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29.12.2003

HR B 42039
Münchener Rückversicherungs-Gesellschaft AG

Subject: Petition pursuant to § 104 of the Companies Act - opinion

Dear Sirs,

We are shareholders in Münchener Rückversicherungs-Gesellschaft AG (hereinafter MunichRe) and have learnt from repeated public statements in 2003 that a petition for supplementation of the Supervisory Board pursuant to § 104 of the Companies Act is to be lodged about now. We hereby state our opinion in this regard and request inclusion in the proceedings, as well as the right to a hearing in the event of a court order.

The MunichRe Supervisory Board is as far as we know still quorate within the meaning of § 108 of the Companies Act taken together with § 13 of the MunichRe articles of association; events may occur or have occurred that put it below complement. § 104 of the Companies Act is based chiefly on four principles:

1. The supervisory board has to apply "forthwith" for legal supplementation if a vacancy is not filled in good time before its next meeting. Accordingly a petition "today" (for appointment of a new member to the Supervisory Board – as of last week none had been filed) is to be rejected as belated; the cause for this application arose on 28 April 2003. The petitioner cannot first ignore the urgency and "today" appeal to this provision.

2. A supervisory board below complement for longer than 3 months is to be supplemented with judicial assistance – there are no indications of such a period of shortfall. A replacement for the resigning member was presumably chosen by the general meeting. The articles of association set no

periods for a resignation to take effect; the rules of procedure are not public. The intending resigner appears as Supervisory Board member on the website as at 24.12.2003.

3. Even a briefer vacancy is to be filled with court assistance where an “urgent case” is present – but this urgency is forfeit, since by the Supervisory Board meeting on 28 April 2003 its cause had already arisen.

4. A supervisory board with co-determination is legally defined as an “urgent case” – that may very well be, but in the present case this rule of urgency (in connection with codetermination) would be being employed abusively. Individual need by MunichRe is at any rate not obvious, and would anyway require particularly intensive justification – especially since MunichRe’s authorities have (voluntarily) submitted to the provisions of the Corporate Governance Code.

If the application for court appointment of a member of the MunichRe Supervisory Board is made with a justification pursuant to **§ 104 II b AktG [Companies Act]** that an “urgent case” is present, then a particularly stringent level of testing applies. This urgency was known to all for at least 9 months (Supervisory Board meeting of 28.4.2003 with adequate notice – the rules of procedure in being are not publicly accessible), so the bodies could have responded accordingly, and cannot therefore now appeal to it – unless new facts have arisen.

It is conceivable for the petitioner(s) to allege an urgent case pursuant to **§ 104 III Tz. 2 AktG**. MunichRe has a co-determined Supervisory Board consisting of 10 employee members and 10 capital-owner members. There is accordingly “always an urgent case” (§ 104 (3)) where there is a vacancy on such a supervisory board. Here again it cannot be that it is left up to a body – or more precisely the member of the body that has declared an intention to resign – to bring about the urgency of the case intentionally and according to plan. This is an abuse of the law, which in fact, according to the undisputed legislative intent, leaves to the courts only unavoidable repair measures (standing in for the required but absent decision by the general meeting) – as it were *ad interim*.

The Act may not be employed abusively, determining a mandate in contradiction with the structures of company law, by deliberately and strategically bringing about “urgency” over such a long period of time, as will further be detailed. It is accordingly requisite to give notice of

Appeal pursuant to § 104 II d AktG.

COMPANY-LAW AND OTHER CONSIDERATIONS

MunichRe has as a company autonomously placed itself under the rules of the Government Commission on Corporate Governance, thereby recognizing as a principle *respect for shareholders’ interests* (as in the compliance declaration and in the Board Chair’s report to the general meeting on 11 June 2003). Accordingly, the (Registry) Court too must assess its authorities on this basis.

This Code provides (since 7 November 2002) in Tz. 2.2.1 that the general meeting should elect the shareholder representatives. This rule was so important to the commission that it is even clearly laid down in Tz. 1 in the preamble: “Members of the supervisory board are elected by the shareholders in the general meeting.” A simple, logical rule, no exception to which is provided for, but

which is to be needlessly departed from at the general meetings on 11 June 2003 and 26 May 2004. This met with vehement criticism from all shareholders at the last general meeting.

The supervisory board has, furthermore, no right or entitlement to cooptation. In particular, the acknowledged general debate and especially the criticism expressed by shareholders at the MunichRe general meeting on 11 June 2003 regarding the current procedure (including the application for appointment by 1.1.2004) cannot be disregarded. As evidence the then discussants (in chronological sequence on 11.6.2003) are offered as witnesses:

Klaus Schneider, WP (Chair of SdK, Schutzgemeinschaft der Kleinaktionäre e.V.)
Daniela Bergdold, RA (DSW, Deutsche Schutzvereinigung für Wertpapierbesitz e.V.)
Thomas Körfgen (SEB Invest GmbH)
Henning Gebhardt (DWS Investment GmbH) and several others
-each with the undertaking to supply an address for summons later-

It is contrary to the organizational structure in company law for the management to seek out "its own" advisers, officers and negotiating partners for the management appointment itself, in abuse of law and with no emergency, for the appointment.

A (judicial) balance can also assess whether an early resignation may have come at the wrong time or ignored the resigner's liability. If necessary, the (remaining) Supervisory Board ought to have checked whether it ought to assert such claims (Arag-Garmenbeck judgment, II ZR 175/95).

The Companies Act clearly provides the incompatibility of membership of the management board and supervisory board (§ 105 AktG). Judicial evaluation of the decision thus logically has to establish why, without a "cooling-off period", a new member is to be appointed by court to the Supervisory Board who a short time ago was still on the Management Board.

The point will have to be assessed that while the member to be appointed was on the management board he as a management member planned the judicial appointment (or helped to), as will be shown in the *narratio* below – as it were evading the statutory incompatibility. It may be that the initial steps (e.g. resignation to create the vacancy, or preparation of the petition pursuant to § 104) to bring about an "urgent case" (§ 104(3) AktG) were brought about by the very management member now to be appointed to the Supervisory Board. Separation of the two authorities is an essential organizational component of the dual system in German company law – any even marginal departure from which disrupts its basic foundations.

While it is true that a "cooling-off period" – between responsible operational activity on the management body on the one hand and oversight on the supervisory body with personal competence on the other – is not a part of German law and as such only rarely practised; it is however also true that we have here to do with a now strengthened and recognized demand of investors, especially permanent and (for pension building) long-term investors – a target group particularly devoted to MunichRe's self-image (see: „Unser Verständnis von Corporate Governance").

The Supervisory Board for its part has to assess (e.g. in its report to shareholders: § 116 AktG; Tz 5.4 and 5.5 of the German Corporate Governance Code) whether it ought not to have prevented these plans from being prepared and now acted on. This is its obligation.

The Supervisory Board has to assess with particular justification whether and if so why it influenced, or affected by its decision, the immediate executability of a (planned) resignation.

The auditor will on 31.12.2003 have to assess whether the disregard for the rules of the code was incorporated in the compliance declaration, or else supplement his attestation accordingly.

THE PUBLISHED FACTS

"The leading post on the supervisory board must not be allowed to degenerate into an entail," says Klaus Kaldemorgen of the investment company DWS Investment GmbH, cited in the Süddeutsche Zeitung No. 111 p. 21 on 15 May 2003. That was just what he seemed to have recognized in the proceedings in MunichRe, in which KAG, on its own presentation at the 2003 general meeting, participates with approx. 3% of all the shares.

The Handelsblatt for 7 February 2002 already ran editor Caspar Busse's headline "MunichRe boss working on his succession behind the scenes" – although recognized company-law rules say it is not for the management board but the supervisory board, free in its decisions (and co-determined), to appoint the management board. Only the internal rules of procedure are regulated within the board, with § 77 AktG providing that management board members have in principle to have equal rights (Hoffmann-Becking, ZGR 1998, 497, 514f).

In the same publication the same editor, on 29 April 2003 following the meeting of the MunichRe Supervisory Board, wrote the headline "Schinzler (NB: Dr. Hans-Jürgen Schinzler, then Chair of the MunichRe Management Board) wants to head the Supervisory Board". In the text he says:

"But Schinzler … is not handing over power just yet. He wants to move on to head the Supervisory Board and thus keep on pulling the strings in the background. … Ulrich Hartmann is accordingly to resign (NB: his post as Chair of the MunichRe Supervisory Board), and Schinzler to be appointed as new Supervisory Board member by court decision and **initially** without a decision by the general meeting." (our emphases)

Again, on publication of the MunichRe quarterly results, the Handelsblatt for 3 June 2003 captions a photo: "MunichRe boss Hans-Jürgen Schinzler is leaving his post at the end of the year and wants to take over the chair of the Supervisory Board " – at a date when, as later, he was (still) a member of the Management Board, not the Supervisory Board. The conflicts of interests between the bodies with differing functions (two-board system) are accordingly to last a further 6 months. It is a recognized principle to avoid conflicts of interest and where necessary make disclosures – notably, a working topic of government oversight at the Bafin (Federal Office for Regulation of Financial Services).

The MunichRe press statement following the Supervisory Board meeting on 28 April 2003 announces its major decisions. These are the motions and votes for the general meeting on 11 June 2003 and the personnel changes on 1 January 2004 – instead of properly and timeously proposing to the ordinary general meeting the election in due form of the shareholder representatives, the Registry Court is to be instrumentalized for the purpose, in abuse of the law. There is no entitlement to elimination of a deliberately self-created emergency by court decision.

The decisions were thus available in good time before the 2003 general meeting – at which the personnel or appointment questions ought actually to have been decided. If this has not happened, then it can also take place at the forthcoming 2004 general meeting. No reason for the change of year exists.

The office-holder who is to resign, Herr Rudolf Ficker, is (still) shown as Supervisory Board member on the home page in these days. It is not known when or with which formalities (e.g. resignation without notice) he will resign - or already has.

Eight months before the operative date for motions, the facts of the "urgent case" now provoked were already clear and well known – adding the time for preparing the meeting, 9 months. This is hardly an "urgent" enough "emergency" to be treated as such. Now the Registry Court is to work off the urgency … That a petition by the management board is still possible at all is questionable; it is obliged to apply forthwith. And it waited another 8 months?

The long-term aspect talked of here means nothing but the time extending beyond a (regular) general meeting. With proper procedure the general meeting could – as would have been right – have made the appointment – i.e. on 11 June 2003; and at the next opportunity, on 26 May 2004. Instead, a petition for a court appointment is kept back for 9 months – only to be passed to the Registry Court for urgent (surprise!) treatment. We see this as abuse of a necessary provision, something that should be stopped. Regulatory practice should be based on the legislator's true intent, which is in line with recognized Corporate Governance principles – at the very least if, as is the case here, the company concerned has not declared any preclusion of these rules.

At the general meeting on 11 June 2003 the Chair, in his report to the Management Board, did (in the introduction) indicate that he would be in that position "this year for the eleventh and last time", but breathed not a word of his move 7 months later onto the Supervisory Board. The shift of mandate decided 44 days earlier on the Supervisory Board was not a topic at the general meeting for the members of the body concerned – that is, the point that today has become *urgent* was not to be a *priority* matter for the only body competent according to the organizational structure in company law and in the Corporate Governance Code. Thus it cannot be an "urgent case" now on the far-sightedly preset last day of the year – unless the Registry Court, with its eyes open, lets itself be used. The shareholders of course discussed this topic, critically.

PETITIONS

<u>We accordingly petition</u> for rejection of the petition for appointment of an additional Supervisory Board member, pending the ordinary general meeting on 26 May 2004,

> since manifestly, and at latest upon estoppel, no "urgent case" is present, and insofar as one might be, acts of evasion on a long-term plan were brought about that would apply the law abusively, and since petitions for appointment pursuant to § 104 AktG the content of which was known at a general meeting held earlier cannot be "urgent", because the applicability of § 104 AktG would thereby be teleologically reduced.

Alternatively, we petition for limitation of the appointment to the period up to the next general meeting, namely the one to approve the annual accounts for financial 2003 –something not excluded by the word “only” in § 11 of the articles of association.

This brief has first been sent to both company bodies, and is being distributed for discussion.

Yours sincerely,

V I P Vereinigung Institutionelle Privatanleger e.V.

Hans-Martin Buhlmann
Chair

Annexes