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Institutional Investors: A U.K. View

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INSTITUTIONAL INVESTORS: A U.K. VIEW

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INTRODUCTION

In his Pomerantz lecture Professor Richard Buxbaum has provided an elegant and insightful analysis both of the issues raised in the United States by the growth of institutional shareholdings and of the international and comparative dimensions of this topic.[1] This note seeks to add only some gloss from a U.K. perspective to the picture presented by Professor Buxbaum. In summary, it may be said that the picture in the United Kingdom is similar in many respects to that in the United States, both in terms of the growth of institutional shareholding in general and in terms of the particular pension-driven causes of that growth. As in the United States, the late, and generally not much lamented,[2] takeover boom of the late 1980s led in the United Kingdom to a revival of the corporate governance debate. Industry accused the institutional shareholding community of short-termism, a charge roundly rejected by the latter. At the same time some influential voices sought to persuade institutional shareholders of the virtues of closer monitoring of management, rather than reliance on market forces, as the main method of disciplining inefficient management.[3]

On the other hand, there have been some interesting differences of emphasis. In particular, in spite of the public nature of the row about short-termism, institutional shareholders in the United Kingdom have been able to continue, by and large, to exercise influence over their portfolio companies in the traditional, private way of bringing influence to bear upon manage-

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[1] Buxbaum, *Institutional Owners and Corporate Managers: A Comparative Perspective*, 57 BROOKLYN L. REV. 1 (1991).

[2] Except, of course, among the professional advisers to bidder and target companies.

[3] For representative contributions, see CREATIVE TENSION? (National Association of Pension Funds, Ltd. 1990); P.R. MARSH, SHORT-TERMISM ON TRIAL (1990) (Report commissioned by the Institutional Fund Managers' Ass'n).

ment behind closed doors.[4] Specifically in terms of the legal framework, it is worth noting that institutional shareholders in the United Kingdom have not come under ERISA-type duties to exercise the voting rights attached to their shareholdings, which duty might have operated so as to make somewhat clearer the policies the institutions were adopting towards their portfolio companies. It is in fact unusual for the English institutions actually to exercise their voting rights.[5] On the other hand, the institutions have not faced the threat to their rights as shareholders—upon which their behind-the-scenes influence depends in some large degree—that U.S. institutions have faced, especially in the takeover area. The theory of shareholder sovereignty and management neutrality has remained the dominant one in the regulatory structure for takeovers in the United Kingdom, and so the institutions have had to bestir themselves neither to head off unwelcome legislative initiatives nor to oppose charter amendments put by potential target companies to their shareholders in an attempt to render the company bid-proof. In other words, although the short-termism debate has raised important issues of public policy, the projected solutions to the problem—assuming that a problem exists—have not involved a significant legal dimension nor have the main proponents of change sought either to curtail or make more public the rights of the institutional shareholders. This is well reflected in what seems to be the consensus proposal for change, for those who think change is necessary, namely that the institutions should exercise their present levers of power rather more actively and be aided in this undertaking by the voluntary adoption by companies of a policy of appointing more independent, nonexecutive directors.

This commentary will explore these themes in a little more detail and then turn to an issue of principle that will arise in the, perhaps unlikely, event of the institutional shareholders becoming close monitors of managerial performance in the United Kingdom.

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[4] *See* Mundheim, *Institutions as Shareholders: The British Experience*, 2 INSTITUTIONAL INVESTOR 36 (1968).

[5] Jackson, *Management of UK Equity Portfolios*, 27 BANK OF ENGLAND Q. BULL. 253, 257 (1987). In the United Kingdom, the institutional equivalent to the Department of Labor under the Employee Retirement Income Security Act of 1976 is the Occupational Pensions Board (OPB), constituted under the Social Security Act of 1973, but the OPB has much less power than the Department of Labor.

I. The Growth of Institutional Shareholding

The growth of institutional shareholding in the United Kingdom in general—and of pension funds in particular—has now reached heights even greater than those in the United States. In 1969, 34.2 percent of listed U.K. equities were held by institutions; by 1985 that figure had risen to 58.9 percent.[6] More recent estimates put the figure at "over two-thirds."[7] Within those global figures the percentage held by pension funds increased from 9 percent to 31.9 percent, a more than threefold increase, whilst the next largest increase was that for insurance companies, a mere fifty percent increase from 12.2 percent to 19.4 percent.[8] To put the matter another way, the share of total institutional shareholding held by pension funds increased from 26.3 percent in 1969 to 54.2 percent in 1985, whilst the share held by insurance companies declined from 35.7 percent to 32.9 percent.

Two reflections are prompted by these figures. The first is that the onward march of the institutions has not, it seems, suffered a setback as a result of the now numerous privatisation exercises that were carried out by the U.K. government in the 1980s.[9] Privatisation may have increased the number of individual shareholders, but not the percentage of U.K. equities held by individuals, which, indeed, continues to decline. The picture in the United Kingdom continues to be one where equity investment directly by individuals is a relatively shallow activity.[10]

On the other hand—and this is the second reflection—indirect investment in equities by individuals has expanded enormously over the last twenty-five years through the retirement-driven growth of institutional shareholdings. The reasons for this are broadly the same as in the United States. In

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[6] Cosh, Hughes, Lee & Singh, *Institutional Investment, Mergers and the Market for Corporate Control*, 1 Int'l J. Indus. Org. 73, 77 (1989).

[7] Pensions Investment Research Consultants Ltd., Intelligence 11 (July 1990).

[8] Cosh, *supra* note 6. The percentage of equities held by unit trusts (open-ended mutual funds) increased from 2.9% to 4.6%, and that held by investment trusts (close-ended funds) fell from 10.1% to 3.0%.

[9] The 1976 and 1980 figures, also reported by Cosh, *supra* note 6, show a steadily rising trend in the percentage of equity shares held by the institutions through the period 1969 to 1985; and the post-1985 figures suggest that trend has continued.

[10] "Only about 0.5 percent of the population now owns a serious portfolio containing more than 10 shares." Fin. Times, Oct. 18, 1990, at 14, col. 1. This is despite the government's encouragement, through tax relief, of "personal equity plans." *Id.*

particular, the U.K. social security system, as envisaged by its post-war architect, William Beveridge, was to be an agent for the relief of poverty—and indeed poverty defined in fairly absolute terms—rather than a broad income replacement scheme. Its linchpin was a scheme that paid out flat-rate benefits in exchange for flat-rate contributions, and these contributions (and therefore also the benefits) had to be set at a level that the poorest workers could afford. This principle was applied to pensions as much as to other social security benefits. Beveridge was happy with this situation because he wished to create an incentive for private (or, at any rate, non-state) initiatives that would supplement the basic state pension.[11]

In the 1970s there was some prospect that the state would take a dominant role in the organisation of supplementary pension schemes, in which workers who could afford it would make additional compulsory contributions, related to their earnings, in exchange for an additional pension that was similarly related. However, by that time the nonstate provision of supplementary pensions through occupational pension schemes was so well established that it was thought politically necessary to enable adequate occupational schemes to contract out of the state supplementary scheme.[12] Moreover, in the 1980s government became so alarmed by the projected costs of the State Earnings-Related Pension Scheme (SERPS) that it devised a scheme of generous incentives to encourage those who had not contracted out of SERPS through their membership in an occupational pension scheme to contract out on an individual basis and to make personal pension arrangements with a private sector institution.[13]

Thus, it is fair to say that, throughout the post-war period, state policy has left the task of guaranteeing an adequate income in old age to private provision, either on an individual basis or, more likely, through membership in a collective scheme linked to one's employment. In light of this, it is not surprising that one can chart a growing percentage of listed U.K. equities being held by the pension funds, and it is likely too that a significant

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[11] SIR W. BEVERIDGE, SOCIAL INSURANCE AND ALLIED SERVICES (1942). In fact, in relation to old age pensions the government was slow to implement even Beveridge's subsistence principle. J. HARRIS, WILLIAM BEVERIDGE 378-470 (1977).

[12] L. HANNAH, INVENTING RETIREMENT 46-64 (1986).

[13] *See, e.g.*, Nobles, *Personal Pensions*, 17 INDUS. L.J. 127 (1988).

proportion of insurance company investment represents monies contributed under insurance policies linked to the insured's retirement.[14]

II. Shareholder Sovereignty

Whilst shareholdings have become increasingly concentrated in the hands of the institutions, the essentials of the legal and self-regulatory frameworks within which shareholders' rights are defined have not undergone a parallel transformation. On the contrary, the proposition that decisions on fundamental changes in the corporation's ownership or structure should lie in the hands of the shareholders has remained intact. This is particularly true in the area of takeovers, which has been the focus of the dispute between industry and the City over "short-termism." Thus, the City Code on Take-overs and Mergers, the self-regulatory but nevertheless very effective set of rules that controls tender offers and associated transactions in the United Kingdom,[15] remains committed to the proposition that in a bid situation no action may:

> be taken by the board of the offeree company in relation to the affairs of the company, without the approval of the shareholders in general meeting, which could effectively result in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits.[16]

This is a strong rule, the thrust of which is to take the decision about the success or failure of a bid out of the hands of the directors and place it in the hands of the shareholders. It constitutes, in effect, a reordering of decision-making powers in the company, in the sense that management powers, which the articles of association normally confer upon the board, may not be exercised by that body if the effect of so doing is to remove the decision on the takeover from the hands of the shareholders. It

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[14] Personal pension plans are particularly likely to take the form of policies entered into with insurance companies.

[15] For a general description of the City Code and the City Panel, see M.A. Weinberg, M.V. Blank & L. Rabinowitz, Weinberg and Blank on Take-overs and Mergers ¶¶ 3-501 to 3-523 (5th ed. 1989).

[16] Panel on Takeovers and Mergers (Great Britain), The City Code on Takeovers and Mergers and the Rules Governing Substantial Acquisitions of Shares B1, General Principle No. 7 (3d ed. 1990) *See also id.* at I13, Rule 21 ("Restrictions on Frustrating Action").

should be noted that the rule focuses upon the effects of the directors' actions, not upon their good faith or the reasonableness of their views. If the effect of what the directors have done or propose to do is to frustrate the bid, the City Code's rule is broken, no matter that they genuinely believe on reasonable grounds that it would be in the best interests of the company that a particular bid be rejected. It should be noted that the rule applies as soon as the board of the offeree company "has reason to believe that a bona fide offer might be imminent"[17] and is thus not confined to the situation where the board has concluded that a sale of the company to a bidder has become inevitable.[18] The rule covers the full range of actions the directors might take, including the initiation of litigation on behalf of the company, unless the company was obliged by a pre-bid contract to take the step in question.[19]

The U.K. government, quite apart from its general commitment to self-regulation in the takeover field, has shown no inclination to push for changes that might increase the defensive possibilities of the boards of target companies, not even changes akin to the U.S. "second generation" statutes.[20] On the contrary, its main efforts in recent years in this field have been directed towards ensuring that the principles underlying the City Code, including the prohibition on frustrating action, are reflected in the proposed European Community directive on takeovers.[21] Of course, the City Code applies only once a bid is imminent. The management of a potential target has greater freedom of action in a pre-bid situation, but even here equity controls the directors' actions through the "proper purposes" doctrine. This as-

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[17] *Id.* at B1, General Principle No. 7.

[18] *Contrast* Revlon Inc. v. MacAndrews & Forbes Holdings Inc., 506 A.2d 173 (Del. 1986) (sale inevitable) *with* Paramount Communications Inc. v. Time Inc., 571 A.2d 1140 (Del. 1990) (sale not inevitable).

[19] City Panel Statement No. 7 (1989) (Consolidated Gold Fields); City Panel Statement No. 20 (1989) (BAT Industries). However, the City Code may not operate so as to catch decisions taken by the directors not qua directors but qua trustees of an employees' pension scheme. See the "poison pill" defence illustrated in Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd., [1991] 11 I.L.R.M. 66.

[20] M. STEINBERG, SECURITIES REGULATION: LIABILITIES & REMEDIES ¶ 1108(3) (1991).

[21] U.K. Department of Trade and Industry, Press Notice (Feb. 22, 1991). Amended Proposal for a Thirteenth Council Directive on Company Law concerning Takeover and the General Bids, 33 O.J. EUR. COMM. (No. C 240) 7, art. 8 (Sept. 26, 1990) requires prior shareholder authorisation for some, but not all, possible defensive tactics by target management.

pect of directors' fiduciary duties stipulates that the powers conferred upon the directors by the articles can be validly exercised only if the main purpose for the exercise of the power is one of the purposes for which the powers were conferred upon the directors. In a large public company, whose articles create two separate and sovereign corporate decision-making bodies, the board and the shareholders', it is unlikely that the court will conclude that one of the proper purposes for which the directors' powers can be exercised is to control the composition of the shareholder body. This is a relatively strict test, which the directors cannot escape by showing that they acted in good faith and on reasonable grounds,[22] but it does give management some freedom of action because an exercise of power whose primary purpose is to conclude a commercial arrangement of benefit to the company is not open to challenge on the grounds that a subsidiary purpose of the directors was to render the company a less easy or less attractive target.

III. CORPORATE GOVERNANCE

Given the concentration of equity shareholdings in institutional hands and the commitment to shareholder sovereignty, it is perhaps not surprising that concern about the level of takeovers has expressed itself predominantly in the United Kingdom in proposals to encourage shareholders to place greater weight upon the monitoring of management and less weight upon the market for corporate control as the means of ensuring effective management. Although some industrialists engaged in the short-termism debate may have wished for an outcome that restricted shareholder power,[23] the majority of proposals for reform seem rather to aim to channel that power along a different path by placing a renewed emphasis upon the shareholders' role in corporate governance. The arguments in this direction have been

[22] Hogg v. Cramphorn Ltd., [1967] Ch. 254. In this respect English law seems to approach the standard proposed by Professor Brudney in *Fiduciary Ideology in Transactions Affecting Corporate Control*, 65 MICH. L. REV. 259, 263-82 (1966).

[23] For example, Sir Hector Laing, Chairman of United Biscuits, has put forward as "a positive step," the suggestion that shareholders should agree to an amendment of the articles of association of their company "restrict[ing] the percentage of a company's issued share capital which can be voted by any one shareholder so long as earnings per share continue to rise at a defined minimum rate." Sir H. Laing, *The Balance of Responsibilities*, in CREATIVE TENSION? *supra* note 3, at 66.

put most eloquently by Jonathan Charkham, an adviser to the Governors of the Bank of England.[24] The essence of his argument is that takeovers constitute an inefficient way of changing the management of a company from the point of view of its shareholders. He asks, rhetorically, "why change ownership if all the company needs is a change of management?," especially as it is the shareholders of the acquiring company who will reap the lion's share of the benefit when the target company is revitalised rather than the shareholders of the previously independent target (even after allowing for the bid premium).[25] Of course, there may be reasons for a takeover other than the need to replace inefficient management, but where the latter is the reason he urges upon the shareholders of the potential target the desirability of "voice" over "exit." Indeed, he darkly predicts that institutional shareholders will lose, or at least have their legal rights of ultimate control diluted, should they continue to be unwilling to make greater use of them.

> Unlike Germany and Japan, UK company management lacks both regular sources of sympathetic influence and, in the rare cases where it is essential, the stimulation of remedial action: the system depends wholly on the company market which does not necessarily produce the most cost effective answer or the best in structural terms, or give the bulk of the rewards to those who might have enjoyed them. The Companies Acts give shareholders the necessary powers to use this influence, but for various reasons they seldom do so. It would be to their advantage collectively if they did.
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> The decisions fund managers make do not always relate to the particular company in whose shares they are dealing - they may be more to do with the balance of the fund, the state of a sector or of the market or of the economy. One of the great virtues of the equity market is its flexibility. Even so, shares are not just gaming chips and if they are treated as if they were, and if both institutional and private shareholders continue to neglect the introduction of ways of performing the limited duties the Companies Acts confer upon them, the industrial system will continue to underperform and that may in time cast a shadow on the Companies Acts themselves. To argue that shareholders cannot realistically be expected to play their part is to

[24] J. Charkham, Corporate Governance and the Market for Control of Companies, Economics Div., Bank of England, Panel Paper No. 25 (Mar. 1989) [hereinafter J. Charkham Panel Paper]; J. Charkham, Corporate Governance and the Market for Control of Companies: Aspects of the Shareholders' Role, Economics Div., Bank of England, Discussion Paper No. 44 (Nov. 1989) [hereinafter J. Charkham Discussion Paper).

[25] J. Charkham Discussion Paper, *supra* note 24, at 6.

invite a reconsideration of alternative structures such as the two-tier board which would facilitate their participation, and open the possibility of participation of others.[26]

At one level, all this argument in favour of shareholder control is rather surprising. It is almost as if Berle and Means[27] had never written and as if the separation of ownership and control had never been noted. The answer of the supporters of shareholder activism would no doubt be that the separation of ownership and management roles in the large corporation is no doubt inevitable, but the impotence of the owners and the arrogation by the directors of both roles is avoidable where the ownership rights are not unduly fragmented. In this light, the emergence of the institutions as the major shareholders in large U.K. companies provides a basis for a reassertion of the old corporate law orthodoxies in, it is said, a meaningful way. This is certainly a development that would have surprised those who in the 1950s and 1960s heralded the demise of the shareholders' unique position of power as a necessary step towards enabling management to be responsive to all the groups with an interest in the success of the company.[28] It is, on the other hand, a development very much in tune with more general ideological developments in the United Kingdom in the 1980s.

Whether one regards shareholder activism as conferring legitimacy upon the private enterprise system or as demonstrating its illegitimacy, there remain the lower order questions of which mechanisms are available for shareholder expression and whether even institutional shareholders are prepared to accept the burden Charkham and others would thrust upon them. Within the traditional structures shareholder activism should presumably concentrate on securing an effective role for the board in monitoring management. This, however, presents the proponents of such activism with an immediate problem, since the boards of large British companies have come to reflect, to a perhaps unusual degree, the managerialist theory of corporate control. A study in the early 1970s found that the typical board of a large British company consisted of ten members of whom

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[26] *Id.* at 7.

[27] A. BERLE AND G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (rev. ed. 1967).

[28] C. CROSLAND, THE FUTURE OF SOCIALISM 295-332 (rev. ed. 1964).

eight were executives of the company or of another company in the same group.[29] Perhaps more worrying was the less systematic but nevertheless convincing evidence that the nonexecutive directors were anything but independent of the senior management of the company to whom they owed their appointment.

The situation was regarded as sufficiently disturbing by the Bank of England and other City Panel bodies that in the early 1980s they sponsored the PRO NED movement.[30] In 1987 PRO NED issued a code recommending that at least three members and about one-third of the board of a large company should be independent nonexecutive directors, and that the nonexecutives should dominate the audit, appointments and remuneration committees of the board.[31] Subsequent monitoring has suggested that the PRO NED movement did have an impact on increasing the number of nonexecutive directors appointed in the first half of the 1980s, so that by 1985 about sixty percent of relevant companies were in compliance with the numerical requirements of the subsequently issued code. Progress since then, however, seems to have been slow, and one suspects the campaign has to some degree run out of steam.[32]

What is difficult to resolve in assessing the impact of the PRO NED movement is the degree of independence directors who are appointed, in effect, by the executive directors of the company can be expected to have. Even if the nonexecutives are formally independent, in the sense of not having a previous employment or professional relationship with the company, one may doubt whether persons beholden to the executive directors for their appointment would then turn out in the majority of cases to be effective monitors of their appointors. This issue has

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[29] BRITISH INSTITUTE OF MANAGEMENT, THE BOARD OF DIRECTORS 2 (1972). On the complexities involved in generalising about the role of non-executive directors, see C. Brookes, Boards of Directors in British Industry, Department of Employment, Research Paper 7, 37-39 (1979).

[30] PRO NED is a voluntary body for the promotion of nonexecutive directors, supported by, inter alia, the Bank of England, the Stock Exchange, the Institutional Shareholders' Committee and the Confederation of British Industry. The Stock Exchange, whilst supporting the City Code, seems not to have made compliance with it a requirement for listed companies. *See* Stock Exchange (London, England), Admission of Securities to Listing § 5, ch. 2, ¶ 21.13 (rev. ed. 1979).

[31] *Non-Executive Directors: The PRO NED Code*, 27 BANK OF ENGLAND Q. BULL. 252 (1987).

[32] *Composition of Company Boards*, 28 BANK OF ENGLAND Q. BULL. 242, 243 (1988).

been discussed in the United States,[33] and it is not necessary to add to that discussion, except to say that the problem would resolve itself if the nonexecutive directors were in fact, and not just in name, the appointees of the shareholders rather than of the executive directors. So at this point one has to face the second issue of whether British institutional investors are willing to take on the greater role that PRO NED enthusiasts would assign to them. That institutional shareholders do from time to time intervene, usually jointly, in the affairs of their portfolio companies is clear, and they do so usually when their rights or financial interests are seen to be at stake. Thus, the recent recession has provoked a number of occasions when the institutions have intervened to secure management changes, often to enforce a splitting of the roles of chairman of the board and chief executive.[34] Again, the institutional shareholders have devised an effective common policy on the issue of when they will agree to the disapplication of their statutory preemption rights.[35] The question, however, is whether they share the view that the benefits likely to be obtained by more closely monitoring the managerial performance of their portfolio companies, whether through nonexecutive directors or otherwise, are likely to outweigh the costs of such a policy.

It is difficult to be optimistic that the institutional shareholders will give an affirmative reply to this question. For many years examples of ad hoc interventions by institutional shareholders have led commentators to raise the issue of whether a more systematic and continuous relationship between institutional shareholders and management was about to evolve.[36] However, that development has not come to pass. This might suggest that, in the absence of a radical restructuring of the framework within which investment decisions are made, the institutions have concluded that the present level of intervention is the most efficient. R.E. Artus, Chief Investment Manager of

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[33] Gilson & Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863 (1991).

[34] *See* Fin. Times, Nov. 15, 1990, at 25, col. 3, Nov. 26, 1990, at 21, col. 2, Dec. 3, 1990, at 16, col. 3 (machinery—investor protection cor mittees—for joint action by the institutional shareholders has existed since the 1930s, and in the UK joint action faces no insurmountable legal or regulatory problems).

[35] *Pre-emption Rights*, 27 BANK OF ENGLAND Q. BULL. 545, 548 (1987).

[36] *See* Mundheim, *supra* note 4, at 86-90.

the Prudential Corporation, which is "probably the largest single shareholder in more British quoted companies than any other investor,"[37] has pointed to the structural limitations that make only occasional intervention a rational policy for the institutions. "Share ownership unaccompanied by the additional involvement in providing finance and other services will never provide the depth of knowledge and commitment that arises with the combination of banking and proprietary interests,"[38] as in Germany or Japan. This view would explain both why regular closer monitoring is not attempted by institutional shareholders and why ad hoc interventions are confined to the most obvious cases.

Closer monitoring by an individual institutional shareholder may also cause it significant free-rider problems. One of the functions of the institutions is to diversify risk, which mandates fairly strict limits on the size of any one institution's holding in any one company, and hence the limited benefit that an institution may capture if it acts on its own to redress managerial weakness. Yet competition among institutional shareholders will militate against effective joint action except in clear cases of corporate failure.[39] What does seem to be the case is that the institutions themselves are far from convinced of the need for greater activism than they currently demonstrate. In the absence of changes in the legal or regulatory frameworks, for which the government seems to have no stomach, that may be a sufficient answer in this particular debate.

IV. THE ACCOUNTABILITY OF PENSION FUNDS

It is thus probably right to be somewhat sceptical about the prospects for much greater activism by institutional shareholders in the United Kingdom in the near future. Nevertheless, I would like finally to assume that such activism is in the cards and to turn to an important issue raised by Professor Buxbaum, which is the question of the legitimacy of the power that institutional shareholders potentially wield. This is obviously both a very broad and not a new issue, but it is worth looking at again briefly. I will confine my comments to the most prominent of the institutional shareholders, the pension funds. The argument that

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[37] R.E. Artus, *Tension to Continue*, in CREATIVE TENSION?, *supra* note 3, at 12.

[38] *Id.* at 14.

[39] *See* P.R. MARSH, *supra* note 3, at 86-90.

can be raised is, in brief, that the trustees or managers of pension funds have not built up their shareholding positions in their portfolio companies by investing their own money, but by investing monies contributed, typically, by the employer, on the one hand, as sponsor of the pension scheme, and by the employees, on the other. For the latter, the opportunity to join an occupational pension scheme and to earn benefits under it is "part of the consideration which an employee receives in return for the rendering of his services."[40] If pension funds are to play a role in making management more accountable to the shareholders, should there not also be a mechanism for making the shareholders, namely the pension fund trustees and mangers, accountable to the people who have contributed the investment monies?

This is an issue to which, surprisingly at first sight, the proponents of greater shareholder activism have given little attention. This seems to be because they assume that the role of the shareholders, to make management more efficient, would be uncontroversial (at least among the beneficiaries of the institutional shareholders). Efficiency is conceived in terms of raising the rate of return on the company's capital, and it seems to be assumed that there are effective mechanisms to ensure that the newly active institutional shareholders pursue such an efficiency goal. This is, indeed, not an implausible viewpoint when one takes into account both the competitive performance pressures upon, at least, outside managers of pension funds[41] and the standard formulation of the duties of pension fund trustees. However, there are tantalising suggestions in Professor Buxbaum's article that greater institutional shareholder activism might be a mechanism for building wider concerns into managerial decision making than currently occurs.[42] He mentions environmental concerns; one could imagine others. If pension funds are to play a role in restructuring managerial decision making, then it is submitted that the accountability to the beneficiaries of the trustees and managers of pension funds, with respect to their relations with portfolio companies, becomes a pressing issue.

In the 1970s in the United Kingdom there was some debate,

[40] Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd., [1991] 11 I.L.R.M. 66, 70.

[41] *See* Jackson, *supra* note 5, at 253.

[42] Buxbaum, *supra* note 1.

in the context of employee involvement in management, that might have led to the creation of institutional structures that could have been used to address this matter. The then government proposed that half of the membership of the controlling bodies of pension funds should be appointed through the machinery of the relevant trade unions,[43] but like the other "industrial democracy" proposals[44] of the time it was never enacted. This leaves the trustees' fiduciary duties at common law as the main component of the relevant legal framework, but, as in the United States, those duties are not defined in the United Kingdom in a way that is at all receptive to the sort of restructuring Professor Buxbaum mentions. Thus, in the leading case of *Cowan v. Scargill*,[45] it was held that to implement a proposal prohibiting investment of the miners' pension fund overseas or in energy industries competing with the coal industry would be a breach of the trustees' duty to act in the beneficiaries' best interests. The court suggested that only in rare instances would it be in the best interests of the beneficiaries for the trustees to choose investments which did not yield the best return in terms of income and capital appreciation. In the absence, then, of specific powers in the trust deed, the trustees' freedom to have regard to wider considerations would seem to be limited to choosing among investments of equal financial attractiveness or to situations where the aim of the investment is to preserve the viability of the sponsoring employer and where the viability of the pension fund itself is dependent upon continuing contributions from that source.

CONCLUSION

In some ways the short-termism debate, although in itself rather inconclusive, has had an exciting sequel, in that it has reanimated the discussion over corporate governance issues in

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[43] See WHITE PAPER ON OCCUPATION PENSION SCHEMES, THE ROLE OF MEMBERS IN THE RUNNING OF SCHEMES, Cmnd. 6514, ¶¶ 31, 33 (1976). The OPB itself had been less enthusiastic about this idea. *See* OPB, SOLVENCY, DISCLOSURE OF INFORMATION AND MEMBER PARTICIPATION IN OCCUPATIONAL PENSION SCHEMES, Cmnd. 5904, ¶¶ 105-25 (1975); Note, *Occupational Pensions*, 6 INDUS. L.J. 188 (1977).

[44] Davies, *The Bullock Report and Employee Participation in Corporate Planning in the UK*, 1 J. COMP. CORP. L. & SEC. REG. 245 (1978).

[45] [1985] Ch. 270. *See* Nobles, *Investment Policies & Trustees' Duties*, 13 INDUS. L.J. 167 (1984).

the United Kingdom. The most immediate proposal to emerge—greater shareholder activism and the reinvigoration of the position of the nonexecutive director—is in fact a rather traditional one and is perhaps not likely to be taken up effectively in the near future. Nevertheless, if the current debate on governance could be linked up with the more radical propositions from the 1970s, and if both could come to grips with the accountability question, especially within pension schemes, something novel and worthwhile might yet emerge.