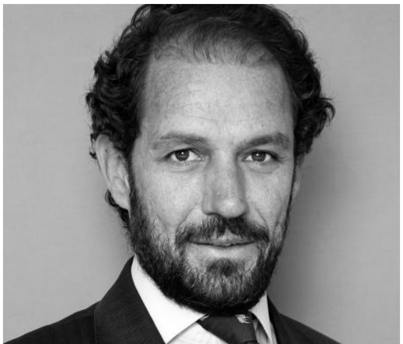
A hard sell

Poor corporate governance could ultimately cost a business its reputation, yet lawyers are still struggling to persuade clients to take the issue seriously

While any company faces the prospect of its reputation being destroyed if it does not have effective corporate governance procedures in place, lawyers acknowledge that it can be difficult to convince clients of the importance of this issue. Many businesses fail to see what value law firms add in this context, but external lawyers argue that, given that they advise a wide array of clients, they have more wide ranging experience of this issue and will be better able to spot potential problems. That said, lawyers acknowledge that, when it comes to big, listed companies, clients can often teach their external advisers a lot about the latest developments and trends in this area. However, the fact remains that clients have to get corporate governance right, especially if they want to attract investment from the US or UK where investors will generally insist that the companies they are targeting comply with the corporate governance regulations that apply in their own jurisdiction.



Herbert Smith Freehills partner Alberto Frasquet said it can be difficult to sell corporate governance services to clients

Spain: Smaller companies need governance advice

Huge opportunity for law firms, though lawyers admit selling corporate governance services to clients can be tough

Event: Iberian Lawyer Corporate Governance Roundtable
Host: Cuatrecasas

The latest trend in corporate governance is ensuring that organisations take steps to ensure they properly engage with their shareholders, attendees at the *Iberian Lawyer* Corporate Governance Roundtable heard. Meanwhile, many smaller companies are waking up to the need for effective corporate governance, and this is generating significant opportunities for law firms. Corporate governance is an expanding concept and is effectively a "reform movement", according to **Cuatrecasas partner Juan Aguayo.** "In the mid-90s, corporate governance focused on the functioning of the board of directors, then attention turned to shareholders' rights, and now the talk is about shareholder engagement," he explained. "Shareholder activism is increasing the understanding of corporate governance, there is a common ground with corporate compliance, and this is the way law firms should look at this, as a whole – there is still a distinction between corporate governance and corporate compliance. Companies should have a relationship with stakeholders as governance concerns the decision-making process." Aguayo added that a number of Spanish listed companies comply with international corporate governance standards, "for instance, facilitating 'distance votes' from shareholders,

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What are currently the biggest opportunities for law firms in the area of corporate governance?

"Corporate governance doesn't only affect listed companies, but increasingly, insurance companies, credit institutions, the so-called 'public interest entities' and, in general, medium-sized companies, associations and foundations. Corporate governance is no longer exclusive to the corporate or capital markets areas – it often requires the involvement of areas such as criminal, tax, financial, labour or compliance."
Guillermo Guerra, partner, Gómez-Acebo & Pombo

"The times of 'formal' corporate governance are over (for example, internal codes and procedures). Clients are now requesting law firms to deliver a comprehensive and practical approach that, based on a deep knowledge of the relevant industry, enables them to keep up with international trends."
Lourdes Ayala, partner, Bird & Bird

"Legislation on corporate governance of non-listed companies is about to come into force in the UK in January 2019. This trend will reach Spain sooner rather than later."
Rafael Sánchez, partner, CMS Albiñana & Suárez de Lezo

"Helping secretaries of the board and general counsel to introduce the best technology to transform security, reliability and traceability."
Patricia Manca Díaz, partner, PwC Tax & Legal Services

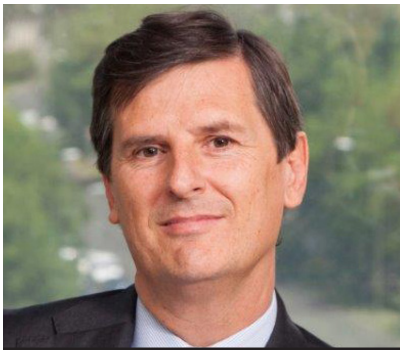
"Recent legislative developments have led to ongoing demand for professional services in this area. New requirements include the reinforcement of the duties of the directors, as well as the implementation of a remuneration plan for directors that takes into account greater liability."
Iñaki Frías, partner, RCD

"In the wake of the WebSummit and the emergence of our own 'unicorns', Portugal is on the map of global start-up hubs. When opportunities arise, venture capitalists and other investors look to replicate governance models in other jurisdictions."
Manuel Cordeiro Ferreira, principal, RRP Advogados

having diverse boards of directors, not only in gender, but in professional and geographic origin, and by having transparent remuneration that follows the best 'say on pay' practices". There is also a trend to reduce the length of time that people serve as directors, for example by having annual elections for board members at shareholders' meetings. "The way for companies to attract international investors is to have international standards of corporate compliance."

Herbert Smith Freehills partner Alberto Frasquet said that law firms face the challenge of convincing clients of the value they can add with regard to the issue of corporate governance. "It can be difficult to sell this product and lawyers have to explain the importance of it," he explained. However, Frasquet added that UK and US investors, in particular, require high standards of corporate governance. He also said that when new corporate governance regulations are introduced in the UK or US, for example, shareholders will demand the same standards from companies in Spain before investing in them. "If you want a stable base of shareholders, you have to comply with what US and UK investors expect," said Frasquet. He added that boards wanted practical advice from lawyers, not only technical advice. "When you go to the board, they need you to say 'this is what you can do'."

"Over-regulation is a massive problem" for clients, according to **Deloitte Legal partner Ignacio Balañá**. He added that, consequently, most companies "do not have enough internal resources" to deal with the issue and therefore need the help of external law firms. "Powerful organisations do have internal resources, but such companies are limited; on top of that, some companies do not have the corporate culture required to develop these kind of policies," Balañá said. He also said that law firms have an opportunity to become involved in the evaluation



Hogan Lovells Madrid managing partner Lucas Osorio said clients not complying with corporate governance requirements could face criminal sanctions

of boards of directors, and "this adds value to the company". Balaña added that corporate governance represented an opportunity for law firms – for example, firms could be involved in providing ongoing training to companies.

One of the major challenges clients face is adapting to new corporate governance requirements, said **Hogan Lovells Madrid managing partner Lucas Osorio**. He added that clients that do not comply with such requirements could face criminal sanctions, as well as potential reputational damage.

Osorio also said that corporate governance standards are permanently changing and clients have to ensure they are aware of the changes. He continued: "If the board of directors and the CEO, for example, believes in corporate governance, then the whole organisation will be on the same page. The challenge is to have strong people in the organisation doing the work – these people need authority." However, Osorio added that the challenge for law firms is to "find the formula for giving added value to clients" when advising on corporate governance. "You need to convince clients that you are adding value to their daily work," he said.

Squire Patton Boggs Madrid managing partner Rafael Alonso said there is a "cultural issue" with regard to some clients' approach to corporate governance. He added that, consequently, lawyers sometimes have to "convince management that their profitability will increase and they will better control risk" if they properly address the issue of corporate governance. Alonso said that, as a result, there was an opportunity for lawyers to influence the decision-making of companies' management on this issue. "This is a fantastic opportunity [for law firms], we need to lobby for our position, but law firms need to upgrade their [corporate governance] service offering and perhaps assume a co-ordinator role where they lead the company on this issue," he added.

While large listed companies have "long been well informed about corporate governance", there are still plenty of opportunities for law firms advising smaller listed companies, said **Garrigues partner Sergio González Galán**. He added that there are also "many quite sophisticated companies that are not listed and want to hear about corporate governance". González Galán said that corporate governance is particularly important in relation to the remuneration of boards in that a recent Spanish Supreme Court ruling has "drastically changed the existing interpretation of how executive directors' remuneration in non-listed companies should be detailed in company by-laws and approved by the shareholders, and this is a very important matter that should be reviewed by all shareholders". He added that, while being given a position on a board used to be seen as "a gift", legislation has become stricter and board members are now more aware of the significant duties and potential liabilities involved and that now, it is "not as easy to find board members". González Galán also said the challenge for lawyers advising on corporate governance is that they have to know, "or at least be well aware", about many areas of the law besides corporate, including employment, tax, data protection and environmental law, for example.

Corporate governance legal expertise used to be centred on law firms, but now law firms can also learn a lot from clients, said **Linklaters managing associate Javier García Cueto**. He added: "Corporate governance applies to large, medium and small-sized companies, especially if listed on a secondary market, as they are subject to stricter disclosure obligations and need to implement a larger corporate governance structure, including for example, audit and remuneration board committees – it's a matter of installing a corporate governance culture in the day-to-day operations." García Cueto continued: "For instance, if an IBEX company hires a CEO who hasn´t worked for a listed company before, he will need to get up to speed on corporate governance matters and adjust his/her role accordingly." García Cueto also said that listed companies often request help from external legal advisers: "They are aware that they face big potential liabilities and want to ensure things are in good shape." He added that while some companies' in-house teams are getting larger and gaining expertise, external lawyers advise a broad range of clients with different concerns and belonging to different industries which enables them to see things clients "have not seen before".

Institutional investors are pushing Spanish companies to adopt international corporate governance standards, said **Allen & Overy counsel Teresa Mendez**. "This is a big worry for directors

What are the biggest challenges clients face with regard to corporate governance?

"Corporate governance means facing the challenge of satisfying the interests of all the business' different stakeholders, while also complying with complex market regulations, both domestically and internationally. It also involves meeting the requirements of practically every sphere of management, since it encompasses all its facets."
Ignacio Aparicio Ramos, partner, Andersen Tax & Legal

"Clients need to be convinced that revising their internal organisation or model is not only a legal obligation, but also a positive opportunity to review and modernise their organisation. Meanwhile, the corporate governance rules need to be adapted to each client according to the scope of their needs."
Natalia Marti Pico, partner, Roca Junyent

"Issues like increasing independent members of the board of directors, gender equality on the board, the risks directors have to assume and their liability, and the evaluation of the board and its performance are among the biggest concern for clients. In addition, the role of proxy advisers is something companies should take seriously, especially if a significant part of the company is in the hands of foreign investors."
Jordi López Batet, managing partner, Pintó Ruiz & Del Valle

"The Portuguese market consists mainly of small and medium-sized companies. Most of the companies are directed by family boards, so they face the big challenge of opening their management teams to external, and competent, members. The market demands transparency on the part of companies and its boards."
João Quintela Cavaleiro, lawyer, Cavaleiro & Associados

and so they seek external advice," she added. Mendez also said that changes in regulation, in addition to changes in government, will drive demand for corporate governance advice.

Portugal: Clients have poor governance record

Opportunity for law firms in ensuring clients comply with regulations concerning the identification and reporting of 'ultimate beneficiaries'

The collapse of high-profile businesses in Portugal in recent years – often due to corporate governance failures – means Portuguese companies are well aware of the need to have proper governance procedures in place. However, many Portuguese businesses have a poor track record in this area, so there is significant demand for lawyers who can guide them through the corporate governance minefield.

The focus of corporate governance in the coming years will be "public and regulatory scrutiny", according to **MLGTS partner Eduardo Paulino**. "The failure of high-profile companies in recent years has been the result of poor governance practices, among other factors, and we expect that clients will continue to ask legal advisors to assist in perfecting their internal governance mechanisms," he says. "We expect that listed companies will be looking at the implementation of [shareholder rights directive] SRD II, potentially entailing developments in the exercise of shareholders' rights, as well as remuneration of directors." Paulino adds that it is also anticipated that regulators will step up their assessment of the effectiveness of audit/supervisory boards and request that such boards play an "increasingly important role in the review of the relevant procedures and decision-making processes".

Vieira de Almeida partner Paulo Olavo Cunha says corporate

Vieira de Almeida partner Paulo Olavo Cunha says new legislation on 'ultimate beneficiaries is an opportunity for law firms

governance in Portugal received a boost with the enactment of the new Corporate Governance Code applicable to listed companies. "This code updates the previous regulations and listed companies must comply with its provisions or explain why they fail to do so in their annual corporate governance report," he explains. "Moreover, Law 62/2017, of 1 August set forth a regime aimed at promoting equal gender representation on the managing and supervisory bodies of public entities and listed companies."

Meanwhile, a regulation has been enacted that relates to the "identification and reporting of ultimate beneficiaries" of corporate entities, according to Olavo Cunha, and this creates an opportunity for law firms to help clients navigate this new legislation.

The increasingly complex legal and "soft law" framework for the corporate governance of listed companies continues to generate opportunities for law firms, says **Uría Menéndez-Proença de Carvalho partner Francisco Brito e Abreu**. He adds: "Opportunities arise not only from the assistance companies require to comply with their duties, but also in determining the corporate governance structures they need to adopt."

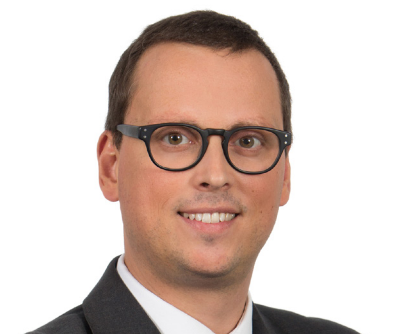
Succession planning for family-owned businesses can require sophisticated corporate governance advice, and this is a significant opportunity for law firms, according to **Cuatrecasas partner João Mattamouros** Resende. He adds: "The enactment of complex new rules and disclosure obligations – such as the ones imposed by the new Central Register of Beneficial Owners legal framework – provide law firms with opportunities to advise clients on the implementation and compliance with such rules."

Among the biggest challenges clients face with regard to corporate governance, is the amount and complexity of regulation that organisations face – such as that related to data protection and anti-money laundering, says **SRS Advogados partner Paulo Bandeira**.

He adds that these regulations "create heavy burdens that organisations have to adapt to very rapidly". Bandeira continues: "More complex regulations imply that different corporate bodies share responsibility in these matters – this impacts on structural governance and affects the distribution of responsibility in the organisation."

Clients also face the problem of ensuring their annual corporate governance report properly justifies non-compliance with any of the provisions of the corporate governance code, says **Sara Reis, managing associate at CCA Ontier**. She adds: "Typically, Portuguese companies' compliance with the 'comply or explain' rule is poor."

In addition, clients in Portugal often face the challenge of reducing the number of members of the board, while also improving the balance between executive and non-executive members, as the proportion of executive members of the board in Portuguese companies is still among the highest in Europe, says Reis.



The focus of corporate governance in future will be "public and regulatory scrutiny", says MLGTS partner Eduardo Paulino