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Regulatory Compliance Report 2014

Untapped market

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REGULATORY COMPLIANCE ANNUAL REPORT



“Regulatory authorities in some areas are also playing an important role as they have increased their inspection and monitoring activities, thus imposing higher compliance standards on the market.”

Francisco Brito e Abreu,
Uriá Menéndez - Proença de Carvalho

Ferreira Sá Carneiro & Associados, says in the last 12 months, financial institutions have been asking for more assistance on compliance policies. Issues of concern to clients include the new Bank of Portugal regulations relating to money laundering, the European Banking Authority's guidelines on the assessment of the suitability of directors and key function holders, and the legislation implementing the UCITS IV Directive. Bento says that most compliance matters are still treated internally by the relevant institutions, but in-house teams are beginning to become overwhelmed with the new legislation and regulations that has been enacted since the start of the financial crisis.

Morais Leitão, Galvão Teles, Soares Da Silva & Associados senior associate Tiago Félix da Costa observes that there has been an increase in demand from clients for advice in relation to data protection compliance, as well as with regard to business in Africa. He adds that general counsel are increasingly aware of the issue of compliance.

Francisco Brito e Abreu, partner at Uriá Menéndez - Proença de Carvalho in Lisbon, says banking and financial services, corporate governance, life sciences, data protection and e-commerce are the business areas that present the most promising opportunities for law firms from a compliance perspective. "These are areas subject to either complex or recent regulation that keeps evolving," he says. "Regulatory authorities in some of the indicated areas are also playing an important role as they have increased their inspection and monitoring activities, thus imposing higher compliance standards on the market."

More assertive enforcement

Nuno Carrolo dos Santos, associate at Abreu Advogados, says the financial crisis exposed existing regulatory failure within companies as well as an "enforcement and advocacy deficit from regulators". He adds: "New regulations have been adopted very quickly and this has caused doubt for clients." Garrigues partner João Paulo Teixeira de Matos says that there is now an increased demand from clients for compliance advice because there is a feeling that the economy is recovering so now businesses are concerned with other issues. Meanwhile, Cocco says some companies do not perceive the value of effective compliance programmes in some specific fields because they are not aware of the consequences that some practices may have – the area of data protection being a good example of this. Carrolo dos Santos agrees that there "needs to be assertive enforcement" on the part of regulators. Caiado Guerreiro & Associados partner Tânia Pinheiro observes that the Portuguese tax authorities are getting more aggressive, and therefore "tax and legal due diligence proceedings are

mandatory to evaluate the possible risks of a transaction".

Maria João Ricou, managing partner at Cuatrecasas, Gonçalves Pereira in Lisbon, says multinationals as a rule are at a "different stage" when it comes to compliance. "You don't need to 'sell' [compliance] for instance to a US multinational, but with domestic companies, while some are already sensible to compliance

matters and want to prevent the associated reputational and cost contingencies, some are less so, so you have to be more proactive with these." Ricou adds that clients should realise that it is "much wiser and much cheaper to take measures to prevent any compliance-related problems arising, rather than trying to tackle a problem after it has occurred".

Paulo Costa Martins, senior associate at Cuatrecasas, Gonçalves Pereira in Lisbon says that, in Portugal and around the world, the number of regulatory requirements in the financial sector is continuing to increase and multinationals are very keen to identify on a regular basis the resulting gaps between their internal policies and Portuguese legislation. Meanwhile, Dos Santos says: "There are companies that want to understand their compliance obligations in order to manage risk but not necessarily to implement full compliance immediately."

Outsourcing

Reis says that if a client has in-house lawyers, they generally give external legal advisers more work. "Not having an internal lawyer, can make it challenging for external lawyers," he adds. Reis says that companies often ask external lawyers to effectively give a "quality seal" to their compliance programmes. He adds that in the banking and pharmaceutical sector most clients have compliance officers, but says this is a lot less common in retail where there may be issues relating to cost and capacity. Another lawyer comments: "I've worked in-house in the past and have been instructed to pass on the responsibility for compliance." Meanwhile Costa Martins adds that, in some credit institutions, the compliance officer is obliged to outsource all compliance work.

Da Costa says there is an increase in demand for high-profile compliance work. "Significant investors are contacting lawyers to get advice on compliance in Portugal – we might find a need to set up a dedicated compliance team." Bento adds that, for some clients in the financial sector, compliance matters are a significant part of the work carried out by seconded lawyers. For some clients, a secondment is a cheaper option for dealing with their compliance needs, one associate says.

A Lisbon-based partner says that medium-sized and boutique law firms in Portugal may not have the resources to provide sufficient compliance support for a mid-sized client. This can result in mid-sized law firms referring compliance work to larger firms, but often smaller law firms are extremely reluctant to refer work because they fear losing the client, according to another partner at a Lisbon firm.

Albuquerque & Associados partner Antonio Mendonça

Raimundo highlights data protection and anti-bribery as growth areas. He adds: "Many Portuguese companies have not yet implemented codes of conduct, and so this is an area of opportunity." Meanwhile, Cláudia Amorim, senior associate at Sérvulo & Associados, says there has been a "significant increase of cases where we have been representing directors of public entities before the Court of Auditors on procedures regarding financial and 'sanctionatory' liability."

António Vicente Marques, founding partner at AVM Advogados, says, given that the UK Bribery Act allows the prosecution of an individual or company with links to the UK, regardless of where the crime occurred, clients are gradually becoming more concerned about adopting "effective internal measures and procedures to prevent corruption, fraud, bribery and other unlawful practices in their companies". Miranda partner Luis MS Oliveira says key client concerns relating to compliance have included: traders' and charterers' environmental liability from oil spills at sea; environmental compliance issues relating to oil and gas and to mining; Equator Principles-type compliance for international financing; and soil groundwater contamination. Meanwhile, PBBR & Associados, Sociedade de Advogados partner César Bessa Monteiro says he believes the areas where compliance offers the biggest opportunities for law firms are data protection, consumer

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protection and environment-related issues. Unlike many other firms, Raposo Bernardo has taken the decision to create a dedicated and specialised compliance team. Partner Sofia Ferreira Enriquez says: "Regulatory compliance is one of the most important and challenging areas for a law firm, considering the constant increase in regulatory action and the high risk involved."

Rogério Fernandes Ferreira, founding partner of RFF & Associados, says there has been an increase in companies needing advice on tax compliance matters as there has been an increase in reporting obligations as well as greater demand from high net worth individuals that are restructuring their assets.

Therefore compliance is one of the few areas of practice that is currently offering law firms the opportunity for significant growth. And that trend is set to continue. With SMEs still lacking knowledge of this issue, compliance lawyers appear to be operating in what is still a largely untapped market.

Spanish companies must act now on compliance

It is crucial that companies act now and ensure they have a compliance programme in place, despite the fact that the reforms to Spain's 2010 Criminal Code have been delayed, according to Bernardo del Rosal, Of Counsel at Clifford Chance in Madrid. Del Rosal says an increasing number of medium-sized companies are seeking advice on compliance. "Unlike the vast majority of larger companies who already comply with international regulations and simply need to adapt existing requirements, many mid-sized companies are only just starting to operate abroad, and have incomplete programmes in place."

Del Rosal says that when the 2010 Criminal Code was approved, medium-sized companies did seek advice at the time, but faced with a law that did not properly define a potentially criminally liable situation, or clarify what "due control" was and its effect, there was very little incentive to act. "Many companies came to us and asked whether they should

invest in compliance, but when they asked how it was going to be useful to them to avoid responsibility, the answer from us was that it was still under discussion, so as many were in economic difficulty, they postponed the decision to act."

However with clearer legislation that makes businesses criminally liable, not only for certain crimes committed by their directors or employees, but for failing to adopt the necessary due control, determining the scope of what exactly can be done by a legal entity in order to make this liability disappear has become essential. "Now, it's not about whether to have a compliance programme, but when to have it in operation," says del Rosal. "Regardless of the legislative delay, in things that benefit the defendant, a judge will be able to apply the benefits of the programme – therefore, it is important for companies to act now."



Bernardo del Rosal