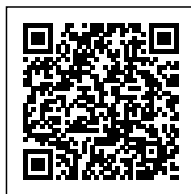


IS MORE LAW REALLY THE BEST MEDICINE FOR BUSINESS?

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While some may believe that increasing regulation is the best remedy for the financial crisis, Iberian Lawyer finds that businesses and law firms alike are reluctant about the prospect of facing more law.

Mientras los líderes del G-20 se reunían en Washington en noviembre en la cumbre «anticrisis», parece que la comunidad empresarial mundial comienza a aceptar que hay una necesidad real de una mejor regulación de los mercados, a la vez que prevalece un fuerte deseo de ver una reestructuración y una consolidación de los órganos reguladores. Estos temas se debatieron en una serie de eventos organizados por Iberian Lawyer y dirigidos a asesores jurídicos internos en Madrid y Lisboa. La petición de aprobar más normativa no podía haber llegado en un momento más difícil, comentaban, ya que los equipos jurídicos están notando el cambio en sus empresas respectivas, con unos desafíos continuos en su papel y en la forma de gestionar la relación con los abogados externos. Toda esta agitación va en contra de la congelación, e incluso de la reducción, de los presupuestos de los departamentos jurídicos. El cómo conseguirán más por menos va a convertirse

en su gran reto.

Whatever else commentators may suggest as the root causes of the credit crunch and the looming global recession, they certainly do not hold lawyers responsible. Unlike the corporate downturn at the start of the decade, there is no suggestion that Enron-like illegal structures and paper shredding have been the catalyst for a collapse in business confidence.

Even so, some commentators are already proposing that lawyers could hold the solution to the current ills of global business. Some say that if a lack of regulation of the financial and business sector was primarily to blame for the credit crunch, then increasing regulation, possibly against a backdrop of government intervention, is the answer.

In-house perspective

Senior Iberian in-house lawyers and their colleagues in private practice debated the issue during a series of recent Iberian Lawyer In-House Club events held in Madrid and Lisbon. Spain and Portugal may not be as badly affected by the credit crunch as some other countries but both face economic crisis, and many of the lawyers that attended see as inevitable a regulatory backlash.

The call for change, they say, could not have come at a more difficult time. Inhouse legal teams are already experiencing change in their roles and the way they manage working relationships with external law firms. This upheaval is against a background of an imposed freezing, or even reduction in, their departmental budgets. How to get more for less is becoming their biggest challenge.

So a wave of new regulation is certainly not going to help. As one bemused in-house participant at the Lisbon debate noted: "We have all found ourselves struggling with the new concepts of compliance and business

Risk at the top of agenda

The recent Washington D.C. G-20 meeting may have searched for the reasons behind the current turmoil and proposed stricter regulation as a potential way out, but Iberia's in-house lawyers say that they are still coming to terms with the increasing demands of compliance and business risk issues that are pushing legal issues to the top of the business agenda.

As businesses become bigger, more diverse and more complex, their legal requirements are also becoming more sophisticated. More than ever lawyers are viewed as central to business needs and the primary protectors of legal risk, both business based risk and regulatory – with an evolving portfolio of responsibility encompassing risk assessment, corporate governance and compliance.

One in-house lawyer at a major Spanish financial institution commented: "Legal issues used to be an afterthought in the business process with important documents passing through the legal department on their way for signature. This has changed radically. The senior executives will no longer get out of bed without first consulting their lawyers."

For Gwyn Price, a former General Counsel (GC) EMEA at American Express, and who lead Iberian Lawyer's European In-House College 2008, risk was clearly already moving up the corporate agenda. Enron, WorldCom, Arthur Andersen and the resulting Sarbanes-Oxley law imposed new obligations, more complex regulation and the emergence of a blame culture, on lawyers within a business environment, he argues.

"In addition to the already long and conflicting list of roles for the in-house lawyer – generalist, specialist, adviser, cost saver, team player, independent adviser and ally – we now add legal risk manager."

"Compliance" is a parallel issue but which still seems to need definition, say some. "We all talk about

compliance but I am not sure if we all share the same understanding of what it is," asks António Alfaia de Carvalho, GC of Portugal's biggest energy company EdP.

In-House College faculty member Elizabeth Wall, former GC at Cable & Wireless and McDonnell Douglas, and now a specialist consultant to businesses, agrees: "The word compliance means something different for each business, or even person, depending primarily on their own requirements, sector and personal needs. Many are not even sure if compliance is even a legal issue."

Redefining the legal requirement

For some, the changing nature of the legal needs of businesses, and not least the compliance challenge they face, requires inhouse lawyers to define more clearly where they can add most value in their business and, frankly, what falls within their remit of responsibility and what does not.

Current demands to cut legal expenditure are making this increasingly urgent. Simon McCall, a former City lawyer, and now business consultant, who moderated the Lisbon debate, asked participants to imagine being asked by their new CEO they have met in a lift: "Tell me, quite genuinely, what do you do and what value do you bring to our business?" In a climate of cost cutting and redundancies you have only the time it takes to complete that lift journey to justify your existence, he suggests. "It is an exercise that helps focus minds on defining the value which the internal lawyers, and by implication, their external advisors, bring to the business."

Historically, the starting point for many legal teams has been to reduce the costs associated with externalising legal costs. Research by Sherwood PSF suggests that generalist legal work can be managed internally at a cost of around 25% of outsourcing to external lawyers.

John Rigau, Vice-President Legal, Pepsico Europe believes, however, that the legal role is truly evolving. "In-house lawyers often start out as a kind of plumber or fireman, fixing the never ending legal issues any business has in order to reduce external legal costs."

But it is dangerous to simply keep absorbing new areas of work, he warns. "We have to think clearly about where we can add value, what we can do to assist the business to manage itself better, and when to pass tasks out to external lawyers."

For Gwyn Price the dilemma is that the CEO is increasingly looking to the GC and Head of Legal for business leadership, while the rest of the business still wants the plumber or fireman.

Jochi Jiménez, GC and Compliance Officer at HCC Global Financial Products, believes that the role of the GC is to get out beyond the legal department and into the business to understand how it runs. "The key is to move from a back office cost centre role to the value-added front office role."

Increasing regulation the solution?

Against a background of uncertainty for inhouse lawyers, many also predict an increasing emphasis on governance and company ethics.

"The business world is very competitive and whether we prefer to call the difficulties which arose deregulation or self-regulation, it is clear that some elements have not acted as they should. Or perhaps, we could say that the system has not self-regulated itself from the excesses sufficiently," suggests Luis de Carlos, co-managing partner at Uría Menéndez.

Just as the authorities were able to pass responsibility for managing certain types of activity over to the market – throughout the 20 year "triumph" of capitalism after the collapse of the Berlin Wall – they can review whether they will take it back. This is not unlike disappointed parents reprimanding their kids, he says.

Like many GC, António Alfaia de Carvalho at EDP believes that the next decade will be increasingly focused towards compliance, risk and regulation. "It is hard to establish or anticipate any limits or boundaries to this. The real question is whether the global crisis happened due to a lack of regulation or because the market made it happen?"

The aim of business has become to "create value", he suggests, an invention of the market that has meant a car manufacturer could also, for instance, run an airline. The current crisis will see a response from the political community, intended to rein-in companies, which will likely be framed as a legal response, he concludes, ie an increase in regulation.

Tiago Melo, of Brisa, has been both a GC and a partner in a law firm, and is now Company Secretary at one of Portugal's biggest businesses: "Regulation has not worked and neither has deregulation. The problem wasn't the regulation, it was the people, as has been noted before, de-regulated Europe functioned better in many respects than the regulated USA."

João Vieira de Almeida, managing partner at Lisbon's Vieira de Almeida agrees that business will likely see both additional and more complex regulation, requiring external lawyers to work much more closely with clients.

"In the past we have witnessed overregulation and know how to work within that environment. The paradox for me is that regulation didn't work so the solution is not to have more regulation, but better regulation and regulators." Vieira de Almeida hopes to see more accountability of regulators, an emerging issue in Portugal particularly within financial services.

What is needed from law firms?

As the legal requirements of business change over the next decade so will the demands placed on external lawyers. If the changing regulatory environment forces business to reassess the logic and role of their internal legal teams, they will inevitably also rethink what work they outsource.

But will business require increased advice on issues such as regulation and risk or, alternatively, develop this expertise internally? What is the criteria from which they will decide, and what is the right price to pay for generalist commodity-type work or more sophisticated advice?

Such changes may however provide both an opportunity and a potential challenge to law firms. At its simplest, in-house lawyers say that imposed budget cuts present two basic options: trying to hold on to their current internal teams by working smarter and passing less work externally, or managing internal fixed costs more closely, including head count, by outsourcing extra work as and when required.

"As in-house lawyers we are being asked to become more specialist. We have leading experts in our areas of core business but no matter how specialist we become there will inevitably be something for which we need additional external advice. Cost savings, I think, will come from the way we pass work to external lawyers and manage those relations well," believes Manuela Vasconcelos Simões, Head of Legal at Deutsche Bank, Portugal.

Rui Mayer, General Counsel, GALP Energia, agrees that budgetary management is a major issue. "Companies are cutting costs and every euro counts. But confidence is the concern of any company board these days. All are concerned about legal issues in the current climate and increasingly rely on the comfort of their lawyers, internal and external."

Law firms must therefore demonstrate that they are aligned with the business interests, not only to the company's senior management but also to the GC. "If this really is the case it makes it easier for us to justify the costs of sending more work outside. We can be focused internally on the company's day-to-day needs but more than ever require our external advisers to draw our attention to new

trends and requirements," explained another Iberian GC.

João Lourenço, General Counsel, Millennium BCP, likens the opportunity presented to law firms as acting as the company's own satellite navigation. "We can manage the day-to-day legal issues as they arise, but we need someone to help us see around the next corner or even over the horizon. Preventative support is the new requirement. Compliance will be a key issue, but one of many. Risk assessment is now the top requirement."

Bridging the gap

A common belief is therefore that business will continue to outsource either the high volume commodity-type or highest value work to external law firms. Those issues in between they will look to manage themselves. The question for law firms is therefore where do they want to position themselves in the value chain?

Inevitably firms may instinctively point to the top tier, higher value, higher fee work, but some lawyers believe that not all firms will be able to deliver.

"As a profession the emphasis has recently been too often towards the creation of billing machines, than developing lawyers capable of looking ahead and identifying client issues," says Pedro Rebelo de Sousa, at Simmons & Simmons Rebelo de Sousa.

Others suggest that the current crisis is generating sufficient levels of work for top firms. Changing market conditions are good news for law firms, the managing partner of one leading firm told Iberian Lawyer, "When you need surgery you go to a surgeon."

Inevitably, however, some lawyers believe than a new "back to basics" approach within business, with their limited recourse to finance, innovation and appetite for risk, will reduce the top quality work around. "For sure business will require more hand-holding on the regulatory side but that would not be of great interest to our lawyers," said the same lawyer.

For Garrigues' President, Antonio Garrigues, the challenge ahead for both the legal and business world is both deeper and more profound. "The global crisis has created great change and confusion but the solution may not be a simple choice between either regulation or non-regulation. The answer may be much simpler than we all imagine: a return to ethical business values and a stronger sense of corporate social responsibility."

An increase in regulation is clearly, however, the concern of the moment for in-house counsel. They worry whether they have either the budgetary resource or the skill set to face it.

Most believe that they will inevitably need more support from private practice and will look for exceptional service to help reduce the perceived shortcomings, but law firms now have to decide if they want to meet the new challenges ahead and, if so, how.

For more information regarding Iberian Lawyer's In-House Club events please see [Events](#)