

CORPORATE COMPLIANCE ANNUAL REPORT 2018: SLEEPLESS NIGHTS

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Many clients are worried about facing criminal prosecution for non-compliance, consequently they are turning to their legal advisers in order to allay their fears

Clients' concern about being held criminally liable for non-compliance are increasing. As a result, legal advisers are fielding a growing number of calls from anxious clients who want help implementing a compliance programme that will minimise the risks they face. This climate of fear is generating significant opportunities for law firms in Spain and Portugal who, in addition to helping businesses implement compliance programmes and conduct internal investigations, are also able to cross-sell employment, IP or corporate legal services, for example.

The reform of the Spanish criminal code in 2015, the publication of the UNE 19601 criminal compliance rules in May 2017, and the deadline for implementation of the EU's General Data Protection Regulation this year have put the spotlight on compliance matters, with law firms reporting an increase in interest from companies in a range of sectors. Traditionally, companies in regulated sectors such as banking, energy or insurance led the way in compliance matters, but an increase in awareness, especially since 2015, means that nowadays many corporates have well-defined compliance programmes. "Many companies, at least the most sophisticated ones, have compliance systems in place, and are now focusing on the next step, the auditing and review of existing systems," remarks Baker McKenzie partner Cecilia Pastor.



Cross-selling legal services

For law firms, this increase in demand for compliance advice can be an opportunity to provide added value to clients. "Compliance audits are key in exposing areas of improvement and risks which are not adequately covered," says Pastor. Meanwhile, lawyers say compliance is an area with the potential to generate business across other practice areas. "Many clients come to us

because they are primarily concerned about minimising the risk of criminal liability, and therefore request assistance with the execution of compliance programmes," one partner says. "This allows law firms to identify other areas of improvement within the company, and to offer additional services such as employment, intellectual property or corporate law advice."

Another key development in the last 12 months has been the proposed new data protection law which was approved by Spain's Council of Ministers in November 2017. Draft legislation allows and encourages the use of anonymous reporting channels, stating that employees and third parties must be informed of their existence. The European Commission has also proposed a directive which would require companies with more than 50 employees or a turnover of more than €10 million to implement reporting channels, as well as measures to protect whistleblowers. It is anticipated that this directive will lead to an increase in internal investigations and subsequent work for law firms. Internal investigations are already becoming more common at companies with sophisticated compliance programmes in place. "Due to the nature of compliance programmes and their reporting channels, some companies have been obliged to conduct internal investigations which have led to the questioning of resources and internal procedures," says Baker McKenzie partner Ester Navas. "Law firms are well placed to accompany corporates throughout the investigation and to guarantee the legal privilege of any information obtained – a particularly important issue in cross-border investigations involving the UK or the US," she adds.

As well as advising companies on the design and implementation of compliance programmes and providing assistance with internal investigations, external lawyers are increasingly taking on the role of compliance officer. Lawyers highlight the recent report by the Legal Committee of the General Council of the Spanish Legal Profession that recommends that the compliance officer role should be given to an external lawyer with no links to the company.



Cleaning up your act

The importance of compliance in public procurement and M&A transactions is becoming increasingly apparent. Alfredo Guerrero, partner at King & Wood Mallesons, highlights the new Public Sector Contracts Act, which came into force in March 2018 and introduces new prohibitions related to public contracting. The Act allows companies that have introduced "self-correcting" measures – such as compensation payments and the adoption of compliance systems – bid for public contracts. According to Pastor, investors are "no longer satisfied with representations and warranties, and frequently require a compliance review in the due diligence phase – having a specialised compliance team in M&A transactions has become essential".

Pablo Albert, partner at BDO, argues that large corporates have the issue of compliance "under control". However, he draws a distinction between large companies and small and medium-sized enterprises. "There is a difference in approach depending on the size of the company," he explains. "Large companies are now at the stage of optimising their compliance programmes, which are very well defined." Albert adds: "A further step is the integration of all existing protocols and making sure that they are adapted to regulations in all the jurisdictions where the company operates."



Financing terrorism

Meanwhile, a series of legislative changes in Portugal have meant that companies are taking the issue of compliance much more seriously. Paulo de Sá e Cunha, partner at Cuatrecasas, Gonçalves Pereira, says there were a series of changes to the law in 2017 that focused on tackling money laundering and the financing of terrorism. They included the creation of the Central Register of

Beneficial Owners – which keeps a record of individuals who exercise direct or indirect control over legal entities – and the implementation of European regulations on anti-money laundering and market abuse.

Vieira de Almeida partner Sofia Ribeiro Branco says the “very demanding compliance duties imposed by recent changes in the Portuguese legal framework have forced companies to invest more in compliance”. She adds: “In turn, the courts became more receptive to the corporations’ line of defence relating to the existence and implementation of compliance.” Filipa Marques Júnior, partner at MLGTS, says demand for compliance advice is on the rise: “We assist clients not just with the design and implementation of compliance programmes, but also with the due diligence of major corporate transactions, the adaptation of general codes of conduct and internal procedures, and internal investigations.”



Third party risk

In both Spain and Portugal, the compliance status of third parties is a significant concern for clients. “Sometimes it’s not easy to assess the risk faced by companies when working with third parties, and scrutinising the practices of partners to ensure that they don’t engage in unethical behaviour is a big challenge for any corporation,” says Ribeiro Branco. “Beyond the due diligence

and the signing of certificates, companies increasingly want to know whether third party partners continue to be up to date with their compliance obligations.” Meanwhile, Navas adds that one of the issues businesses have to deal with is “deciding how far to go with requirements imposed on third parties, and managing the obligations arising from such requirements”.

Another major challenge, according to one partner, is how to put compliance programmes into practice in the most effective manner. “Law firms have a key role to play in this, bringing not just a legal perspective to the matter but looking at the company from a global point of view,” the partner says. “They must understand the difficulties facing the company in the implementation of compliance programmes, and to lead and provide advice tailored to each particular situation.”

Guerrero agrees that providing tailored, sector-specific advice is crucial: “To effectively implement compliance programmes, in-depth knowledge of the particular sector where the company operates is essential – law firms are therefore increasingly tailoring their advice to each sector and specific client needs.”