

International Compliance Update

1/2017

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

Asia

South Korea – Recent Anti-Corruption Developments

Eric Mayer / Gabriel Piatti

- South Korea undergoes a downturn in the newly published Transparency International Corruption Perceptions Index ("**TI CPI**") 2016 compared to last year.
- South Korea is facing a huge corruption scandal involving both, the public and the private sector.
- Through the recent enactment of the "Kim Young-Ran Act" in 2016 the country tries to tackle its corruption problem.

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Current Perception of Corruption in South Korea

According to the newly published TI CPI 2016 which was released on January 25, 2017, South Korea ranks number 52 of overall 176 countries. In total, South Korea's rank has declined by 15 positions compared to the previous year where it ranked number 37. The downturn is due to a slight three-point drop to 53 out of 100 points and may be indicative of further negative perceptions to come.¹ South Korea is one of the biggest East Asian economies and home to a multitude of world market leaders in the electronic, automotive or ship-building industry. With its high-performance economy and its significant technological capabilities, South Korea is one of the most important economic partners in Asia and is the second-largest Asian export market for Germany next to the People's Republic of China.²

Currently, South Korea is rocked by a huge corruption scandal uncovered in 2016 suggesting that corruption at the highest levels of government and business will be a critical issue in 2017. The corruption scandal involves South Korea's President Park Guen-hye ("**Park**") who was impeached by parliament for corruption with the alleged involvement of almost every major Korean corporation. Furthermore Swiss Engineering Group ABB just recently fell victim to alleged fraud by significant embezzlement and misappropriation of funds at its South Korean subsidiary. So far South Korea, the world's 11th biggest economy and 6th largest exporting nation, has proven poorly in fighting corruption effectively and fostering transparency in politics and business.³

¹ Transparency International – "Corruption Perceptions Index 2016": <https://www.transparency.org>
Transparency International – "Corruption Perceptions Index 2016 – Asia Pacific":

http://www.transparency.org/news/feature/asia_pacific_fighting_corruption_is_side_lined

² German Department of Foreign Affairs – "Relations between the Republic of Korea and German":

<http://www.auswaertiges-amt.de/DE/Aussenpolitik/Laender/Laenderinfos/Suedkorea/Bilateral.html>

³ Inquirer.net – "Tough anti-corruption law takes effect in South Korea":

<http://newsinfo.inquirer.net/819878/tough-anti-corruption-law-takes-effect-in-south-korea>

Overview of the Latest Corruption Scandal in South Korea

Since July 2016, South Korea is experiencing the unfolding of one of the largest corruption scandals in the country's history – a scandal that has recently culminated in the impeachment of President Park and the arrest of Samsung Group Vice Chairman Jae-Yong Lee ("**Lee**"). Park is accused of colluding with Choi Soon-Sil ("**Choi**"), the daughter of a South Korean sect leader and close friend to Park, to extract money from South Korean conglomerates or "chaebols"⁴ by raising money for Choi's non-profit foundations and to let Choi take influence in state affairs, including nominations of public officials. Choi most likely acted deliberately to enrich herself at the expense of funds raised for cultural and sportive purposes. Furthermore, Choi is accused of influencing her daughter's admission to an elite Seoul university. As a result, Choi has officially been indicted with corruption and intervention into state affairs. Additionally, several professors have been investigated for preferential treatment and her daughter has been arrested in Denmark just recently. Finally, prosecutors are now turning their eyes towards the donating corporations as well as to specific bribery payments. Offices of the Samsung Group have been raided in November 2016 and in February 2017 public prosecution arrested Samsung-heir Lee on bribery charges.⁵ He is leading, amongst others, the biggest division of Samsung Electronics. In the meantime the corporation has announced the complete shut down of the powerful "Strategy Office". Generally,

Reuters.com – "Switzerland's ABB hit by \$100 million South Korean fraud":

<http://www.reuters.com/article/us-abb-fraud-idUSKBN16114L>

⁴ Chaebols are horizontally diversified conglomerates with various industrial and financial activities such as e.g. Samsung, Hyundai or LG.

⁵ Bloomberg – "South Korea on the Verge of Impeaching Its President: Timeline":

<https://www.bloomberg.com/news/articles/2016-12-09/south-korea-on-the-verge-of-impeaching-its-president-timeline>

BBC News – "Samsung boss questioned in South Korea corruption probe":

<http://www.bbc.com/news/business-38591931>

Samsung – "Board of Directors":

http://www.samsung.com/us/aboutsamsung/samsung_electronics/management/boardofdirectors.html

the malicious and corrupting influence of the public sector by internationally well-known South Korean conglomerates or "chaebols" is common practice and widely known as *jeong-gyeong yuchak* (which translates into collusion between politicians and business).⁶

The Improper Solicitation and Graft Act ("Kim Young-Ran Act")

The above mentioned corruption scandal unravels only months after a new anti-graft and anti-corruption law came into force on September 28, 2016. Contrary to former regulations, the Kim Young-Ran Act does not require the difficult proof of a *quid-pro-quo* purpose of a granted advantage.⁷ In general the Kim Young-Ran Act is prohibiting improper solicitation of public officials and their acceptance of financial or other advantages.⁸ The key elements of this new piece of legislation are as follows⁹:

- *Prohibition of improper requests*
The Kim Young-Ran Act prohibits every improper request to public officials regardless of the monetary value.
- *Expansion of the scope*
The Kim Young-Ran Act expands its scope to public institutions and public officials (including schools and media companies and their representatives, etc.) and financial and other advantages (including, money, goods, food, drinks, etc.).
- *Elimination of criminal intent*
The Kim Young-Ran Act provides for criminal prosecution without the necessity of determining criminal intent.

⁶ The New York Times – "South Korean Corruption Will Endure":

<https://www.nytimes.com/2016/12/09/opinion/south-korean-corruption-will-endure.html>

⁷ Inquirer.net – "Tough anti-corruption law takes effect in South Korea":

<http://newsinfo.inquirer.net/819878/tough-anti-corruption-law-takes-effect-in-south-korea>

⁸ The Improper Solicitation and Graft Act – Chapter 1. General Provisions: Article 1.

⁹ Kobre & Kim – "The Kim Young-Ran Act: Key Elements of the Law":

<http://email.kobrekim.com/rv/ff002de8504c48934b4a79642d4f9783f78194a1/p=5311868>

The Improper Solicitation and Graft Act – Chapter 1. General Provisions: Article 2.

- *Corporate liability*
Unlike the Korean Criminal Code, the Kim Young-Ran Act provides for corporate liability. The criminal behavior of an employee may be attributed to the employing legal entity. Thus a corporation may be subject to the same fines as applied to the individual unless the corporation had undertaken reasonable care and supervision to prevent the violations of the Kim Young-Ran Act by the employee.
- *Limited exceptions*
The Kim Young-Ran Act provides very limited exceptions including certain value thresholds for meals, gifts, monetary gifts for weddings or funerals. However, all kinds of facilitation payments are strictly prohibited.
- *Whistleblower protection*
The Kim Young-Ran Act prescribes anonymity, police protection and financial rewards for whistleblowers reporting a violation.

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Implications of the Kim Young-Ran Act for Corporations

Article 24 of the Kim Young-Ran Act regulates the criminal liability of corporations. It explicitly states that the violations of representatives of a legal person or organization, or agents and employees of a legal entity, can be attributed to the legal entity. However, a corporation can be exempted from criminal liability if certain measures have been implemented.¹⁰ In this regard Article 12 refers to an overall management of duties to prevent improper solicitation and acceptance of financial or other advantages. These duties provide indications on how to take prevention measures and are explicitly listed in the Kim Young-Ran Act as follows:

- Improvement of systems to prevent improper solicitations and the acceptance of advantages as well as the establishment and implementation of related training and promotion plans,
- Formulation and dissemination of the criteria for categorizing and determining improper solicitations and unacceptable advantages,
- Determining standards for preventive measures,
- Guidance and consultation, as well as reporting improper solicitations and
- Protection of and rewards for whistleblowers.¹¹

¹⁰ The Improper Solicitation and Graft Act – Chapter 1. General Provisions: Article 24.

¹¹ The Improper Solicitation and Graft Act – Chapter 1. General Provisions: Article 12.

Conclusion

Article 12 and 24 require an effective Compliance Management System ("**CMS**") in analogy the "Compliance Defence" under section 7 of the UK Bribery Act. Such CMS could exempt South Korean corporations from corporate liability. As a result, we conclude that an effectively implemented and continuously monitored and improved CMS will become key for corporations in South Korea. This, however, is likely to have implications also for foreign business partners of the world market-leading South Korean chaebols. It remains to be seen how strictly the South Korean government will enforce the new provisions and whether it will apply it to prominent conglomerates and political representatives in contrast to past practices. The chances are there, however, that South Korea, as a significant market place and major exporter can actually start improving its lack of transparency in politics and business.



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Germany

Draft Legislation on the Creation of a Competition Registry: Governmental Blacklisting and the Increasing Significance of Self-Cleaning*Dr. Max Erhard / Madlen Nrecaj*

- On February 20, 2017 the Federal Ministry for Economic Affairs and Energy ("**BMWi**") presented a piece of draft legislation on the introduction of a competition registry.
- The introduction of the registry would implement a blacklisting of criminal companies for all public procurement procedures.
- Self-Cleaning which requires the implementation of an effective Compliance Management System ("**CMS**") as an integral part, will allow affected companies to prevent, or as the case may be, end their blacklisting.

The Background of the Draft Legislation

Public procurement is a major economic factor in Germany. The total value of contracts awarded to private companies by the public sector amounts to hundreds of billion euros per year.¹ The legal framework for public procurement procedures is to be found within the German cartel and competition law ("**GWB**"). Inherent part of the public procurement procedures are the obligatory and optional grounds for exclusion of tenderers. According to these, companies in whose sphere of responsibility economic crimes have been committed, shall be excluded from public procurement procedures in the future. However, it has been proven difficult for contracting authorities to always obtain the relevant information and, as a consequence, to determine whether or not significant grounds for an exclusion would exist.

On February 20, 2017 the BMWi presented a piece of draft legislation on the introduction of a competition registry.² According to this draft public contracting authorities will be obliged to determine whether grounds for exclusion of a tenderer exist by consulting an electronic data

registry set up at the federal level. Provided that the draft becomes effective, the electronic database is supposed to be fully operational by 2019.

Offences that Require Registration

According to sec. 1 Act on the introduction of a competition registry ("**WRegG-E**"), the registry shall provide public contracting authorities with information on grounds for exclusion within the meaning of sec. 123, 124 GWB. These include obligatory grounds for exclusion (sec. 123 GWB) as well as optional grounds for exclusion (sec. 124 GWB). Obligatory grounds for exclusion comprise, inter alia, human trafficking, the formation of criminal organisations, terrorist funding, money laundering, fraud and corruption. Pursuant to the draft an entry into the registry will require a legally binding criminal conviction, penalty order or final fining decision (sec. 2 para. 1, 2 WRegG-E) that is issued under the criminal offences of collusive bidding (sec. 298 of the Criminal Code or StGB), withholding or embezzlement of wages (sec. 266a StGB), tax offences (sec. 360 AO) or under the criminal offences referred to in sec. 123 GWB. The termination of criminal proceedings subject to the fulfillment of an obligation (sec. 153a of the Criminal Procedure Code or StPO) shall not be sufficient for a registry entry. Law enforcement authorities who have gained knowledge of one of these offences shall be

¹ <https://www.bmwi.de/Redaktion/DE/Dossier/oeffentliche-auftraege-und-vergabe.html>

² https://www.bmwi.de/Redaktion/DE/Downloads/E/entwurf-eines-gesetzes-zur-einfuehrung-eines-wettbewerbsregisters.pdf?__blob=publicationFile&v=6

obliged to inform the registry authority thereof (sec. 4 WRegG-E).

Liability Rules

Solely companies, but not individuals, shall be registrable. Since the German criminal law does however not provide for a corporate criminal liability, criminal offences committed by individuals would have to be attributed to the company.

Convictions, penalty orders and fining decisions shall expressly be registered only if they can be attributed to the company (sec. 2 para. 3 WRegG-E). Therefore, under the draft legislation the individual convicted must have acted as a function holder responsible for the management of the company. The term management in that context also presupposes any executive position responsible for monitoring the company's management or exercising other supervisory powers. Additionally, the criminal or administrative offence must have been committed in connection with business transactions (sec. 2 para. 3 no. 1 WRegG-E). Furthermore, offences committed by employees who are not in such a executive position shall be attributed to the company in case of organizational or supervisory fault of the company's owner pursuant to sec. 130 of the Act on Administrative Offences or OWiG (sec. 2 para. 3 no. 2 WRegG-E) or in case the company itself has been fined pursuant to sec. 30 OWiG (sec. 2 para. 2 no. 3 WRegG-E). Subsequently, the prosecution authorities are responsible to decide whether a criminal offence is attributed to the company.

Prior to any entry into the registry the affected company shall be given the opportunity to comment on the issue within two weeks (sec. 5 para. 1 WRegG-E). In case the company conclusively states that such entry is unfounded, the entry will be marked with a blocking notice until final clarification (sec. 5 para. 2 WRegG-E). If the entry is determined as being incorrect it shall be deleted immediately.

Consequences of Registration

According to the draft legislation public contracting authorities, sectoral contracting entities as well as grantors shall specifically be obliged to consult the registry before awarding any contract (sec. 6 para. 1 WRegG-E). This obligation shall apply to all public procurement procedures with a contractual volume exceeding EUR 30.000 (net). As a result the attribution of offences mentioned in sec. 123 GWB to a company would entail its exclusion from almost all public procurement procedures.

Deletion Possibilities

A ray of hope for affected companies will be the fact that being registered is going to be limited in time. The draft provides for a removal from the registry after expiry of the listing period of three respectively five years (sec. 7 WRegG-E). Nevertheless being excluded from public tenders for up to five years can of course constitute a substantial economic disadvantage for the affected companies. In this respect the decision by the ministry to allow for an early deletion from the registry in the event that the affected company proves sufficient measures of self-cleaning (sec. 8 para. 1 WRegG-E) has to be welcomed. It will most likely be of high significance for many companies. This provision again underlines the vital importance of an effective Compliance Management System ("**CMS**") for companies participating in public procurement procedures.

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Self-Cleaning

The institution of self-cleaning has been codified for the first time in the course of the Act on Modernizing Public Procurement Law (April 2016) by the introduction of the new sec. 125 GWB. Until then, self-cleaning had been an integral but unwritten part of the procedure of exclusion as an evaluation criterion for the reliability of a tenderer.³ Henceforth, sec. 125 GWB stipulates the compulsory "exclusion from the exclusion". The contracting authority shall not exclude any company according to sec. 123 or 124 GWB when the self-cleaning conditions of sec. 125 GWB are fulfilled. However, the respective contracting authority remained in charge of assessing the prerequisites of self-cleaning.⁴

With the draft the overall responsibility for assessing the prerequisites of self-cleaning will be transferred to the registry authority and thus to one central decision-maker (sec. 8 WRegG-E). Under the draft listed companies may request an early deletion when they provide evidence of successful self-cleaning.

Subsequently, a decision-making competency with external impact would be given to the registry authority. The contracting authority would be bound by the decisions.

The radiating effect of the decision made by the registry authority may increase the significance of self-cleaning once more. Furthermore the centralization of the decision-making power could provide longstanding clarity in the interpretation of the conditions laid down in sec. 125 GWB.

Sec. 125 GWB sets out three cumulative prerequisites for the verification of self-cleaning: Compensation for damages (No. 1), active participation in clarification of the facts (No. 2) as well as implementation of compliance measures (No. 3).

Whereas content and scope of the first two measures may be defined rather easily, implementation of compliance measures opens

a wide range for interpretation. According to the legal wording the affected company must have taken demonstrable and concrete technical, organizational and personnel measures capable of preventing offences or other misconduct (sec. 125 para. 1 no. 3). However sec. 125 GWB does not clarify which exact measures may be considered appropriate. Furthermore, in contrast to the US and UK⁵ no administrative regulations exist that provide guidance on evaluation standards used by the authorities. Up to date, the relevant case-law also remains rather vague.⁶ It is clear, however, that in any case an effective and thus certifiable⁷ CMS consisting of the three pillars prevent, detect and respond will be sufficient.⁸ Therefore, affected companies are well advised to not only attempt to meet the specific requirements of sec. 25 para. 1 no. 3 GWB by means of individual organizational measures, but to directly implement a CMS appropriate to the company's business and size. However, it has to be acknowledged that even the best CMS will be deemed insufficient for self-cleaning unless the necessary personnel consequences are drawn and employees involved in criminal offences are actually sanctioned (i.e. usually dismissed).

⁴ Roth, NZBau 2016, 672 (676).

⁵ FCPA Ressource Guide; The Bribery Act 2010 – Guidance.

⁶ OLG Brandenburg, NZBau 2008, 277; VK Lüneburg, Beschluss vom 13.05.2016 - VgK-10/2016; VK Bund, ZfBR 2015, 822.

⁷ For example certification standards ISW PS 980 or ISO 19600.

⁸ Cf. VK Bund, ZfBR 2015, 822 (824).

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³ Prieß/Stein, NZBau 2008, 230; Dreher/Hoffmann, NZBau 2012, 265 (267); Roth, NZBau 2016, 672 (674 f.) OLG München, NZBau 2013, 261; OLG Frankfurt a. M., ZfBR 2004, 822 = VergabeR 2004, 642.

Outlook

It is still completely open whether the draft legislation will become effective at all. It seems, however, only a matter of time before blacklisting which is known from Anglo-American jurisdictions and partly from the free economy as well, will be reflected in German legislation in some form or another. As a result, the importance of implementing an effective CMS by companies is increasing once again. Either, for the purpose of simply not appearing on a blacklist at all or even in order to be deleted from such list.



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World

Transparency International Corruption Perceptions Index Global Corruption Perceptions in 2016*Gabriel Piatti / Nicole Neumann*

- On January 25, 2017, Transparency International ("**TI**") published the most recent Corruption Perceptions Index ("**CPI**") for 2016.
- Countries with strong democratic institutions achieve good results and thus rank among the leading countries.
- As in the previous year, Germany obtained 81 points and remains being ranked on the 10th position next to Luxembourg and the United Kingdom.

Overview of the Corruption Perceptions Index 2016

On January 25, 2017, TI published the 22nd edition of the CPI with a total of 176 reviewed countries.¹ The TI CPI measures the perception of bribery in the public sector of an individual country based on various expert surveys. In particular, effective mechanisms to prevent corruption are being evaluated by TI. The reviewed countries are finally listed on a scale from 0 (high level corruption) to 100 points (no corruption).² Denmark, New Zealand and Finland are the highest ranked countries and therefore holding the first three positions. On the contrary, Somalia, South Sudan and North Korea come last in the ranking. Countries like Afghanistan, Syria and Yemen which are torn by civil war-like conditions are ranked at the bottom. In comparison to the previous year Qatar, Bahrain and Kuwait have declined the most. Surinam, Belarus, Timor-Leste and Myanmar however display the biggest ranking improvements.³ The Bahamas,

Barbados, Brunei, Dominica, Grenada, Maldives, Saint Lucia, Saint Vincent and the Grenadines, and Solomon Islands entered the newly published TI CPI 2016 for the first time whereas the Seychelles are no longer included.⁴

In general countries with high scores are characterized by strong institutions in the area of governance, press freedom, civil rights and an independent judicial system. Low score countries are mostly characterized by insufficient law enforcement measures against corruption, poor governance and weak institutions. In total, more than two thirds of the evaluated countries have received less than 50 points demonstrating the urgent need for global action in the fight against corruption.⁵

Russia for instance is considered as one of the world's most corrupt countries. The TI CPI 2016 ranks Russia on 131th position with 29 points in total. Therefore Russia competes with countries like Nigeria, Uganda or Bangladesh in the bottom third of the ranking. Bribery payments are common practice in Russia as the latest corruption scandal involving the Russian Minister of Economic Affairs Alexei Uljukaev shows. He is accused of having requested about two million dollars from

¹ Transparency International – "Corruption Perceptions Index 2016: Germany ranks further on position 10"
<https://www.transparency.de/Pressemitteilung-Transparency.2832.0.html?&contUId=6811>

² Transparency International – "Corruption Perceptions Index 2015":
<http://www.ti-austria.at/forschung-tools/corruption-perceptions-index.html>

³ Transparency International - "Corruption Perception Index 2016"

http://www.transparency.org/news/feature/corruption_perceptions_index_2016

⁴ Corruption Perceptions Index 2016: Frequently Asked Questions

⁵ Supra Note 1.

Russian oil giant Rosneft for approval of a share-deal with another Russian oil company.⁶

Brazil, as another example, currently has to deal with the biggest corruption scandal in history of the country. In the wake of the so-called "Operation Lava Jato" or "Car Wash" around the Brazilian state-owned company Petrobras, numerous top politicians have been arrested. In the TI CPI 2016 Brazil is ranked with overall 40 points on position 79 far behind its neighbouring country Uruguay yet significantly ahead of Argentina, Colombia, Bolivia and Venezuela. Brazil has slightly lost positions in the ranking in comparison to the years before the corruption scandal. In 2013 the country held position 72 with 42 points and one year later Brazil yielded 43 points resulting in position 69. But even before "Operation Lava Jato" Brazil was perceived as a corruption-prone country showing results clearly below the 50 point threshold.⁷

Development of Corruption Perceptions in Germany

Germany, placed at the 10th position with a total of 81 points, is part of the top ten. Moreover, the TI CPI 5-year comparison indicates that Germany holds a constant level between 78 and 81 points ranking between positions 10 to 13 respectively. However, Germany's good performance is clouded by concerns about the integrity of the business location. According to the Executive Opinion Survey of the World Economic Forum ("WEF")⁸, executives of German companies perceive facilitation payments in the public administration as common practice. Additionally the Global

Corruption Barometer⁹, published by TI in November 2016, indicated that one third of the respondents in Germany assumed that all or at least most of corporate management was perceived to be involved in corrupt activities. In terms of combating corruption, Germany still falls short facing needs for improving transparency in party financing and lobbying.¹⁰ Corruption remains a current theme in Germany due to recent corruption scandals at the BER airport in Berlin, the Frankfurt-Hahn Airport and around "Dieselgate" at Volkswagen.¹¹

<http://reports.weforum.org/global-risks-2015/executive-opinion-survey-2014/>

⁹ Transparency International - "Global Corruption Barometer"

http://www.transparency.org/research/gcb/gcb_2015_16

¹⁰ Supra Note 1.

¹¹ Zeit Online - "Gericht verhängt Haftstrafe im BER-Korruptionsprozess"

<http://www.zeit.de/wirtschaft/2016-10/flughafen-ber-berlin-korruption-haftstrafe-bestechlichkeit-bereichsleiter>

SWR Aktuell - "Land meldet Schadenersatzansprüche an"

<http://www.swr.de/swraktuell/rp/korruption-am-flughafen-hahn-land-meldet-schadenersatzansprueche-an/>

[/id=1682/did=17869204/nid=1682/dlasm5/](http://www.handelsblatt.com/unternehmen/industrie/vw-dieselgate-in-den-usa-die-erste-milliarde-ist-geflossen/19281626.html)

Handelsblatt - "Die erste Milliarde ist geflossen"

<http://www.handelsblatt.com/unternehmen/industrie/vw-dieselgate-in-den-usa-die-erste-milliarde-ist-geflossen/19281626.html>

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⁶ Spiegel Online - "This sum is in accordance with a mayor"

<http://www.spiegel.de/politik/ausland/korruption-in-russland-diese-summe-entspricht-einem-buergermeister-a-1121760.html>

Handelsblatt - "Im Sumpf der Korruption"

<http://www.handelsblatt.com/politik/international/russland-im-sumpf-der-korruption/14845144.html>

⁷ Zeit Online - "Senatspräsident nach Korruptionsvorwürfen abgesetzt"

<http://www.zeit.de/politik/ausland/2016-12/brasilien-senatspraesident-renan-calheiros-abgesetzt-korruption>

⁸ World Economic Forum - "Executive Opinion Survey 2014"

Impacts of the Corruption Perceptions Index for companies

In many cases the results of the TI CPI are used as risk indicators for companies' compliance management systems ("**CMS**"). Thus the CMS should be updated according to the new results of the TI CPI 2016. Special attention has to be drawn to countries whose scores have declined considerably as new or aggravated compliance risks can appear.



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