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# SUPERVISION OF CORPORATE MANAGEMENT: THE "OUTSIDE" DIRECTOR AND THE GERMAN EXPERIENCE

GUENTER H. ROTH†

In October of 1972 Arthur Goldberg, the former Secretary of Labor, Supreme Court Justice, and ambassador to the United Nations, resigned from his seat on the board of directors of Trans World Airlines. The reason for the resignation was that Goldberg's attempts to form an overseer committee consisting of Trans World Airlines' twelve outside directors, in order independently to review management performance, had met with strong management resistance and had ultimately failed. Goldberg declared that he found it impossible to fulfill his legal and public obligations as a member of the board under the existing conditions.<sup>1</sup>

The Goldberg incident excited widespread attention beyond the inner circles of corporation law<sup>2</sup> and once again spotlighted a crucial problem of the "modern" widely-held corporation:<sup>3</sup> should there be supervision of management by an independent intra-corporate "watch-dog" for the benefit of shareholders and perhaps for other groups affected by the corporate enterprise?<sup>4</sup> This problem is common to most countries with a highly industrialized economy based on private capitalism, and it is at the same time an area particularly promising for a comparative law approach, since one can find within the framework of similar enterprise structures basically different legal approaches

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1. *The Goldberg Variation*, NEWSWEEK, Oct. 30, 1972, at 88.

2. *Id.* See also Smith, *The Goldberg Dilemma: Directorships*, Wall Street Journal, Feb. 7, 1973, at 16, col. 4.

3. It is only this type of corporation, which might be called the American Telephone & Telegraph or General Motors type, with which we are concerned. For a discussion of the distinctions to be made between the "modern" widely held corporation and the shareholder-dominated public corporation see Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 CALIF. L. REV. 1, (1969). For a criticism of Eisenberg's criteria see G. ROTH, DAS TREUHANDMODELL DES INVESTMENTRECHTS 179 (1972).

In the case of a dominant stockholder the question of management supervision becomes largely moot, except for purposes of minority stockholder protection.

4. The other groups who might be represented are consumers, environmental interests, and labor groups.

to an identical problem. This is true in comparing the German corporate model and the American corporation, and it is for this reason that for many years German scholars of corporate law, dissatisfied with the results of their own law and bent on reform, have turned to the United States in order to study,<sup>5</sup> and sometimes to suggest the adoption of,<sup>6</sup> the alternative to be found there. In the United States, on the other hand, certain ideas seem to be gaining momentum that may result in something not very different from the German intra-corporate structure,<sup>7</sup> and at least one American writer expressly suggests adoption of certain features of the German model.<sup>8</sup>

### THE LEGAL BASIS FOR INTRA-CORPORATE SUPERVISION

#### *The German Supervisory Board*

The feature distinguishing the internal structure of the German *Aktiengesellschaft* from its American counterpart is found in the *Aufsichtsrat* (supervisory board).<sup>9</sup> While it is true that both German and American corporations are characterized by a tripartite structure (the shareholders, the *Aufsichtsrat* and a *Vorstand* under German law, and the shareholders, the board of directors and the officers under

5. The most recent fruits of such studies are: B. GROSSFELD, *AKTIENGESELLSCHAFT, UNTERNEHMENSKONZENTRATION UND KLEINAKTIONAER* (1968); E. MESTMAECKER, *VERWALTUNG, KONZERNGEWALT UND RECHTE DER AKTIONAERE* (1958); K. PFLUEGER, *NEUE WEGE DER VERWALTUNGSKONTROLLE IM AKTIENRECHT* (1969); G. ROTH, *supra* note 3; R. WIETHOELTER, *INTERESSEN UND ORGANISATION DER AKTIENGESELLSCHAFT IM AMERIKANISCHEN UND DEUTSCHEN RECHT* (1961).

6. See, e.g., R. WIETHOELTER, *supra* note 5, at 299-314.

7. See the various contributions to the ABA Proceedings on Officers' and Directors' Responsibilities and Liabilities: Conard, Mace, Blough & Gibson, *Functions of Directors under the Existing System*, 27 *BUS. LAWYER* 23, 24 (Special issue, Feb. 1972); Cary & Harris, *Standards of Conduct under Common Law, Present Day Statutes and the Model Act*, 27 *BUS. LAWYER* 61, 66 (Special issue, Feb. 1972); Vagts, *The European System*, 27 *BUS. LAWYER* 165, 166 (Special issue, Feb., 1972). In addition, see Conard, *Behavioral Analysis of Directors' Liability*, 1972 *DUKE L.J.* 895. Notice in this context that the German model has proved attractive to the draftsmen of an EEC convention on the creation of a "European company." See E. STEIN, *HARMONIZATION OF EUROPEAN COMPANY LAWS* 463 (1971).

8. Letter from Thomas J. Schoenbaum to Guenter H. Roth, Apr. 26, 1973. Professor Schoenbaum's suggestions will be published at a later date.

9. This is one of the four or five substantial differences between German and American corporate law. The others are the stricter safeguards on capital in the German corporation (minimum capital requirement, promoters' capital obligations, restrictions on redemption of shares), the differences in shareholder voting (banking as opposed to management proxy system, see text accompanying note 48 *infra*), and the American derivative suit. The prerogatives retained by German shareholders over dividend distribution do not seem to be too important in practice, and the labor force voice in the enterprise, see text accompanying note 58 *infra*, is considered a matter of labor, rather than corporation law.

American law), only the shareholder elements of the two structures correspond functionally. The *Aufsichtsrat* does not correspond to the board of directors, because the authority to "direct the association as a matter of its own responsibility"<sup>10</sup>, statutorily vested in the American board of directors, under the German corporation statute is vested in the *Vorstand*. It is the executive body or "board of management".

The *Aufsichtsrat*, in contrast, is created for the sole purpose of supervising the management.<sup>11</sup> It is a kind of continuous representative of the shareholders<sup>12</sup> between their meetings<sup>13</sup> and is the guardian of shareholder interests; consequently its active participation in management affairs is limited to some very rare exceptions.<sup>14</sup> The independence of the supervisory board is maintained by a provision prohibiting simultaneous membership on the board of management and on the supervisory board,<sup>15</sup> which is a salient feature if compared to the relationship between the board of directors and the officers in an American corporation. The link between the shareholders, the *Aufsichtsrat* and the *Vorstand* is the same as between the corresponding institutions in the American corporation: the members of the supervisory board are elected by the shareholders, and the supervisory board appoints as well as removes (only for cause, however) the members of the executive body.

### *The American Board and Its Outside Directors*

Considering the actual situation in many large American corporations, one might be tempted to question the conclusiveness of the distinction outlined above, or at least the fundamental significance claimed for it. Not only is there a general shift of effective power of management from the entire board of directors to an executive group

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10. Aktiengesetz (German corporation law) of Sept. 6, 1965, (1965) 1 Bundesgesetzblatt 1089 (hereinafter cited as AktG) § 76 (1). For an English translation see R. Mueller & E. Galbraith, *The German Stock Corporation Law* (1966).

11. *Id.* § 111(1).

12. The labor force—the second constituency of the supervisory board, in addition to the shareholder—is not discussed here. *But see* text accompanying note 58 *infra*.

13. See Fischer, *Rechtsschein und Wirklichkeit im Aktienrecht*, 154 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 85, 109 (1954); H. SCHUMACHER, DIE ENTWICKLUNG DER INNEREN ORGANISATION DER AKTIENGESELLSCHAFT IM DEUTSCHEN RECHT BIS ZUM ADHGB 73 (1937); E. SONTAG, DIE AKTIENGESELLSCHAFT IM KAMPFE ZWISCHEN MACHT UND RECHT 106 (1918); 1 STUDIENKOMMISSION DES DEUTSCHEN JURISTENTAGS, UNTERSUCHUNGEN ZUR REFORM DES UNTERNEHMENSRECHTS 30 (1955).

14. § 111(4) AktG.

15. § 105(1) AktG.

including the "insider" faction or executive committee of the board, but there are also indications that even an unemasculated board of directors should be thought of as an independent supervisory body, as a "continuous independent link between management and stockholders,"<sup>16</sup> rather than as the center of management. Finally, in the large enterprise, supervision, functionally speaking, is necessarily inherent in top management, with the effective decisionmaking power being dispersed deeply within the ranks of the so-called techno-structure.<sup>17</sup>

But we are not concerned here with the simple truth that the closer we approach the top of a complex management structure the more the proportion of supervision of delegated decisionmaking to actual decisionmaking will increase. What constitutes an independent supervisory body is its separation from active management, both personally and institutionally, in order to secure independent judgment and to preclude conflicts of interest. This requires, on the one hand, the prohibition of overlapping membership on the management and the supervisory body, and on the other, strict confinement of the latter to supervisory functions, as distinguished from management decisionmaking, on the other.

As to the first requirement, the American corporation can boast of a partial separation between its officers and its board members insofar as its outside directors are concerned and of a complete separation in the rare cases in which the board consists of non-officer members only. But it is the second requirement that raises the more intricate problems, since it is difficult to define the functional relationship between management and a supervisory body. Of course, supervision means evaluation of the performance of management,<sup>18</sup> as distinguished from encroaching on management's business discretion or substituting one's own decision for management's. But there is also the problem of the supervisor's reproof of individual acts or projects, a censure that is likely to be accompanied by some indication of what conduct would be preferred, and the even more serious problem of the supervisor's power to appoint, to reappoint, and eventu-

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16. R. GORDON, *BUSINESS LEADERSHIP IN THE LARGE CORPORATION* 120 (1945).

17. J.K. GALBRAITH, *THE NEW INDUSTRIAL STATE* 69 and *passim* (1967).

18. The practical problems involved in the evaluation of management performance will not be discussed in this article. Of course, supervisory bodies will encounter many of the intricacies that already have caused courts all but to capitulate. For an eloquent complaint see *Heller v. Boylan*, 29 N.Y.S.2d 653 (Sup. Ct. 1941) (Collins, J.).

ally to remove the management's top personnel. Control over the appointment of management, or at least the ability to propose candidates to the shareholders, is a power that is perhaps necessary to make the supervision meaningful, but at the same time it opens avenues for interference with active management.

Despite these difficulties, and despite the German *Aufsichtsrat*'s additional power to participate directly in management matters in some exceptional cases, the criterion of functional separation of management and supervision clearly distinguishes the German *Aufsichtsrat* from the American board of directors. It is the unmistakable effort at personal *and* functional separation that characterizes the *Aufsichtsrat* as a supervisory rather than managerial institution. The American board of directors, in contrast, in light of legislative enactments and judicial decisions<sup>19</sup> can hardly be labeled a nonmanagerial body, even in the exceptional cases of strict separation of board membership and officers.

On the other hand, in the average board consisting of both inside and outside directors, all of its members do not participate, or at least not to the same extent, in managerial functions. We arrive therefore at a distinction within the board of directors: one group, typically those forming the executive committee and perhaps serving as officers at the same time, is part of the management, and a second "outside" group is not. This does not *necessarily* imply that the outside directors in fact serve as management's supervisors, but that role is one of the few available to them, unless one is prepared to consider them as entirely useless and superfluous or merely as an instrument for business contacts and public relations.

Indeed, the courts, though they may sometimes be rather lenient with regard to the degree of care they expect outside directors to observe in the discharge of their duties,<sup>20</sup> have never left any doubt that directors who did not actively participate in the management of the corporation nevertheless had the duty to supervise management. As early as 1919, the United States Supreme Court, in holding an outside director liable for violation of his duties, stressed the outside director's duty to "exercise the diligence which prudent men would usually exercise in ascertaining the condition of the business . . . or a reasonable

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19. See, e.g., *Gould v. American Hawaiian Steamship Co.*, 351 F. Supp. 853 (D. Del. 1972); *Campbell v. Loew's Inc.*, 36 Del. Ch. 563, 134 A.2d 852 (1957).

20. See, e.g., *Bates v. Dresser*, 251 U.S. 524 (1920); *Briggs v. Spaulding*, 141 U.S. 132 (1891).

control and supervision over its affairs and officers."<sup>21</sup> And the decision in *Escott v. BarChris Construction Corp.* is well-known for the strict standard it applied to an outside director's duty "to investigate the facts."<sup>22</sup> The liability arose under federal securities law, but the case is nevertheless an establishment of the supervisory obligations of outside directors.

### *The Disinterested Directors of Investment Companies*

Finally, there is one special field of corporation law in which the outside directors have been given an independent supervisory role by express legislation and in which their function has been institutionalized to a certain extent. The Investment Company Act of 1940, as amended in 1970,<sup>23</sup> requires in section 10(a) that every investment company have a board of directors at least forty percent of whom are "disinterested" in the sense of not serving, or having other interests, in the management of the company. Section 15(c) then subjects any contract with an investment adviser (the management contract in the case of an external management)<sup>24</sup> and any renewal thereof to the majority approval of these outside directors. The 1970 amendments added to Section 15(c) an express provision obliging the directors, in the discharge of this function, "to request and evaluate . . . such information as may reasonably be necessary to evaluate the terms of any contract . . . ."<sup>25</sup>

The most important feature of this legislative approach for the purposes of our discussion is that the outside directors act as an independent body, distinct from the insider members and therefore from the board as such. The parallels to the German supervisory board are apparent, and the supervisory duties of disinterested directors of investment companies have not been disregarded by the courts<sup>26</sup> or by legal writers attempting to work out realistic and specific guidelines for

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21. *Bowerman v. Hamner*, 250 U.S. 504, 511, 513 (1919); see *Barnes v. Andrews*, 298 F. 614, 615 (S.D.N.Y. 1924), where Judge Learned Hand, with regard to an outside director, speaks of the "individual duty [of directors] to keep themselves informed."

22. 283 F. Supp. 643, 687 (S.D.N.Y. 1968).

23. 15 U.S.C. §§ 80a-1 to -52 (1970).

24. External management—the management of the investment company or fund not by an executive body of its own but by a separate management or so-called advisory company on the basis of a management contract—is the predominant form of management organization in the field of investment funds.

25. 15 U.S.C. § 80a-15(c) (1970).

26. See, e.g., *Lutz v. Boas*, 171 A.2d 381, 395-96 (Del. Ch. 1961).

effective supervision.<sup>27</sup>

In light of this common-law and statutory law background, the attempt by Arthur Goldberg to organize the outside directors appears as just another proposal for creating an independent supervisory body within the corporation. What Goldberg had in mind when he suggested the formation of an independent body was not the take-over of active management by the outside directors,<sup>28</sup> but rather the development of an organizational framework for a more effective supervision of active management.

If this interpretation of Goldberg's intentions is correct, those intentions may be linked to ideas outlined nearly forty years earlier by William O. Douglas,<sup>29</sup> and they might be understood as a specific answer to Bayless Manning's more general demand to "provide—judicially, legislatively, administratively or by new nongovernmental machinery—some supervision of management's behavior in corporate matters . . . ."<sup>30</sup> Indeed, the need for providing some institutionalized supervision of management in the large, widely-held enterprise where shareholder control has become all but meaningless can hardly be denied; the most recent scandal at Equity Funding Corporation<sup>31</sup> is just another, if extreme, illustration of it. Rather, the problem is how to make such supervision really meaningful.

#### THE REALITIES OF SUPERVISION

##### *The American Outside Director*

In practice no intra-corporate supervisory mechanism has really been able to work effectively. With regard to the outside directors of

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27. Glazer, *A Study of Mutual Fund Complexes*, 119 U. PA. L. REV. 205 (1970); Mundheim, *Some Thoughts on the Duties and Responsibilities of Unaffiliated Directors of Mutual Funds*, 115 U. PA. L. REV. 1058 (1967); Nutt, *A Study of Mutual Fund Independent Directors*, 120 U. PA. L. REV. 179 (1971).

28. I submit that this interpretation, given by Everett Smith in the *Wall Street Journal*, *supra* note 2, is incorrect, although I have to admit that Goldberg's own language referring to an overseer committee and its responsibility for the management of the corporate enterprise is far from unequivocal. Smith's own ideas concerning the outside director's role, therefore, seem similar to the Goldberg proposal, perhaps with a somewhat stronger accent on informal and non-obligatory counseling. His allusion to the judge-like character of an outside director corresponds closely to my conception of supervisory functions.

29. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1308 (1934) [hereinafter cited as *Directors Who Do Not Direct*]; see W. DOUGLAS, *DEMOCRACY AND FINANCE* 49-54 (1940). See also Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399, 418-19 (1962).

30. Manning, *Book Review*, 67 YALE L.J. 1477, 1491 (1958).

31. See *Wall Street Journal*, Apr. 24, 1973, at 1, col. 6.

American corporations this conclusion is certainly not startling; more than thirty years ago William O. Douglas had accused outside directors of being no more than "business colonels of the honorary type—honorary colonels who are ornamental in parade but fairly useless in battle."<sup>32</sup> Investigations made for the Temporary National Economic Committee at about the same time reached similar conclusions.<sup>33</sup> The fact that things have not changed in the meantime is not only illustrated by Arthur Goldberg's spectacular manifestation of discontent over his lack of power as an outside director, but is also broadly supported by a recently completed study by Myles Mace.<sup>34</sup>

The actions of Arthur Goldberg indicate that it is not a lack of interest or attention on the part of outside directors that should be blamed for the dilemma in the first place. The outside director can hardly be expected to function effectively as management's watchman, not only because of lack of adequate organization and independent facilities, but because of the more important reason that the outside director is dependent on management for his position. Management appoints the outside director through its control of the proxy machinery and can refuse to reappoint him or eventually even have him removed if it so desires.

The firm command that management as a rule retains over the election of directors is indicated by Securities and Exchange Commission statistics on proxy solicitation. In 1971, for example, 5,864 solicitations of proxies for the election of directors were filed with the SEC, but only thirty-one companies, or roughly one-half of one percent, were involved in proxy contests. Of these thirty-one cases management won seventeen, and non-management opposition succeeded in five cases.<sup>35</sup> (Contests for control of the board and contests for representation on it are combined.)

There can be no doubt that in the event of a proxy contest between the inside and the outside directors, the insiders would be in control of the proxy machinery. In fact, the outsiders would probably not control it even if they represented a majority of the board of direc-

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32. W. DOUGLAS, *supra* note 29, at 46; see *Directors Who Do Not Direct*.

33. M. DIMOCK & H. HYDE, *BUREAUCRACY AND TRUSTEESHIP IN LARGE CORPORATIONS* 23-25 (TNEC Monograph No. 11, 1940).

34. M. MACE, *DIRECTORS—MYTH AND REALITY* (1971); see Conard, Mace, Blough & Gibson, *supra* note 7, at 32-37.

35. 37 SEC ANN. REP. 53-54 (1971). The respective figures for the fiscal year 1971-72 are 6,378 elections of directors, twenty-three proxy contests (.35%), with management winning fifteen and the opposition four. 38 SEC ANN. REP. 30-31 (1972).

tors or if the chairman of the board were an outside director, as was illustrated vividly by the events surrounding the case of *Campbell v. Loew's Inc.*<sup>36</sup>

### *Supervision of Mutual Fund Management*

For the reasons mentioned above,<sup>37</sup> one might have higher expectations for the supervisory function of outside directors in investment companies. However, experience does not support those expectations. This does not mean that the role of outside directors under section 10(a) of the Investment Company Act has no significance at all,<sup>38</sup> but on the other hand the outside directors are not the independent and efficient counter-balance to management the enactors of the Act probably supposed they would be.<sup>39</sup> The main reason, once again, is the control by management (or the investment adviser) of the proxy machinery. This control is so efficient that when the management companies of even the large "fund complexes" (ten or more investment companies managed by the same adviser) have so desired, they have had no difficulty filling the boards of those investment companies for decades with exactly the same persons. The ineffectiveness of the powers conferred upon the disinterested directors in section 15(c) of the Investment Company Act is indicated by the ease and the matter-of-course attitude with which the investment advisor's position has been sold and transferred.<sup>40</sup>

Proposals to have outside directors appointed by the SEC<sup>41</sup> or to have the candidates for election nominated by the incumbent outside directors alone<sup>42</sup> have not met with much response. Even under such conditions it is difficult to see how outside directors could wield any in-

36. 36 Del. Ch. 563, 134 A.2d 852 (1957); see W. CARY, *CASES AND MATERIALS ON CORPORATIONS* 274 (4th ed. 1969).

37. See text accompanying notes 21-25 *supra*.

38. Court decisions like *Lutz v. Boas*, 171 A.2d 381 (Del. Ch. 1961), have contributed to the sharpening of outside directors' sense for responsibility and potential liability in recent years.

39. SEC, *A STUDY OF MUTUAL FUNDS* 466 (1962); Glick, *Mutual Fund Management Fees: In Search of a Standard*, 25 BUS. LAWYER 1471, 1482 (1970); Nutt, *supra* note 27, at 215-25; Wymeersch, *Some Aspects of Management Fees of Mutual Funds*, 17 BUFFALO L. REV. 747, 752 (1968); Note, *Conflict of Interest in the Allocation of Mutual Fund Brokerage Business*, 80 YALE L.J. 372, 389 (1970).

40. See, e.g., *SEC v. Insurance Sec., Inc.*, 254 F.2d 642 (9th Cir. 1958). Potential difficulties in this area are not to be found in section 15(c), but in the enforcement of fiduciary duties. See *Rosenfeld v. Black*, 445 F.2d 1337 (2d Cir. 1971).

41. Glick, *supra* note 39.

42. Nutt, *supra* note 27, at 216-17.

fluence with management, given the lack of realistic alternatives to retaining the incumbent management in office under practically any circumstances.<sup>43</sup>

### *The Failure of the German Supervisory Board*

Two reasons for the failure of outside directors to act independently of management, together with the corresponding recommendations for redress, were stated by William O. Douglas in 1934:<sup>44</sup> the lack of separation between supervision and management personnel and the command by management of the machinery appointing the outside directors of the corporation. Arthur Goldberg has added a third reason: the lack of an independent organization and of an autonomous staff for the supervisors. All three of these reasons are, at least in principle and as a matter of law, resolved by the German *Aufsichtsrat*. Nevertheless, this institution does not guarantee effective supervision of management in the interest of shareholders and other legitimately interested groups either.

As far as the members elected by the shareholders are concerned,<sup>45</sup> a review of the supervisory board in the widely-held public corporation<sup>46</sup> reveals three typical situations: (1) the *Aufsichtsrat* is, functionally speaking, part of the management; (2) it has degenerated into an "organization for business contacts and friendships";<sup>47</sup> or (3) it exercises effective supervision, but does not represent the stockholders.

*The Role of Banks.* In order to understand this situation more clearly, it is important to realize that Germany does not have the same system of shareholder voting that has developed in the United States. The authority to vote is not conferred upon management in Germany.

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43. The writer knows of no case of firing of an old and hiring of a new management by initiative of the outside directors of a mutual fund. Even in *In re Managed Funds, Inc.*, 39 S.E.C. 313 (1959), a change in the management position took place only with the help of the SEC.

44. *Directors Who Do Not Direct* 1314-15.

45. As distinguished from the labor force representatives; see text accompanying note 58 *infra*.

46. One difference between the American and the German corporate scene is that in Germany the General Motors type of corporation is relatively less important though far from negligible; it represents about ten out of the largest fifty and four out of the largest ten industrial corporations, and in addition the three largest banks. See Roth, *Die Herrschaft der Aktionäre in der Publikums-AG als Gegenstand rechtssoziologischer Betrachtung*, in Festschrift Paulick — (1973).

47. W. RATHENAU, *VOM AKTIENWESEN* 16-17 (1917).

But since the small German stockholder is no less indolent than his American counterpart, there exists in Germany a kind of proxy voting, exercised by the banks with whom shareholders have deposited their certificates. These banks normally represent eighty-five to ninety-five percent of the shares voted at the shareholder meetings of the larger public corporations.<sup>48</sup>

Because the shareholders of a given corporation deposit their certificates with different banks, one may find as many as fifty banks exercising the voting rights of shareholders at a shareholder meeting. However, this rarely results in a diversity of opinions; instead the banks follow the lead of one or two of the large commercial banks, who may represent either the largest bulk of votes or an absolute majority.<sup>49</sup> The absence of provisions similar to the proxy regulations under the Federal securities laws<sup>50</sup> means that the individual shareholder has even less of a say than under the American proxy system.

As a consequence, banks enjoy a potentially dominant position in the German corporation, and they have to a large extent usurped the shareholder's position. This would not in itself necessarily constitute a negative statement, since a few banks can more effectively exercise some control over management than myriad diverse stockholders. But there is the immediate danger that the banks will exercise their power in pursuit not of the small shareholder's interest, but in pursuit of their own and possibly conflicting interests. This potential conflict of interest is a highly controversial subject in Germany<sup>51</sup> and has for good reason been met with some amazement and disbelief on the part of American observers who are "imbued with the conflict of interest experience that led to the . . . American legislation separating commercial banking from broker-dealer functions."<sup>52</sup> Such a separation is unknown in Germany. The neglect by banks of the small shareholder whose voting rights they exercise is evidenced in their usually steadfast opposition to attempts to place small shareholder representation on a supervisory board.

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48. See Roth, *supra* note 46, at —.

49. At recent shareholder meetings of the three big banking corporations, the bank itself (i.e., its management) held an average of forty-five percent of the votes, in one case even fifty-five percent. See *id.* at —.

50. The one provision of this kind, AktG § 135(I)(2), envisages only a particular case.

51. See G. ROTH, *supra* note 3, at 308-13.

52. Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 HARV. L. REV. 23, 62-63 (1966).

On the other hand, it does not necessarily follow from the potential power of banks that they always effectively control a corporation. While it is true that the top executives of the banks account for approximately one-third of the shareholder-elected members on the supervisory boards of large corporations,<sup>53</sup> it is equally true that shareholder meetings as a rule approve management proposals by a margin of 98 to 99.98 percent.<sup>54</sup> These management proposals are normally unanimously supported by both the management board and the supervisory board, and it is difficult to assess the degree to which the supervisory board (and its bank members) influences the actual decisionmaking. But, in conclusion, it does seem that the banks, not unlike American institutional investors, are inclined to abandon their power in favor of the management of the corporation so long as the overall conduct of the business is satisfactory, thus creating a situation that in essence is not very different from the American corporate scene.

*Management and Supervision.* One effect of the role of banks described above is that management usually is able to elect its candidates to the remaining positions on the supervisory board.<sup>55</sup> Management uses this ability mainly for one of two purposes: either it uses the board as a liaison and public relations institution, as a source of advice at best, or as a dumping ground for veteran executives (similar to the outside faction of the American board), or it extends itself beyond the management board into areas of the supervisory board. It might, for example, appoint several of its senior members to positions on this board rather than the management board. This is similar to the close relationship between inside directors and officers in an American corporation, except that the provisions prohibiting simultaneous membership are formally observed.<sup>56</sup>

Secondly, instead of being controlled by the supervisory board, the management more often seems able to control the supervisory board

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53. See G. ROTH, *supra* note 3, at 309.

54. See *id.* at 186-87; Roth, *supra* note 46, at —.

55. E. MESTMAECKER, *supra* note 5, at 91; 1 STUDIENKOMMISSION DES DEUTSCHEN JURISTENTAGS, *supra* note 13, at 30, 76; Schilling, *Macht und Verantwortung in der Aktiengesellschaft*, in Festschrift Gessler 159, 163 (1971). For additional references see R. WIETHOELTER, *supra* note 5, at 295-97.

56. In addition to the literature cited in the previous footnote see Fischer, *supra* note 13, at 110-11; K. PFLUEGER, *supra* note 5, at 71-75; W. RATHENAU, *supra* note 47, at 14-15; Hachenburg, *Vom Aktienwesen im Grossbetriebe*, 1918 JURISTISCHE WOCHENSCHRIFT 16, 17. For recent empirical material see *Mitbestimmung im Unternehmen*, in VI/334 BUNDESTAGS-DRUCKSACHE 32-33 (1970) (the so-called "Biedenkopf opinion").

even if the management does not itself occupy positions on the latter. This is partially a consequence of management's influence on the elections to the supervisory board, and partially a result of an accommodation between management and the banks represented on the supervisory board. In the individual case, it is impossible to determine the extent of the accommodation or the relative strength of each party, but the result is that in the absence of some serious crisis management is a self-perpetuating oligarchy that regenerates itself by means of co-optation rather than by supervisory board selection. There are cases in which members of the management were refused reelection or were removed by the supervisory board, it is true,<sup>57</sup> but it is difficult to determine whether the impetus for removal originated within the supervisory board or within the management itself.

Management domination of the supervisory board seems even to be reinforced to a certain extent by labor participation (or "co-determination") on this board, which is the second original feature of the German *Aufsichtsrat*. The employees of the enterprise elect one-third, or in particular cases one-half, of the supervisory board members.<sup>58</sup> The co-determination, particularly when amounting to parity, could serve as a potentially powerful instrument for labor unions against both the management and capital owners of the corporation. However, a recent study made for the German government suggests that labor representation on the supervisory board more often is an ally of management in confrontations with the shareholder representatives on the board, rather than an independent pressure group.<sup>59</sup>

The identification of labor representatives with management suggests a better explanation for the constant failure of intra-corporate supervision of management than those discussed above. For despite the conflicts of interest of banks and management's influence on the selection of supervisory board members, strong-minded and independent outsiders are occasionally elected to the supervisory board. It is under these favorable conditions that one might expect the German *Aufsichtsrat* to provide some effective supervision of management, superior to the supervisory system in the American corporation, but unfortunately this seems in fact to be the result in only rare cases.

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57. See, e.g., Vagts, *supra* note 7, at 168, describing the Volkswagenwerk situation.

58. A recent and very accurate account of the German co-determination legislation is to be found in Wall Street Journal, Feb. 23, 1973, at 1, col 1.

59. *Mitbestimmung im Unternehmen*, *supra* note 56, at 36-37.

Instead, the odds are that the powers inherent in the supervisory board and the enticements corporate leadership may offer to such highly qualified persons, be they capital or labor representatives, will result in a type of psychological metamorphosis that has best been described by Detlev Vagts as the "gravitational attraction of management."<sup>60</sup> These men will become part of the management, not because they were appointed to the board in this capacity, but because they imperceptibly begin to identify themselves with the objectives of management.

### CONCLUSION

Neither the concept of outside directors in any of its different forms nor the German *Aufsichtsrat* lives up to the needs for effective supervision of management. The usefulness of outside directors and German supervisory board members in contributing their valuable perspectives and outside business contacts is not questioned, but this role should not be confused with supervisory functions. The German experience shows that even expectations of supervisory control based on the separation of supervisory and management personnel, the establishment of independent facilities, and the attempt to control the election machinery by the supervisory body are not well-founded. Even under such circumstances the supervisory body will be unable to counterbalance the dominance of management within the corporation.

If one desires supervision in the proper sense of the word, one additional step becomes indispensable: the separation of the supervisory body not only from management, but also from the enterprise itself, and the organization of the supervisory body on a supra-corporate level. This seems to be the only way in which to prevent identification with management.

On the other hand, it would not be desirable to abandon completely the advantages of intra-corporate supervision. The solution might be found in the establishment of a governmental agency similar to the Securities and Exchange Commission or in the establishment of a self-policing, industry-wide association. Members of the agency or association, as salaried and full-time professionals, would be assigned to individual corporations, and a system of rotation would prevent the above-mentioned danger of identification with management.

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60. Vagts, *supra* note 52, at 61.

In view of the general opposition to governmental or quasi-governmental intrusion into private enterprise, the negative response of business to any suggestion like the above can be anticipated. However, in my opinion public control of private capitalism, or at least of the corporate giant, will increase in any event, in both Germany and the United States. Be that as it may, increased public control over private corporations is the price one may have to pay to achieve effective supervision of corporate management in the large public corporation.

