies' medium-to-long-term performance can denote their financial and non-financial performance.[171] If both interpretations hold, institutional shareholders are expected implicitly to govern and undertake engagement practices for bettering the assets' market value and improving investee companies' medium-to-long-term financial and non-financial performance to satisfy clients' and beneficiaries' interests. Undertaking and governing double-materiality-minded engagement practices may improve asset value, better investee companies' medium-to-long-term financial and non-financial performance, and satisfy clients' and beneficiaries' interests.

The permissibility of double-materiality-minded engagement practices, however, must not be overstated. Institutional shareholders are not under a duty to undertake engagement practices. Save perhaps for UCITS management companies and AIFMs, institutional shareholders are not required to govern engagement practices either. The sectoral laws examined may allow institutional shareholders to undertake and govern double-materiality-minded engagement practices. Nevertheless, the impetus most of them give to institutional shareholders to undertake and govern ESG-considerations-related engagement practices stops short of inviting them to deal with financially material ESG considerations.[172] It is plausible for doubly material ESG considerations to be financially material and hence be factored if such engagement practices are governed and undertaken on the strength of the impetus these laws give to institutional shareholders to do so. However, not all doubly material ESG considerations may qualify as financially material, meaning they may be prone to neglect. The law regulating institutional shareholders for their engagement practices has gone only as far as raising implicit expectations about institutional shareholders' treatment of engagement practices. Institutional shareholders can disregard many of the expectations by not occupying themselves with engagement practices; or creating the appearance of undertaking and governing such engagement practices. The enforcement of the expectations may push institutional shareholders to refrain from acting in either fashion.[173] Notwithstanding, it is doubtful whether the expectations can impress on institutional

[170] ibid. See also SRDI (as amended by SRDII), Art. 3h(1).

[171] See Section 2.1 above.

[172] This modelling of the law may be attributed to the 'financialised' legitimation of the integration of ESG considerations. See on this, McNeil, I., Esser, I. M.: From a Financial to an Entity Model of ESG, *European Business Organization Law Review*, 23(1) 2022.

[173] See in general, Katelouzou, Sergakis: Shareholder Stewardship Enforcement, (n. 42).

shareholders that they should govern and undertake double-materiality-minded engagement practices.

There is, principally, an issue with how institutional shareholders may perceive those expectations should be met. Institutional shareholders may choose to meet the expectations by undertaking and governing engagement practices to encourage 'responsible' business practices or address ESG considerations only when it benefits them or their clients and beneficiaries financially.[174] This does not mean the governance and undertaking of such engagement practices are unequal to being double-materiality-minded. However, institutional shareholders when undertaking and governing these engagement practices may forego touching on matters pivotal for promoting sustainable business practices based on following double materiality. The lax interpretive room the terminology used in the law informing the implicit expectations allows institutional shareholders to interpret the expectations in a manner which they may believe it is suitable to undertake and govern this quality of engagement practices to meet them, irrespective of whether their engagement practices are not going to be double-materiality-minded.[175]

Differentiating between different brands of engagement practices can discern whether it is best to undertake and govern double-materiality-minded engagement practices to meet expectations. Difficulties in doing so, however, can challenge institutional shareholders' competence to conduct such an exercise.[176] Trying to tell whether institutional shareholders should govern and undertake double-materiality-minded engagement practices to meet the expectations compared to engagement practices of a different quality depends on metrics telling the difference between them. The author is unaware of the existence of such metrics. Even if they are available, they may bear similar issues to those metrics used for measuring the input of business and finance into sustainable development and those in development. Relying on them may lead to decision-making about engagement practices which may be incomparable and difficult to pin down as expectations-compliant.

Another issue is the possibility of double-materiality-minded engagement practices proving incompatible with meeting some implicit expectations. As stated, undertaking and governing double-materiality-minded engagement

[174] Prominent economists support this ideal of alignment based on rational thinking of welfare and integration of ESG considerations as material in decision-making. See, for example, Hart, O., Zingales, L.: Companies Should Maximize Shareholder Welfare Not Market Value, *Journal of Law, Finance, and Accounting*, 2(2) 2017.

[175] Johnston et al. (n.12), p. 74.

[176] See on this, Och (n. 162), p. 94.

practices may be consistent with the expectation to undertake and govern engagement practices to improve the assets' market value and investee companies' medium-to-long-term financial and non-financial performance for the benefit of clients and beneficiaries. However, undertaking and governing double-materiality-minded engagement practices is not the end these expectations pose; that is the latter. Calling institutional shareholders to undertake and govern engagement practices for the latter purposes is susceptible to legitimising the undertaking and governance of double-materiality-minded engagement practices only when it is explicit that doing so achieves those purposes.[177] The consequence may be institutional shareholders outright not governing and undertaking double-materiality-minded engagement practices not for the lack of trying, but for the lack of explicit normative premises suggesting they should govern and undertake double-materiality-minded engagement practices.

One may find this point moot, for undertaking and governing double-materiality-minded engagement practices may become synonymous with meeting these expectations if the metrics relied upon to inform said actions are wedded to double materiality.[178] However, the abovementioned challenges regarding metrics and sustainable development indicators should question the judiciousness of having too much confidence in making value creation and performance improvement the yardsticks for undertaking and governing double-materiality-minded engagement practices.[179] Regulation may generate better disclosures of information and processes, correcting many of the deficiencies in the metrics for sustainable development and business practices.[180] Yet the issue remains

[177] On the merits and demerits of making a business case for approaching sustainable business practices, see, from the perspective of corporate social responsibility initiatives, Millon, D.: Corporate Social Responsibility and Environmental Sustainability, in: Sjåfjell, B., Richardson, B. J. (eds.): *Company Law and Sustainability: Legal Barriers and Opportunities*, Cambridge: Cambridge University Press, 2015.

[178] But see on this, Cullen, J., Mähönen, J.: Taming Unsustainable Finance: The Perils of Modern Risk Management, in: Sjåfjell, B., Bruner, C. M. (eds.): *Cambridge Handbook of Corporate Law and Sustainability*, Cambridge: Cambridge University Press, 2019.

[179] See Section 3.1. above.

[180] This is hardly a novel argument. Instrumental regulation aiming at facilitating the mechanics of the market to facilitate optimal behaviour (in the sense of achieving allocative efficiency) was traditionally posed as an important argument. See Easterbrook, F. H., Fischel, D. R., *The Economic Structure of Corporate Law*, Cambridge: Harvard University Press, 1991. Cf Johnston, A., Governing Externalities: The Potential of Reflexive Corporate Social Responsibility, *Centre for Business Research, University of Cambridge, Working Paper No. 436*; and, in the context of corporate sustainability, Johnston, A., Sjåfjell, B.: The EU's Approach to Environmentally Sustainable Business: Can Disclosure Overcome the Failings of Shareholder Primacy?, in: Peeters, M., Eliantonio, M. (eds.): *Research Handbook on EU Environmental Law*, Cheltenham: Edward Elgar Publishing Limited, 2020.

that these expectations may create the impression to institutional shareholders to govern and undertake double-materiality-minded engagement practices only as a means to an end – to pursue value creation and improvements in the financial and non-financial performance of investee companies – rather than them being the end itself. Having value creation and performance improvement as guides for governing and undertaking double-materiality-minded engagement practices may lead to avoiding double-materiality-minded engagement practices if the metrics relied upon are misaligned with double materiality or they caution against them. It may also lead to exhibiting behaviour seeking to attain the former but ultimately failing to encourage adopting sustainable business practices, creating a new kind of 'investor myopia'.

4. THE WAY FORWARD: REFORM THE LAW, BUT CAREFULLY

Looking at the analysis in Section 3, the Commission must adopt decisive measures if it longs for institutional shareholders to govern and undertake double-materiality-minded engagement practices and the law regulating their engagement practices to induce them to do so. The Commission's announcement of reviewing the frameworks governing engagement and stewardship practices marks a step in the right direction, provided the aim is to establish double-materiality-minded engagement practices as the new engagement practices standard. The review can expose existing deficiencies in the law and propose relevant reforms. Additionally, the review can highlight possible reforms regarding institutional shareholders' aptitude and eagerness to govern and undertake double-materiality-minded engagement practices.

The author argues that the Commission should recommend reforming the law in question if it aspires this law to become a major driver for influencing the governance and undertaking of double-materiality-minded engagement practices. Regulatory rules of conduct connected to double-materiality-minded engagement practices must be introduced, whether as part of regulating institutional shareholders' overall governance or distinctively.[181] Such rules can be accompanied by provisions centred on double-materiality-minded engagement practices, guiding the contemplation and action on ESG considerations.

However, caution must be exercised should the recommendation be acted upon. While institutional shareholders may develop engagement policies and strategies grounded in following double materiality, the structures guiding their

[181] Barker and Chiu have made a case for similar reforms to take place, focusing however on the public interest consideration of promoting the interests clients and beneficiaries. See Barker, Chiu (n. 118), pp. 185-188.

treatment of engagement practices may undermine their implementation and enforcement.[182] Reforming the EU-derived law regulating institutional shareholders for their engagement practices by simply mandating the development and disclosure of double-materiality-minded engagement policies and strategies may prove inadequate in responding to such shortcomings.

Moreover, unwanted and undesirable outcomes may precipitate if care is not exercised when reforming the law.[183] As previously discussed, the governance and undertaking of double-materiality-minded engagement practices hinges partly on addressing various challenges related to measuring the contribution of business and finance to sustainable development. Regulation has been introduced for these challenges, and further measures are anticipated.[184] The success of regulation at its task and its efficacy in enabling institutional shareholders to govern and undertake double-materiality-minded engagement practices remains uncertain at the time of writing. Reforming the law without adequately taking note of these uncertainties may jeopardise the efforts to encourage, through legal means, the governance and undertaking of double-materiality-minded engagement practices.

The possibility of getting the reform wrong may be amplified if no standards and criteria constitute the nature of double-materiality-minded engagement practices. One should not take for granted that indicators of achieving specific sustainable development objectives or criteria for determining when sustainable business practices are 'sustainable' are benchmarks for classifying engagement practices occupied with these as double-materiality-minded. Distinct standards and criteria for double-materiality-minded engagement practices may be essential to create a rubric for ascertaining their occurrence. Such standards and criteria can dictate whether engagement practices encourage investee companies to adopt sustainable business practices based on double materiality by referring to specific outcomes achieved, or any goals promoted. Reforming the law without much thought into developing standards and crite-

[182] See on this, Johnston (n. 114), pp. 57-63 (arguing that although index funds may engage for some issues, that engagement will most likely be limited, and most likely going to focus on shareholder-value-related matters).

[183] This is especially the case given that there are profound uncertainties looming in conducting sustainable finance. See Zetzsche, Anker-Sørensen (n. 154), pp. 63-71.

[184] See SFDR; Taxonomy Regulation; CSRD; Due Diligence Directive; Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks, (OJ L 317, 09.12.2019); and Proposal for a Regulation of the European Parliament and of the Council on the Transparency and Integrity of Environmental, Social and Governance (ESG) rating activities, COM/2023/314 final, 16.03.2023.

ria for double-materiality-minded engagement practices may legitimise institutional shareholders' current treatment of engagement practices irrespective of its impact on adopting sustainable business practices.

Several design principles can be factored in to reform the law cautiously. Any reforms made must avoid harming the transition to sustainable development. The uncertainties caused by the challenges faced by institutional shareholders in undertaking and governing double-materiality-minded engagement practices are multifaceted. The risk of unintentionally legitimising suboptimal standards of engagement practices and the governance thereof also remains high. Given these, the best course of action may be prioritising the development of standards and criteria for double-materiality-minded engagement practices. The standards may be accompanied by guidance on governing certain engagement practices. They may also build on existing standards and criteria established by other sustainable finance regimes.

Beyond standard-setting, the reform must foster institutional shareholders' ability to appraise the governance and undertaking of double-materiality-minded engagement practices.[185] The reform should change the structures guiding institutional shareholders' treatment of engagement practices endogenous to institutional shareholders' decision-making. Considering the uncertainties surrounding institutional shareholders' faculty to undertake and govern double-materiality-minded engagement practices, these changes should not be overly prescriptive, at least for now.[186] They should also strive to cultivate expertise in undertaking and governing double-materiality-minded engagement practices.

To this end, three regulatory steps should be taken.[187] First, the reform must not be isolated from other EU and national corporate and financial regulations on sustainable finance and business. After all, the reform's efficacy is contingent on its consistency with all other relevant regulatory frameworks.[188] Secondly, the reform should support any efforts to create expertise on undertaking and governing double-materiality-minded engagement practices. Thirdly, the reform must be open to innovative approaches to governing and undertaking

[185] Similar suggestions, albeit with different suggestions, were made by Chiu and Katelouzou in Chiu, Katelouzou (n. 157), pp. 94-96.

[186] A similar point was made about sustainable finance in Zetzsche, Anker-Sørensen (n. 154), pp. 74-80.

[187] These steps echo the suggestions made in ibid, citing Romano, R.: Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation, *Hofstra Law Review*, 43(1) 2014.

[188] On the connections between the SRDII obligations and national stewardship codes, see Katelouzou, Sergakis (n. 17).

engagement practices. Much of what is and will be known about double-materiality-minded engagement practices may prove erroneous. Allowing flexibility to innovate in undertaking and governing double-materiality-minded engagement practices can help develop best practices as more research and information about them is gathered.

Acting on these recommendations, the Article proposes introducing procedural rules about stewardship teams related to double-materiality-minded engagement practices. The Article further proposes creating programmes dedicated to experimenting with governing and undertaking double-materiality-minded engagement practices.

4.1. STEWARDSHIP TEAMS

Data shortages, lack of credible metrics, and factors discouraging engagement practices or bolstering potentially deleterious engagement practices come together to dampen the prospect of institutional shareholders governing and undertaking double-materiality-minded engagement practices. With reliable standards over double-materiality-minded engagement practices missing, regulators and supervisory agencies can hardly impose qualifications for or assess details about the quality of institutional shareholders' engagement practices and their governance besides overarching principles, such as those found in national Stewardship Codes.[189] This makes merely amending institutional shareholders' existing EU-derived obligations to resound the EU's sustainable development objectives less promising, for it is unclear what utility will be derived from it.[190] Yet keeping the status quo of institutional shareholders' treatment of engagement practices does not seem a sensible path either if the goal is for double-materiality-minded engagement practices to emerge.

The reform of the law regulating institutional shareholders for their engagement practices should thus focus on stewardship teams in parallel to creating standards and criteria for double-materiality-minded engagement practices. As a general rule, rules about stewardship teams may prescribe having stewardship teams in place and articulate their responsibilities. The rules can align with existing obligations about developing, managing and implementing engagement policies and strategies.[191] Furthermore, the rules can demand over-

[189] But see, ibid, pp. 229-235 (arguing for the possibility of the laws acting symbiotically with Stewardship Codes so that Stewardship Codes can flexibly provide higher standards for shareholder engagement).

[190] Cf EIOPA (n. 73), pp. 208-209 (suggesting policy changes to this end).

[191] See Section 2.1, above.

sight of those functions in proportion to institutional shareholders' size, nature, scale and complexity of activities.[192]

The rules on stewardship teams can demand contemplating and acting on sustainability risks and PAIs when governing and undertaking engagement practices which derive from their conduct and the conduct of investee companies. Notwithstanding, it is perhaps sensible for a while to create qualifications about these due to the uncertainties deriving from the challenges in measuring the contribution of business to sustainable development. Adjusting Zetzsche's and Anker-Sørensen's recommendations on risk management rules to engagement practices, it is suggested these requirements be followed by a qualification of contemplating and acting on sustainability risks and PAIs when robust data and indicators support both.[193] Such a step may help improve expertise in governing and undertaking double-materiality-minded engagement practices in conjunction with improvements in the quality of data and metrics. For the rest of the cases, the requirement may allow institutional shareholders to test and learn from novel approaches to governing and undertaking double-materiality-minded engagement practices.

Considering the complexity and plurality of the moving parts associated with governing and undertaking double-materiality-minded engagement practices, any rules about stewardship teams must avoid being overtly prescriptive. Instead, the rules should facilitate knowledge, and expertise in governing and undertaking double-materiality-minded engagement practices. EU-derived sectoral law already requires staff members to be appropriately trained and be of good repute. Notwithstanding, the risk of governing and undertaking quack engagement practices and demonstrating them as double-materiality-minded is real. Creating expertise by requiring or encouraging the development of firm-specific sustainable development strategies and training may be of value in gaining the knowledge and expertise needed. Supervisory agencies and regulators may support such initiatives by providing training and guidance.

4.2. CULTIVATING INNOVATION AND EXPERIMENTATION

In summary, the recommendations above are to create and implement standards and criteria for double-materiality-minded engagement practices; ensure reporting about engagement practices follows those standards and criteria; and enact enabling governance rules. The work involved in developing, propos-

[192] Suggesting these qualifications is not antithetical to existing governance rules about other functions of institutional shareholders' investment management. See Section 2.3, above.

[193] Zetzsche, Anker-Sørensen (n. 154), pp. 78-79.

ing and enacting such regulations and standards may be time-consuming and difficult to navigate.[194] Until the work for such reform is complete, regulators should accommodate institutional shareholders' experimentation with governing and undertaking double-materiality-minded engagement practices. Regulatory methods and structures allowing such experimentation can potentially bolster it.

Reflecting on the uncertainties surrounding sustainable finance, Zetzsche and Anker-Sørensen argued that regulating experimentation and innovative approaches to sustainable finance should not be entirely different from regulating other innovations, such as financial technologies ('Fintech'), where the need for regulation must be balanced with openness to innovation.[195] Arguably, this argument applies to double-materiality-minded engagement practices as well. The uncertainties and rapid developments surrounding sustainable finance and financial technologies mirror those in engagement practices, making the regulatory challenges comparable in designing effective and adaptive regimes for them.

Therefore, it may be wise to transplant some modes of regulating Fintech to foster experimentation and innovation in engagement practices.[196] Setting up regulator-controlled innovation hubs and regulatory sandboxes about the governance and undertaking of double-materiality-minded engagement practices could kickstart gathering expertise and knowledge-building for them. Alongside similar programmes for sustainable finance, such initiatives could benefit institutional shareholders lacking the experience and know-how to govern and undertake double-materiality-minded engagement practices. Regulators could offer institutional shareholders incentives to participate or develop codes of best practice alongside national stewardship codes based on participants' initiatives in those programmes, generating potential reputational gains.

Innovation hubs are typically platforms where industry members can access regulators' guidance on navigating regulatory requirements or specific approaches to a particular happening.[197] An innovation hub for double-materiali-

[194] For an account of the led-up to the enactment of the SRDII see, Birkmose, H. S., Sergakis, K.: SRD II: Political Ambitions and Regulatory Rationales, in: Birkmose, H. S., Sergakis, K. (eds.): *The Shareholder Rights Directive II: A Commentary*, Cheltenham: Edward Elgar Publishing Limited, 2021.

[195] Zetzsche, Anker-Sørensen (n. 154), pp. 80.

[196] ibid. See also on this, generally, Zetzsche, D., Bodellini, M.: A Sustainability Crisis Makes Bad Law! - Towards Sandbox Thinking in EU Sustainable Finance Law and Regulation, *SSRN Working Paper*s, 2022.

[197] Buckley, R. et al.: Building FinTech Ecosystems: Regulatory Sandboxes, Innovation Hubs and Beyond, *Journal of Law and Policy*, 61 2020, pp. 58-59.

ty-minded engagement practices could assist institutional shareholders by clarifying the expectations the law regulating their engagement practices raises, bridging any possible 'expectation gaps' between regulators and institutional shareholders. It could also offer institutional shareholders tailored advice on compliance with the law and adherence to reporting standards. On a broader scale, innovation hubs for double-materiality-minded engagement practices could provide macro-level guidance through white papers, consultation meetings, and seminars focusing on governing engagement practices or topics engagement practices may deal with.

Innovation hubs for engagement practices already exist in the private sphere, making their development specifically for governing and undertaking double-materiality-minded engagement practices sound relatively uncontroversial. The Investor Forum in the UK is a good example of an association performing such a function. Although its reach and effect are disputed,[198] the Investor Forum has been established to consult with its members – mostly institutional shareholders – to understand their concerns and help develop constructive solutions by generating practical guides and research on contemporary issues.[199] Additionally, the Investor Forum has created a collective engagement framework to facilitate collaborations between institutional shareholders and act as their intermediary at the investee-company level.[200]

On the other hand, proposing to create regulatory sandboxes for double-materiality-minded engagement practices is more novel. Regulatory sandboxes typically form a space for innovation by allowing several concessions, such as the temporary application of regulatory regimes on participants, or by offering compliance guidance to them.[201] Regulators overseeing regulatory sandboxes monitor participants' actions and evaluate them against strict, pre-determined criteria shared with participants beforehand.[202] Regulatory sandboxes may not be experimental in the sense of creating and applying a completely different set of conditions and rules for participants to try new measures. Yet their key feature is fostering a stronger collaboration between regulators and regulatees to ensure compliance and action on specific phenomena.[203]

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198 See, for example, Johnston et al. (n. 12), p. 74.

199 The Investor Forum: *Review 2023*, London: The Investor Forum CIC, 2023.

200 ibid. The success of it, however, is mixed. See, The Investor Forum, Review 2023, 2023.

201 Zetzsche, D. et al.: Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation, *Fordham Journal of Corporate and Financial Law*, 23 2017, pp. 63-64.

202 ibid, p. 68.

203 Ranchordas, S., Vinci, V.: Regulatory Sandboxes and Innovation-friendly Regulation: Between Collaboration and Capture, *Italian Journal of Public Law*, 1 2024, p. 6.

A regulatory sandbox for double-materiality-minded engagement practices could focus on offering participants bespoke guidance about their approaches to governing and undertaking engagement practices. The guidance may revolve around giving assurances about how specific rules apply to participants' engagement practices or confirming the prudence of participants' approaches. Using pre-designed tools, the regulatory sandbox could determine whether certain approaches to engagement practices or a governance attribute are permissible or consistent with any expectations or standards raised or established about engagement practices. Participants would remain responsible for adhering to relevant laws during the regulatory sandbox experiment, and they could set out compliance performance indications throughout. Participation in such a regulatory sandbox would be subject to the regulators' admission, monitoring and evaluation processes, with the regulator selecting suitable candidates for participation.

Creating a regulatory sandbox for double-materiality-minded engagement practices offers potential benefits. For one, such an initiative can signal that regulators are open to innovation in governing and undertaking double-materiality-minded engagement practices, even while developing standards and criteria for them.[204] Moreover, a regulatory sandbox for double-materiality-minded engagement practices would provide an important learning opportunity for regulators. Regulatory sandboxes are renowned for allowing regulators to appreciate participants' practices and assess the dynamics dictating them and their capacity to be involved with certain matters.[205] Regulatory sandboxes for double-materiality-minded engagement practices may give fresh insights into the appropriateness of existing and proposed expectations, standards and criteria for governing and undertaking engagement practices.

Yet, of course, neither innovation hubs nor regulatory sandboxes are silver bullets. Regulators wishing to promote innovation in governing and undertaking double-materiality-minded engagement practices need to make the staff available to interact with institutional shareholders, assist with advice and guidance and issue bespoke guidance and affirmations.[206] Besides the risks of harming investee companies and other stakeholders in the process, the risk of getting their particulars and design features wrong is also high. Similar experimental regimes have been criticised for their loose methodology, casuistic nature and limited ability to validate that they have been helpful or successful in causing

[204] Buckley et al (n. 197), p. 71. Cf Zetzsche et al. (n. 201), p. 79.

[205] ibid.

[206] Buckley et al (n. 197), pp. 77-78.

changes to existing practices.[207] Access to such regimes will also be of interest only to a few institutional shareholders. Hence, it is questioned as to whether they will be useful or meaningful enough to cause widespread change.[208]

The utility derived from experimental regimes can only be attained when sufficient attention is devoted to designing such regimes. Several moving parts dictating institutional shareholders' treatment of engagement practices may complicate the design process. Differences between institutional shareholders in their organisation, the use of investment intermediaries, and the uncertainty of the impact of engagement practices add further complexity to the undertaking. If the regimes are poorly designed, they will most likely not produce any benefits and potentially cause more harm to participants or other stakeholders than good.[209] Experimental regimes showcase the connection between public policy, compliance with the law and methodological design. Should the recommendation be followed, regulators must ensure they design regimes which fulfil several methodological requirements, carefully assessed and considered to create optimal results.[210]

5. CONCLUSION

This article argued that the Commission should recommend in its review of the stewardship and engagement practices frameworks to reform the law regulating institutional shareholders for their engagement practices if the Commission wishes this law to influence institutional shareholders to govern and undertake double-materiality-minded engagement practices. The article signified that the effect of several factors on institutional shareholders' treatment of engagement practices and the challenges in measuring the contribution to sustainable development must be mitigated and overcome respectively for institutional shareholders to govern and undertake such practices. The law examined as it interacts with key EU sectoral laws arguably paves the way for market-led regulation to address these issues in the context of engagement practices. However, the article argued that such initiatives will likely not follow to the point of enabling the governance and undertaking of double-materiality-minded engagement practices without changing the structures guiding

[207] Ranchordas, S.: Experimental Regulations and Regulatory Sandboxes: Law without Order?, *Law and Method*, 2021, p. 3.

[208] Buckley et al. (n. 197), pp. 77-78.

[209] See on this, Ranchordas, S.: Experimental lawmaking in the EU: Regulatory Sandboxes, *University of Groningen Faculty of Law Research Paper No. 12/2021.*

[210] ibid.

institutional shareholders' treatment of engagement practices and the law's imperative about it.

Failing to recognise the deficiencies in the law examined concerning the promotion of double-materiality-minded engagement practices risks jeopardising the Commission's aspiration to ensure engagement practices will accord with the EU's sustainable development objectives. Steps have been taken by supervisory authorities such as EIOPA to pinpoint said deficiencies. Yet endeavouring to remedy them through simply making amendments to the existing law may prove inadequate. Arguably, the laws in question cannot lead alone or in conjunction with EU sectoral law to see institutional shareholders governing and undertaking double-materiality-minded engagement practices. Stimulating the governance and undertaking of double-materiality-minded engagement practices is neither a simple task nor can be solved by slightly amending existing legal parameters. Greater attention is needed to create a more holistic engagement practices regime focusing on ESG considerations and permeated by double materiality. The recommendations set forth by the Article are hoped to stimulate a discussion for designing said regime.

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