

Bartosz Makowicz (ed.)

# Global Ethics, Compliance & Integrity

Yearbook 2018

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# Global Ethics, Compliance & Integrity

Yearbook 2018

Edited by

Prof. Dr. Bartosz Makowicz

Authors

Lino Arboleda; Leas Bachatene; Pierre-Antoine Badoz; Elodie Beth; Dr. Sophie Luise Bings; Nicola Bonucci; Philip Brennan; Tom Brown; Dr. Daniel Lucien Bühler; Henry Chen; Alex Conesa-Pietscheck; Prof. Dr. hab. Wiesław Czyżowicz; Geert Delrue; Ousmane Diagana; Dr. Oskar Filipowski; Prof. Dr. Peter Fissene-wert; Cynthia Gabriel; Marcin Gomoła; Christin Grothaus; Michael Kayser; Shahzad Khan; Gabriel Kurt; Ingrid Leonard; Prof. Dr. Bartosz Makowicz; Dr. Rainer Markfort; Dr. Klaus Moosmayer; Noor Naqschbandi; Dr. Barbara Neiger; Dr. Raluca-Isabela Oprişiu; Will Phua; Meinhard Remberg; Prof. Dr. Han-Kyun Rho; Prof. Dr. iur. Achim Rogmann (LLM); Helena Sjöholm; Marcin Szczepański; Dr. Tobias Teicke; Thomas Thomas; Christine Uriarte; Anatoly Yakorev; Vincent Pepito F. Yambao; Jose F. Zamarrigo; Deming Zhao; Liviana Zorzi; Nico Zwickler

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# List of authors

<b>Arboleda</b> Lino	GE Global Operations, Singapore
<b>Bachatene</b> Leas	ethiXbase, Singapore
<b>Badoz</b> Pierre-Antoine	Orange S.A., Paris, France
<b>Beth</b> Elodie	United Nations Development Programme, New York, United States of America
<b>Bings</b> Sophie Luise, Dr.	Deloitte Legal Rechtsanwaltsgesellschaft mbH, Düsseldorf, Germany
<b>Bonucci</b> Nicola	Organisation for Economic Cooperation and Development, Paris, France
<b>Brennan</b> Philip	Raiseaconcern Ltd., Straffan, Ireland
<b>Brown</b> Tom	Kaizen Compliance Solutions, London, United Kingdom.
<b>Bühr</b> Daniel Lucien, Dr.	Ethics and Compliance Switzerland, Bern, Switzerland
<b>Chen</b> Henry	The Compliance Reviews, Partner at Dentons, Beijing, China
<b>Conesa-Pietscheck</b> Alex	United Nations Development Programme, New York, United States of America
<b>Czyżowicz</b> Wiesław, Prof. Dr. hab.	Warsaw School of Economics, Warsaw, Poland.
<b>Delrue</b> Geert	Detective Commissioner, Brussel, Belgium.
<b>Diagana</b> Ousmane	World Bank, Washington D.C., United States of America
<b>Filipowski</b> Oskar, Dr.	KGHM Polska Miedz S.A., Lubin, Poland
<b>Fissenewert</b> Peter, Prof. Dr.	Buse Heberer Fromm Rechtsanwälte Steuerberater PartG mbB, Berlin, Germany
<b>Gabriel</b> Cynthia	The Center to Combat Corruption and Cronyism, Selangor, Malaysia
<b>Gomola</b> Marcin	T-Mobile Polska S.A., Warsaw, Poland
<b>Grothaus</b> Christin	Mahidol University, Bangkok, Thailand
<b>Kayser</b> Michael	Idox Compliance, Berlin, Germany

List of authors

<b>Khan</b> Shahzad	Mubadala Investment Company, Abu Dhabi, United Arab Emirates
<b>Kurt</b> Gabriel	AWB Rechtsanwalts-gesellschaft & AWB Steuerberatungsgesellschaft, Münster, Germany
<b>Leonard</b> Ingrid	National Crime Agency, London, United Kingdom
<b>Makowicz</b> Bartosz, Prof. Dr.	Viadrina Compliance Center, European University Viadrina, Frankfurt (Oder), Germany
<b>Markfort</b> Rainer, Dr.	DICO – Deutsches Institut für Compliance, Partner at Dentons Europe, Berlin, Germany
<b>Moosmayer</b> Klaus, Dr.	Siemens AG, Munich, Germany
<b>Naqschbandi</b> Noor	Alliance for Integrity, Berlin, Germany
<b>Neiger</b> Barbara, Dr.	neiger. C advisory, Wien, Austria
<b>Oprişiu</b> Raluca-Isabela, Dr.	STALFORT Legal. Tax. Audit, Sibiu, Romania
<b>Phua</b> Will	Thyssenkrupp, Singapore
<b>Remberg</b> Meinhard	DICO – Deutsches Institut für Compliance, SMS GmbH, Düsseldorf, Germany
<b>Rho</b> Han-Kyun, Prof. Dr.	International Anti-Corruption Academy, Laxenburg, Austria/Kookmin University, Seoul, Korea
<b>Rogmann</b> Achim, Prof. Dr. iur. LL.M.	Brunswick European Law School, Wolfenbüttel, Germany and Murdoch School of Law, Perth, Western Australia
<b>Sjöholm</b> Helena	Direndi AB, Lund, Sweden
<b>Szczepański</b> Marcin	Siemens Sp. z o.o, Warsaw, Poland
<b>Teicke</b> Tobias, Dr.	CMS Hasche Sigle Germany, Berlin, Germany
<b>Thomas</b> Thomas	ASEAN CSR Network, Singapore
<b>Uriarte</b> Christine	Organisation for Economic Cooperation and Development, Paris, France
<b>Yakorev</b> Anatoly	Center for Business Ethics & Compliance, Moscow, Russia
<b>Yambao</b> Vincent Pepito F.	Boehringer Ingelheim Singapore Pte., Ltd. as the Senior Compliance Manager for South East Asia and South Korea

List of authors

<b>Zamarriego</b> Jose F.	Farmaindustria, Madrid, Spain
<b>Zhao</b> Deming	Partner at HaoLiWen Partners, Beijing, China
<b>Zorzi</b> Liviana	United Nations Development Programme, New York, USA
<b>Zwikker</b> Nico	Compliance Associates, Apeldoorn, The Netherlands

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## A. Introduction

*Prof. Dr. Bartosz Makowicz*

This first edition of the Yearbook of Global Ethics, Compliance and Integrity focusing on “Cross Cultural Compliance” is the result of a number of projects, various discussions, conferences, workshops and international congresses on Ethics, Compliance and Integrity. At these events, industry representatives (usually chief compliance officers) repeatedly complained about the considerable challenges they faced when attempting to implement internationally uniform and reliable compliance management systems (CMS) within a global organization or group structure. Certainly, methods and standards on how to determine and manage risks in individual countries do exist. However, social and cultural borders or foreign culture and values may make it difficult to ensure not only compliance but also the integrity of all members of an organization / corporation.

Yet why is all this necessary? What does compliance have to do with values, ethics, culture and integrity? There is only one answer: everything! Human beings are at the center of any CMS along with their culture and underlying values. Human culture and values are formed by experiences, education, environment, religion and many other factors: these same values and culture determine whether a bribe has been accepted, environmental standards breached, interest rates manipulated or customers deceived. In all cases of non-compliance, values and the human culture therefore play a crucial role. In addition, human conduct and the values directing it are the subject of ethics, a branch of philosophy. A CMS cannot function effectively without a sound understanding of ethics and thereby the values and culture that prevail in the area where it operates. Is it not enough then for people to internalise the culture and underlying values? No! They must also ensure that their outward acts consistently accord with these values. It is at this point that integrity comes into play. Compliance and integrity may therefore be regarded as two sides of the same coin, whereas ethics represents a specialist discipline within these two areas. This explains the first of the two approaches in this work “Ethics, Compliance and Integrity”. The boundaries between these three terms are porous and complement each other.

The second approach deals with challenges where the boundaries are somewhat clearer. Nowadays, when national economies are so closely interwoven, it would be wrong to adopt a single approach to Ethics, Compliance and Integrity; rather developments should be viewed from a global perspective. Once a CMS has been implemented in one part of the organization or extended to a part located in a different culture, one must consider the differing ethical and moral rules, the culture and the values of its inhabitants. Otherwise, the system will be re-

## A. Introduction

jected and produce nothing more than undesirable side-effects, thereby resulting in attempts at evasion.

This work takes up the challenge of creating a constantly updated compendium of expert knowledge on Ethics, Compliance and Integrity. The contributions contained in this first edition have been produced by over 44 experts from different continents and countries, diverse cultures and corners of the world with the common aim of promoting Ethics, Compliance and Integrity by means of effective and efficient CMS. They share valuable knowledge, techniques, experience, practice and methods. In this book, you will find practical contributions divided into seven chapters (besides this brief introduction). These have been produced as part of the “Cross Cultural Compliance” series of conferences which have taken place in Frankfurt, Bangkok and Hamburg over the past three years. The authors are not just lawyers but also renowned economists, philosophers, psychologists, communication experts, practitioners, consultants, public officials and other experts. This is the only way of doing justice to the interdisciplinary dimension of Ethics, Compliance and Integrity.

Starting with this introduction (Chapter A), several contributions deal with the future of compliance (Chapter B). The main part of the book (Chapter C) investigates challenges in the fields of compliance and integrity which arise in respect of the cross-border implementation of CMS. We then focus on the most common risks for global compliance in the field of corruption (Chapter D). Despite sophisticated anti-corruption systems, the preventive instruments of international organizations and the efforts made by the international community in this field, corruption still remains a wide-ranging phenomenon in many states. CMS standards (Chapter E), attempt to take account of cross-border differences and diverse cultures, on the one hand, and the efforts towards creating uniform solutions on the other. The last three chapters deal with more practical subjects: namely, the preferred methods of CMS (Chapter F), especially intercultural communication and whistle-blowing systems, which are heavily influenced by cultural aspects (Chapter G). The final chapter concerns Ethics, Compliance and Integrity in international trade (Chapter H).

We have therefore adopted in this book a rounded and self-contained concept which nevertheless retains a degree of flexibility. We will expand and update the work at regular intervals. We herewith invite interested authors and experts from the world of Ethics, Compliance and Integrity to submit their proposals for contributions. We will also ensure that similar works feature high-quality contributions in order to promote the development of Ethics, Compliance and Integrity in the long term.

It has been an honor and pleasure to have worked with the hundred or so contributors to this work. Thanks are due not only to the numerous authors but also to

the proof-reader Christopher Dallimore, the publisher and its team, translators and friends, my team from the Viadrina Compliance Center and all partners, sponsors and supporters who have enthusiastically helped with organizing the Viadrina Compliance Congresses! In particular, I would like to thank the Center “B/Orders In Motion” at the European University Viadrina Frankfurt (Oder) for providing financial support for the “Cross Cultural Compliance” project which gave rise to the contributions in this work with its long-lasting and sustainable results!

I am delighted that this project given rise to a global community of so many distinguished experts from all over the world and sincerely hope that this work will serve to promote the interdisciplinary and global research and practice of Ethics, Compliance and Integrity from the perspective of international organizations in the long term.

Professor Bartosz Makowicz  
Frankfurt (Oder), 21<sup>st</sup> November 2018

## B. Challenges and Future of Compliance

### I. The future of Compliance

*Dr. Rainer Markfort*

The 4th Viadrina Compliance Congress brings together experts from many different countries to discuss ideas on what the future of compliance will bring and what we can do to contribute to its development in our communities. Before looking ahead, we should start with an analysis of the status quo even though, at first glance, this may not seem very encouraging. By gaining a clear view of where we come from, we can better understand the deficiencies we encounter today (1.). Today, numerous business and social factors are driving the need for a more sophisticated approach to compliance. We must be patient as this evolution will take time (2.). However, only through our own initiative and commitment will we ensure the prospects of success for compliance in the future (3.)

#### 1. Where does compliance stand today?

In Germany, compliance first emerged in 2005. Before then, no one had heard the word “compliance” except bankers and doctors. Daimler then became the subject of investigation by the US Department of Justice (DOJ) and the Stock Exchange Commission (SEC). One year later, the same happened to Siemens and since then a similar fate has befallen a series of large and small companies. Scandal after scandal followed and there were times when almost every day the newspapers were reporting about corruption, fraud, breach of antitrust regulations, manipulation of interest rates and other economic crimes taking place within many respected companies.

Shockwaves rippled through the German Automobile Club ADAC (by far the largest NGO in Germany in terms of members) when manipulations of inquiries and fraud came to light. The same happened to FIFA, the only difference being that many had harbored suspicions regarding FIFA officials whereas the German Automobile Club was a somewhat ‘holy’ institution.

The amounts that corporations were paying in penalties consistently increased and society became used to reading about fines in the billions being imposed. At the same time, the reputation of these corporations were destroyed. Once upon a time, the name “Deutsche Bank” was synonymous with strength and glory. But what is left now?

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A whole industry is constantly demonstrating what happens when compliance merely means applying the rules set by the regulator. The banking sector claims that it has practiced compliance for over 20 years. However, a closer look shows that this is only true in specific areas. Some of the biggest scandals in the past, which led to enormous penalties, have occurred in banks. So it appears there has been no value-based compliance for a long time and this may still be true today.

Today, many of Germany's large corporations have established compliance organizations, appointed compliance officers, implemented anti-corruption and anti-trust policies and trained their employees accordingly. Some of them did so after they experienced corruption and other criminal scandals and were forced to act owing to the pressure of investigative authorities and the public debate. Astute companies were quick to take these measures in order to avoid such situations.

After the initial phase of corporations tackling compliance, a big German corporation was repeatedly fined for breaching anti-trust rules. It responded by implementing a state-of-the-art Compliance Management System. This was one of the first tested by external auditors according to IDW PS 980, a newly developed standard. The accountants certified the Compliance Management System as being adequate, implemented, and effective. It may therefore be surprising to learn that this same corporation was again subjected to high fines owing to a new breach of anti-trust rules! How could this happen? Then it was announced that the board member responsible for legal matters and compliance had to quit his job for a personal breach of the compliance rules. This case clearly demonstrates that compliance requires more than policies and procedures.

It does appear surprising that compliance scandals happen again and again. Did the compliance function fail to achieve its aims? Were there deficiencies in the company's policies or training? In view of these examples, we may have to admit that compliance is still in its infancy and, in this sense, needs time to develop.

### **2. Does compliance have a future?**

Quite a few people are of the opinion that compliance is just hype and that it will fade away. The burden of compliance bureaucracy could endanger and challenge a company's competitiveness. Some argue that, in most countries of the world, business does not work without bribes and it is not the company's responsibility to make the world a better place to live.

A keynote speaker is not a prophet but he may dare a prognosis: Compliance has a future and will not vanish! The reason is that, today, compliance is no

longer simply an issue between the authorities on the one hand and corporations on the other. Compliance is far more than this because public opinion has changed dramatically in the past years.

Twenty years ago, tax fraud was viewed as a trivial offence. Bribery and corruption, especially in foreign countries, was a legitimate means of obtaining business. In Germany and other countries bribes were even tax deductible. The biggest mistake in breaking anti-trust rules was to be seen to have been caught. Today, this is different: penalties and damages have increased as has the pressure resulting from investigations. Most of all, however, the corporation's reputation suffers to such an extent that it influences the value of products and the company as a whole. Here, we see that public opinion has a really dramatic impact which leads to change.

Back in the 70s or 80s, the laws for the protection of the environment were tightened with the support of a strong social movement. At that time, a breach of environmental laws was viewed as a trivial offence, at least within the business community. Some entrepreneurs ignored the stricter rules and argued that following these rules would endanger their business and that they were responsible for creating jobs in society. Today, nobody would dare to suggest that environmental crime is a trifling affair.

One can therefore predict that compliance will undergo a comparable evolution and, for this reason, has a future. How long will it take? Probably one generation of managers. Recently, a study showed that managers' business attitudes are mainly influenced by their experiences during their first years in business. This finding may not be all that surprising. However, it does show that we must be patient: it may be difficult to convince today's director that corruption is evil. When this director was a young sales person early in his career, he might have used petty cash to obtain business. However, a young business person today, who has gained his first business experience against the backdrop of compliance scandals and internal investigations, will certainly have a different attitude when he becomes a manager or director.

### **3. How can we improve the prospects of compliance?**

Compliance must become attractive! Compliance must add value to those who run the business and make profits for their company. Compliance should support and promote business and not hinder it. However, compliance is still rarely viewed in this way.

Today, most managers understand that they may be held liable for the misconduct of their employees. However, they may still claim that in foreign markets they could lose business to competitors who are less rigorous with regard to



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compliance. Sales persons and people from procurement departments are unhappy about the amount of training and e-learning. They are annoyed and frustrated about having to check company policies on gifts and hospitality when they want to invite a business partner for lunch. They blame compliance for the bureaucratic hurdles they have to overcome before they can start business with a new partner. So what can we do?

Let's look at the example of third party checks, often referred to as "Business Partner Due Diligence". For business, the integrity check is not the most important thing when starting a new relationship. For people on the front line, it is more important to understand whether a new business partner will be able to deliver quality and whether he has good financial standing so that he might survive a longer business relationship or a challenging project. Now, if the Compliance Department were able to provide exactly this information at this very early stage (i. e. immediately after the first contact has been made), all stakeholders would be fine. The company's decision-makers would have relevant information available for their business decisions and the Compliance Department would be involved at a very early stage and might be in a position to check for potential risks. Business and compliance working hand-in-hand are much better at supporting compliance than policies and controls.

When management takes compliance seriously and entrepreneurial decisions are guided by values then compliance can be a useful tool for good leadership. People are much more creative, effective and, ultimately, productive when they work in an environment that reflects their own values and principles. A management that uses compliance as a leadership tool need not fear liability owing to their employees breaking the law.

Finally, compliance will support competition. Brand, reputation, sustainability and corporate social responsibility are becoming increasingly important as they represent a substantial part of the added value of a product. In such an economic environment, compliance is a competitive advantage. In today's world, a product or company's value will, to a certain extent, be determined by good compliance. However, writing down a set of core values won't be enough. What we need (as in all other areas of business), is specific implementation, best practice, and support. At the same time, not every company has to reinvent the wheel. The wider stakeholders in the economy should come together to establish common rules for good business.

This was exactly the idea and goal when, in November 2012, German corporations, university professors, accounting and law firms took the initiative and founded the German Institute for Compliance, DICO. Today, DICO has more than 200 members, more than half of which are corporations from all sectors and industries. Over 200 individuals are personally engaged in six committees

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and 11 working groups. They discuss and develop guidelines, working papers and training materials on various topics such as business partner compliance, internal investigations, qualifications, compliance certificates and quality management. Other working groups cover healthcare compliance, data privacy, anti-trust and export control. They formulate opinions and develop proposals for legal initiatives. By this means, DICO protects the stakeholder interests to avoid bureaucratic and excessive laws and regulations. On the other hand, DICO members can rely on proposals and models that they have developed collaboratively.

This is the best way to ensure compliance. We are taking the initiative, developing our own ideas and not waiting for the legislator to intervene. Let us take compliance into our own hands, work together to further its development and improve compliance's prospects of success in the future.

## II. Some Challenges for Cross-Border Compliance Across Europe

*Pierre-Antoine Badoz*

Orange is a telecom operator and services provider formerly known as “France Telecom”, the French incumbent. Since its creation, it has widely expanded geographically and now has a large international footprint. In Europe, it provides mass market telecom services in France, Belgium, Luxembourg, Moldova, Poland, Romania, Slovakia and Spain. In Africa and the Middle East, it offers services for mass market customers in 21 countries from Egypt to Ivory Coast, Jordan, Madagascar, Morocco and Senegal, to name but a few. Orange also provides telecom services for business customers in more than 200 countries and territories through its Orange Business Services subsidiary: cross-border issues are a daily challenge at Orange!

Orange revenues totalled € 40 billion in 2015 with 156 thousand employees serving more than 252 million customers worldwide; 16 million of them are using “Orange Money”, a mobile wallet service.

Orange strategy focuses on the quality of networks and services and reasserts Orange’s international ambitions in Europe and MEA countries as well as its commitment to continued expansion in mobile financial services and “connected objects”.

Looking at Orange’s strategy and assets through the “lens of compliance” makes one realise that each of them involves specific ethics or compliance risks and challenges, as shown in figure 1 below.



Fig. 1: Our Ethical and Compliance challenges

## II. Some Challenges for Cross-Border Compliance Across Europe

Orange strategy is supported by business development and M&A activities with potentially “non-fully compliant” targets in countries which are not necessarily Transparency International’s leaders (according to its “Corruption Perception Index”). In addition, Orange’s expansion in the internet of things and mobile financial services may lead to personal data protection and security issues or banking compliance challenges with the focus on anti-money laundering and counter-financing terrorism (AML/CFT).

The Orange brand needs to be protected against reputational risks while stakeholders’ trust in its ethical values must be continuously reinforced along with the awareness of every Orange employee in sharing, promoting and acting in accordance with these values. Other “must haves” are training employees whose activities may expose them to corruption risks, knowing every customer as required by both banking and telecom regulations and making proper due diligence vis-à-vis intermediaries and partners.

Last but not least, its international footprint exposes Orange to an ever increasing number of national and international laws and regulations involving corruption, sanctions, anti-trust, privacy, technical requirements, tax, environmental issues, etc. It also exposes Orange to differences in “cultural approaches to the rule of law”.

Recently, various compliance issues concerning the telecom sectors have arisen, examples of which are listed below:

- Vimpelcom, the Russian operator is a subsidiary of Telenor, the Norwegian incumbent, which is listed on NASDAQ and registered in the Netherlands. In February 2016, it was fined \$795 million for having paid a \$114 million bribe to an Uzbekistani public agent in order to obtain its mobile license in Uzbekistan.
- A source reported that this action was “*a precursor for a much larger settlement coming down the line with TeliaSonera*” as Telia, the Swedish and Finnish incumbent, faces investigations by the US Department of Justice and Swedish prosecutors. It announced its withdrawal from all central Asian countries and suffered the dismissal of its CEO, CFO, legal director and several other top managers.
- Meanwhile, the American judiciary is working overtime with more than 80 ongoing FCPA investigations, five of which concern telecom operators or suppliers.
- In addition, the US is pragmatically investing part of the fines in recruiting FCPA prosecutors and FBI agents. In 2015, it also rewarded whistleblowers with more than \$ 54 million. In the same year, Ms Yates, Deputy Attorney-General of the DoJ wrote a famous memo requesting American prosecutors to focus their efforts on the personal liability of managers.

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- MTN, the South African telecom giant, was recently fined the equivalent of \$ 5 billion and recently reached agreement with Nigerian authorities to pay close to \$ 1.7 billion for “missing a deadline to disconnect unregistered customers”.

These examples show that compliance is indeed a very hot topic in telecoms!

At Orange, we therefore deployed a comprehensive compliance programme back in 2012, leveraging our previous anti-fraud and anti-corruption programmes. We used a “classical” 6-step approach to comply with the requirements of various guidelines (including the FCPA and the UKBA). Each of these steps raises very practical issues when deployed across our footprint, as can be seen from figure 2 below.

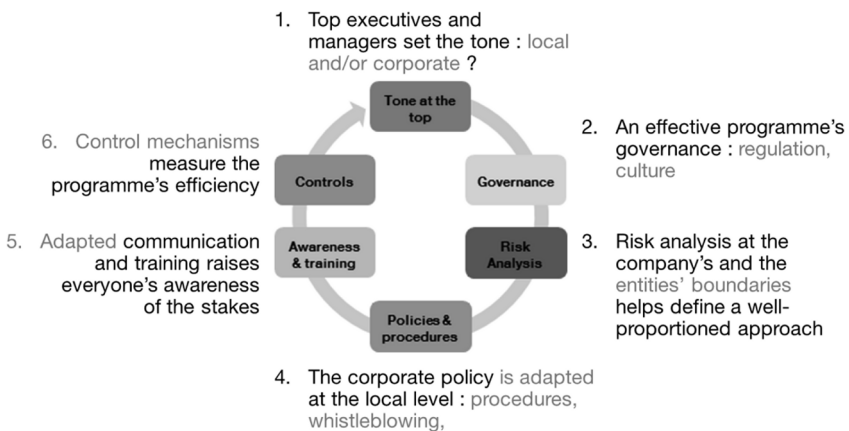


Fig. 2: Our Ethical and Compliance challenges

Let's take the example of step 1 “tone from the top”: to start with, there is the very practical language issue as 6 different languages (Flemish, French, Polish, Slovak, Spanish and Romanian) are spoken within our European Business-to-Customer footprint. This number more than doubles within our European Business-to-Business footprint and more than doubles once again within our worldwide footprint where many employees speak neither French nor English.

There is also the important issue of the person who carries the message: should it be the local CEO, the Division Executive Committee member or our Group CEO? The answer is not obvious, as the impact of the message is not necessarily commensurate with the speaker's position within the organisation as the following example shows.