Increased requirements on proper organisation of companies in Germany

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by Dr. Hans-Michael Mache

Not long ago media reports stated that the public prosecutor’s office instituted preliminary investigations of (former) members of the management board of an international well known company in Germany. The reason for this investigation was the accusation that the company secured orders by means of corruption. Due to these developments numerous other companies were subject to inspections by specialist public authorities.

What is particularly interesting from a legal point of view is that these (preliminary) investigations do not only focus on corruption activities or any profits derived therefrom. These investigations are based on one particular provision of the German Regulatory Offences Act (Ordnungswidrigkeitengesetzes (OWiG)). Section 130 thereof is entitled „Breach of duty of supervision in companies“. This provision requires the management of a company to organise their company in such a manner as to avoid any breaches of duty of supervision. All acts or failures to act under threat of penalty or regulatory fine are deemed to be breaches of duty.

Corruption is only one of many possible breaches of duty. This provision also applies if, for example, environmental damage is caused by a disturbance in the operation of production facilities, damage is caused to a consumer due to a faulty product or a traffic accident is caused due to a truck being overloaded. In all these and many similar cases, depending on the amount of damage caused, the competent supervisory authority or the public prosecutor’s office may institute preliminary investigations against the management of a company pursuant to Section 130 OWiG. Such investigations serve to check what kind of organisational precautions were taken within the company in order to avoid the occurrence of such damage. These requirements are valid for all companies, irrespective of their size or legal form. In such cases, the legislators and the judiciary expect that the respective employee was chosen diligently and carefully and that the employee is qualified for his/her very tasks. Furthermore, the employee must have been continuously trained with regard to the requirements of the employee’s workplace. In addition, regular supervision is necessary. First and foremost, this is the obligation of the entrepreneur or the corporate bodies.
However, it is possible to delegate these obligations. The prerequisite therefor is that the respective person is suited to take over this responsibility, i.e. is qualified due to his/her training and work experience. Often there are misconceptions as to the fact that even in case of delegation the entrepreneur or a member of an executive body is never entirely released from his/her responsibility. Yet it is necessary to employ regular and appropriate measures to ascertain the functioning of the organisational system, i.e. in particular to ascertain that the delegation scheme works.

Not only the issue as to whether or not the management of a company has fulfilled its obligations, but above all whether or not this has been documented with absolute and legal certainty, is regularly decisive for the course that such investigations take. It has to be highlighted that the management systems that exist in most companies, e.g. in accordance with DIN ISO EN 9001, 140001 or ISO 18001, do not automatically evidence the fulfilment of the requirements on proper organisation. These voluntary systems, even if these are certified systems, serve entirely different purposes.

Based on the above-mentioned experience with major enterprises, the German authorities have started to also consistently check the organisational structures of medium-sized companies. There is a trend towards shareholders or members of corporate bodies to try raising claims against managers for breaches of duty of supervision. Consistent checks of the corporate organisation with regard to liability risks, in particular in the fields of product safety, plant operation and occupational health and safety are urgently recommended. Any shortfalls could result in the personal liability of the owner, the board of management or a managing director of a company for any unlawful acts of employees, of which the management had not even gained knowledge. The fines imposed pursuant to Section 130 OWiG can amount up to one million Euros. What is especially critical is that insurers, not only D&O insurers, increasingly look for any indications of knowing breaches of duty by managers in order to be able to refuse or reduce payment.