

# Contents

**Summary** .....5

**Introduction**.....9

**Main Aspects of the Book *Compliance Jurisdictionalisation***.....11

MARIE-ANNE FRISON-ROCHE

Chapter I. The Company established Prosecutor and Judge  
of itself by Compliance Law .....14

Chapter II. Procedural Law in Compliance Law .....23

Chapter III. Articulation between Compliance Law  
and International Arbitration .....28

Chapter IV. The Judge in Compliance Law .....31

**Reinforce the Judge and the Lawyer to Impose  
Compliance Law as a characteristic of the Rule of Law** .....39

MARIE-ANNE FRISON-ROCHE

I. Compliance: a *Toolbox* to make Judges unnecessary?.....41

A. The Judge and the Lawyer, by their very nature, useless  
in a well-done Compliance?.....41

B. Compliance by design: the dream of the useless Judge?.....44

1. A presentation of the ability of the algorithms to be  
sufficient to ensure compliance by the company  
and by the people for whom it is accountable  
to the applicable regulations .....44

2. The Judge, presented as a sign of dysfunction  
in the mechanical Compliance System .....48

C.	The emergence of the Deferred Prosecution Agreement and the French Judicial Public Interest Agreement, these technical embodiments of the introduction of conformity as a bifurcation in the road before the courts.....	50
1.	The French <i>CJJP</i> , an attempt to expel the Judge, a mechanism that has itself been widely criticised for having been designed for American Prosecutors and Judges, strangers to the continental legal culture.....	50
2.	A Prosecutor transformed into a Judge and the question of the office of the Validation Judge.....	53
II.	The linked and invaluable contribution of Judges and Lawyers to Compliance Law.....	56
A.	The duty of the Judge and the Lawyer to maintain Compliance Law as a characteristic of states governed by the Rule of Law .....	56
1.	Compliance, the hallmark of the Rule of Law.....	56
2.	Judge and Lawyer, consubstantial guardians of Compliance Law, characteristic of the Rule of Law .....	58
B.	The specific role of the Lawyer.....	61
1.	The Lawyer, present in the Compliance mechanisms which transform the company into a Judge.....	61
2.	The Lawyer, present to ensure that the rights of the defence are respected, and not just the adversarial principle, when the gathering of information potentially leads to the imposition of a penalty .....	62

## Chapter I

<b>THE COMPANY ESTABLISHED PROSECUTOR AND JUDGE OF ITSELF BY COMPLIANCE LAW .....</b>	<b>67</b>
---	-----------

<b>The “Judge-Judged.” Articulating Words and Things in the face of Conflicts of Interest.....</b>	<b>69</b>
--	-----------

**MARIE-ANNE FRISON-ROCHE**

Prerequisite: bearing in mind three principles for implementing the appropriate legal regime for the <i>Judge-Judged</i> .....	71
--	----

I.	Unmasking Companies that claim not to be “Prosecutors” or “Judges” and subjecting them to Procedural constraints .....	76
A.	The confusion of roles “imposed” by <i>Ex-Ante</i> Compliance Law .....	77
1.	The legal obligation to carry out investigations, risk assessments, reporting and sanctions.....	77
2.	The proportion of externally imposed obligations and the proportion of the “responsible” economic operator’s own expression of will .....	78
B.	The <i>Ex Post</i> power of qualification by the Courts.....	79
1.	The Judge’s prerogative in qualification power, control of the relationship between Words and Things.....	79
2.	Integration into the jurisdictional model, placing Compliance Law in the continuity of Regulatory Law .....	80
II.	Enabling Companies to prosecute and judge themselves Impartially .....	83
	Prerequisite: renouncing the only sublime ethical heroism.....	84
A.	Putting in place all the legal distances between the judging Company and the Company being judged, without resorting to legal personality.....	85
1.	Importing the solution found in General Procedural Regulatory Law into General Procedural Compliance Law .....	85
2.	The need to establish functional autonomy for the prosecution and judgment activities without resorting to the concept of legal personality.....	87
B.	Organising the principle of Impartiality within Companies to distance opposing interests when prosecuting and judging at the same time.....	89
1.	The mirage of “impartial machines” .....	89
2.	Modelling internal organisations on the Regulatory Authorities example: creating functionally autonomous bodies .....	90
3.	The prospect of using human third parties: the central role of the Compliance Department and Lawyers.....	92

## **Reflections on the existence of companies' jurisprudence through Compliance matters** .....95

**CÉCILE GRANIER**

- I. A possible functional analogy.....98
  - A. Analogy in the process of rule emergence.....98
  - B. Analogy in the scope of the rule.....100
- II. An impossible organic analogy .....103
  - A. The theoretical opportunity to overcome the organic obstacle .....104
  - B. The practical opportunity to overcome the organic obstacle .....106

## **The jurisdictionalisation of reputation by platforms** .....109

**LUC-MARIE AUGAGNEUR**

- I. The algorithmic treatment of reputation: jurisdictionality without jurisdiction and without Law .....112
  - A. The simili-jurisdictional nature of platforms .....112
  - B. *Data is Law*, the normative power of data .....115
- II. The outline of an alternative and participatory jurisdiction .....118
  - A. Limited and illusory transparency and adversarial system.....118
  - B. A singular governance of jurisdictionality: the role of third parties.....122

## **The company judges itself: the Compliance function in the bank**.....127

**ALAIN BRUNEAU**

- I. What rules can the company establish in the absence of a public norm, and on what basis? .....130
  - A. The regulations require the implementation of measures that call on the company to judge third parties .....131
  - B. Consideration of reputational risk allows to refuse certain transactions.....133

II. The internal sanction mechanism established by Compliance Law in the banking industry.....	136
A. Internal sanctions or bans adopted by the compliance department.....	136
1. The compliance function is required by law to act as the company's prosecutor .....	137
2. The compliance function can act as the company's judge .....	138
B. Sanctions by the regulator and the judge.....	141

**Compliance law in the construction industry and the contradictions, impossibilities and deadlocks that companies face** .....147  
**JEAN-MARC COULON**

**Compliance in Companies: The Statutes of the Process**.....155  
**CHRISTOPHE LAPP**

I. The company's processes: the constrained making of the legal rule .....	156
II. Corporate processes: conformism and disempowerment.....	161

**The Legal Nature of the Facebook "Supreme Court"** .....167  
**JEREMY HEYMAN**

I. Identification.....	170
A. Available categories.....	171
B. Qualification retained .....	174
II. Questions .....	179
A. Legitimacy.....	179
B. Authority .....	181

**Internal investigations within companies** .....183  
**DAPHNÉ LATOUR**

I. When and for what main reasons may a company have to open an internal investigation? .....	185
---	-----

A. Mandatory internal investigations.....	188
B. Recommended internal investigations.....	189
II. What are the risks incurred by a company carrying out an internal investigation and how can it protect itself against them?.....	192
A. Specific risks inherent to the status of “self-prosecutor” and “party,” both shouldered by the company during an internal investigation .....	193
1. The risk of destruction or alteration of evidence .....	193
2. The risk of a conflict of interest.....	194
B. Risks, particularly criminal, incurred by the company for violation of its employees’ rights.....	195
1. The risk of violating the substantive rights of the employee.....	195
2. The risk of violating the employee’s procedural rights .....	197

## **Shaping the Company through Negotiated Criminal Justice Agreements. French Perspective.....**

**ALEXIS BAVITOT**

I. Shaping the facts.....	209
II. Shaping the prosecution.....	211
III. Shaping the agreement.....	213

## **Vigilance, being a judge and not judge.....**

**SAMIR MERABET**

I. Nomenclature of due diligence .....	218
A. Negative <i>vigilance</i> : identifying a risk.....	218
B. Positive <i>vigilance</i> : neutralising a risk .....	221
II. Vigilance control.....	223
A. The value of monitoring.....	224
B. The scope of control.....	225

**Chapter II**

**PROCEDURAL LAW IN COMPLIANCE LAW** .....229

**Procedural Principles in Compliance Law** .....231

NICOLAS CAYROL

- I. On the legitimacy of procedural principles in Compliance Law .....236
- II. The nature of compliance litigation .....238
- III. Responsibilisation trials.....240

**Compliance Law, a New Guiding Principle for the Trial?** .....245

FRANÇOIS ANCEL

- I. The door open to guiding principles: the purposes of compliance, the purpose of the trial .....246
  - A. The purposes of compliance.....246
  - B. The purpose of the trial.....247
- II. Practice open to the emergence of a procedural compliance principle.....248
  - A. The practice of procedural protocols.....248
  - B. The principles of loyalty, coherence (estoppel), and efficiency: a variation of a procedural compliance principle? ..... 249

**Privilege Lessons from the U.S.**.....251

BRYAN SILLAMAN

- I. Thesis.....251
- II. The U.S. Experience .....252
- III. France’s current path .....253

**Motivation and publicity of the decisions of the Restricted formation of the French Data Protection Authority (*Commission nationale de l’informatique et des libertés – CNIL*) in a Compliance Perspective**.....257

ALEXANDRE LINDEN

- I. Motivation .....257
- II. Publicity .....259

A. The public or non-public nature of the Restricted formation's meetings.....	259
B. Publicity of sanction decisions .....	259
C. Arrangements for publication .....	260

**The Difficulty for Compliance Enforcement Authorities to Comprehend the Rights of the Defence in Compliance Matters**.....263

**SOPHIE SCEMLA**

**DIANE PAILLOT DE MONTABERT**

I. The AFA's hybrid status undermines the rights of those subject to the "Sapin 2" law .....	265
A. The scope of AFA's guidelines undermines the presumption of innocence.....	265
B. AFA's conflicting missions undermine the effectiveness of its advisory role.....	266
II. The absence of procedural rules undermines the rights of controlled entities.....	267
III. The rights of the defence are not sufficiently protected in the context of the AFA's controls.....	268
A. The disclosure of documents is not sufficiently regulated.....	268
B. The absence of a procedural framework during the investigation and before the AFA Sanctions Committee .....	271

**Adjusting General Procedural Law to Compliance Law by the Nature of Things**.....273

**MARIE-ANNE FRISON-ROCHE**

I. The natural link between General Procedural Law and Compliance Law in the company .....	275
II. The transformation of the role of the Judge in cases involving Compliance Law.....	282



**Chapter III**

**ARTICULATION BETWEEN COMPLIANCE LAW AND INTERNATIONAL ARBITRATION .....287**

**Compliance and arbitration. An attempt at problematisation ... 289**  
**JEAN-BAPTISTE RACINE**

**What place is there for compliance in investment arbitration? . 305**  
**EDUARDO SILVA ROMERO**

**RAPHAELLE LEGRU**

- I. The traditional approach: monitoring compliance by verifying the legality of the investment .....307
- II. A more recent approach: monitoring compliance by verifying the existence of a “social license to operate” .....311
- III. A new approach: the inclusion of human rights and environmental protections in bilateral investment treaties ....314

**The arbitrator’s position on compliance .....319**  
**MATHIAS AUDIT**

- I. Identification of a compliance obligation.....321
  - A. Autonomy of the compliance obligation .....322
  - B. Source of the compliance obligation .....325
- II. Breach of a compliance obligation .....328
  - A. Conformity with the arbitration mission.....328
  - B. The sanction of non-compliance .....330

**The objectives of compliance confronted with the actors of arbitration .....335**

**ELIE KLEIMAN**

- I. Arbitration and its actors are overtaken by compliance.....337
  - A. The legitimacy of international arbitration as the preferred method of resolution of international trade disputes requires visible and effective self-regulation by its players, who operate in a globalised market.....337

1. Arbitration as the preferred method for resolving international trade disputes .....	337
2. Spontaneous self-regulation in the global international arbitration market.....	339
3. The visibility and effectiveness of self-regulation in international arbitration.....	340
B. The corruption exception: compliance in the judicial review of the arbitral award's conformity with international public policy by the Paris Court of Appeal.....	342
1. The context: judicial review of arbitral awards for inconsistency with international public policy due to corruption risk.....	342
2. The tools borrowed from compliance: the evidentiary method known as <i>faisceau d'indices</i> .....	348
II. Arbitration takes over the adjudication of commercial disputes arising from compliance .....	350
A. Compliance is as an arbitrable matter .....	350
1. The impact of French case law on consistency with international public policy.....	350
2. The powers of arbitration confronted with compliance and the violations it seeks to prevent.....	352
B. Arbitration and disputes arising from the compliance market ...	354
1. Compliance, a new business for arbitration players.....	354
2. Transitioning from confrontation to collaboration.....	354

## Chapter IV

### THE JUDGE IN COMPLIANCE LAW .....

357

#### The Judge, the Compliance Obligation and the Company.

#### The Compliance Evidence System .....

359

MARIE-ANNE FRISON-ROCHE

I. Pre-requisite: situating Proof and Compliance in relation to each other.....	362
---	-----

A. The basis: the Evidentiary Square.....	362
B. The head-on collision between Evidence principles and Compliance, defined as the obligation to demonstrate its conformity with all applicable regulations .....	372
II. Objects of proof specific to Compliance Law: structural mechanisms and best practices expected.....	376
A. Proving that the required structural organisations have been put in place to achieve the Monumental Goals .....	376
B. Demonstrating the best efforts to achieve behaviours that concretise Monumental Goals.....	379
III. Who bears the Burden of Proof in Compliance Law?.....	383
A. The burden of proof on the Company in meeting its legal Compliance Obligations.....	384
B. The Evidentiary Dialectic when the fact, which is the subject of evidence, may give rise to sanctions.....	389
IV. Relevant Means of Proof in Compliance Law.....	391
V. Pre-constitution of Evidence, Mirror of the <i>Ex-Ante</i> Nature of Compliance Law .....	393

## **The application of compliance standards by European Union judges**.....397

**JULIETTE MOREL-MAROGER**

I. Challenging the validity of compliance standards before the European judges .....	399
A. The action for annulment.....	401
B. The preliminary ruling.....	402
II. The role of the EU judge in the application of compliance standards .....	403
A. The application of compliance standards by EU judges.....	404
B. The interpretation of compliance standards by European Union judges.....	405

<b>A single judge in the event of an international breach of compliance obligations?</b> .....	409
<b>SOPHIE SCHILLER</b>	
I. Possible grounds .....	412
A. European text.....	412
B. International text .....	415
II. Difficulties of application in compliance .....	417
A. General procedural rules.....	417
B. Characteristics of the situations in question .....	420
<b>Compliance and Judge of the Law</b> .....	423
<b>OLIVIER DOUVRELEUR</b>	
<b>The Administrative Judge and Compliance</b> .....	433
<b>FABIEN RAYNAUD</b>	
<b>Some Reflections on Compliance and the European Court of Human Rights</b> .....	441
<b>ERIK WENNERSTRÖM</b>	
I. Introduction .....	441
II. Compliance and the ECHR.....	443
III. Oversight, Execution and Compliance .....	445
IV. Compliance and Case-law Developments in Relevant Areas.....	446
V. Concluding Remarks.....	450