

COMPANIES WISHING TO ACCESS FUNDS FROM THE RECOVERY, TRANSFORMATION AND RESILIENCE PLAN MUST HAVE A COMPLIANCE PROGRAMME IN PLACE

The Recovery, Transformation and Resilience Plan (“RTRP”) is an instrument promoted at a European Union (“EU”) level to mitigate the economic impact of the COVID-19 crisis and to modernise the productive fabric of Member States, advocating respect for the environment and promoting the digitalisation of their economies. In order to achieve this objective, the RTRP will provide countries with financial assistance to enable them to meet the milestones and targets in their respective recovery plans.

In Spain, the Ministry of Finance and Civil Service has recently approved Order HFP/1030/2021, of 29 September, which sets up the management system of the Recovery, Transformation and Resilience Plan (the “Order”) with the aim of implementing the initiatives proposed by the EU in the shortest possible time. The Order, published in the Official State Bulletin (BOE) on 30 September 2021, includes the obligation for entities involved in the implementation of RTRP measures to strengthen mechanisms to prevent, detect and correct fraud, corruption and conflicts of interest.

At the same time, in order to ensure the proper use of RTRP funds, Article 8 of the Order sets out a number of requirements to be met by the final recipients of such funds (whether grant beneficiaries, contractors or subcontractors), which are described below.

1. Adherence to the highest standards of regulatory compliance

The managing and executing bodies dealing with the invitations to apply for aid provided for in the RTRP must require recipients to submit a “*sworn statement regarding the commitment to comply with the cross-cutting principles established in the RTRP*” in accordance with the model included as Annex IV.C. of the Order.

Annex IV.C. of the Order includes the beneficiary of RTRP funds committing to “*the highest standards in relation to compliance with legal, ethical and moral rules, adopting the measures required to prevent and detect fraud, corruption and conflicts of interest, and reporting any non-compliance to the appropriate authorities*”. That is, committing to having developed and implemented a crime prevention or compliance programme.

While it is true that the Order does not expressly refer to crime prevention programmes, the commitment to adopt the necessary measures to prevent and detect certain crimes such as fraud or corruption is closely linked to the adoption of organisational and management models “*which include surveillance and control measures suitable for preventing crimes*” referred to in Article 31 bis 2 of the Spanish Criminal Code (the “SCC”).

In this regard, it is worth remembering that Article 31 bis 5 SCC establishes that crime prevention models must comply with the following requirements:

- (i) Identify the crimes that should be prevented and activities that may lead to such crimes being committed.
- (ii) Establish internal protocols or procedures for making and implementing decisions within the company.
- (iii) Have appropriate financial resource management models in place to prevent crime.
- (iv) Impose the obligation to report possible non-compliance on the person responsible for the prevention model.
- (v) Establish a disciplinary system to penalise non-compliance with the prevention model.
- (vi) Carry out regular checks of the prevention model and keep it up to date.

Although the Order emphasises the prevention and detection of fraud, corruption and conflicts of interest, it cannot be ignored that assuming “*the highest standards in relation to compliance with legal, ethical and moral rules*” means that crime prevention models must also take into account other risks inherent to the activity of each company in accordance with Article 31 bis 5 SCC, such as the commission of crimes concerning intellectual property, the market and consumers, or even the environment (respect for which is specifically promoted by the RTRP).

2. Other requirements

Independently of the requirement described above, the Order requires the bodies managing RTRP funds to request certain minimum documentation from the beneficiaries for the purposes of auditing and controlling the use of the aid. Although it is more of a formal requirement, the documentation to be collected includes:

- (i) The Tax Identification Number (NIF) of the beneficiary.
- (ii) The name of the natural or legal person.
- (iii) The tax domicile of the natural or legal person.
- (iv) Document accepting the transfer of data between the Public Administrations involved.
- (v) Document confirming registration in the census of business people, professionals and withholders of the State Tax Administration Agency or in the equivalent census of the Regional Tax Administration, where applicable.

In view of the above, it is clear that the Administration wishes to establish a culture of compliance, especially when it comes to receiving aid from the different institutions. The management of RTRP funds is a challenge that requires the coordinated action of the administrations involved and of the beneficiary entities, especially since it takes place in the context of the recent creation of the European Public Prosecutor's Office, which has the aim of protecting the EU's financial interests¹.

In any case, leaving public administrations aside, the publication of this Order highlights the importance of the development and implementation of crime prevention programmes by companies, regardless of their legal nature, size or the sector in which they operate. It is worth noting that, although most large companies have compliance programmes in place, many small and medium-sized companies have not yet implemented any preventative model. All companies seeking to access RTRP aid will therefore have to be aware of this, at least in terms of regulatory compliance.

This Legal Briefing was prepared by Juan Palomino and Jonathan Gómez, Partner and Associate respectively in the White Collar Crime and Investigations practice.

The information contained in this Legal Briefing is of a general nature and does not constitute legal advice. This document was prepared on 3 November 2021 and Pérez-Llorca does not assume any commitment to update or revise its contents.

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¹ See Article 4 of Organic Law 9/2021, of 1 July, implementing Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.