Networks in Legal Organizations: On the Protection of Public Interest in Joint Regulation of Markets

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Florindo: Tu hai servito due padroni nel medesimo tempo?
Truffaldino: Sior si, mi ho fatto sta bravura. Son intrà in sto impegno senza pensarghe; m'ho volesto provar. Ho durà poco, è vero, ma almanco ho la gloria che nissun m'aveva ancora scoverto, se da per mi no me descovriva per l'amor de quella ragazza.

Il servitore di due padroni
Carlo Goldoni

Businesses of all kinds usually try as much as they can to participate in the regulation of their markets. They try to shape their opportunity structure, to structure their environment, and to uphold the social mechanisms allowing them to cooperate in an 'organizational society'. [1] At the inter-organizational level, at least two different sociological traditions deal with the issue of regulation of markets, stressing either the formal and often exogenous aspects of this regulation, or the informal and often endogenous character of self-regulation.

For the first tradition, a socio-legal one, exogenous regulation (see for example Ayres and Braithwaite, 1992; Hawkins and Thomas, 1984; Shapiro, 1984; Weait, 1993; Weaver, 1977) is provided by government agencies backed up by courts. These studies focus, for example, on the decision by government agencies to prosecute deviant companies. Such decisions are not obvious and they often come out of tradeoffs between official inspectors and company managers. This is especially the case when they face risks such as large-scale losses and layoffs, and sometimes bankruptcy, should the law be strictly enforced. The second tradition focuses on interfirm arrangements promoting self-regulation benefits for firms in their interorganizational transactions and more informal conflict resolution mechanisms. Precisely because litigation is costly, economic firms may sometimes prefer informal dispute resolution whenever possible, especially when they have long term continuing relationships (see for example Macaulay, 1963, 1986; Raub and Weesie, 1993, 2000; Rooks et al., 2000; Buskens et al., 2003). Here the focus is on pressures to conform by one organization on the other. Pressures are based on resource dependencies and reputation. Thus, each tradition focuses on a different kind of actor intervening in regulation: mainly the State and/or companies themselves – the latter sometimes through industry representatives or through selection of partners.

1 See about the 'organizational society' Reiss (1984), Coleman (1990), Perrow (1991), Presthus (1962). About the emergence of a new *lex mercatoria*, see Berger (1999), Djelic and Quack (2002), Dezalay and Garth (1996), Fligstein (2002), Flood (2001, 2002), Swedberg (2003), Volckart and Mangels (1999).

In reality, the two forms of regulation, or conflict resolution, systems combine in various ways. One example of combination is provided by Ayres and Braithwaite (1992) in their analysis of 'responsive self-regulation'. This analysis shows the existence of 'enforcement pyramids' that exist between State regulatory agencies and corporate actors. Such pyramids express the possibility, for industry representatives and for law enforcement, to escalate from persuasion to warning letters to civil penalties to criminal penalties to license suspension and revocation. Actors know that such enforcement pyramids exist. They know that each way of enforcing contracts is only one way among several others, and that an escalation can be triggered. This is why, in spite of the costs of litigation, firms do use formal institutional litigation both as plaintiffs and as defendant (Galanter and Epp, 1992; Dunworth and Rogers, 1996; Cheit and Gersen, 2000) and conflicts do follow the disputing pyramid transforming informal complaints into court filings and formal judiciary decisions (Felstiner et al., 1980).

Following the idea that the two forms of conflict resolution are connected, I further explore this connection. I identify two forms of 'joint' regulation or a combined regime of endogenous and exogenous conflict resolution in markets by looking at professions and consular courts. I use the label 'joint' because they represent regulation mechanisms that combine self-regulation and exogenous regulation. The combinations of the two can take many hybrid forms. The joint element in 'joint regulation' is thus defined as the coexistence of several sources of constraint, both external and internal, that weigh on the actors in charge of solving conflicts and enforcing rules. These actors can be identified as third parties when they sit in judgment and make decisions about how to solve conflicts related to market activities between a first and a second party. Saying that such third parties are constrained by external and internal forces is equivalent to saying that they have to deal with influences coming from various stakeholders in the conflict resolution process.

Thinking about joint regulation in those terms follows both an organizational and a broadly conceived organizational and structural approach to economic institutions (Lazega and Mounier, 2002, 2003), an approach in which network analysis is used to study systematically and empirically actors' resource interdependencies. Here I use these organizational and structural perspectives to contribute descriptively to the study of economic and legal institutions that represent a combination of exogenous and self-regulation of markets. On the basis of empirical network studies, I first criticise the usual solution in corporate law firms for solving the problem of a conflict of interest, namely Chinese walls within the law firm. Although I do not provide evidence of lack

of impartiality by corporate lawyers using such walls in specific cases, I describe ways in which the formal and informal organization of their practice raise unanswered questions about their ethics. A second application of network analysis concerns the commercial courts in France with their composition of organized business interests. Both applications have a common background, in the sense that the public interest is not served from above by State regulation but at the 'grass roots' level of the legal profession and organized business. I thus use the issue of conflicts of interests in corporate law services and in consular commercial courts to show one of the limitations of 'weak' joint regulation.

I try to provide evidence of the fact that reliance on the capacity of business to self-regulate through professionalization and consular institutions should be matched with renewed State and citizens' capacity to monitor more closely issues such as conflicts of interests, and thus with renewed capacity to sanction accordingly. I will argue that in strong market economies and 'organizational societies', in the context of loss of (direct and indirect) control of markets by the State, increasing the transparency of economic actions becomes, in my view, a public service.

Case One: Conflicts of interests in New England corporate law partnerships

The problem of conflicts of interest is a classical ethical preoccupation for many professions: for lawyers who represent successively or concurrently potentially competing clients; for medical doctors who, for instance, have to manage the transfer of organs, or own a laboratory in which they send their clients for medical tests; for industrial engineers and researchers who move from one employer to another and have to sign agreements preventing them from working for competition on the same matters for at least two to five years; for U.S. bankers who, for many years, were not allowed to underwrite securities. And so on: the problem looms large when conflicts of allegiance divide actors invested with some discretion and trust.

These professions have traditionally tried to deal with this problem by formulating codes of deontology that are meant to protect confidentiality and secrecy in the relationship between the professional and the client. However, in the 20th century the growth of organizations (both private and public) employing professionals and semi-professionals (law firms, accounting firms, hospitals, financial institutions), their increasing specialization, the mobility and flexibility of their members, all contributed to the need to define this problem in new ways and to design new measures to deal with it. One recent example is the case of Arthur Andersen, a global audit and consulting partnership (one of the Big Five in which many partners are also lawyers), that collapsed without a fight in the aftermath of the 'Enron scandal'. The so-called Chinese wall separating its accounting and consulting branches did not work ('had developed some gaping holes'). Revenues generated from Enron (a very large corporation brokering energy) on the consulting side were an incentive for partners on the audit side to help Enron camouflage its true financial condition.[2]

Here I take the case of conflicts of interests not in large multinational accounting firms, but in New England corporate law firms. I look at the self-regulatory solution to these problems that both kinds of firms have implemented, namely the above-mentioned Chinese walls. I describe the market for legal services in New England as I observed it at the beginning of the 1990's, as well as my research there, insisting on the contribution of a network study of one of these firms to understand the social discipline [3] that characterizes them, but also seems to prevent them from making weekly, costly, and unfriendly ethical decisions concerning conflicts of interests. This approach questions the efficiency of the Chinese walls solution to conflicts of interests and raises the issue of the capacity of the State to monitor markets for such services.

Multiple representation and self-regulation by the legal profession

In the case of the legal professions, self-regulation is a form of social control exercised on members by entities other than the State and its agencies. If we focus on lawyers, 'self' can be the profession (represented by a bar association, the law firm as an organization, and the individual lawyers themselves). I define conflict of interests as a problem stemming from multiple representation by a lawyer or a firm. For instance, take a fictitious New England firm, Spencer, Grace & Robbins: it receives legal work (insurance defense litigation against claimants) from two large insurance companies, Aetna insurance and ITT Hartford. ITT Hartford may want to sue Aetna insurance for alleged

2 'The Andersen team handling the Enron audit directly contravened the accounting methodology approved by Andersen's own specialists working in its Professional Standards Group' (U.S. *vs* Arthur Andersen).

3 By social discipline, I mean the social processes such as solidarity, control and regulation that are made possible by relational investments by members of a collective (Lazega and Mounier, 2002). This definition of social discipline goes beyond simple statements of embeddedness seeking to prove the economic efficiency of the existence of social ties, or 'social capital'. This approach identifies processes that are key to collective action, mainly exchanges of resources, control of commitment and oligarchic negotiation of 'precarious values' (Selznick, 1957; Lazega, 2001).

practices of unfair competition. At Spencer, Grace & Robbins, attorneys will have to choose which side they are on. They may not represent both firms on this matter. Especially for professions involved in adversarial practices, it is not entirely unsafe to assume that when lawyers have inside information (for instance on the other side), they may use it to protect the interests of the most lucrative client.[4]

Lawyers' mobility within the profession (modern career paths), the fact that many firms are multicity, the complexity of many financial transactions, and the likelihood of cross-ownership or payment in shares, all these factors increase the ethical difficulty of multiple representation. Conflicts can arise with former and with current clients. Technical conflicts are not so much interesting as the grey area of potential conflicts in which the firm would get too close to the appearance of impropriety to a former or a current client. At least for large law firms, this grey area has considerably increased in a generation because these firms run into themselves systematically, including because these conflicts are sometimes hard to uncover (Hazard, 1987, 1988), at least before it is 'too late'. It is important to remember that conflicts are imputed throughout the firm (the legal entity is the firm, and if a lawyer who is a partner in the firm is disqualified by the court for a conflict, the whole firm is disqualified).

With regard to this issue, the legal profession is divided between a purist attitude (mainly the scholars and the small firms) and a pragmatist attitude (mainly the large law firms). The large firms try to redefine and loosen the rules of ethics in their professional associations so that appearance of conflict will not be enough to disqualify a lawyer. Disqualification, the pragmatists say, should be justified only if the old client, or the other side, can establish that there is conspiracy.

Practically, before opening a file, a lawyer can check for conflicts by looking at whether other parties to the new matter are former clients. This is the 'adversity' check. Computers can do it in seconds. If it comes up blank, the lawyer is technically and legally safe. To simplify, one may say that purists are happy with this kind of technical check because it is 'politically' clear: if there is a potential conflict here, the purists say, the lawyer should refuse to open a file and take the new client on. But pragmatists are not happy with this simplistic solution (and for the time being, they are winning): if there is a potential conflict brewing there, the lawyer runs a second check, a 'matter' check to see whether the former and current matters are the same or substantially related. That is where pragmatists and purists really diverge.

4 Access to inside information through situations of conflict of interests may even be considered to be one explanation among many others for the economic and political influence of the legal professions in many countries (see for example Sellers, 1991).

The purists say that because conflicts are imputed throughout the firm, a conscientious lawyer would have to conduct these two checks for all former clients of every lawyer in the firm. In addition, they would have to do this usually before they open a file, i.e. before the full scope of the new matter is known, without really knowing the precise information to look for. With hundreds or thousands of lawyers in multicity and multinational firms, it becomes next to impossible. That more or less forces these firms to overlook many conflicts that they call 'theoretical'. So the purists' solution would necessarily set a limit to the growth of corporate law firms.

The pragmatists' answer to this stand is that they disclose[5] these potential matter conflicts, and that clients are often willing to waive conflict issues in most areas except litigation, or when there is a risk that the firm has special and sensitive inside knowledge about the company. Large clients are practical about this issue when it suits their interests: for instance sometimes joint representation cuts through problems, saves them money, and expedites the process. Some even assert that if they are going to be sued, they would rather have a working relationship with the lawyers on the other side.[6] The reason for which the clients are willing to waive conflict issues is related to the fact that the firm sets up a 'Chinese wall' between the lawyers who represent the potentially conflicting sides.

In effect, one of the means used by organizations to cope with conflicts of interest is the enforcement of a 'security system' concerning information flows. The key aspect of this security system consists in the regulation of intraorganizational communication that isolates employees from one another when they work on cases creating conflicts of interest. The employees are supposed not to communicate and therefore not to be able to betray the confidence of the organization's clients. It is this regulation of information flows that is sometimes called Chinese walls. It corresponds to a mobile internal compartmentalization of the organization. Organizations such as large American and European law firms who employ hundreds or thousands of lawyers, use computerized systems to isolate and compartmentalize their employees, thus providing a formal guarantee that access to confidential information does not occur (Hamermesh, 1986). This self-regulation, i.e. reliance on internal

5 It is difficult to study the 'decision to disclose' and the methods of disclosure, but there are many incentives not to disclose (just like for the decision to prosecute by inspectors enforcing external regulation, as shown by Hawkins, 1984).

6 One interesting ramification of this is that large law firms themselves incorporate the problem into their litigation tactics: they systematically use the question of conflicts as purely procedural attempts to disqualify the other side's representation (attempts that are sometimes punished as 'frivolous' by the judge).

organizational devices in order to protect clients' confidence, constitutes a recognized - but questioned - way of avoiding disqualification or clients' suspicion. The existence of these 'security systems' raises questions that have not yet been empirically answered: Are such internal boundaries efficient, and what are the conditions of this efficiency? Are organizations right to trust these 'security systems'? Can self-regulation provide the adequate guarantee against the loss of confidentiality? How safe is safe enough when communication systems are concerned, and for whom? Is the suspicion of external observers (the public, the authorities) justified?

The Chinese wall is thus the answer of the pragmatists to the purists, the answer that large law firms give to this ethical question of the matter check, and which is in itself an organizational answer (Morgan, 1987). This answer is based originally on Paragraph (b) of S.E.C. Rule 14e-3 which provides a 'safe-harbor' exclusion from the abstinence requirement for multi-service firms that adopt a Chinese wall. Thus brokers in a securities firm are permitted to trade stocks of companies that are fiduciary clients as long as the firm has implemented policies and procedures, reasonable under the circumstances, to insure that confidentiality is maintained. In the legal profession, this is called the screening solution, and it is used to try to keep the threat of disqualification and clients' suspicion under control. For instance, when a lawyer leaves a firm for another firm, the firm's conflicts do not travel with him/her if he/she is screened from participation in the particular matter giving rise to the conflict within his/her new firm. This screen is equivalent to a Chinese wall, or a 'Cone of silence'. It is important to large law firms that clients and judges believe in lawyers' respect for these Chinese walls.[7]

Research on six New England law partnerships

So the purists and the pragmatists disagree on the value of such a screening solution. There is no direct way of evaluating this method. I try to do so using an indirect approach: an organizational and structural approach in the New

7 It is not necessary to complexify too much here, but it is useful to mention that often the large clients do not buy the Chinese wall argument. They do so when it suits them. For instance, corporations identify what they call 'positional conflicts' as a reason to reject a firm as counsel. Large insurance companies do not use law firms that sue insurers. Conversely, one of the firms examined in this study protects its right to take in new business and be free from questions of conflicts by having, in their engagement letter signed by a new client, clauses giving the firm the option to be across the table in 'unrelated matters'. Again, the question becomes a question of informed consent: do most clients know what they are doing when they waive conflicts? The only advice they usually have on the matter is from the lawyer with the conflict. The extent to which all clients have to accept such a clause, however, remains unknown.

England State in which I conducted this study in the early 1990's, there were approximately ten medium-sized firms in a relatively small State. As most of the lawyers I interviewed admitted, conflicts of interests were everywhere, and managing partners or ethics committees had to make decisions regarding the gray area of conflicts as often as once to three times a week. Clients spread their business around, firms expanded and took on an increasingly broad range of businesses; so the likelihood that they would not be able to represent a client because of a conflict with another client was increasing. Some managing partners said that they were rejecting between one and three prospective clients a week because of a possible conflict with a current client. Most firms did not say anything.

At the time, there was enough business, and there were enough old clients willing to overlook dual representation. But managing partners anticipated the time when conflicts might prevent their firm from growing (in spite of built-in pressures to grow (Nelson, 1988; Flood, 1987; Galanter and Palay, 1991)). Some thought that there was room for only two to four large firms (with more than one hundred lawyers), not ten, unless the firms expand beyond the limits of the State.

This research was designed in two steps. A first step during which I interviewed 40 managing partners, department heads, lawyers with managerial responsibilities in six among these ten largest firms, about their formal structure and managerial policies. And a second step during which I focused on one New England firm, and conducted a network study of it. The information collected during fieldwork is helpful with respect to focusing on the aspects of the organization of law firms that limit the efficiency of Chinese walls.

Aspects of the organization of law partnerships that limit the efficiency of Chinese walls

In general, an organizational approach has been shown to help understand trust violations, such as breaking clients' confidence (Reichman, 1989; Vaughan, 1983, 1999). In my case study, there are several features of firm organization and operations that question the efficiency of Chinese walls. The first is that there are two ways of growing for a law firm: growth by general representation and growth by special representation. During the previous twenty years, firms had grown by special representation. This increased enormously the opportunities for being confronted with conflicts. There was no business strategy that could try to prevent the emergence of conflicts; such firms could not make it a priority.

Another aspect of the organization of work that is important for our issue is the workflow policy, particularly the intake (opening new files), which is

very often decentralized. Formal structure attempts to coordinate the work process. In its effort to organize its practice, the firm formally regulates intake (mainly, who decides whether or not to take in a case, based on what criteria) and assignment (mainly, who will do the work). There are many reasons for implementing an intake policy. The firm wants to be sure that it is not using its resources on work that is either less interesting or less profitable than other work that it might be able to get. This means that the firm is also preoccupied with situations which are not technical conflicts of interest, but which are not desirable in business terms. Intake procedures are always somewhat flexible. Flexibility, at least in the implementation of intake, seems to be imperative because workflow depends on the nature of the practice. In some areas, clients usually come directly to the lawyer. In others, lawyers may work on files because they were given these files when they were associates and they stayed on these files. Many large firms are well established and corporate clients are passed down from partner to partner over the years. Clients come to partners through referrals from other lawyers in the community or through cross-selling by partners from another area of practice.

According to firms' intake procedures, new clients should be cleared with the managing partner. But this requirement is not systematically respected. Some partners did not even seem to know about it. Lawyers in general do not like to turn work away. Some of the most intense fights about which attorneys tell Goffman-like stories in these firms were about lawyers who had to give up a client, either to another lawyer, or to just let the client go, after it appeared that there might be a conflict that could not be handled. Law firms are professional firms, with thick carpets and a quiet atmosphere, where members try to avoid such conflicts. In two firms out of six, department heads checked every Monday the list of new clients for the firm; in two other firms, the list was published in the newsletter; in the rest of the other firms, partners had the summary at the monthly partnership meetings. But everything was done in a way that encouraged a pragmatic attitude toward conflicts: the underlying assumption was that 'if we opened a file, that means that the client is cleared by the technical conflict check and that there is no matter conflict'. Partners did not enjoy challenging other partners' intake behaviour, and the Managing Partner only intervened when there was a problem with a client or when asked to by a partner.

Another policy that was important from this point of view was the compensation policy. As firms adopted a more entrepreneurial approach to their practice, there was a trend toward compensation systems that weighed 'merit', client responsibility, and productivity more heavily than other factors. This meant competition not only between firms, but among partners within the same firm. This was an organizational setting in which members had strong incen-

tives to use the organization for their personal benefit more than for the interests of the organization as a whole, including its ethical reputation. There was another incentive here, it seems to me, to be very pragmatic about potential conflicts, and to make all sorts of efforts to stretch the 'matter' criterion in a way that was favourable to the individual lawyer, or not to disclose the potential conflict to the client, or to disclose it in such a way that it did not seem threatening.[8]

I could continue with other policies, such as the fact that marketing tended to be seriously organized (when it was organized at all) only at the departmental level, not at the firm level, and as a result even generalist firms did not make a conscious effort to prevent putting themselves in situations of conflict. Or the fact that a formal peer review system was a very sensitive matter (i.e. no one wanted a formal peer review committee that would look into each partner's ethics). Or the fact that the relationship between partners and associates was not a purely hierarchical one. Intellectual challenges were very much valued. In this environment, partners always found ways of talking about a matter with screened colleagues, for training purposes for instance. In addition to all this, the lawyers who moved from one firm to another often had a good dose of resentment for the firm that they were leaving. They did not have many personal allegiances and incentives not to use information that they gathered in a previous workplace. This information was part of their human and social capital. Maintaining and cashing in on such forms of capital is almost what corporate law firms are all about (Gilson and Mnookin, 1985; Flap et al, 1998). And new forms of collegiality seemed to accommodate opportunistic behaviour much better than previous forms.

All these organizational features of law firms, in my opinion, question the efficiency of the screening solution and of joint regulation. I would like now to use some results of a network study of a New England corporate law partnership to question even further the efficiency of the Chinese walls.

8 See Kenneth Mann's (1985) book on how corporate lawyers manage information in their relationship with their client.

Can collegial organizations make costly and unfriendly decisions on a day-to-day basis?

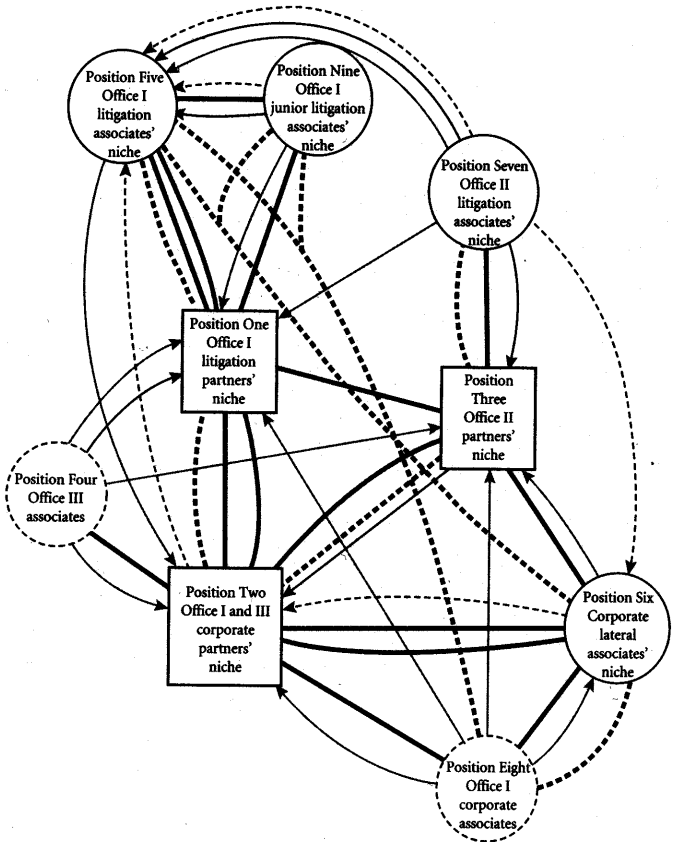
One of the firms in this research agreed to a network study. [9] This study produced a clear picture of the social discipline that helps this kind of collegial organization operate on a day-to-day basis. The description of this social discipline is relevant to my purpose here. Figure 1 provides a picture of members' informal resource interdependencies in this firm. These interdependencies are the basis of this social discipline.

Let us go back to the example of Aetna insurance and ITT Hartford. Let us take a potential conflict in which we (Spencer, Grace & Robbins) are suing our own client, but the two cases are different matters. For instance Aetna insurance gives us litigation work but now one of our partners also decides to represent a real estate company with which Aetna had invested a lot of money in a common project. Tensions arise because, after having committed itself to invest in this project, now Aetna threatens to withdraw from the deal unless changes are made in the project (the example was taken from the *Hartford Current*). The two matters are totally different, the actors involved are different, and the pragmatic view supports the idea that 'there is no conflict, as long as there is a Chinese wall between the lawyers in our litigation department who do the insurance defence work, and the lawyers in our real estate department who handle the deal matter.'

So let us look at this internal boundary between the litigation department and the corporate department at Spencer,Grace & Robbins. Aggregating all the choices made by all the lawyers in three intra-organizational social networks shows, as pictured in Figure 1, that the firm has developed informal mechanisms to counter the centrifugal effects of its internal boundaries (such as differences in practice, status, and office). These mechanisms are important for its internal cohesion. In each of the three networks, attorneys cluster in small social niches. These niches are themselves embedded in a system of niches in which strong work ties cut across the status boundaries, strong advice ties cut across office boundaries (or geographical and market distances), and strong friendship ties cut across practice boundaries.

9 For the reconstitution of co-workers, advice, and friendship networks (among others) in this firm, all the attorneys were presented with a list of all the other attorneys of their firm. They were asked to check the names of their strong co-workers, advisors and friends (for detailed name generators, see Lazega 2001).

Figure 1
Can collegial organizations make costly and unfriendly decisions on a day-to-day basis?



This picture represents 'social niches' and resources interdependencies among attorneys at Spencer,Grace & Robbins, a New England corporate law firm. Simply visualizing the three networks together provides a picture that is too complex to be informative. This figure is a reduction representing the pattern of relationships between positions of approximately structurally equivalent members (see Burt, 1991) across the three networks of all attorneys in the firm. Boxes represent positions of partners. Circles represent positions of associates. Thick lines represent mutual exchanges of a specific resource. Thin arrows represent unreciprocated transfers of a specific resource. Black lines represent the co-workers' network. Grey lines represent the advice network. Dotted lines represent the friendship network. All the positions are social niches, with two exceptions: the dotted circles representing Positions Four and Eight mean that the latter are not social niches. Source: E. Lazega (2001), *The Collegial Phenomenon: The social mechanisms of cooperation among peers in a corporate law partnership*, Oxford: Oxford University Press.

So on the one hand, for our conflict between Aetna and the real estate developer, we want the corporate department to be isolated from the litigation department. But in this case we realize that the ties that cut across these boundaries are not only professional ties such as advice ties, or co-workers ties, but strong friendship ties. The latter are important as a mechanism for securing the internal cohesion of the firm (in a period when it is not unusual to see whole chunks of a firm leave for another firm). Thus the ties that cut across the Chinese wall are the friendship ties, which are the least visible and the least subject to any form of control. At Spencer, Grace & Robbins, friendship and social discipline were a threat to the ethics of joint regulation. The pattern of relationships represented in Figure 1 drastically decreases the likelihood of Chinese wall efficiency.

The least that can be argued here is that given the way law firms operate at the formal and informal levels, the argument that screening solutions solve the problem of conflicts is a blanket statement that is not convincing. Attorneys in large firms would have to be heroes for this solution to be efficient. There is no reason to assume that Chinese walls will not be respected at all or that they will be respected universally: it makes good sociological sense to think that it depends on the position of the individual in the formal structure and in the informal structure of the organization. Professional joint regulation thus meets with the more general issue of contemporary decline in trust in the professions (Dingwall and Fenn, 1987).

Case Two: A French consular jurisdiction as a form of joint regulation

Another type of legal organization can be used to explore the issue of conflicts of interests from our perspective. Courts are natural places to examine in order to identify joint forms of regulation. They are not static institutions making a-temporal and purely rational decisions (Heydebrand and Seron, 1990; Wheeler *et al.*, 1988). They are contested terrain, the prizes or objects of broader economic competition and conflicts that occur outside courthouses (Flemming, 1998). This is especially the case in courts in which judges are themselves business people elected by their local business community.

This second case will help focus on how organized interests try to shape the forum in which disputes between businesses are processed. In such 'consular 'commercial courts, I look at judges as both official third parties upholding legal rules and procedures in the conflict resolution process, and as unofficial and potential levers of influence representing their industry of origin, thus possibly favouring outcomes that do not hurt the interests of this industry. As levers, they could be in a position to weigh directly on judicial decisions, or indirectly if they can influence the other judges sitting with them by gaining

their consent for specific outcomes. Our broadly conceived structural approach to joint regulation is applied to a French consular commercial court, i.e. a court in which judges are lay judges elected by the local Chamber of Commerce and to which the State has delegated conflict resolution among businesses. In France, such commercial courts are the main official conflict resolution mechanism made available by law to business people.

French commercial courts as joint regulation systems

In France, the role of commercial courts is to solve conflicts between economic actors, mainly businesses, and to exercise a form of discipline on market entry and exchanges. Institutional solutions found for such problems vary within and between countries. Data on French commercial courts are particularly useful to my argument because a specific form of combined regulation of markets has existed in France for five centuries.[10] The State has long been sharing its own judiciary power with the local business community. In effect, a special jurisdiction exists for commerce, and these commercial courts are operated by consular judges. Judges act as individual judges, but they need the official support of an employer's association to become judges. This makes them representatives (although without any specific mandate) of the business community (Lazega and Mounier, 2003). They are lay, unpaid judges elected for two or four years (for a maximum total of fourteen years) by the members of the Chamber of Commerce of their local jurisdiction. The two economic institutions support each other and maintain close ties. The French tribunal de commerce is a case of business and civil society doing something important in the State apparatus.

These judges sit in judgment one day a week, on a voluntary basis, to enforce the law among their peers, both in matters of commercial litigation (between consumers and businesses, or between businesses) and of bankruptcies. This court is thus both a formal legal institution and a social mechanism in its enforcement of the law and sanctioning of deviant behaviour in the business community.[11] Decisions made by the court can be challenged, as in any court,

10 Arbitration and its more secretive operations also exists as a formal avenue of conflict resolution for businesses. But it is usually much more expensive and therefore limited to large and multinational companies.

11 For the characteristics of the French system of commercial courts as an institution of combined external and self-regulation, see for example Chaput (2002), Hirsch (1985), Ithurbide (1970), Jean (2000), Szramkiewicz (1989). Today, there are 191 commercial courts in France, around 3.000 consular judges making approximately 300.000 judicial decisions each year, of which around 50.000 concern insolvency issues (Ministry of Justice figures for 1998; www.justice.gouv.fr/publicat/tc1807.htm).

and be brought to the Court of Appeal. At the Court of Appeal, judges are no longer lay judges, but career magistrates coming out of the very official *Ecole Nationale de la Magistrature*. A small percentage of cases (around 5%), comparable to that of other jurisdictions, are challenged by the parties in French commercial courts. Thus this system represents a particular and efficient combination of external and self-regulation of local business communities.

In such a system, there are several types of such unpaid, voluntary, and consular judges. For example, there are retired business people looking for status, an interesting activity and social integration; but also younger professionals, whether bankers, lawyers, or consultants, who look for experience, status, and social contacts, sometimes on behalf of their employer (who keeps paying their salary one day a week while they are practicing as a judge at the Tribunal). If the individual judge is young enough, this can help build a relational capital (as explicitly stated in the flyers trying to attract new judges to the job) and open doors for future positions in economic institutions such as the Chambre de commerce itself, arbitration courts, the 'Conseil économique et social' (an advisory board to the Prime Minister), and other honours. Indeed, for younger professionals, sitting as a lay judge has traditionally been considered a 'chore' that would be rewarded later on with seats on prestigious committees in economic institutions of the country (Lemercier, 2003; Chatriot and Lemercier, 2002). Various types of lucrative contracts and missions may also be given on a discretionary basis by the acting President of the Tribunal de commerce to former judges to advise companies on a 'prevention' basis.

There are several justifications for this joint regime. Firstly, it is a cheaper and faster form of justice than a system with professional judges. Business bears more of the costs of its own regulation, and backlogs and waiting time are much smaller than in traditional high courts. For example, there are no jurisprudence or published cases. Secondly, inexperienced (in business) and non specialized professional judges – who are civil – are often considered unable to understand the problems of entrepreneurs or to monitor satisfactorily the behaviour of company directors, particularly in the insolvency and bankruptcy mine fields (Carruthers and Halliday, 1998: 431). Thirdly, business law often ignores idiosyncratic norms and customs (called *usages* in French commercial courts) based on industry traditional subcultures characterizing whole sectors. The argument is that efficient conflict resolution cannot ignore these bodies of rules that organize business practice differently in each traditional sector. Lay judges at the Tribunal de Commerce, since they are supposed to be experienced business people, are thus said to be specialized in their professional field and in a better position (than tenured civil servants) to know about these customs; to adjust them more quickly to unstable or changing business environments; and to be in a better position to foster regulatory innovations.

Thus the French 'Tribunal de commerce' has specific features that make some aspects of the link between legal (exogenous) and social (endogenous) mechanisms in the regulation of business more visible. The State alone does not, by itself, enforce and sanction. It needs the participation and investments by specific individual and corporate actors prepared to do their share. In effect, in this case, elected representatives (who may represent corporatist interests) perform a function usually considered to be a State function. This is a rather special case of joint regulation, understood as industry-associations self-regulation with some oversight and/or ratification by the State (Grabosky and Braithwaite, 1986: 83). In this system, the difficulty with representing general and particularistic interests has always been the predicament of these judges.[12] The public has always suspected that patronage appointments lead to politicised elections of judges, who then fail to distance themselves from their virtual 'constituency', i.e. the industry that endorsed their candidacy for the job. Especially in small town commercial courts, litigants' confidence in the impartiality of the tribunal's decision is often impaired. They fear that judicial control can be exercised by competitors. The institution, however, assumes that zealous judges will be entirely virtuous in spite of the short distance between regulator and regulatee (Black, 1984).

In general, the business community wants speed and decisiveness from modern commercial courts, a low level of appeals, sharp segregation of politics and personal patronage from judicial decision making, and as much neutrality as possible. But with consular courts, entire sectors of this business community, as represented by their *syndicats patronaux*, may think that they sometimes have the possibility of preventing damage to the interests of their industry. Indeed, the employers' associations' interest is to be represented at the court for several reasons. First, this is a way of defending the customs of their occupation or profession. For example, the financial industry sees arrangements for corporate liquidation or administration as very important to its practice of commercial lending. Bankers could easily handle their affairs concerning corporate rehabilitation outside of the courts if they perceive these courts to be incompetent or opposed to their interests. The courts must often conform to the

12 The same is true for in English and American history: 'In bankruptcy cases, delay permits the remaining assets of the bankrupt corporation to run down, or to forestall rapid reorganization, thus impairing chances for corporate turnarounds' (Carruthers and Halliday, 1998: 474). There is thus a need for rapid judgments by an empowered court. In the past, patronage, political partisanship, and conflicts of interests bedeviled bankruptcy courts. A system of mutual accommodations and exchanges of favors brought all the players in the system into a tight coalition of mutually protective practitioners. Judges were necessarily part of this 'bankruptcy ring' (480).

expectations of the financial industry or lose much of their business (Carruthers and Halliday, 1998: 488). The 'quality of justice' as defined by the financial industry (limit risk and permit failures, or extend credit and aid reconstruction) is a significant factor in the strategy of this industry. Second, it signals to the constituency that the leaders of their *syndicat* are working hard at promoting the interests of the profession. Increases in the number of judges sent to the commercial court makes the apparatchiks look good.

Thus, from the perspective of each industry, consular judges are more than simple judges. They are judicial entrepreneurs (McIntosh and Cates, 1997) representing the sensitivity of the *syndicats patronaux* and organized interests that helped them into the courthouse in the first place by endorsing their candidacy. This is true in spite of the fact that many judges are now managers in medium sized or large companies. They rarely own many shares in their employer. Large banks sometimes control their group. They are no longer the baker, or the jeweller who owned their shop around the corner. They are entrepreneurs because they should identify problems and push for solutions that make sense in their own business community. As seen above, having judges of one's sector sitting in judgment may represent minimally a guarantee that one's way of doing business will be respected, if not a leverage or a damage control instrument. The judges themselves do not entirely share this view. Officially, in our interviews, they declare that – once a judge – they are independent, without any mandate from their industry of origin, and think of themselves as entirely impartial. They may not accept the idea of being 'representatives' with a mandate from the industry that helped them become judges. But they are still expected to speak on behalf of this industry and its customs by the members of this industry. The system itself thus represents a typical joint regulation regime.

Attempts at influencing what goes on in court from outside the court come through various angles. Flemming (1998) lists five such angles: they can try to influence jurisdiction (the range of disputes over which the court has authority), positions (actors formally authorized to participate in the disposition of cases), resources (the capacity to influence the decisions of other actors), discretion (the range of choices available to actors), and procedure (rules governing courtroom processes). Parties involved in that contest may not be directly concerned by all the conflicts that are dealt with by the court, but they may have indirect concerns, material or symbolic, in the decisions of the court, and thus attempt to influence what goes on in them.

The law and the courts in general are of course aware of the fact that different types of actors in the environment of the court may be involved in such influence attempts. Anticipating that the court will be the object of external attempts at influence, the legal system helps the judges in protecting themselves from such influences. It can do so, firstly, either by providing them with tenure

(thus lowering their level of dependence upon external sources of influence) or, if judges are elected, by trying to diversify the sources of influence so that they cancel each other out (Friesen et al., 1971). Secondly, if differences in access to resources exist between judges, the legal system tries to protect the court from the effects of such differences by providing each judge with the resources that he/she needs to make decisions. Examples of such protections include a procedurally well defined filing system, or institutionalised collegiality of deliberation that helps judges in confronting their different definitions of the situation and reach a common frame of reference. Thirdly, there are rules concerning conflicts of interests for judges: when a he/she is too close to one of the parties, for example when he/she sits in judgment of a competitor, sometimes even of a business in the same industry as his/her industry of origin, he/she must self-disqualify or, if this is discovered, be removed from the case by the hierarchy. However, given the incentives identified above, a structural approach to this issue of external versus internal influences raises the issue of the success of such procedural attempts in neutralizing external influences, especially when the judges are elected.

Fieldwork at the Tribunal de Commerce de Paris (TCP)

Fieldwork was conducted at the Tribunal de Commerce de Paris (TCP) in 2000 (wave 1) and 2002 (wave 2). This court is one of the four large commercial courts in the Paris region (along with the courts of Nanterre, Bobigny, and Créteil). The court includes twenty-one generalist and specialized chambers (such as bankruptcy, unfair competition, company law, European community law, international law, multimedia and new technologies, etc) that handle around 12% of all the commercial litigation in France, including large and complex cases (when they do not go to arbitration courts). The list of judges included 157 names, that of the 147 judges that were active at the end of 2000, plus 10 'wise men', i.e. former judges who asked to remain in the tribunal as advisers after they decided to resign as judges; they are thus former judges to whom sitting judges can turn for advice in complex cases.[13]

Three categories can be identified inductively. A first type of judge includes *men at the end of their career*, still employed but close to retirement age. This category includes 51% of the judges. However, years of service at the court

13 Socio-demographic characteristics of the judges in 2000 show that 87% of the judges were men. Average age was 59 (minimum 36, maximum 78, standard deviation 8 years). On average, women judges were slightly younger than their male colleagues (53 versus 60). 52% of the judges have been with the Tribunal for ten years or more; 36% were elected between 1991 and 1995; 12% since 1996. 38% are retired.

seems to vary a lot. A fifth of these individuals became judges at the 'Tribunal de commerce de Paris' in 2002. No industry is over-represented in this class. A second type includes 13% of the judges. 65% of the latter are *bosses of medium-sized companies* (as opposed to 34% in the whole population of TCP judges). Members of this category are young, professionally active, and they tend to value their identity of entrepreneurs. Half of them are women. The hotel, restaurant and retail industries are over-represented here. A third type includes 36% of the judges. Most are *retired, former in-house counsels or former managers* in a large business group. Banking and chemical industries, as well as elite French business schools, are over-represented here (compared to their proportion in the total population of TCP judges). In depth interviews with all the judges show that the categories described here make sense to the judges themselves (Lazega, Mounier & al. 2003).

Positions occupied by judges in their industry and occupation of origin (or former occupation) include CEOs (25%), vice-presidents, and top executives of all kinds. Among the youngest judges, there are more professionals such as company counsels, accountants, and consultants. Most of the times, they work for large business groups or medium-sized companies (that the judges do not like to name); they prefer to be discreet about their professional affiliation. Most judges have diplomas from top French business schools, law schools, elite engineering schools (specialized or generalist).

The organizational functioning of the TCP is complex. It is not our purpose to describe it here in detail. Several kinds of professionals operate these courts together: consular judges, clerks, business lawyers, representatives of the attorney general, bailiffs, experts of all kind, professional liquidators and/or administrators (for companies that are on the brink of bankruptcy but could perhaps be brought back to life). Judges rotate across twenty-one generalist and specialized chambers. The minimal distinction in terms of specialties is between bankruptcy and litigation. Different procedural rules are attached to each. But the litigation bench is then subdivided in many types of subspecialties. There is a president of each chamber who reports to the president of the Tribunal. In each chamber, three – sometimes five – judges sit together in judgment, processing cases collegially while listening to the conflicting parties, their lawyers, a series of clerks, and other professionals, as in any other court.

Over-representation of the financial industry among the judges

Recall that, according to the justification of this system of joint regulation, the selection of judges should produce a representation including as many sectors as possible, especially in large commercial courts such as that of Paris. In 2000, economic sectors represented by the judges (i.e. in which they work or in which

they used to work) were indeed very diverse. Thus, in complex cases, intelligence about one specialty could be made available to the court from the judges coming from that specialty. However, although in theory, all the *syndicats patronaux* can present candidates to the elections of consular judges on an annual basis to fill in the vacancies created by a 10% turnover at the court, in reality all did not. Some did so much more systematically than others. 29% of the judges came from the financial industry.[14] 44 consular judges were currently employed by the financial industry or had been employed by it in the past. This industry promotes several candidates for election to the job each year.[15] The next industries to be strongly represented at the TCP were the services and construction industries.

These three industries are traditionally very litigious sectors (Cheit and Gersen, 2000). The business docket in France, as probably in most countries, is dominated by contract disputes and debt collection issues. A sizable portion of this docket involves the financial industry for obvious reasons, which provides a strong incentive to invest in judicial entrepreneurship – for example to ensure damage control in cases involving high levels of credit. It also involves the construction industry that is structured as a cascade of subcontracting deals offering frequent incentives for conflict. Thus such industries have high amounts of resources at stake in these conflicts. They are willing to play for the rules and have an interest in trying to shape the court and impose their industry norms and practices over those of other industries. The priorities of specific sectors, in particular that of the financial sector (such as preserving high value of assets, high level of claims, and high sensitivity to the impact of corporate failures on the economy) can thus be defended in both the litigation and the bankruptcy bench.

The financial industry is clearly over-represented, in relative terms, at the TCP. In effect, the sector of financial activities represents 3% of the active population in France[16] and 5.1% in Paris where the services industries are over-represented compared to the rest of France.[17] In terms of value added to the

14 NAF 60, code 65. NAFs are the French equivalent of Standard Industrial Classification codes.

15 For example, 21 were elected as candidates of the *Association française de banque* and 5 as candidates of the *Association française de sociétés financières*. Among the financial institutions that were the employers of sitting judges (at the TCP alone), BNP-Paribas had sent 7 judges, Suez had sent 4, Société Générale 4, Crédit Lyonnais 4, and Crédit Commercial de France 4. These counts do not include judges coming from the insurance companies which, in France, are owned by banks.

16 Source: Enquête Emploi 2000, Institut national de la statistique et des études économiques, CD-ROM Version.

17 Source: Institut national de la statistique et des études économiques, Mensuel no. 202, Octobre 20001, *Ile-de-France à la page: Gros plan sur l'emploi francilien en 1999*.

economy per branch (chained prices for previous year, 1995 basis), the share of the financial services industry in the total value added to the French economy was 5.3%.[18] These descriptive figures show that judges coming from the financial industry are clearly potential levers of that industry and that influence over other judges in the court would mean that the financial industry is a threat to this court's independence.

One of the likely influence processes that characterize joint regulation is detected in the selection of judges themselves (i.e. the 'positional' effect in Flemming's vocabulary). In spite of the French business community's attempts at diversifying the origins of judges through a complex election procedure, only a few industries actually invest in judicial entrepreneurship (financial, construction). Why do others neglect it – in spite of their incentives to exercise influence on judges sitting as third parties and potentially used as levers? The answer may be that large companies go to arbitration (no publicity) and no longer care about public commercial courts. Or perhaps that small *syndicats* do not have the necessary clout to lobby effectively. All sectors of the business community cannot participate equally actively in the contests and attempts to shape the courthouse from outside. The potential influence of each in the struggle over this kind of contested terrain varies with the resources available to promote candidates for the jobs of consular judge. Resources available are not the same in the banking industry and in less well-organized sectors, such as retail.

The fact that 29% of the judges come from the financial industry does not mean, however, that bankers make 29% of the decisions in this court. Because most decisions are made by a collegial body of at least three consular judges, bankers may participate either in much less or in much more than 29% of the decisions. An indirect way of looking at this kind of influence is to focus on advice interactions between judges, which we assume to be equivalent to interactions setting the premises of judicial decisions. The advice network among judges is considered to be a bridge between structure and premise setting.[19] In effect, patterns of advice seeking in the court show who is prepared to listen to whom when framing and defining problems at hand in the judicial

18 Source: Institut national de la statistique et des études économiques, Comptabilité nationale, 2001 (www.insee/fr/indicateur/cnat_annu/tableaux/t_1201_25_4.htm).

19 Premise setting for judicial decision making is key to our approach of micro-level knowledge sharing. Solution to problems depend on how problems are defined or framed. Framing and appropriateness judgements highlight certain dimensions of a problem and downplays others (Lazega, 1992). Definitions of a problem that gain early acceptance among members of an organization, including judges in a courthouse, are likely to subsequently dominate in the definition of a solution. Sentencing is often about the kind of information that should be included in presentence reports, i.e. about definition of the situation and reframing of problems.

decision making process. Therefore, we looked at the ways in which these judges transfer and exchange advice, then tried to appreciate the ways in which contextual factors can influence this process.

Data on advice seeking among judges were collected in waves 1 and 2 using the following name generator: '*Here is the list of all your colleagues at this Tribunal, including the President and Vice-Presidents of the Tribunal, the Presidents of the Chambers, the judges, and "wise men." Using this list, could you check the names of colleagues whom you have asked for advice during the last two years concerning a complex case, or with whom you have had basic discussions, outside formal deliberations, in order to get a different point of view on this case.*' Our high response rate allowed us to reconstitute the complete advice network (outside formal deliberations) among judges at this courthouse, and thus to measure each judge's centrality in this network. We measured the capacity of an industry to set the premises of decisions by looking at the centrality of its representatives in the advice network among all the judges, and then at the determinants of this centrality.

Individual decisions are rooted in this collective competence that is managed formally and informally. From a sociological perspective, competence is not a purely individual capacity. It is 'distributed', 'capitalized' in a process of 'collective learning'.[20] Mutualisation of experience includes informal consultations among judges. Formally, the deliberation process provides opportunities to share knowledge and experience. Informally, lay judges also consult with each other in areas of law and economics that they may not master necessarily well. Consultations of that kind require relational skills associated with a local social discipline. Without this social discipline, the sharing of knowledge and experience would probably not be efficient as a form of quality control in the organization.

In wave 1, data display a social network in which, on average, each judge sought advice from eight colleagues during the past year, outside formal deliberations. Such an average value suggests the existence of a sharing process but also hides structural effects. The weight of the formal structure of the court, for example, shows in the fact that judges tend to consult first with members of their own Chamber[21], and more often with the President of their Chamber. The formal structure, however, does not canalise all the flows of intelligence among lay judges. In effect, a centre-periphery structure and an informal pecking order exist among them. They are represented in Figure 2. It is a

20 The judges described their work to us from the perspective of 'learning' and permanent adaptation to a changing business world. This ethnographic data will not be presented here.

21 For more details see Lazega, Mounier et al. (2003).

stable[22] structure that is characterized, in particular, by a small elite of 'reference judges' that are visible at the top of the picture. These judges are consulted much more often than the others without being formally identified as official advisors. A specific form of deference comes attached to their intellectual authority. Bankers are over-represented in the top two layers of this informal stratification.

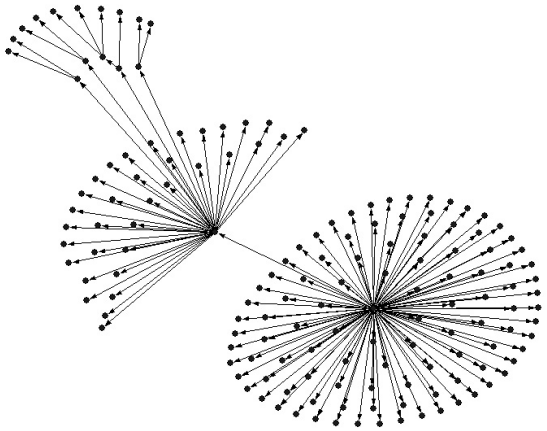
Formal structure and informal hierarchy do not capture all the variations observed in the choices of advisors among TCP judges. Descriptive statistics (Lazega, Mounier & al., 2003) show that obvious attributes of judges do not constitute strong bases for homophilous choices. Judges without a law degree, for example, do not seem to consult with judges with a law degree more than they consult with each other. Coming out of HEC, the French top business school, or from Polytechnique, the French top engineering school, are not much more discriminant.[23]

Judges coming from one sector of the economy do not consult more frequently judges coming from their own sector than judges coming from other sectors. This result tends to show that interdisciplinarity exists quite strongly in this court – an argument supporting one of the self-justifications of this kind of consular institution.

22 Correlation between centrality scores in wave 1 and 2 measurements of the advice network is 0.9. This stability may reflect the process in which giving advice creates a reputation that attracts more advice seekers. Thus the pecking order may, in part, be the visible outcome of this process.

23 This absence of simple effects may be due to the rotation mechanism allocating judges across chambers. The rotation can prevent visible regularities from emerging.

Figure 2
Layers of lay judges



A simplified picture[24] of a 3-layered pecking order in the advice network among lay judges at the Tribunal de commerce de Paris

Judges from the same class (in terms of year of becoming judge and entering this court), although scattered in different Chambers, do however consult with each other more often than they consult with judges of other classes. It is all the more obvious for classes including very central judges (classes of 1992 and 1993). Employment status is also a discriminant factor: judges active in the business world seek each other more than they seek retired judges; retired judges tend to behave in the same way and do not seem to seek younger judges' fresh competencies avidly. An even more socially subtle form of social homophily characterizes advice seeking among these judges: one that is connected to these judges' career trajectory. Differences among judges with respect to career are also bases for homophilous choices of advisors (based on wave 2 data). Men at the end of their career consult with each other more than with

24 Made with Pajek software (Batagelj and Mrvar, 2003).

other judges. Bosses of medium-sized companies also consult with each other more than with other judges. The same is true for retired in-house counsels and managers. Advice seeking and knowledge sharing is thus shown to be sensitive to a subtle form of social logic, one that is based on former trajectory, and thus in all likelihood on social and cultural background. Collective learning depends to some extent on the meaning that these actors give to their experience as a judge.

What is the relative importance of these factors on collective learning and knowledge sharing? To answer this question we included several attributes along with several other characteristics of the judges in a regression model predicting centrality in the advice network among judges.[25] Table 1 provides a few answers by showing results of the analysis of the effects of several characteristics of these judges on their centrality in the advice network in waves 1 and 2, which provides a few answers.

Table 1
Who are the most central actors in the advice network of all the judges in the Commercial court of Paris?

Independent variables	Parameter estimates (Wave 1)	Parameter estimates (Wave 2)
Intercept	-3.45 (1.13)	-3.60 (1.77)
Number of years as a judge	**0.68 (0.08)**	**0.92 (0.14)**
Speciality (bankruptcy vs. litigation)	-0.29 (0.77)	0.98 (1.11)
Having worked in the banking sector	0.69 (0.62)	1.51 (1.02)
Having worked in a large business group	0.00 (0.57)	0.28 (0.94)
Seeks advice from economic sector	**1.55 (0.62)**	-0.42 (1.07)
Seeks advice from professional judges	**4.42 (1.44)**	**5.29 (2.09)**
Seeks advice from Attorney general	**-1.75 (0.66)**	-1.72 (1.28)
Currently employed (vs. retired)	-0.65 (0.64)	-0.16 (1.06)
Member of the *noblesse d'Etat* (ENA, X)	0.94 (0.91)	2.10 (1.53)
Active in the social life of the court	**2.37 (0.93)**	1.59 (1.40)

Linear regression model measuring the effect of the judges' characteristics on their centrality in the advice network. Standard deviations in parenthesis. N=147. R-sq=0.38 and 0.34

25 For theory and justification of the use of these variables see Lazega and Mounier (2003).

In wave 1, controlling for the other variables, being active in the social life of the court does have a robust effect on centrality in the advice network, and thus on the capacity to set the premises of other judges' decisions. The sector of origin of a judge, particularly coming from the banking industry, has no effect on being central. Notice that, in addition to being socially active in the court, being senior and seeking advice from other sources (in the business community and among professional judges) are also good predictors of potential influence in this court. Notoriety of consular judges can be built inside the small microcosm of the courthouse by investments in ties to other judges whether within or outside this specific courthouse. However, seeking advice from the attorney general (who represents the State directly inside the TCP) is strong and negative: the more socially active the judges within the court, the more open to discussions with the business community and with the legal environment – but the less open to discussions with representatives of the State – the more influential one is at the TCP.

Based on wave 2 data, two characteristics of the judges remain strong over time. Seniority of judges (measured as number of years as a judge) and being in touch with professional judges (mostly at the Court of Appeal). These tendencies are confirmed in spite of many changes of advisors between the two waves. The judges consult with new colleagues as they feel the need for new competencies. In spite of this, seniority and ties to professional judges at the Court of Appeal are the best predictors of centrality. Experience accumulated and visibility of the eldest may explain this result. Being in touch with professional judges may represent a guarantee of access to legal competencies. The other variables do not resist over time.

The bankers' lack of potential influence may thus be explained by at least two factors. Firstly, seniority measured by the number of years spent as a judge is the strongest determinant of centrality in the advice network. This is partly correlated with being a Président de chambre, which explains the strength of this effect. Most senior judges, i.e. often also retired ones, tend not to be from the financial sector. Professionally active judges, often bankers, may have less seniority at the court, less time to interact with other judges, socialize with them, and thus less centrality as advisors. But, secondly, the social integration of bankers at the court is relatively weaker than that of judges coming from other industries precisely because the banking industry has so many representatives on the bench. Being perceived to be so strong in terms of 'position' may be counterproductive in terms of influence. The banking industry is defensively perceived to be a substitute for the State, once the latter has withdrawn from direct control of the economy. This was illustrated to us by a judge who is himself a former banker: '*les commerçants détestent la banque*' (shopkeepers

hate bankers). Another indicator is that judges coming from the financial sector are almost systematically those elected with the smallest number of votes.

Using this broadly conceived structural and organizational approach to conflict resolution in markets, it is possible to see that joint regulation raises problems of conflicts of interests in commercial courts just as it does in the professions. Organized business interests, particularly the financial and banking sector which places on the bench a high proportion of judges coming from its ranks, tries to exercise indirect control on commercial courts and thus on conflict resolution in markets. 'Consular' judges coming from this sector are not more central than judges coming from other sectors in the advice network connecting the judges in this court. Thus they are not able to reach a position in which they can obviously set the premises of other judges' decisions and to perform the second step of the control mechanism. But investments made by this highly organized economic sector for the promotion of consular judges in this specific court show that attempts to control the *Tribunal de Commerce* by the financial industry is thus both evident and challenged from within the court.[26]

Joint regulation and the need for more transparency in market activities

In conclusion, I used here a broadly conceived structural approach in two case studies of joint regulation. I examined aspects of the social discipline characterizing two organizations in charge of this joint regulation, and its implication for the control of conflicts of interests. I have attempted to provide evidence of the fact that, in the organizational and market society, reliance on the capacity of the professions and of business to participate in the protection of public interest should be matched with renewed State and citizens' capacity to monitor more closely issues such as conflicts of interests. There are many limitations to the case studies used here and to our capacity to carry out studies with a broadly conceived organizational and structural approach. We do not have systematic information on the outcomes and on the quality of the decisions made by the actors. We are often unable to distinguish ability and intentions. We are also aware of the fact that the State sometimes 'externalises' some of

26 For example, seen from the perspective of article 6 ECHR, French commercial courts are biased and vulnerable to criticism, both on paper and based on our results. Recognizing this, attempts to carry out judicial reforms in France were indeed planning to request a declaration of interests (and a regular update of this declaration) from consular judges to deal with issues of conflicts of interests or at least appearance of conflicts of interests (Colcombet and Montebourg, 1998; Deffigier et al., 2003; Fabri, Langbroek and Pauliat, 2003). To this date, such reforms have not been implemented.

its functions to avoid having to carry out difficult tasks that can reflect negatively on political leaders – a view held for example about handling bankruptcies and subsequent layoffs. Nevertheless, identification of a joint regulation of markets helped in reconstituting social disciplines that may be virtuous at the local level but questionably so at the collective, more global level – at least as long as we do not have, for example, measurements of the quality of the work of these actors (Langbroek, 2003).

The two case studies used to ground this assertion are very different and were carried out in very different countries. However, they are not the only countries in which this delegation by the State raises issues of conflicts of interests (Bruinsma, 2003).[27] Countries also vary in the extent to which they are sensitive to the issue of conflicts. In common law countries, for example, the appearance of conflict used to be as bad as conflict itself. In civil law countries, this has not necessarily been the case up to now. However, as different as they may be, the two cases raise the same issue: that of the delegation of powers by the State to intermediary, meso-level organizations and institutions, and the loss of monitoring capacity that comes attached to modern forms of joint regulation. We live in an organizational society in which organizations that are not meant to protect the public interest nevertheless increasingly pretend to do so. It can be part of their efforts to improve their opportunity structure and to weaken the regulatory mechanisms that constrain them. Being in a situation of conflict of interests, and getting away with it, provides access to inside information and helps weak actors in 'punching above their weight' or strong actors in accumulating even more power. When these efforts are built into the operations of economic institutions, public interest and public service are at stake. Work presented here therefore suggests that it is not just the amount of civil society participation in an increasingly organizational society (where the meso level is particularly important) that is important for the protection of the common good, but the kind of participation.

27 See for example Bruinsma (2003, chapter 4, p.53) on 'Alternative dispute resolution Dutch style', with the example of the Arbitration Council for Construction Disputes (Raad van Arbitrage voor de Bouw): '(W)hereas the professional judge and counsel on behalf of one-shot players mitigate the advantages of repeat players almost everywhere else in the Dutch legal system, in the Arbitration Council they are reinforced on two accounts. To start with, according to procedural law in the books arbitration is the free choice of both parties, but in reality it is impossible to get something built on other conditions than by subscribing to a standard clause with exclusive jurisdiction for the Arbitration Council. Secondly, legal counsel in the construction sector are concentrated within a few corporate law firms. As a result it might be difficult for the one shot estate owner to obtain the assistance of specialized counsel without a conflict of interest.'

For many sociologists of governance, contemporary States are no longer the main source of regulation, for example because large multinational companies can escape country-level regulation. I would like to argue that the more the State 'loses direct control' of the economy, the more different forms of regulation of these economies are multiplied, the more this State needs to impose at least more transparency in market activities so as to help protect the common good. The situation described by the cases examined here is not a situation in which the State has spread its tentacles over civil society in a totalitarian manner, overlooking constitutional checks and balances. It is a situation where so much power over common goods (the rule of law, for example) and so many privileges are transferred to business and civil society via professionalization or consular institutions, that increasing the transparency of economic actions and their regulation becomes, in my view, a public service. Sociologists, with organizational and structural approaches, can contribute to this public service.

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