COMPLIANCE BY DESIGN

# 72 Compliance by Design

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**La compliance n'est pas un département, c'est un comportement. Tandis que le business s'accélère et se digitalise, la *compliance by design* (CBD) est la clef : intégrer et coder la compliance dans la stratégie, la technologie, le produit. La CBD amorce 5 (r)évolutions : gouvernance, substance, efficience, responsabilité et *sandboxing*. La plus grande innovation en compliance sera d'assurer la compliance de l'innovation, son humanité.**

## 1. Why and Why Care?

Compliance is not a department, it is a *behaviour*. Hence the fortunate and urgent shift from paper compliance to behaviour compliance. Behaviour has so far meant behaviour of *humans*: what people do, how people behave. How to prevent a cartel when talking with competitors? How to mitigate money laundering risks in financial transactions? How to respect data protection when sending marketing emails? How to avoid corruption when inviting an official to lunch? How to ensure cybersecurity when employees download apps? How to prevent coerced work in countries of operation where human rights are not on the agenda? All that is fundamental.

Yet, it misses a key of the compliance puzzle: how other *critical business factors* - strategy, technology and products - come to existence and *behave*. Business is going faster and digital. Embedding compliance into the company's very strategy, technology and product becomes key to ensuring they are human-centric. That is *compliance by design* (CBD). To ensure that non-human factors never become inhuman. To ensure human centricity in a modern, fast-paced, digital world. CBD is everyone's biggest opportunity to reconcile business, technology, law and values.

In fact, what is the point of investing millions in break-through technology or strategy - such as automated stock management, public service software, autonomous vehicles, real-time pricing algorithm, drones for package delivery, defence or medical checks - if soon after one realises that it entails discrimination, privacy violations, safety or death risks, anti-competitive or fraudulous behaviour? The rationale is common-sense: there is no sustainable business, trustworthy reputation, smart investment or responsible innovation without compliance by design.

Put simply, the biggest innovation in compliance will be to ensure compliance of innovation.

## 2. Compliance by Design: 5 (r)evolutions

A. - **How and when:** a shift in vision and governance.
B. - **Compliance with what:** breaking silos and the black box.
C. - **Bring efficiencies:** the value of synergy and consistency.
D. - **The responsibility shift:** from liability to accountability.
E. - **The new relationship:** public-private holistic sandboxing.

### A. - How and When to Do It?

Today's drama revolves around one mistaken idea: "*innovate and strategise first, bother with compliance later*". That may be the result of compliance being presented as an extra layer, a piece of paper, unsuited for purpose, or a business burden. When

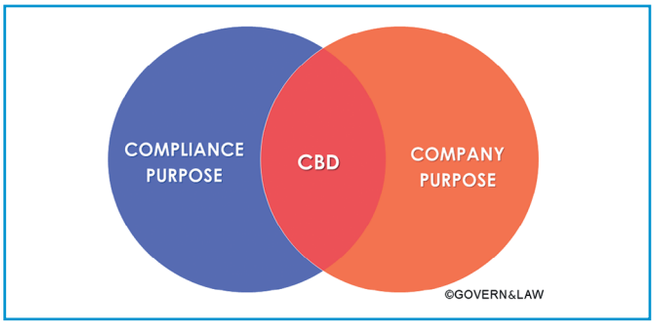
well done, compliance, especially by design, is a business and innovation enabler.

Strategically, CBD requires to involve compliance intelligence higher and earlier: higher in the company's strategy, earlier in the project development and programming.

Operationally, CBD comes with having the right compliance people, at the right table, at the right time, asking the right questions, and addressing them, to maximise compliance of the output in and of itself. How ready are compliance experts to sit at the innovation and techy table? How willing are business managers and engineers to make compliance intelligence part of the DNA of their decision-making and coding? We can testify to hearing often: "*Why didn't we hear this question earlier? We would have designed differently*".

Compliance by design brings along virtuous shifts in behaviour and governance:
- From compliance experts to compliance reflexes.
- From compliance as a support function to compliance as a core function and everyone's business.
- Breaking or bridging functional silos (e.g. R&D, legal, sales, management, IT) for effective interdisciplinarity.

For everyone to care about embedding compliance in their strategy, technology, projects and products, linking the business purpose and the compliance purpose is essential.




## B. - Compliance with What?

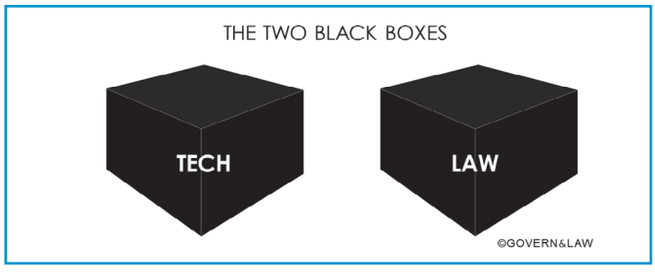
Clarifying the substantive magnitude of compliance is critical to achieving and measuring any success. Two challenges are immanent in the substantive compliance world: the specialty syndrome and the black box.

### 1° The Specialty Syndrome

When going for a *health* check, how comfortable are you if only your lungs get checked? Why not the heart, the brain, your sports and eating habits? Same with *compliance*. Can a company comfortably claim it is compliant, if it covers only a silo or two? Compliance experts and enforcers focus on their own specialty, so compliance is limited to their silo: data protection compliance / antitrust compliance / anti-corruption compliance / anti-fraud compliance / embargo compliance / climate compliance. As a result, the scope of compliance tends to be too narrow or too siloed, preventing trustworthy health checks and benchmarking.

### 2° The Black Box

Laws and ethics are like technology: a black box. "*Everyone talks about compliance, no one knows what's included*". There are so many laws, ethics guidelines and case law applicable to businesses and innovation that those who do care about holistic compliance would be at odds grasping the essence of what ought to be cared about in any strategy or technology. The challenge is acute not only for businesses but also for law and ethics makers.




### 3° Compliance by Design Addresses the Specialty Syndrome and the Black Box

First, CBD is pragmatic: it prompts to clarify and to consolidate upfront the substantive scope of compliance, for it to be *embeddable*. In practice, once embedded and coded (e.g. in an algorithm or a deployed strategy), it can prove technically or financially unfeasible to go back and do it all over again for each compliance silo. Here is a typical issue in traditional siloed compliance: "*we embedded the GDPR but we did not know about antitrust*". To be embeddable, the substantive scope of compliance must be *intelligible*: first, try to map all relevant rules (from black box to glass box). Rules shall include hard law (binding and democratic) and may include soft law and ethics (CBD may be integrity and ethics by design). Second, out of all applicable rules, can you craft, ideally in one page, the checkpoints that shall always be accounted for in compliance? That is the box essence. One may now take it to the engineering room for integration.

Second, CBD generates a common denominator allowing for trustworthy internal health checks but also for external benchmarking across companies, technologies, industries and countries. Alongside indicators of technology readiness (TRL) or sustainability performance (SDG), time seems ripe for CBD readiness levels. CBD on common grounds becomes a public factor of trust, attractiveness and competitiveness.

## C. - Stop Waste, Bring Efficiencies

The compliance maturity level of an organisation is revealed by how it depicts compliance: as a cost, an investment or an

asset. Compliance by design allows to invest in what matters, to bring value and efficiencies in everyone's interest.

CBD facilitates the identification of *prima facie* inconsistencies, often missed in siloed compliance. When embedding compliance in a strategy or technology, contradictions become obvious: e.g. minimise data under GDPR vs. maximise data under KYC; collective boycott can fight corruption vs. violate antitrust; profiling people could maximise safety vs. violate non-discrimination. CBD experience calls naturally to resolve potential contradictions, to spot red zones, to map risks meaningfully, to code balancing and relevant choice criteria. That is where CBD stimulates business intelligence, human centricity and innovation explainability.

CBD further cuts redundancies by streamlining various compliance goals and fields. Substantive wrongdoings vary (killing differs from a cartel which differs from a bribe) but compliance drivers are similar: awareness, due diligence, risk mapping, detection, mitigation, remediation. Consider an app aimed to be compliant by design: the developer might fall asleep if trained in every compliance field and, worse, none of it might be factored in the app itself. In CBD, multifocal compliance is discussed and tested upfront, leading to functionalities (e.g. risk detection) designed to work for several compliance fields. That is where CBD generates synergies.

### D. - From Liability to Accountability

Traditional compliance arose from fear of *liability*. That is when the wrongdoing or harm has occurred, someone is held liable and subject to sanctions and reparation. In today's world, the wrongdoing and harm have the same features as innovation: wider, deeper, faster. The wrongdoing may even be automated and autonomous with artificial intelligence. In that context, the liability paradigm may be too little, too late, and it fails to incentivise compliance as much as it used to.

That is why the biggest opportunity lies in *accountability*. That is to account and be answerable for someone or something, for their actions and decisions, in light of given standards, irrespective of a harm occurrence. Accountability implies careful scoping, thinking and designing towards explainability and answerability. That is exactly what compliance by design fosters. Isn't it more crucial and beneficial for a business to care and be able to show how its strategy and product embeds core compliance goals, than to wait for an accident to strike?

### E. - Holistic Sandboxing

Where a strategy or innovation carries many promises (better life, health, comfort...) but entails serious risks too (killing, hurting, intruding, excluding...), should we give up on innovation or take the risks? If risks are taken, how to mitigate and balance them? Who is legitimate to make the choice and in whose interest? Compliance choices may put a burden (and power) on the business that in fact belongs to or should be shared by society and government.

Sharing the burden of compliance dilemmas is in both business and government's interest, *a fortiori* when choices are embedded or automated. Most businesses are willing not to bear the burden alone, while most enforcement authorities are willing to learn more about the challenging world of day-to-day compliance decision-making and programming.

In 2020, who could businesses and innovation teams *viably and reliably* turn to when faced with a compliance dilemma? Going to each siloed authority, in each country of activity, is neither viable nor reliable.

Public-private sandboxing for CBD is a solution. Where a promising innovation cannot be wholly compliant, a holistic sandbox authority could offer businesses, innovators and compliance advisors a safe room. It would frame and allow a sandbox within which innovation and compliance limits may be tested and the benefit/risk ratio concretely assessed. It would altogether sharpen authorities' compliance intelligence in the real world. To be viable and reliable, a holistic sandboxing authority shall be one-stop, interdisciplinary (e.g. human rights, anti-corruption, anti-fraud, antitrust, climate, cybersecurity, data protection), fit for collaboration and democratically legitimate. Holistic sandboxing for CBD is positively linking society, business and government.

## 3. Conclusion

Compliance by design will be the main driver and benchmarker of effective compliance in today's world. It means much more than compliance. CBD engineers the interoperability of business, technology, law and values. It spurs humanity, trust and explainability within innovation. A company offering a product that is compliant by design has a special competitive advantage: it creates value with values. It is profitably human.

Ultimately, compliance by design is a powerful opportunity for business and innovation to be *human by design.*

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