

## International Compliance Update

1/2016

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Our "International Compliance Update" portrays current developments and trends in international compliance legislation, jurisdiction and practice with a focus on their relevance for Germany.

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### United Kingdom

#### **The UK Modern Slavery Act 2015: New Compliance Challenges in international Supply Chain Management**

*Eric Mayer*

- The *Global Slavery Index* is estimating over 35 million modern slaves in 167 countries worldwide. The definition of modern slavery typically comprises debt bondage, forced labor, child labor, forced marriage, prostitution and human trafficking.
- More and more legislators are therefore stipulating new transparency obligations for companies. The *UK Modern Slavery Act* ("**UKMSA**") is also relevant for companies outside the UK provided that those are supplying goods or services.
- As a consequence, the UKMSA also applies to many German companies, which can only be protected against litigation risks by effectively and efficiently implemented CMS.

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### The Phenomenon of "Modern Slavery"

Over 1,000 casualties after the collapse of a textile factory building in Bangladesh three years ago and the extremely questionable working conditions on the construction sites for new football stadiums for the World Cup 2022 in Qatar have dramatically increased the public awareness for human rights violations. The *Global Slavery Index*<sup>1</sup> is estimating over 35 million modern slaves in 167 countries worldwide. The definition of modern slavery typically comprises debt bondage, forced labor, child labor, forced marriage, prostitution and human trafficking. Individual rights and civil liberties keep being deprived because of economic exploitation and personal enrichment. More and more legislators are therefore stipulating new transparency obligations for companies. With the *California Transparency in Supply Chains Act*<sup>2</sup>, the "Golden State" already enacted a comparable codification in 2011 applicable even outside California and covering external business partners as well.

### UK Modern Slavery Act 2015 Overview

The *UK Modern Slavery Act* ("**UKMSA**")<sup>3</sup> came into effect on October 29, 2015 and applies to natural persons as well as to companies. In analogy to the *UK Bribery Act 2010* it is also relevant for companies outside the UK provided that those are supplying goods or services, are generating an annual total revenue of a minimum of 36 million British pound<sup>4</sup> worldwide, were founded in the legal form of a business partnership or corporation in or outside the UK and are carrying on "a business in any part of the UK". As a consequence, the UKMSA also applies to many German companies.

<sup>1</sup> <http://www.globallslaveryindex.org/>

<sup>2</sup> <http://www.state.gov/documents/organization/164934.pdf>

<sup>3</sup> <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>

<sup>4</sup> Equals approximately 46 million Euro, conversion rate as on March 3, 2016.

The UKMSA introduces the criminal offence of slavery, bondage, forced and compulsory labor in section 1 and that of human trafficking in section 2 with a penalty of up to ten years imprisonment. Section 54 (1) UKMSA stipulates that companies must publish a slavery and human trafficking statement for each financial year in a "prominent" place on their website. Basically, companies have the choice of either submitting a statement on the actual measures taken in order to prevent slavery and human trafficking in the supply chain or stating that *none* of those measures were taken. Positive statements need to precisely specify the particular company structure, business model including its supply chains, specific company guidelines, due diligence processes, risk analysis- and risk management processes and special trainings. Such statements must be published for a first time for fiscal years ending on March 31, 2016 or later. Companies not complying with this transparency obligation and not submitting any statement at all will not have to face criminal sanctions. The UKMSA only provides for the possibility of an injunction to be enforced by the Secretary of State.

### Risks

The legislator directly obliges to transparency. Furthermore, he is consciously relying on companies as fellow campaigners against modern slavery. The intention clearly targets potential *reputational damages* created by consumer pressure and leveraged by other stakeholders like NGOs. Companies refusing to submit a statement will likely attract more public attention in future. Business sectors that are globally exposed to particular exploitation risks like extractive industries, engineering and construction, electronics, agriculture or textile will be closely observed by media, NGOs and many other pressure groups. Recent experiences suggest that this attention will not only focus on the very submission of the required statements but also on their concrete content. Already a wording formulated too broadly – or the opposite – too narrowly can quickly result in unwanted defensive reflexes.

Additionally, companies need to anticipate an increased *litigation risk*. The extraterritorial reach of the UKMSA raises the danger that the published information could be used in international litigation against the declaring company. In California the clear trend can be observed that NGOs and other activist groupings are dragging companies to the courts in the name of alleged victims of modern slavery. There are currently about 20 legal proceedings pending in the USA – most of them in the US state of California. Companies like Nestlé, Hershey, Mars, Procter & Gamble, Toyota, Mitsubishi or Mitsui are being sued by disgruntled shareholders complaining about insufficient information policy, by international NGOs or by aggressive US trial attorneys in class actions. Nestlé, for instance, is accused of abusing child slaves on their cocoa plantations in the Ivory Coast. Much of this litigation reveals a basic pattern: Companies that do report their measures against modern slavery are supposed to be well aware of the problem in the first place. Hence they would also have to accept legal responsibility based on this knowledge. The bigger the targeted corporation the more market power and control of entire regions will be assumed – with the corresponding failure to prevent modern slavery as an alleged consequence.

### Implementation Recommendations

The implementation of the UKMSA cannot be exhaustive with the simple submission of a statement. In fact only a focused embedding of the compliance risk dimension of modern slavery will provide reliable protection with a risk based implementation approach. All relevant corporate functions such as purchasing, procurement, production and logistics in particular – nowadays often summarized with the term "supply chain management" – as well as all affected business units and international subsidiaries must be integrated, too.

#### *Compliance Risk Analysis*

The compliance risk analysis serves as a basis for the effective and efficient design and development of a company-specific Compliance Management System ("**CMS**"). This is already required by almost all international anti-

corruption laws like the *US Foreign Corrupt Practices Act (FCPA)*, the *UK Bribery Act* or the *Brazilian Clean Companies Act (CCA)*. Section 54 (5) (d) UKMSA also mentions the risk assessment explicitly. In this context, the particular business model of each company needs to be reflected appropriately. Very often ultra-short deadlines, fierce performance strain and tough cost calculations are putting enormous economic pressure on business partners such as suppliers and labor contractors and therefore force the exploitation of low-wage or blue-collar alternatives, e.g. of seasonal workers in agriculture.

#### *Policies and Contract Terms*

Using the results of the compliance risk analysis the compliance policy framework needs to be tailored or continuously adapted. Specific Supplier Codes of Conduct are particularly recommended. However, these codes will have to be systematically integrated in all relevant contracts and flanked with special monitoring-, audit- and termination clauses or with appropriately supplemented General Terms and Conditions of Purchase for a multitude of purchase orders.

#### *Business Partner Compliance Due Diligences*

As a core CMS element, risk based business partner compliance due diligences represent an internationally accepted standard required by a globally converging anti-corruption legislation. Section 54 (5) (c) UKMSA explicitly refers to due diligence processes as key component of the transparency statement. Robust business partner compliance due diligences must be conducted *before* contracts are being signed. The selection of business partners who need to be reviewed should be based once again on the results of the compliance risk analysis and ought to focus on high-risk countries and high-risk business partner categories. The scope of a high-risk business partner compliance due diligence will vary significantly from reviews of less risky business partners. Integrated solutions in close cooperation with the responsible compliance- and supply chain management functions are particularly promising. Business proximity of all compliance processes is

always indispensable in this regard. Experienced purchasers working closely with the respective business partner candidates should be used systematically and the compliance risk dimension of modern slavery should be embedded in all supplier selection-, qualification- and audit processes accordingly for the prevention of external exploitation risks.

#### *Compliance Trainings*

Furthermore the results of the compliance risk analysis need to be implemented in the conception of special compliance trainings on exploitation in supply chains. Already established e-learning formats have to be supplemented respectively. Colleagues in particular company functions such as procurement or project management should be trained individually. Eventually, also business partners in high-risk categories and -countries should be trained as well.

#### *Compliance Communications*

Internal compliance communication should feature particular content concerning exploitation risks. In external communications, companies with effective and efficient CMS should consider fostering a proactive exchange with NGOs such as Amnesty International, Anti-Slavery International or Transparency International, with international organizations such as the International Labour Organization (ILO) or UN Global Compact, multilateral development banks such as the World Bank and African Development Bank as well as with selected industry initiatives. The compliance measures of an integrity pact e.g. for particular projects or of collaborative action in multi-stakeholder coalitions may also have to be taken into account.

#### **Conclusion**

Just like the UK Bribery Act the new UKMSA will be applicable to many German companies, too. They are well advised to avoid underestimating the new law as a mere paper tiger. The ongoing US litigation and the explicit repetition of the obligations of the California Transparency in Supply Chains Act clearly speak against this. It will not suffice to just follow the letter of the law simply submitting a positive transparency statement – and be done with it. Companies will virtually not have a genuine choice between "comply" or "explain". Already the public pressure taken consciously into account by the legislator will lead to the result that only a *positive* statement on measures to fight modern slavery has to be submitted. With this a corresponding self-binding effect will come into play: every information might provoke litigation risks. Only effectively and efficiently implemented CMS can prevent their consequences. The risk-based approach can significantly help to reduce the necessary additional efforts though. Eventually companies must consider very carefully that a publicly communicated corporate social responsibility strategy can only be implemented in a both credible and sustainable manner with robust compliance processes such as in particular business partner compliance due diligences also enhancing the business- and performance transparency.



#### **Eric Mayer**

*is Attorney at Law and Partner of Pohlmann & Company in Munich. He advises international corporations on the design and implementation of Compliance Management Systems focusing on business partner checks and M&A compliance due diligences.*

## World

**Current Trends in the Diagnosis of Corruption: The Corruption Perceptions Index 2015***Sebastian Bartsch / Miriam Ettel*

- Germany for the first time among top 10 countries with the lowest corruption perception.
- Brazil still suffering from the Petrobras scandal deteriorated the most in the Americas.
- Nearly two-thirds of the 168 listed countries below 50 CPI-points.

On January 27, 2016, Transparency International ("TI") published its Corruption Perceptions Index ("CPI") 2015. The annual index covers 168 countries or territories and was published in its 21<sup>st</sup> edition since 1995.

The CPI is derived from various expert surveys and has evolved into an international de-facto Compliance standard for assessing risks from business operations worldwide. It can serve as indication for *inter alia* relevant country risks with regard to business locations or places where services are performed or goods sold.

**Winners and losers in CPI TI 2015**

This year, Germany has been able to improve its position from 12 to 10, sharing this position with Luxemburg and the UK. As in the previous years, Denmark took the top spot in the CPI 2015, followed by Finland, Sweden, New Zealand and the Netherlands. These top CPI-countries share characteristics such as high level of press freedom; high level integrity among people in power; access to budget information; no differentiation between rich and poor in the judiciary; and independence of the judiciary from other government institutions.<sup>1</sup>

Somalia and North Korea remain unaltered at the low end of the CPI. Afghanistan, Sudan und South-Sudan complete the group of the five lowest ranking countries in the CPI in slightly changed order compared to last year.

<sup>1</sup> Transparency International, Press Release – Corruption Perceptions Index 2015, <https://www.transparency.de/Pressemitteilung-Transparency.2755.0.html>

Countries occupying the last positions in the CPI typically share characteristics such as armed conflict and civil war, poor governance, weak public institutions and a lack of press freedom.<sup>2</sup> In the CPI 2015, nearly two-thirds of the 168 countries scored below 50 out of 100 CPI-points. Among EU member states the average score is 62 CPI-points whereas in 2012 the average was 65 CPI-points.

Compared to the previous year, Brazil and Lesotho as well as Guatemala and Angola recorded the biggest minus in CPI-points losing 5 and 4 CPI-points respectively. Brazil is still suffering from the corruption scandal around the state-controlled oil company Petrobras. In contrast to the aforementioned countries, the Czech Republic, Kuwait and Ruanda recorded the largest increase in CPI-points with plus 5 CPI-points. Austria, Jordan and the Netherlands raised their CPI scores by 4 CPI-points.

Compared to the previous year, seven countries – namely the Bahamas, Barbados, Dominica, Puerto Rico, Saint Vincent and Grenadines, Samoa and Swaziland – were not included in the CPI 2015. In most cases this is due to the lack of sufficient reliable information.

<sup>2</sup> Ibid.

### Four-years-trend from 2012 to 2015

In addition to the annually compiled ranking, this year TI also published a four-year-trend for the period 2012 to 2015. According to this, Australia, Brazil, Libya, Spain and Turkey had to cope with the largest CPI-point losses while Greece, Great Britain and Senegal were able to significantly increase their CPI-scores.<sup>3</sup> The decline of the EU average score was already mentioned above.

In the four-year-trend, Australia fell six points and dropped six positions in the CPI. Allegations of corruption with regard to the application for the FIFA World Championship 2022 and the bribery scandal of Hochtief's Australian subsidiary Leighon in 2015 probably added significantly to this. Australia's downward trend is also supported by TI's *Global Corruption Barometer* ("GCB")<sup>4</sup> published in 2013. This survey examines – unlike the CPI – the local population's perception of corruption in different sectors. In the current survey, 58% of Australia's population stated that they reckon the political parties of the country to be most affected by corruption. Only 16% of the respondents considered the government's measures in the fight against corruption to be effective.

Unlike Australia, Greece gained 10 CPI-points and improved 36 positions – even though the country has been suffering from poor governance for several years. Unlike the CPI, the GCB shows a poor trend for Greece. In fact, 70% of the Greek population perceive corruption in the public sector to be an ongoing serious problem. The political parties (90%), the legislative (83%) and the health sector (73%) are considered to be particularly corrupt.

<sup>3</sup> Transparency International, Corruption Perceptions Index 2015, <https://www.transparency.org/cpi2015>

<sup>4</sup> Transparency International, Global Corruption Barometer 2013, <http://www.transparency.org/gcb2013>

Moreover, another index may be considered in this context. The *Global Slavery Index* ("GSI")<sup>5</sup> which has been published annually since 2013 by the *Walk Free Foundation* examines the amount of people living in modern slavery in 167 countries. According to the GSI, modern slavery is most widely spread in Mauritania, Uzbekistan, Haiti, Qatar and India measured by the proportion of slaves among the population. Island, Ireland, Luxemburg, New Zealand and Norway, on the contrary, are the countries least affected by slavery.

The GSI apparently correlates with the CPI since countries in which modern slavery is most widely spread according to the GSI also occupy the last ranks in the CPI. In contrast, countries where modern slavery is little or no concern, take the top spots in the CPI.

<sup>5</sup> Walk Free Foundation, Global Slavery Index 2014, <http://www.globalslaveryindex.org/>

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### Increasing importance of GCB and GSI

In the upcoming years, the GSI will most likely play an even more important role. This might especially be the case with regard to the *UK Modern Slavery Act* which came into force in October 2015. Taking into account the intensive trade between Germany and the United Kingdom, many German companies will be affected by the UK Modern Slavery Act and are therefore obliged to take action. One possibility to properly meet those obligations is the implementation or adjustment of corresponding due diligence tools like those already used in the course of business partner checks.

The changes in the CPI along with the findings derived from the GCB illustrate that efforts in the fight against corruption have certainly not yet reached an end. Further initiatives by states and the private sector will have to follow.



**Sebastian Bartsch**

*is Senior Consultant at Pohlmann & Company. He focuses on Compliance Risk Analyses, maturity analyses of Compliance Management Systems (CMS) as well as business partner reviews and the implementation of risk-based processes.*



**Miriam Ettel**

*studied International Business (B.Sc.) with focus on economic policy and European law. After completing an internship at Pohlmann & Company in Frankfurt she is currently working for the monopoly commission in Bonn.*

## Austria

**Transparency International Corruption Perceptions Index 2015: Austria's upward trend**

Gabriel Piatti

- Austria has improved 7 positions to the overall rank 16 in the Transparency International Corruption Perceptions Index 2015 compared to last year.
- Austria's improvement is based on multiple positive changes in the field of corruption-prevention and transparency.

**Transparency International Corruption Perceptions Index 2015: Austria**

According to the newly published Transparency International Corruption Perceptions Index 2015 ("TI CPI 2015"), released in January 2016, Austria ranks number 16 of overall 168 countries. In total, Austria has therefore improved by seven positions compared to the previous year (rank 23). Austria is finding itself in a continuous upward trend since its plunge to rank 25 in 2012. Rank 16 implies that Austria takes currently the same position as in 2011. However, the top-position of rank 10 in 2005 is still far away, thus the "Alpine Republic" has some work left in fighting corruption.<sup>1</sup>

The CPI measures the perception of bribery in the public sector of an individual country. Especially effective mechanisms to fight and prevent corruption are being evaluated by TI. The basis of the CPI consists of comparable country analysis by advisory agencies, NGOs, foundations as well as expert opinions from managers of internationally operating companies. The range of the TI CPI 2015 is between 0 (extensive corruption) and 100 (no corruption) points.<sup>2</sup>

Austria scores 76 out of a total of 100 points in the TI CPI 2015. In contrast, Denmark, as the most corruption-resistant country, earned

91 points and Somalia as well as the Democratic People's Republic of Korea, as the most corruption-prone countries, both score 8 points. Austria is once again situated in the higher average section of the ranking compared to all other EU- and OECD-states. However, in comparison to the former EU-15 states and the Anglo-Saxon democracies, Austria is still ranked in the lower midfield. In contrast to the German-speaking neighboring countries Germany (rank 10) and Switzerland (rank 7) Austria lags significantly behind.<sup>3</sup>

**Reasons for Austria's improvement at the TI CPI 2015 ranking**

Austria's improvement of its TI CPI 2015 ranking in comparison to the previous years is based on multiple measures implemented in the field of corruption-prevention and transparency<sup>4</sup>, such as the *Korruptionsstrafrechtsänderungsgesetz* ("**KorrStrÄG**") 2012 which came into effect on January 1, 2013<sup>5</sup>. The KorrStrÄG includes *inter alia* the following essential developments:

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<sup>3</sup> See Note 1.

<sup>4</sup> Ibid.

<sup>5</sup> Silvia Langenhahn, "Österreich", in: Malte Passarge, Stefan Behringer (Eds.), *Handbuch Compliance International* (Berlin: Erich Schmidt Verlag, 2015), p. 393.

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<sup>1</sup> Transparency International – "Corruption Perceptions Index 2015": <http://www.ti-austria.at/forschung-tools/corruption-perceptions-index.html>.

<sup>2</sup> Ibid.



- *Prohibition of baiting / "Anfütterungsverbot"*

The new criminal offence "*Anfütterung*" (accepting and offering of improper benefits for an impact) is stated in section 306 and 307b of the Austrian Criminal Code. The triggering element is the favorable treatment of the public official.<sup>6</sup> The criminal offence "*Anfütterung*" is fulfilled if a public official is accepting improper benefits for influencing purposes, or if a person is offering improper benefits to a public official or an arbitrator for influencing purposes.<sup>7</sup>

- *Extension of the term "public official"*

The term "public official", as amended in *KorrStrÄG 2012*, includes *inter alia* persons working for government-related institutions. In detail, a public official is a person who works for a local, regional, national or international authority, state or international organization and also every person who works for any public law entity.<sup>8</sup>

- *Application of anti-corruption laws for representatives of the Austrian government*

The term "public official" also applies to representatives of the Austrian government.<sup>9</sup> Therefore, active and passive bribery of government representatives is punishable by law.<sup>10</sup>

<sup>6</sup> Die Österreichische Justiz – Verschärfung des Korruptionsstrafrechts, Gastkommentar:

<https://www.justiz.gv.at/web2013/html/default/2c948485398b9b2a013af8d511a90c94.de.html>

<sup>7</sup> Norbert Wess et al., "Austria", in: Jonathan Pickworth, Jo Dimmock (Eds.), *Bribery & Corruption* (London: Global Legal Group Ltd., 2015), p. 23 i.V.m. Bundeskanzleramt/RIS – "§§ 306 ff":

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296>

<sup>8</sup> See Note 5.

<sup>9</sup> Ibid.

<sup>10</sup> Korruptionsstrafrecht Neu:

[https://www.justiz.gv.at/web2013/file/2c948485398b9b2a013c6764c78f2bfb.de.0/korrstraeg\\_fibel\\_wbversion.pdf](https://www.justiz.gv.at/web2013/file/2c948485398b9b2a013c6764c78f2bfb.de.0/korrstraeg_fibel_wbversion.pdf)

Further changes of the *KorrStrÄG 2012*<sup>11</sup> are

- application of the Austrian jurisdiction to criminal offences of and against Austrian public officials abroad,
- increased sentences for private corruption,
- elimination of accessoriness to the public service law ("*Dienstrechtsakzessorietät*") – because no public service laws are in effect for certain professional groups like ministers, governors and mayors,<sup>12</sup>
- no exemption of criminal liability in case of voluntary self-declaration ("*Tätige Reue*")<sup>13</sup> and
- changes of section 308 Austrian Criminal Code ("*Verbotene Intervention*").<sup>14</sup>

Furthermore, the improvement in Austria's TI CPI 2015 ranking is linked to a leniency program, transparent waiting lists for surgeries, a new law on political parties, renewal of the right to give instructions, implementation of an anonymous whistleblowing-system of the Public Prosecutor's Office against Corruption as well as higher attention to Compliance in the public and private sector in general.<sup>15</sup>

Nonetheless a continued effort is required to fight corruption in Austria in order to prevent a repeated decline in the TI CPI ranking in future. For instance, Austria is ranked with only "Moderate Enforcement"<sup>16</sup> (ranging from Active Enforcement to No Enforcement) in the recently published Exporting Corruption Progress Report. Moreover, Austria is listed in the section Band C<sup>17</sup> (ranging from Band A to Band F) of the Government Defence Anti-Corruption Index 2015 *indicating* the corruption-risk in the defence industry. In both indices Austria is therefore just in the midfield.<sup>18</sup>

<sup>11</sup> See Note 5, p. 393, 394.

<sup>12</sup> See Note 6.

<sup>13</sup> MANZ Verlag – "§ 307c StGB":

<https://rdb.manz.at/document/ris.n.NOR40110134>

<sup>14</sup> See Note 5, p. 393, 394.

<sup>15</sup> See Note 1.

<sup>16</sup> Transparency International – "Exporting Corruption": [http://www.transparency.org/exporting\\_corruption](http://www.transparency.org/exporting_corruption)

<sup>17</sup> Government Defence Anti-Corruption Index – "View all Countries":

<http://government.defenceindex.org/list/>

<sup>18</sup> See Note 1.

"The subsisting weaknesses of certain areas have to be critically evaluated in order to close all gaps in a fast and effective manner. Every corrupt action, regardless of the committing persons, is undermining the constitutional state, democracy and our entire social system!", stated Eva Geiblinger, chairwoman of Transparency International – Austrian Chapter (TI-AC).<sup>19</sup>

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**Gabriel Piatti**

*is Consultant at Pohlmann & Company in Munich. He studied Business Law at the Vienna University of Economics and Business Administration with focus on International Business as well as International Business Law at the Université de Montréal.*

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<sup>19</sup> Ibid.

## Preview

**The Ease of European Iran-Sanctions and their Effects on Compliance***Andrea Hienzsch / Julia Kahlenberg*

- Business with Iran is booming.
- New Opportunities – New Obligations.
- Please find more in the June issue of the magazine **comply**.

On March 15, 2016, the so-called Implementation Day, when the International Atomic Energy Agency (IAEA) confirmed Iran's implementation of first central steps of dismantling from the agreed nuclear phase-out programme "Joint Comprehensive Plan of Action" (JCPOA), the sanctions against Iran were significantly eased. The following lifting of numerous import and export embargoes and authorization requirements has created significant new market opportunities for a variety of German companies.

Experts now foresee Iran becoming the biggest Middle East market quite soon, regaining access to more than 150 billion USD which – until January – were frozen in foreign banks due to the trade embargo and may now be pumped into the modernization of its infrastructure and the reactivation of traditional industries.

Despite this euphoria caution is required. Even though certain legal transactions categorically forbidden in the past may generally be permitted again, they underfall a scaled system of extremely complex testing and authorization requirements. In any case sufficient time and resources shall be set aside to comply with these requirements.

Thus everyone who wants to open up Iran as a new business destination, should do so in close coordination with the responsible legal and compliance organization and with special diligence. And with all the potential in the lifting of sanctions it should not be forgotten that Iran remains a heavily regulated market where the government and military still have the economy firmly under control and which in 2015 again was placed at the bottom end of the annual Transparency International Corruption Perception Index (TICPI) with rank 130 out of 168.

A further discourse on the impacts of the ease of sanctions as well as on the detailed obligations will be published in the June issue of **comply**<sup>1</sup>, which we would like to recommend warmly to our readers and clients.

<sup>1</sup> A free copy of the magazine can be ordered here: <http://www.comply-online.de/>

**Andrea Hienzsch**

*is Associate at Pohlmann & Company in Munich. She was admitted to the bar in Germany in 2013. During her studies and her legal traineeship, she worked for several international law firms in Germany and in Washington D.C., USA.*

**Julia Kahlenberg**

*is Attorney at Law and Principal at Pohlmann & Company in Munich. After employments in China, Vietnam and Hong Kong her area of responsibility includes all aspects of a Compliance Management System from risk prevention and investigation to remediation.*

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**update@pohlmann-company.com**

**Pohlmann & Company**

Guiollettstrasse 48  
D-60325 Frankfurt a.M.

Nymphenburger Strasse 4  
D-80335 Munich

1000 Rue de La Gauchetière West 24<sup>th</sup> Floor  
Montreal, QC H3B 4W5, Canada

P: +49 (0)69 260 1171 40

T: +49 (0)89 217 5841 70

P: +1 514 448 7487

www.pohlmann-company.com

update@pohlmann-company.com

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