

Ignore at your peril



Across Iberia, companies are being exposed to more and more risks from increasing regulation and scrutiny from regulators. Given the sanctions for non-compliance, including personal liability, Spanish and Portuguese law firms really need to start playing catch-up.

Compliance, worldwide, has increasingly become a must have for all companies, say lawyers. While in some jurisdictions, the US and UK for example, 'compliance' is very clear cut, in others, the concept is just taking off due to the pressures of increasing regulation and requirements with which businesses must comply.

Among law firms in Iberia, there are various methods of dealing with compliance, from dedicated departments to teams brought together as and when needed. What is clear is that there is currently no common approach, and that Portugal is currently a little further down the compliance road than Spain.

Sanctions have also changed recently across the Peninsular, meaning that the costs of non-compliance go further than before, even as far as imprisonment. However, lawyers agree that companies aren't giving it the importance it deserves, particularly in the current climate, and that they may only be forced into action when they see others suffering the consequences of non-compliance.

As compliance touches on so many practice areas and sectors, it seems difficult to narrow down a single definition. But while the specifics of each industry are different, says João Teixeira Matos, Partner at Garrigues in Lisbon, there is a common approach to compliance among the sectors that can be shared throughout law firms, and those more dedicated to regulatory matters can share their methodology with others.

Where there is need

For companies, however, the compliance issues that affect them are much clearer, falling into two distinct categories. First are those related to the legal requirements to start a business activity or acquire companies

carrying out highly regulated activities, explains Carlos Vázquez, Partner in charge of Public Law at Gómez-Acebo & Pombo in Madrid, and second are legislative changes that could affect the requirements to be met by companies already carrying out these activities.

Companies doing business in the regulated markets, such as energy, telecoms, financial markets and insurance face the most demanding compliance challenges, with a wider range of rules to contend with than others, say lawyers. Those activities with greater potential risks are those with the greater compliance needs.

For both Spain and Portugal, there is no doubt that the financial sector has the most coordinated approach to compliance given its extremely regulated nature, with other regulated sectors slowly catching up. And a consequence of the crisis is the marked increase in regulatory compliance pressures that they face, for example, the upcoming MiFID II, which increases the pressure on companies to ensure their compliance houses are in order. What's worrying clients in this sector is how to approach the regulations, according to Paloma Fierro at Linklaters in Madrid. "They come to us wanting to know everything they need to do and to comply with."

Other sectors increasingly on the compliance radar include the pharmaceutical and healthcare industry and business activities with an environmental impact. In Spain, new data protection laws also come into force later this year, while in Portugal, lawyers cite electronic communications, transportation and water as being high on the list.

Continually changing regulation

If companies have a better understanding of their compliance requirements, for many law firms, however, the situation is less than clear. One of the most relevant and complex challenges faced by internal and external compliance teams, says Casto González-Páramo, Counsel at Hogan Lovells International responsible for the EU & Competition Department in Madrid, is knowing which areas of activities of the client are subject to compliance at any moment.

One of the big challenges for any business developing its activities in regulated sectors, according to Marta Cruz de Almeida, Consultant at Linklaters in Lisbon, is to keep updated as to the relevant regulation it has to comply with and the specific regulator's

Las conclusiones en el informe anual sobre Regulación y Cumplimiento Normativo en la Península Ibérica indican que, en su mayoría, las compañías están muy expuestas a ser sancionadas a raíz del incremento de normativas y del escrutinio de los reguladores. La situación es aún más seria cuando en ciertos casos la sanción puede ser de carácter penal contra los administradores.

views on ambiguous issues.

What makes that so difficult, lawyers agree, is that over the past few years, regulations have been changing at a rather incredible pace. There is a regulatory frenzy all over the world and not only in the EU, trying to regulate everything and anything, says Teixeira Matos at Garrigues in Lisbon. Therefore, the main challenge clients are facing is to be able to rapidly adapt their business structures to new regulations that are being constantly approved, explains Gloria Hernández Aler, Financial Regulation Partner at Deloitte in Madrid.

Clients do, however, tend to be very pragmatic when it comes to regulatory changes, says Paulo Costa Martins, Associate at Cuatrecasas, Gonçalves Pereira in Lisbon. "The immediate advice required is how changes, even if still under discussion, will impact on their current business model."

While major multinationals know in advance what regulations are likely on the horizon and have the capacity to prepare, it's the medium sized companies that are worrying. "They want to do business fast and are much less concerned with compliance," according to Gonçalo da Cunha, Partner at F Castelo Branco & Associados in Lisbon. However, big companies don't always stop because of regulatory changes, says Filipe Faria Of Counsel at ABBC in Lisbon, more often they just move forward and adjust when important business strategies are at stake.

Companies want to know how far the regulatory reforms can go, says José Giménez, Partner at Linklaters in Madrid, and that's where lawyers can add value. "Clients want us to be ahead of the regulations and so participation in the discussion forums with regulators leading up to implementation is crucial."

The regulators

Across Iberia, lawyers agree, regulators are adopting a much more intrusive approach. They are intensifying enforcement and cross-border cooperation between authorities, and increasing the number of actions being brought. "There are also an ever expanding number of authorities actively seeking to bring prosecutions with ever broadening powers to investigate and gather information," according to Cecilia Pastor, Partner and Head of Compliance at Baker & McKenzie in Madrid.

In Portugal, the number of regulatory bodies is also on the rise, while many are more visible and active in monitoring compliance issues, says Ricardo Costa Macedo, Partner and Head of IP at Caiado Guerreiro in Lisbon, including, among others, Autoridade da Concorrência (Competition) and CMVM (securities and exchange).

A critical aspect, therefore, is maintaining good relations with regulators, he says, to get more responsiveness that makes a difference for their clients. And to provide a really good compliance service, you need to be respected by the regulator, says Magda Cocco, Partner at Vieira de Almeida & Associados in Lisbon, and to gain this respect you need to know your sector.

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A criminal act

A particular area of specialisation that is currently very much in demand is criminal law, as everything to do with compliance is linked to it, explains Pedro Duro, former member of the Ministry of Justice's Legal Policy and Planning Office and now at Sérvulo & Associados in Lisbon. In fact, the introduction in 2012 of regulation of corporate criminal liability for the first time in Spain has been the biggest compliance challenge of the past few years, says Adriana de Buerba, Partner at Pérez-Llorca in Madrid.

Companies now have to adapt any control and compliance measures they had in place to the new criminal law framework, says David Velázquez, Partner at Cuatrecasas, Gonçalves Pereira in Barcelona, and considering the heavy sentences under the reform and the need to prove compliance to the courts, companies require assessments that cover the new criminal risks, and the implementation of effective compliance measures.

For Bernardo del Rosal, Of Counsel at Clifford Chance in Madrid, because of the nature of our 'information society', where news travels everywhere so quickly, the damage in terms of reputation that a criminal charge can cause to any corporation is huge.

A risky approach

The problem lawyers are having is that it is sometimes difficult to convince clients of the fact that the cost of a regulatory breach is much more expensive in terms of legal, economical and reputational damages than the cost of investing in preventative legal advice, says Antonio García Muñoz, Head of the Public, Regulatory, Environmental and Competition Law Department at Lener in Madrid.

At a time when companies cannot afford a loss in reputation or revenue, it is possible that these risks, coupled with the potential criminal liability of each and every employee, will prompt companies to pay more attention to compliance, say lawyers.

Legal risks have also significantly increased over the past years as a consequence of the crisis, says Pablo García Montañés, Manager of Regulatory Compliance at Deloitte in Madrid, plus the fact that law firms haven't been giving the compliance issues the weight they deserve. "Compliance is not just a back-office function as it plays a relevant role in terms of advance impacts on business, which can result in saving millions for the business."

Prevention, therefore, is key, lawyers stress. A comprehensive risk management system is the basis of any