

Corporate compliance annual report 2016: Getting tougher



With competition intensifying, and greater commoditisation of services, making compliance a profitable area of practice is, for some firms, increasingly hard work

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Competition in the market for compliance-related legal advice is escalating. With much compliance-related work now becoming commoditised, ensuring such work is profitable is a major challenge for some law firms. However, the good news is that there is a massive untapped market for compliance advice

in both Spain and Portugal – those law firms that are best able to sell the benefits of compliance to clients are sure to prosper.

Many clients are still only at the early stages in terms of developing a compliance programme, says Alejandro Touriño, managing partner of Ecija. He adds that, consequently, it is not yet certain how profitable this work will be, but acknowledges that law firms have to provide such a service to clients. “We need to be there, but it can be a nightmare,” he says. Gómez-Acebo & Pombo partner José María Álvarez says commoditised compliance advice is not appealing for some large firms because they have no interests in competing with other firms in this area. Touriño adds that the onus is on law firms to “find a formula” that will make compliance work more profitable. Pérez-Llorca partner Adriana de Buerba says that law firms have an important role to play when clients need advice on compliance. “There are areas of law where consultants usually do not provide advice,” she says. “For example, anti-corruption is an area that is critical and anti-money laundering is very technical.” De Buerba adds that clients need advice from external legal advisers on how to maintain the compliance structure in their organisation. Meanwhile, Eversheds Nicea partner María Hernández says there is a need to raise awareness of the importance of business ethics among clients and “help them realise the need for compliance”. Luis Miguel de Dios, partner at CMS Albiñana & Suárez de Lezo, says leads for compliance-related work are generated by the firm’s corporate partners. “Corporate partners have a good overview and generally receive the requests,” he says. “However, other partners may detect deficiencies in clients’ data protection procedures, for example.”

Who wants the job?

Selecting which employee within an organisation should take the role of compliance officer can be problematic, according to Touriño. “Often, no one wants to be the compliance officer,” he says. Compliance committees rather than individual compliance officers may be a more suitable option for many businesses as they will “encompass the different skills needed to effectively exercise that surveillance duty”, Hernández argues.

Cecilia Pastor, partner at Baker & McKenzie, says that law firms provide a vital service in terms of giving clients choices in terms of how they address the issue of corporate compliance. She adds: “A client may say, look at my company and tell me what options I have and I will take those options to the board.” De Buerba argues that law firms can provide advice of “great value added” in relation to some compliance matters. She adds: “This includes early detection [of a problem] and a reaction when it happens.” In addition, clients also seek “second opinions” on their compliance programmes from external lawyers, one partner says.

Many clients in Spain are exposing themselves to potential risks because they are simply “forgetting compliance altogether”, according to Touriño. “If clients do compliance well, they will be seen as professional, they won’t become involved in scandals and other parties doing business with them will realise they are dealing with

“We need to be there, but it can be a nightmare.”

Alejandro Touriño
Ecija



professional entities.”

What are currently the biggest compliance-related risks clients face?

“It is not just a matter of having a prospectus or internal rules. The company has to show willingness to enforce those rules and commit real resources, both technological and human.” **José Bonilla, partner, Jones Day**

“The risks assumed by clients depend on the sector – for example, for insurance and banking entities, the money laundering policy has to be optimal, whereas in a pharmaceutical company, the anti-bribery company is the most important policy.” **Francisco Lacasa Lobera, partner, AGM Abogados**

“If we consider criminal risk in itself, it includes corruption among individuals, money laundering, tax evasion, crimes against privacy and computer hacking, all of which may occur in most sectors.” **Mariana Ladaga, senior associate, RCD – Rousaud Costas Duran**

“The main risks are now antitrust, criminal responsibility, money laundering prevention and personal data protection.” **Alonso Hurtado, partner, Ecija**

“A widened exposure to legal penalties, financial and material losses, loss of reputation, legal disqualifications, as well as limited, and ultimately loss of, business opportunities.” **Ainhoa Veiga, partner, Araoz & Rueda**

“Detailed and exhaustive guidelines on how to design, implement, execute and monitor efficiently compliance programs in order to fulfil the legal requirements set forth under the Criminal Code are not publicly available.” **Alfredo Guerrero, partner, King & Wood Mallesons**

“If a criminal offence is committed by a director or an employee, the conclusion must be that an ‘accident’ has occurred, that the company could not have done anything else to avoid it. In order to reach that conclusion, a proper and effective corporate defence programme must be put in place.” **Álvaro Sainz, senior partner, Herbert Smith Freehills**

“In many cases, clients do not know the risks they face, even companies where compliance was established long ago (such as financial and pharma companies); they probably do not focus on all matters and the identification of compliance risks fails.” **Francisco Javier Carbayo, partner, Deloyers Abogados**

“Implementing ‘standard’ compliance programmes instead of ‘tailored’ programmes adapted to the specific risks companies face. If the programmes implemented are not able to prevent and detect potential criminal risks related to the specific activities of the company, they will probably have to face criminal liability if criminal proceedings are started.” **Ignacio Sánchez, counsel, Hogan Lovells**

Risk of overconfidence

One danger is that companies can become overconfident, according to Pastor. “Sometimes big companies with global compliance programmes have too much confidence in the programme and say, I don’t need a compliance programme specifically for Spain, for example.” DLA Piper partner Joaquín Echánove says businesses should see compliance as an opportunity to improve their risk management. Álvarez argues that many businesses still do not fully understand what compliance means: “Being compliant will help you with your business.” Rafael Sánchez, counsel at CMS Albiñana & Suárez de Lezo, says effective compliance involves a mix of legal and advisory services. He adds: “Regarding profitability, some clients will need a higher level of advice than others.”

Many Spanish companies are now seeking foreign investment, but such investors have very high expectations of their targets, according to Pastor. “Meanwhile, Spanish companies are opening in international markets and entering new jurisdictions with new expectations regarding compliance,” she adds. Though since 2010 it has been possible to hold Spanish companies criminally liable for certain offences committed by their employees, there have been no “significant convictions”, De Buerba says. “There are currently some investigations going on in political parties – we will see what the courts will say in the next two years.” Sánchez says clients will need to be compliant to be a counterparty with other businesses. He adds: “Compliance will also be a requirement in order to receive investment.”

Echánove says demand for compliance advice largely depends on the type of client. “There are big clients with compliance departments – it’s clear they have to implement compliance programmes – but with smaller clients, there are directors trying to mitigate their liability,” he adds. De Dios says advising sophisticated clients on compliance is “still profitable”, though for other clients it is a value-added service. He continues: “The risk for the client is that the market could see compliance advice as a commodity – sometimes law firms receive requests for proposals (RFPs) from clients’ purchasing departments ‘with the aim of ticking the box’. But they shouldn’t because circumstances, and the environment, can change. It is a typical issue to be dealt with by the internal legal structures and the external counsel.”



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Adriana de Buerba Pérez-Llorca

Portugal: Low awareness levels

There is a view among lawyers in Portugal that awareness among domestic clients of the importance of corporate compliance is still relatively low. Filipa Marques Júnior, partner at MLGTS, says: “We would like to see more of an increase in work [among Portuguese clients]; there is more demand from international clients.” Tiago Ponces de

Carvalho, lawyer at Abreu Advogados, adds that Portuguese clients are “not highly developed” in terms of taking a preventative approach to compliance. He continues: “Consequently, we are providing training for clients on internal audit procedures.”

While institutions such as banks have in-house compliance functions, the situation at other businesses is often different, says José Pedro Fazenda Martins, of counsel at Vieira de Almeida. “Other companies do not have internal compliance departments and so they are more flexible in terms of outsourcing,” he says. Bruno Azevedo Rodrigues, partner at ABBC, says that SMEs in Portugal are generally unaware of compliance “until they have an issue”. He adds: “In contrast, companies operating in highly regulated sectors – including financial institutions that are looking to establish operations in Portugal – are already well focused on the subject of compliance.”

Marques Júnior says MLGTS provides training for its lawyers across the firm to raise awareness of the issue of compliance and its impact on clients. “The aim is to get lawyers talking to their own clients and make them aware of the issue,” she adds. Ponces de Carvalho says it is important that law firms are proactive in terms of educating clients – particularly small and medium-sized enterprises (SMEs) in Portugal – about compliance. PLMJ partner Duarte Schmidt Lino says his firm is doing a lot of work with private equity funds advising start-ups on compliance. He adds: “The market for compliance advice is small as companies in Portugal don’t value compliance and that won’t change unless regulations change.”

Need for cultural change

SME’s in Portugal are reactive, rather than proactive, on the issue of compliance, says Paulo de Sá e Cunha, partner at Cuatrecasas, Gonçalves Pereira. “All banking and insurance companies have internal compliance departments, but with SMEs, corporate compliance is not in their mindset,” he says. “There needs to be a change of culture.” Marques Júnior says that having a specific department dealing only with corporate compliance would not be a profitable business, unless it also involved, for example, litigation. She adds that MLGTS has changed the name of the criminal litigation practice group to “Criminal Litigation, Misdemeanour Litigation and Compliance” in order to raise

What are the biggest opportunities for law firms in corporate compliance?

“Clients are becoming more and more aware of compliance issues – the crisis has played an important role in this change in the companies’ mindset – and are engaging significant resources in compliance not only on a reactive but also on a preventive basis.” **Francisco Brito e Abreu, partner, Uría Menéndez – Proença de Carvalho**

“It would be interesting to approach compliance from a general point of view, encompassing not only criminal prevention, but also the regulatory and competition aspects and the personal responsibility of directors and officers.” **Rafael Mateu de Ros, partner, Ramón y Cajal Abogados**

“Clients are implementing more specific internal compliance programs, dealing with particularly sensitive areas such as data protection and human resources as well as ‘best practice’ rules on those subjects.” **João Caiado Guerreiro, managing partner, Caiado Guerreiro & Associados**

“Lawyers should advise companies on how to adapt their existing, or non-existent, compliance programmes to the new compliance models, always respecting the company’s identity and resources.” **Rocio Gil, senior associate, Olleros Abogados**

“Compliance programmes have not yet been widely adopted in Portugal. The first opportunity is, therefore, to organise compliance programmes that are adapted to clients’ needs. The other is to intervene in the execution of said programmes. Whistle blowing mechanisms are also an opportunity for law firms.” **José Lobo Moutinho, partner, Sérvulo e Associados**

“In Spain, we believe that the biggest opportunities for law firms are those related to the implementation of compliance management systems through compliance programmes.” **Fernando A. Martín Martín, partner, Loyra Abogados y Asesores**

“The growing importance of compliance in Spain – first with the changes in the Spanish Criminal Code in 2015 and, more recently, with the interpretation of the Spanish Public Prosecutor Office (“Fiscalía General del Estado”) – will have a strong

awareness among clients. There is a high demand for compliance advice from companies in the oil and gas sector, according to Schmidt Lino. "In Angola, compliance



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Filipa Marques Júnior
 MLGTS

is profitable, oil and gas companies are highly regulated and US companies have special requirements for compliance,” he adds. Meanwhile, Carla Martins Branco, partner at Pbb, says data privacy is a niche compliance area, but very profitable. FCB Sociedade de Advogados associate João Osório de Castro argues that clients need to understand that there is a reputational risk in not being

compliant.

De Sá e Cunha believes that lawyers working in the area of corporate compliance have an advantage over lawyers in other practice areas in that, if clients ask for a fee quote, the law firm’s estimate of the amount of time it will take is usually accurate. However, he adds: “If it goes to a trial and clients ask for a capped fee, it’s tricky because you don’t know how long you will spend on the case.”

If demand for compliance advice increases in Portugal, then legal market competition could also increase, warns Henrique Salinas, partner at CCA Ontier in Lisbon. But he adds: “It’s too soon for small boutique firms in Portugal specialising in compliance; Portugal’s penal code does not have the same provisions as Spain’s.” Salinas says that an effective compliance programme “not only prevents wrongdoing but also avoids the legal person’s criminal liability – its usefulness is unquestionable as the penalties laid down for corporate criminality are extremely severe.” He continues: “Portugal-based companies are not yet duly informed about corporate crime penalties and consequently they do not have compliance implementation as a top priority.”

What steps should clients take in order to be proactive on the issue of compliance?

“Steps include: (i) enforcing from the top what acceptable and unacceptable behaviours are; (ii) appointing a specific body within the company with independent powers to initiate and control the crime prevention model; (iii) raising awareness among employees with regard to their obligation to report any unethical behaviours; (iv) raising awareness among managers of their obligation to monitor employee behaviour; and (v) periodically requesting feedback with regard to any detected breaching of internal policies.” **Alfredo Domínguez Ruiz-Huerta, partner, Cuatrecasas, Gonçalves Pereira**

“First of all, the company needs to appoint someone with responsibility for the effectiveness and effective function of the compliance model. In this regard, the Spanish Office of the Public Prosecutor has given great importance to the supervision of the model. This means that a company that designs and implements a compliance model (usually, with the assessment of a law firm) and forgets about it afterwards, won’t be covered if a crime is committed in the organisation.” **Begoña Fernández Rodríguez, partner at Deloitte Abogados**

“Companies should design and approve their compliance models. According to the Instruction 1/2016 issued by the Spanish General Prosecutor, compliance models should not only prevent, detect and respond to criminal offences, but prevent any type of breach of the law.” **Alain Casanovas Ysla, partner, KPMG Abogados**

“As the board of directors (or sole administrator) is ultimately responsible, it is desirable to have a complete, and concrete, compliance protocol.” **Pablo Albert, head of dispute resolution department, BDO Abogados**

Booming demand

SRS Advogados partner Paulo Bandeira says his firm is doing more to publicise the issue of compliance and raise awareness of the issue among clients. He adds that there has been a “big boom” in demand for compliance advice relating to data privacy. Meanwhile, there is a need to create a compliance culture in Portugal, according to Ponces de Carvalho. “In Spain there is already a market concerning

“Company culture and compliance should go hand in hand, and everyone — from new recruits to upper level management — should recognise that compliance is part of everyone’s responsibilities. Also, clients have to train and reinforce proactive behaviour in their employees, to establish a strong compliance culture.” **Javier Casals Matute, managing partner, Casals Abogados**

“Clients should check and ensure that their systems meet the compliance requirements of the latest reform of the Criminal Code and Circular 1/2016, with constant verification of its effectiveness and training to directors, officers and employees”. **Jaime Garrido Mata, partner, Viallegis Abogados**

compliance – the recent changes to the Spanish Penal Code regarding legal persons’ liability address solutions on the graduation of the penalties, as well as on its sanctioning,” he says. “Portugal now has the opportunity to implement a

preventive practice in Criminal Law”. Marques Júnior says: “Compliance is more than words and a code of conduct on your website is not enough – instructions have to be specific, they have to exist and they have to be understood by everyone.”

External legal advisers can add value to clients on the issue of compliance, says Fazenda Martins. “Experienced law firms know how to provide external checklists that can relieve the stress for new compliance officers,” he adds. Clients need to train their employees in compliance and also train the board, says Martins Branco. “You have to monitor the compliance programme and you have to audit – you must understand how well the policy is being implemented,” she adds. “Clients should see compliance as an investment in that it generates trust, but it’s often seen by clients as a cost.” Osório de Castro says being compliant enables clients to give their business partners, or potential business partners, increased confidence and demonstrate to them that they are “reputed companies”.

There is a need to draw attention to the problems faced by companies that don’t have effective compliance policies, says Schmidt Lino. “There is a reputational risk, directors’ lives can be destroyed and Portugal has abundant examples of this.” Azevedo Rodrigues concludes: “Compliance protects value, it spares directors the humiliation of civil and criminal lawsuits and, if you’re not compliant, you may be out of business.” IL

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