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## Institutional Owners and Corporate Managers: A German Dilemma

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# INSTITUTIONAL OWNERS AND CORPORATE MANAGERS: A GERMAN DILEMMA

*Friedrich K. Kübler\**

Professor Buxbaum's impressive analysis is based on his intimate knowledge and perfect understanding of German law. There is no reason for contradiction or correction. He asks whether there is anything the United States can learn from German institutions. I will ask the converse: how can the German aspirations for reform be guided by the American experience? My answer will be given in three parts: First, I will mention very briefly some of the basic features of the German scene in order to illustrate the marked differences, or perhaps more accurately, the wide gap between the two systems. Next, I will review in a nutshell the current proposals for change and the discussions they have triggered. Finally, I will address what might be the basic choices Germany is facing today. I hope this will bring me back to the important conclusions of Professor Buxbaum's article.

## I. INSTITUTIONAL OWNERSHIP AND CORPORATE GOVERNANCE IN GERMANY

Toward the end of his article, Professor Buxbaum describes Europe as having "older and deeper economic, political, and social structures."<sup>1</sup> This description appears to be particularly true for Germany. In terms of Robert Clark's "Four Stages of Capitalism"<sup>2</sup> we are still sitting on the first two steps of the stairway. While this cannot be fully explained here, it may prove useful to outline four essential points:

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<sup>1</sup> Buxbaum, *Institutional Owners and Corporate Managers: A Comparative Perspective*, 57 BROOKLYN L. REV. 1, 38 (1991).

<sup>2</sup> Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises*, 94 HARV. L. REV. 561 (1981).

1. The general structure of German corporate law is very rigid; it is much closer to its American counterpart of three generations ago than to current Delaware or California statutes or the Revised Model Business Corporation Act. The emphasis is still on creditor protection. This is particularly true for the stock corporation (Aktiengesellschaft). Germany requires legal capital to be fixed by the articles of incorporation; the minimum amount is prescribed by statute;<sup>3</sup> the distribution of earnings is restricted by mandatory reserve requirements; in most cases the repurchase of the corporation's own stock is illegal.<sup>4</sup> Existing stockholders are preferred to investors. There is no general disclosure requirement for the public distribution of securities,<sup>5</sup> but whenever the corporation issues new stock there are mandatory preemptive rights for its shareholders.<sup>6</sup> All private companies (GmbH) with more than five hundred employees and all stock corporations are required to have both a managing and a supervisory board. One third of the seats on the supervisory board are given to the representatives of the employees and their unions.<sup>7</sup> This number is increased to one half in enterprises with more than two thousand employees. This institutionalization of codetermination is only one aspect of a dramatically different system of labor relations: its key element is the works council (Betriebsrat), a mandatory committee elected by the employees to represent their interests and voice their demands against management. Thus codetermination integrates the works council and, to a lesser extent, the unions into some parts of corporate planning and responsibility.

2. Institutional investment in Germany is not easily explained in a few words. Endowments are nonexistent. Industrial foundations, like the Carl-Zeiss-Stiftung or the Robert-Bosch-

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<sup>3</sup> Actually it is 100,000 DM for the stock corporation and 50,000 DM for the private company (GmbH).

<sup>4</sup> For a comparative analysis, see F. KÜBLER, *AKTIE, UNTERNEHMENSFINANZIERUNG UND KAPITALMARKT* (1989).

<sup>5</sup> Hopt, *Vom Aktien-und Börsenrecht zum Kapitalmarktrecht?*, 140 *ZEITSCHRIFT FÜR DAS GESAMTE HANDELS-UND WIRTSCHAFTSRECHT* 141, 201, 389 (1976-77); H.-D. ASSMANN, *POSPEKTHAFTUNG* 75-79 (1985).

<sup>6</sup> For a comparative and economic study, see Kübler, Mendelson & Mundheim, *Die Kosten des Bezugsrechts*, 35 *DIE AKTIENGESELLSCHAFT* 461 (1990).

<sup>7</sup> For details, see F. KÜBLER, *GESELLSCHAFTSRECHT* 407 (3d ed. 1990); for a comparative evaluation, see Summers, *Codetermination in the United States: A Projection of Problems and Potential*, 4 *J. COMP. CORP. L. & SEC. REG.* 155 (1982).

Stiftung, are institutional owners but not real institutional investors; they are mostly limited to holding shares in a single enterprise.<sup>8</sup> Pension funds so far have had very little importance.<sup>9</sup> The same is largely true for investment funds. It may be that they have never fully recovered from the blow they received a generation ago from Bernie Cornfield and his International Overseas Services.<sup>10</sup> Their number is very limited,<sup>11</sup> and they appear to be particularly unattractive if they invest in the equity segment of the securities market.<sup>12</sup> Moreover, they are dominated by banks.<sup>13</sup> Thus, among the five categories of institutional investors discussed by Professor Buxbaum,<sup>14</sup> only two are relevant to the German scene: insurance companies and banks. Insurance companies have always been subject to strict limitations with regard to investment in equity,<sup>15</sup> and often they do not even use the very restricted opportunities allowed by law. However, the largest German insurance conglomerate, Allianz, by the sheer volume of its funds, appears to have some impact on public corporations.<sup>16</sup> The biggest issue, however, has been and remains the banks. The bank issue may become still more acute due to the fact that the separation between the banking and the insurance industries, which has never been legally mandated, is slowly evaporating.<sup>17</sup> For a long time the big banks

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<sup>8</sup> For details, see H. KRONKE, *STIFTUNGSTYPUS UND UNTERNEHMENSTRÄGERSTIFTUNG* 188, 271 (1988).

<sup>9</sup> See notes 22-27 *infra*.

<sup>10</sup> See C. RAW, B. PAGE & G. HODGSON, *DO YOU SINCERELY WANT TO BE RICH?*, 244 (1971).

<sup>11</sup> By the end of 1988 there were 35 domestic funds offering shares to the public: 28 invest in securities, seven in real estate. See Baur, *Investmentgeschäfte*, in *HANDBUCH DES KAPITALLAGERECHTS* 534 (H.-D. Assmann & R. Schütze eds. 1990).

<sup>12</sup> See 31 Monatsberichte der Deutschen Bundesbank Nr. 8, 11; Schneider, *Auf dem Weg in den Pensionskassenkorporatismus?* 35 *DIE AKTIENGESellschaft* 317, 319 (1990).

<sup>13</sup> See *BERICHT DER STUDIENKOMMISSION, GRUNDSATZFRAGEN DER KREDITWIRTSCHAFT* 67 (1979).

<sup>14</sup> Buxbaum, *supra* note 1, at 7.

<sup>15</sup> The general rule is that they may invest only five percent of their capital and only in shares of listed corporations; for a discussion see Reuter, *Welche Maßnahmen empfehlen sich, insbesondere im Gesellschafts- und Kapitalmarktrecht, um die Eigenkapitalausstattung der Unternehmen langfristig zu verbessern?* 55 *DEUTSCHER JURISTENTAG B* 90 (1984).

<sup>16</sup> This can be inferred from the number of seats its top managers occupy on the supervisory boards of such corporations. See the figures in *Monopolkommision, Gesamtwirtschaftliche Chancen und Risiken wachsender Unternehmensgrößen*, in *HAUPTGUTACHTEN* 156 (1984-85).

<sup>17</sup> Deutsche Bank has started its own insurance business. Aachen Münchener Ver-

have owned blocks of shares of industrial corporations. The most spectacular example is certainly the 28.5 percent holding of Deutsche Bank in Daimler-Benz.<sup>18</sup> This has become even more of an issue since Daimler-Benz controls AEG and was allowed to acquire Messerschmidt-Bölkow-Blohm, thus becoming the number one German industrial conglomerate. When one examines the statistics, the situation appears to be much less dramatic. The Federation of German Banks contends that the holdings of the ten largest private banks—and they are the only ones that matter—in the aggregate equity of all German stock corporations declined from 1.32 percent in 1976 to 0.57 percent in 1989.<sup>19</sup> To my knowledge, these figures<sup>20</sup> have not been contested.<sup>21</sup> The figures, however, do not disclose that these holdings are concentrated within the three biggest private banks, the "Grossbanken." Yet there are still good reasons to assume that the influence exercised by Allianz, the largest insurance enterprise, exceeds the corresponding weight of Dresdner Bank or Commerzbank.

3. In general the sources of retirement funding are the same as in the United States, but there are significant differences with regard to their function, structure and respective importance. Social security in Germany is an old but very comprehensive system. It covers about ninety percent of the population<sup>22</sup> and, after a lifetime of work, it offers a retirement income of about seventy percent of the recipient's last annual salary.<sup>23</sup> On the other hand, the third pillar, privately invested savings, appears to be less important than in the United States.<sup>24</sup> The second pil-

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sicherung has acquired control of Bank für Gemeinwirtschaft.

<sup>18</sup> Monopolkommission, *supra* note 16, at 139.

<sup>19</sup> Informationen des Bundesverbandes deutscher Banken, Zur Diskussion um die "Macht der Banken" 7 (Sept. 1989).

<sup>20</sup> They compare favorably with other institutions; the insurance industry (including all sorts of pension funds) owns 11.8% of the aggregate equity of German stock corporations. See Guthardt, *Pensionskassen und Börse*, 43 WERTPAPIER-MITTEILUNGEN 1789 (1989).

<sup>21</sup> They are accepted by informed critics like Lambsdorff, *Die Macht der Banken*, 43 ZEITSCHRIFT FÜR DAS GANZE KREDITWESEN HEFT 1, 12 (1990).

<sup>22</sup> Stolleis, *Hundert Jahre Sozialversicherung in Deutschland*, 69 ZEITSCHRIFT FÜR VERSICHERUNGSWISSENSCHAFT 155 (1980).

<sup>23</sup> The figure includes the pension paid to "public officials" (judges, diplomats, high government servants, university professors, etc.) out of the state's tax income.

<sup>24</sup> This is certainly true for life insurance and for securities; it is less obvious for real estate.

lar, employment-based private pensions, may have the same respective weight in both countries. But in Germany the structures are radically different. As already mentioned, in Germany the American-type pension fund is a rare phenomenon. Rather the system is characterized by the "Pensionszusage," the pension commitment given by the employer to the employee. The basic mechanism is simple. The employment contract provides that the employee, having reached retirement age, will receive monthly payments of a specified amount. In order to be able to honor this commitment, the enterprise (not necessarily a corporation) will start to accumulate reserves. In technical terms the pension commitment is a tax-relevant liability on the balance sheet.<sup>25</sup> It therefore generates liquidity which is normally used for the expansion of the business. All enterprises entering into pension commitments are under a statutory duty to buy insurance against the risk of insolvency.<sup>26</sup> For this purpose, German industry has organized its own insurance system, the Pensions-Sicherungs-Verein, Versicherungsverein auf Gegenseitigkeit (PSV).<sup>27</sup>

4. The most striking contrasts relate to the markets. The size and the importance of the German stock market are exemplified by just two figures: there are no more than 2,300 German stock corporations, and fewer than 630 are listed on one of the German stock exchanges.<sup>28</sup> Apart from the very big enterprises, other forms of business organizations such as the limited partnership or the private (closed) company clearly are predominant. The activity and the depth of the stock market is further reduced by the traditional attitude favoring long-term investment and by the comparatively modest impact of institutions. The internationalization of the securities markets has resulted in some change. For example, the increasing volatility of the German stock market—as illustrated by sharp market breaks on October 19, 1987 and, more recently this year, as a result of the

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<sup>25</sup> For some time pension commitments could be given off-balance sheet. This regulatory gap has fortunately been closed by the statute transforming the Fourth Directive into German law.

<sup>26</sup> For details see W. BLOMEYER & K. OTTO, *GESETZ ZUR VERBESSERUNG DER BETRIEBLICHEN ALTERSVERSORGUNG* 579 (Kommentar 1984).

<sup>27</sup> *Id.* at 781.

<sup>28</sup> Hansen, *Das Höchststimmrecht und seine Grenzen*, 35 *DIE AKTIENGESELLSCHAFT* R 166 (1990).

Persian Gulf crisis—is generally attributed to the influx and sudden withdrawal of American, Japanese and British institutional funds.

But the most significant aspect may be that so far there has been no real market for control. Of course there are mergers and acquisitions, but there have been no proxy fights and no serious unfriendly takeover bids.<sup>29</sup> This phenomenon is generally explained by the very small number of truly public corporations;<sup>30</sup> the estimates range from forty to about eighty companies.<sup>31</sup> But this lack of a market for control is still surprising when one considers that some of these corporations enjoy a very substantial amount of liquid assets. It has even been assumed that in times of depressed stock prices (such as in early 1988) they have come close to the aggregate market value of the enterprise. Consequently, there must be and indeed there are other explanations. One may be the complications resulting from the two-tier board structure and from codetermination.<sup>32</sup> Another may be the role of the banks<sup>33</sup> and the lack of institutional investors eager to take large quantities of Deutsche Mark-denominated junk bonds into their portfolios.

## II. ASPIRATIONS FOR REFORM

At least from an American perspective it must be obvious that a system such as the one I outlined above suffers from very serious deficiencies. Consequently, there exists in Germany a certain uneasiness and a growing awareness that some change will be inevitable. However, the debate is quite heated where specific reforms are under consideration. I will restrict my comments to a few particularly illustrative examples:

1. Several proposals target the "deregulation"<sup>34</sup> of stock cor-

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<sup>29</sup> Assmann & Bozenhardt, *Übernahmeangebote als Regelungsproblem zwischen gesellschaftsrechtlichen Normen und zivilrechtlich begründeten Verhaltensgeboten*, in *ÜBERNAHMEANGEBOTE* 1 (1989).

<sup>30</sup> Monopolkommission, *Die Wettbewerbsordnung erweitern*, in *HAUPTGUTACHTEN* 296 (1986-87).

<sup>31</sup> Schneider, *supra* note 12, at 318.

<sup>32</sup> This may be one of the reasons why management today tends to have a more favorable view of codetermination than 15 years ago.

<sup>33</sup> Monopolkommission, *supra* note 30.

<sup>34</sup> See H. ALBACH, C. CORTE, R. FRIEDEMELD, M. LUTTER & W. RICHTER, *DEREGULIERUNG DES AKTIENRECHTS* (1988).

poration law. The recommendations include the abolition of cumbersome formalities required for the process of incorporation, for shareholders' meetings and for the listing of smaller corporations,<sup>35</sup> the abolition of legal capital and par value requirements, the liberalization of corporate distributions<sup>36</sup> and the elimination of mandatory preemptive rights.<sup>37</sup> Others suggest that the existing ability to restrict the voting power of block holdings be outlawed by new mandatory provisions.<sup>38</sup> With regard to the underlying policy considerations it is widely, although not universally, agreed that medium-sized and small enterprises tend to be undercapitalized and should therefore be encouraged to go public in order to gain immediate access to the capital market.<sup>39</sup> This should provide the stock market with more volume, depth and turnover and thus help to redirect retirement funding from the existing system to American-type pension funds.<sup>40</sup> The most recent and probably the most controversial debate relates to unfriendly takeovers and whether Germany should improve—or even create—the framework conditions for an efficient market of corporate control. It is not surprising that the arguments in favor and against such measures follow the much more elaborate American discussion.<sup>41</sup>

2. A second major issue is the impact of banks on corporate governance. The relationship between a bank and a nonbank corporation may involve the following four elements: (a) providing the whole range of commercial and investment banking services (this is called the "Hausbank" function); (b) under the German proxy system the banks represent the small shareholders in shareholders' meetings; (c) a bank manager may sit on the corporation's supervisory board (or vice versa); and (d) the bank

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<sup>35</sup> *Id.* at 52.

<sup>36</sup> Kübler, *supra* note 4, at 55.

<sup>37</sup> Kübler, Mendelson & Mundheim, *supra* note 6, at 474.

<sup>38</sup> Schneider, *Gesetzliches Verbot für Stimmrechtsbeschränkungen bei der Aktiengesellschaft?* 35 DIE AKTIENGESELLSCHAFT 56 (1990); Baums, *Höchststimmrechte*, 35 DIE AKTIENGESELLSCHAFT 221 (1990).

<sup>39</sup> For the discussion see Reuter, *supra* note 15, at B 7. See also F. KÜBLER & R. SCHMIDT, *GESELLSCHAFTSRECHT UND KONZENTRATION* 107 (1988).

<sup>40</sup> For details, see text accompanying notes 48-53 *infra*.

<sup>41</sup> Assmann & Bozenhardt, *supra* note 29, at 10; W. WERNER, *PROBLEME "FEINDLICHER" ÜBERNAHMANGEBOTE IM AKTIENRECHT* (1989); Adams, *Was spricht gegen eine unbehinderte Übertragbarkeit der in Unternehmen gebundenen Ressourcen durch ihre Eigentümer?* 35 DIE AKTIENGESELLSCHAFT 243 (1990).

may own a substantial block of the corporation's stock. The prevailing "cumulation theory" contends that the combination of these four elements generates an undesirable concentration of power and therefore calls for legislative action.<sup>42</sup> But the "cumulation theory" is not fully supported by empirical evidence.<sup>43</sup> For example, the large public corporations, in general, have accumulated substantial amounts of liquid assets; for this reason they are rather independent from commercial and investment banking services. In the commercial banking area, competition is tough; the market share of the Big Three accounts for less than nine percent; they have to compete with other private banks (including internationally operating foreign banks), with mutually linked cooperative banks, and with the public law system of savings banks which accounts for roughly half of the German market.<sup>44</sup>

Another problem is what measures should be taken. So far nobody has come forward with a plausible concept for a system of proxy voting that could operate without the assistance of the banking sector.<sup>45</sup> What remains is the proposal of the Monopoly Commission, an independent body of antitrust experts appointed by the government to limit bank holdings in nonbank corporations to a maximum of five percent.<sup>46</sup> If we leave out the Deutsche Bank-Daimler Benz combination this is not a very promising proposal. There are already safety and soundness restrictions for industrial holdings by banks.<sup>47</sup> In addition, there would have to be a number of exceptions, including those for underwriting purposes and for corporate reorganizations. Thus, it appears uncertain if such a measure would produce any real

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<sup>42</sup> Monopolkommission, *supra* note 16, at 176; Lambsdorff, *supra* note 21, at 10.

<sup>43</sup> Compare the carefully researched and balanced conclusions of BERICHT DER STUDIENKOMMISSION, *supra* note 13, at 166.

<sup>44</sup> For the latest figures see *Deposit Insurance Reform and Financial Modernization, 1990: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs on Reforming Federal Deposit Insurance, Modernizing the Regulation of Financial Services, and Maintaining the International Competitiveness of U.S. Financial Institutions*, 101st Cong., 2nd Sess. (1990) (statement of U. Cartellieri, June 13, 1990).

<sup>45</sup> BERICHT DER STUDIENKOMMISSION, *supra* note 13, at 287; Lambsdorff, *supra* note 21, at 12. The banks have repeatedly announced that they are not particularly interested in retaining the present system.

<sup>46</sup> Monopolkommission, *supra* note 16.

<sup>47</sup> Provided by § 12 Kreditwesengesetz, BUNDESGESETZBLATT, TEIL I [BGBI.I] 1472 (1985).

change.

3. Retirement funding is also a source of permanent concern. The very comprehensive social security system<sup>48</sup> operates on a current account basis: the contributions paid in by those who work are used to provide for the living of those already retired. This is, in a somewhat euphemistic way, called the "generation contract." This mechanism has several defects: it does not provide for savings and investment, it increases the burden imposed on the working generation as more people grow older and need more health and other care, and it has difficulties coping with irregular demographic developments. It is therefore suggested that social security be reduced in order to stimulate private savings and investment.<sup>49</sup> While this may happen over a long period of time, a sudden change is highly unlikely.

Within the private sector, the main issue is whether employment-based retirement funding should be transformed from the present system of "pension commitments" to an American-style system of pension funds. This would have to be achieved by amendments to the tax laws. The conflicting interests and positions are rather clear. The manufacturing industry wants to retain the present system,<sup>50</sup> while the stock exchanges,<sup>51</sup> banks<sup>52</sup> and insurance companies<sup>53</sup> would like to have the pension funds.

4. A last point, while arguably less important, may serve as one more example to illustrate the differences between the American and the German scenes. With the internationalization of the securities markets, American and other non-German institutional investors have acquired substantial blocks of stock of the major German corporations. As in the United States, increased institutional ownership preoccupies management, but this happens for different reasons. It is not the actual or potential activity, but rather the inactivity, the lack of interest shown

<sup>48</sup> See text accompanying notes 22-27 *supra*.

<sup>49</sup> H. SCHLESINGER, *DER BÜRGER IST FÜR SEINE RENTE VERANTWORTLICH* (Commerzbank 1985); Hauck, *Pensionskasse—ein Instrument der Altersvorsorge*, *Frankfurter Allgemeine Zeitung*, June 13, 1987, at 13.

<sup>50</sup> E. Reuter (CEO of Daimler Benz), *Verhandlungen des 55 DEUTSCHER JURISTENTAGES* K 181 (1984).

<sup>51</sup> Hauck, *supra* note 49. Mr. Hauck was a former President of the Frankfurt Stock Exchange.

<sup>52</sup> Guthardt, *supra* note 20, at 1790. Mr. Guthardt is CEO of Deutsche Genossenschaftsbank.

<sup>53</sup> M. von Bahren, *Verhandlungen des 55 DEUTSCHER JURISTENTAG* K 190 (1984).

by foreign institutional owners, which is viewed as a problem.<sup>54</sup> The main concern is that decreasing attendance at shareholders' meetings will produce random majorities and facilitate unfriendly takeovers. In addition, problems of legitimacy could arise within the supervisory board if representatives elected by twenty percent of the owners face representatives elected by ninety percent of the workers. A study group has begun investigating if and how foreign institutional investors can be encouraged to attend shareholders' meetings.

### III. THE GERMAN DILEMMA

We have seen that the German system of financial institutions and markets is characterized by a long list of defects and weak spots. They are particularly obvious when viewed from an American perspective. The stock market is narrow, thin and boring. At least in comparison with most of the English-speaking countries, our industries are thought to be undercapitalized. At the same time they appear to be dominated by a small number of big banks. This, in turn, may have several anticompetitive effects.<sup>55</sup> The system of retirement funding is largely controlled by the political process and by enterprises and therefore, to a much lesser extent, by markets. The mechanisms of corporate law are rigid and cumbersome. There is no market for corporate control. In general, the financial system as a whole is dominated somewhat more by institutions than by markets. It can be assumed that this impact reduces allocative efficiency and slows down economic growth, handicapping the country when it competes with other nations. In the terms of modern finance theory it is an underdeveloped system, marked by distinct welfare state features which still reflect some of the conflicts and ideologies of the early stages of industrialization. It may be likened to a steam engine in the age of computers.

Seen from that perspective there can be no doubt that Germany should not waste its time with incremental modifications and modest reforms. Rather, we should combine our forces and efforts to achieve a much more comprehensive and radical

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<sup>54</sup> Christians, *Der Aktionär und sein Stimmrecht*, 35 DIE AKTIENGESELLSCHAFT 47 (1990).

<sup>55</sup> This is the main concern of the Monopoly Commission. See Monopolkommission, *supra* note 16.

change which would promote us to the stages of a more advanced capitalism.<sup>56</sup> But even assuming that this could be achieved by the slow and heavy mechanics of a democratic government, there may be some reasons to hesitate and to think twice before such radical reform gets underway. Let me explain this by returning to three issues which have been mentioned before:

1. The German system of enterprise-based pension commitments clearly suffers from the disadvantage that savings are accumulated and reinvested by and for the immediate benefit of the employer. This involves the accumulation of risks for employees<sup>57</sup> and may, in comparison with the pension fund model, produce a less efficient resource allocation, since investment decisions are determined by management and not by the capital market. However, there are some advantages to this system. The system provides financing not only for public corporations but also for Jensen-type privately owned enterprises.<sup>58</sup> At the same time the employees acquire a financial interest in the business of their employer; this interest increases commensurate with their length of employment and may benefit the enterprise by improving the motivation and the work attitude of the employees.<sup>59</sup> Of course, they own debt and not equity. But their claims are long term and not redeemable before retirement and therefore show some of the characteristics of equity. This seems to be particularly true where the sum of the pension reserves, the "social capital," exceeds the capital contributed by the shareholders.<sup>60</sup> This solution may appear to be very paternalistic. But the system is based on contract and, more importantly, the employees participate in the governance of the corporation. Their agents sit on the supervisory board. This perspective affects and changes the meaning of codetermination. In reality, the two "benches" of the supervisory board, shareholders and employ-

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<sup>56</sup> For instance in terms of Clark's model, see note 2 *supra*.

<sup>57</sup> Higher pensions are not completely covered by the PSV-insurance. Section 3 (3) Gesetz zur Verbesserung der betrieblichen Altersversorgung, BGBI I 845 (1974).

<sup>58</sup> Jensen, *Eclipse of the Public Corporation*, 67 HARV. BUS. REV. 61 (Sept.-Oct. 1989).

<sup>59</sup> For a general discussion, see Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codeterminations, and Economic Democracy*, 99 YALE L.J. 1749, 1761 (1990).

<sup>60</sup> It has to be remembered that with the decline of equity, debt has to bear more of the risk of equity.

ees, represent two types or classes of capital rather than an "antagonistic" conflict between owners and workers.<sup>61</sup> At the same time, the character of the enterprise is affected. The corporation adopts some of the features of a cooperative organization.<sup>62</sup> Finally, there is an impact on labor relations: the system clearly provides incentives for both sides to understand employment as a long-term relationship. This encourages human capital investments by both parties and may produce a better educated and more highly qualified workforce.

2. The German banking structure can be characterized by its (comparative) lack of regulation. Private banks are subject to supervision and to capital and some structural requirements. The rest are business corporations allowed to offer all sorts of services to the public. This liberal approach allows the entrepreneurial combination of financial services generally referred to as the "universal bank." This concentration of functions can produce anticompetitive effects and conflicts of interest<sup>63</sup> which could be mitigated by imposing the separation of different activities. But in a moment when Glass-Steagall in the United States and comparable provisions in Japan seem very close to being repealed, Germany would hardly be well advised to require the strict separation of commercial banking from investment banking. Consequently, the only measure that remains available is the limitation or prohibition of bank holdings in nonbank corporations.

One of the questions to be asked is how this would affect the soundness and safety of the banking system.<sup>64</sup> Let us assume that German banks are correctly thought to be comparatively healthy. This is hardly due to differences in regulation, but might be explained by the close or even symbiotic relationship between German banks and German industry. The investment

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<sup>61</sup> Steindorff, *Einzelfragen zur Reichweite des Mitbestimmungsgesetzes*, 141 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 457, 464 (1977); F. KÜBLER, W. SCHMIDT & S. SIMITIS, MITBESTIMMUNG ALS GESETZGEBUNGSPOLITISCHE AUFGABE 195 (1978).

<sup>62</sup> In the sense that it prevents worker ownership to "degenerate" into investor ownership, see Hansmann, *supra* note 59, at 1774.

<sup>63</sup> BERICHT DER STUDIENKOMMISSION, *supra* note 13, at 46; Monopolkommission, *supra* note 16, at 167.

<sup>64</sup> Compare Clark, *supra* note 2, at 571 (The "concept of soundness" is the "basic regulatory approach" to the third stage of capitalism which is characterized by the dominant role of institutional investors and financial intermediaries.).

of bank funds in blue chip stocks might improve the diversification and lower the level of risk in the bank's asset portfolio.

Yet another aspect might be more important. Symbiotic bank-industry relations are not a one-way street of influence or control. Manufacturing companies own banking stock and sometimes banks. Industrial managers are sitting on the supervisory boards of the "Grossbanken," and corporations like Siemens or Hoechst are enormously important banking customers. At the same time these corporations depend on the continuation of banking services. This is particularly obvious with regard to export financing. Thus the industrial customers and business partners of the banks are more interested in their stability than in their profitability. This is not to say that any statutory limitation of bank holdings will necessarily be harmful. But it might well be that the special relationship between private banks and big corporations generates monitoring effects in both directions and thus encourages and promotes a certain amount of prudence in the exercise of the banking business.

3. The last issue is how far Germany should go in order to provide the framework for a workable market for corporate control. Assuming for a moment that in the United States the beneficial effects of the takeover game outweigh its costs, the question is whether this would be equally true in Germany. This is uncertain at least with respect to the monitoring of management.

The supervisory board is an institution that links the public corporations (including the big private banks) with each other and with the major unions. The top managers regularly sit on the boards of other companies.<sup>65</sup> They have at least one interest in common: not to shake a system to which they owe their positions and the opportunities these positions provide, by allowing obvious violations of the fiduciary duties of care and loyalty. This results in a network of mutual monitoring. In comparison with the United States it considerably reduces the autonomy of individual (public) corporations. Top management of German business can be seen as a comparatively homogeneous group of people interacting to run the private economy or, viewed in other terms, as a less monocratic than oligarchic structure of

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<sup>65</sup> But direct cross relations are not allowed. See § 100 (2) 3 Aktiengesetz BGBI.1 1089 (1965).

corporate governance. This interaction, which includes to a limited extent some of the union leaders, operates as an element of moderation and balance. For example, management compensation in Germany is, at least from the point of view of an academic, by no means paltry. To a certain degree it is linked to the performance of the corporation. But compared to their American colleagues, with wonderful opportunities for stock options and golden parachutes, the German top management compensation looks comparatively poor. The system seems to exercise a certain function of (re-)distribution, aiming at a balanced relationship between dividends, salaries and management compensation.

Up to this point the German dilemma has been stated in a somewhat narrative or anecdotal form: Germany knows that it has to modernize, yet it is afraid that by going too far it may lose more than it wins. Professor Buxbaum's analysis forcefully asks for a more theoretical definition. But there are limits to generalization. From my examples it should be obvious that Germany is hardly the "Japan of Europe."<sup>66</sup> And the categories of "liberal" and "corporatist"<sup>67</sup> may be too traditional and too simple to cover the increasingly sophisticated blends of "markets and hierarchies"<sup>68</sup> existing today.

For this reason I return to the element of time. I agree with Professor Buxbaum that little is gained by the mere contraposition of "short term" versus "long term."<sup>69</sup> But his reference to ecological concerns<sup>70</sup> may help my point: the East German experience clearly demonstrates how, in the long run, irresponsible pollution affects the interests of enterprises, owners and workers. It may be seen as an element of culture. In Germany, and in most of Western Europe, financial markets are shaped by more permanent social relations between enterprises and workers, between corporations and management and between banks and manufacturing industry. This appears to indicate a different

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<sup>66</sup> Buxbaum, *Institutional Ownership and the Restructuring of Corporations*, in *FESTSCHRIFT FÜR E. STEINDORFF* 7 (1990).

<sup>67</sup> See Romano, *Megapolitics and Corporate Law Reform*, 36 *STAN. L. REV.* 923 (1984); Buxbaum, *supra* note 66, at 29.

<sup>68</sup> O.E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 206 (1985).

<sup>69</sup> Buxbaum, *supra* note 1, at 28; but see also Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 *U. PA. L. REV.* 1, 7 (1987).

<sup>70</sup> Buxbaum, *supra* note 1, at 28.

rhythm, perhaps more in line with other segments of society. Business is slower and steadier; there is less mobility, less growth and less color and excitement. Germany has no Michael Milken and no Donald Trump. But there is also more continuity and somewhat less risk. From such a conservative point of view the question will be whether Germany can respond to the challenge of larger markets without losing the balance of its institutional structure.

