

***Putting Justice "Into Play" on  
the Global Market:  
Law, Lawyers, Accountants  
and the Competition for  
Financial Services***

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The "independence of Justice" or "the law of the market place". "Competition and the pursuit of profit" or "the defense of rights and freedoms". Such were the terms employed by the British Bar to launch their campaign against the reforms proposed by the Lord Chancellor, Lord Mackay. Their vehemence is as violent as the proposed upheavals that aim at nothing less than the suppression, in the short term, of the age-old barriers separating the professions – between barristers and solicitors but also between jurists and accountants, or other professionals such as financial advisors and estate agents. The objective is the more rapid development of large law factories on the model of those already flourishing in the City, that aim to dominate the international market of corporate and financial legal advice (*The Economist* 1989).

Unlike British barristers who claim they are ready to defend their traditions to the bitter end, leaders of the Parisian Bar have, it would seem, wagered on modernity. With only minor discord, most appear in favour of a radical remaking of the professional model. They propose nothing less than the abolition of intra-professional barriers within the heart of a 'grande profession'. They are harrying their peers to put aside their old aristocratic prejudices against trade,

which up until recently have kept them from the world of business (Karpic 1988). The new model to follow is that of the American Lawyer, entrepreneur in legal services, jurist in the service of entrepreneurs (Soulez-Lavivière 1988).

In the United States, because of the prosperity and political weight of lawyers, a reform of the professional model has not so far appeared on the agenda. However, the commercial success of these practitioners has provoked soul-searching debates on "the decline of professionalism, the loss of collegiality and the new market aggressiveness". Moreover, signs such as the development of subsidiaries by law firms (Fitzpatrick, 1988) suggest that there too the professional model could undergo serious transformations in the near future.

Thus, across the Western world, business justice has provoked practitioners – normally a discreet group – into public confrontations on the question of the transformation of the professional model, as if this sudden prosperity of business law was challenging the division of legal tasks as well as the definition of legitimate competence and professional excellence. For some, the practice of law precludes the use of the market rules valid for the mere merchants. Others, again, believe that remaining in this ivory tower cuts practitioners of law off from the rest of the business community and from other providers of corporate services. They believe that this isolation runs a substantial risk of weakening the law and lowering the status of its clerks, to the benefit of new competitors in this field of expertise.

As the business community discovers justice and vice versa, it suddenly appears necessary to call into question – and may eventually be necessary to radically modify – the internal rules and institutions that define the market of law and limit competition between clerks. Is this only a coincidence? If not, does the remaking of the professional field at a time when Western economies are undergoing the most serious restructuring of their history not invite a reassessment of the old debate on relations between law and economy?

With this objective in mind, one should first clarify the relationship between the major changes affecting the sphere of production and trade – that is, the globalization and the "financialization" of economy – and those observed in the market of business law. During this process, if one does not wish to fall back into outdated schemas of law that simply reflect economic change, it is necessary to pay particular attention to mechanisms that help create new rules and institutions likely to contribute to the security and stability indispensable to trade and economic production.

In the field of business law, according to McBarnett (1984), practitioners play a central role in this continual redefinitions of legal norms. Through their intermediary, in day to day practice, the interests of clients are inscribed into law. But these intermediaries are not machines acting out the letter of the law. They have a specific history behind them and specific interests that determine the ways in which these social interests are translated into the language of the law. And these structures are not immutable. They are endlessly transformed to suit the strategies of the practitioners, and are subject to their ambitions and positions, as much in the field of law as in that of business. The dual membership and the dual role played by business lawyers serve as a buffer and a porous membrane between the law and the economy whereby each overlaps tightly while preserving its autonomy.

If, as Thompson (1975) suggests, the law does not simply reflect the interests of the dominant class, it is because legal transformations are primarily the product of a transformation of these professionals who define the law and put it into practice. The redefinition of legal forms and institutions comes to pass through a continual redefinition of professional structures. In other words, the development of business law is a by-product of the commercialization of legal practice, and by the same token, in the field of legal practice, trade values have "juridicalized" the market. Traders have rediscovered the law because, simultaneously, lawyers have rediscovered competition and profit. This 'discovery' is thus a deliberate strategy responding to, and even anticipating, a transformation of their market. These presuppositions dictate the researcher's choice of terrain and work methods: a structural analysis of the transformation of the field of the business professionals which takes into account the dual role of these practitioners – in the field of law and in the field of economic power – in order to explain their strategies.

Our hypothesis is in effect that confrontations about the professional model – to varying degrees observed everywhere – are related to the rapid emergence of an international market of business services, which is in itself one of the components of the globalization of the financial market. The restructuring of economies has as its corollary the restructuring of the consulting market. Homologically, the internationalization of trade has brought in its wake a questioning of barriers raised by different groups of practitioners in order to protect their specific territories on a national or categorical basis (Abbott, 1988). The rise of the demand for expertise and me-

diation has sharpened the appetites of newcomers who have jostled the habits of the "gentlemen" of law and of finance. This competition has opened the doors to new markets and professional know-how. At the same time, it has remodeled the professional system and its modes of legitimation.

Competitive and complementary strategies are turning law into an instrument of financial power and are simultaneously introducing trade imperatives into the field of law. However, before describing – or at least outlining – the concatenation of these strategies, we must review the previous research in order to clarify our problem and to distinguish our particular approach from others which have attempted to analyze the same phenomena.

## **From a positivist to a structuralist approach**

Preceded by practitioners and the legal press (Nader, 1907; Gordon, 1985), academic jurists have at last entered the debate on 'the commercialization of law'. Their approach is two-fold. On the one hand it strikes the observer by its apparent modesty. Current studies, as of yet few in number, are mainly concerned with first isolating, then describing different facets of the phenomenon: the growth of law firms and business litigation, the transformation of careers and the like. The rare tentative interpretations remain for the present extremely guarded, disallowing any 'grand theory'. But paradoxically, this approach, from the outside pragmatic and positivist (Sarat, Silbey, 1988) is tied, implicitly or explicitly, to a moralistic concern. Researchers are not satisfied with the position of outside observers who can be objective because they are disinterested. In line with North American academic traditions they have adopted a critical perspective on these new developments in the field of business practices (Gordon, 1988, Trubek, Nelson, 1988).

This dual role played by teacher-researchers is a sign that they are not, and cannot remain, neutral within this debate which touches the fundamental, policy orientations of the legal field in effect, as the European example demonstrates, current upheavals are not limited to corporate law; the whole professional edifice as well as its social legitimacy has been thrown into question by recent evolution. It is understandable that academics, who since time immemorial have been the "guardians of the temple", cannot now disengage them-

selves: their attitudes are neither surprising, nor reproachable. However, it must be noted that this engagement contradicts the positivist, scientific approach (Sarat, Silbey, 1988) which implies the observer's neutrality and exteriority. One could ask, in this case, whether the concern on the part of researchers for objectivity (in spite of, or rather because of, their implication) might not lead to a certain tunnel-vision: in order to produce quantitative, objectively measurable (sic) data, researchers are obliged to isolate this or that aspect of a phenomenon whose main characteristic is precisely its globality – a globality researchers refuse to take into account. For if they did, they would have to think the legal field out in political and strategical terms – thereby destroying their claims of a positivist and objective science.

We have only to look at the Wisconsin University team, certainly the most advanced in this particular train of thought (see also Nelson, 1987; Spangler, 1986). Their research has followed two parallel tracks. In one, Galanter, Rogers (1988) have interpreted the growth of business litigation as the aftermath of the transformation of markets and, more generally, methods of governing enterprise. The "judicialization and the judicialization" of business disputes – that is, the taking of business disputes into the legal fora – are therefore a consequence of the disappearance of long-term relationships, an idea proposed in the past by Macaulay. In the other track, Galanter and Palay (1989) view the growth of law firms as induced in a quasi-mechanic way to a mode of organization – the partnership. According to them, the maintenance of profit-level, in an organizational form such as the partnership, requires exponential growth of a type whose cumulative effects have only been apparent these last twenty years.

To our minds, there are a number of objections to this approach. Without denying that these hypotheses are pertinent to a degree and thereby merit further study, it is difficult to discern, using this model, the fundamental reasons underlying the 'commercialization of law'. Such a model, like many statistical models, confuse correlation and cause. This is because of two analytical blind spots. The first tends to ignore the international and intra-professional dimension necessary to explain these phenomena which are limited neither to practitioners of law nor to North America. The second blind spot is more fundamental and is characteristic of a positivist approach. These studies postulate implicitly that legal authorities and jurists have contented themselves with passively recording the ef-

fects of the changing demands society has made upon the law. Moreover, these studies postulate that legal authorities and jurists are the victims of the mechanical logic of a self-imposed mode of organization – a mode of organization which only after half a century, are they beginning to realize, is driving them inexorably towards concentration and gigantisme.

We find a mechanistic vision of relations between jurists and their market or their structures of production rather simplistic. This ultra-positivist approach tends to negate the very existence of policy choice within the legal field. This denial is paradoxical since it concerns a group of policy-minded professionals who have long sought, not only personal autonomy, but the right to manage affairs of the community. It is not necessary to go far back in history to find examples of lawyers trying to influence the rate of litigation or the organizing of legal and judicial work (Harrington, 1985). Lastly, is it not contradictory to deny the existence of policy strategies in the field of law when researchers, who implicitly adopt this position, actively participate in debates in which the main objectives are the redefining of professional practices?

Such contradictions are serious because they drive these studies towards relative myopia. Unable to clarify and integrate into their considerations their own positions and strategies within the political and professional game, they are obliged to limit drastically the field of their research, thus running the risk of excluding important variables essential to the understanding of the phenomenon under study. In this manner, they render invalid a scientific approach whose apparent positivism imperfectly masks its actual subjectivity. In the long run, their concern with statistical rigor cannot replace epistemological coherence. The confusing of genres, if not lucidly analysed as such, risks not only the invalidation of their scientific approach but also damage to the credibility of the political strategies they follow. The atomistic nature of this sort of approach renders it particularly fragile, enabling critics to tear it apart and expose it for what it really is: subjective and tactical.

## For an enlargement of the field of observation

To do justice to the vastness and complexity of the phenomenon, it is necessary to find a "structural" explanation that by itself can account for the competitive or complementary strategies which aim to preserve or modify not only the distribution of roles at the core of the legal field, but also the position of these professionals within the social field (Bourdieu, 1986).

This type of political sociology of the legal field implies a considerable broadening of the observed terrain to include different professional categories which influence the evolution of business law practices, although they are not part of it. By emphasizing legal politics, this sociology reintroduces in the analysis the academic debates where the choice of terrains and research hypotheses are determined. Academic lawyers are far from being strangers to or neutral towards the question of the commercialization of law. It is they who assure the reproduction of practitioners. They feel thus entitled, not only to regulate the supply of producers of law, but to redefine professional competence. This broadening should also take into account the interests and strategies of other professional groups such as accountants, investment bankers, consultants, who compete with lawyers in the market of business consulting, and who preceded them on the path towards diversification, and aggressive marketing of their product (Stevens, 1981, 1985). As Abbott (1988) has shown, it is within this inter-professional competition that not only the practices, but also the institutions and knowledge of a specific profession, are continually redefined in order to improve their positions on the market. Here lies, in fact, one of the central hypotheses of our study: because of the upheavals brought about by the internationalization of the financial market, each professional group has tried to broaden – or at best, preserve – their share of the market and the area of competence reserved to them within the framework of the nation-state. It is not by accident that the professional 'big bang' is following closely behind the financial 'big bang'.

A structural approach cannot leave aside the effects of class that combine with professional positions to redefine the strategies of different actors during this restructuring of the field of practices. Different sectors of the legal group whose specific characteristics and antagonistic interests make up the diversity of the field also corre-

spond to sectors of society whose profile and politics are strongly determined by the paths of their members through society. This diversity and these internal struggles allow the legal field to transform from within in accordance with changes in the political climate.

In concrete terms, this means one cannot understand the new commercial practices of business jurists without relating them to the social characteristics and scholastic achievements of the rising generation of practitioners. The relative democratization of recruitment is as much a cause as an effect of the growing hierarchy in the division of labour. If competition on the advice market has rendered democratization obligatory, it has also been encouraged by the opening of educational doors to middle-class children, giving access to careers until recently reserved for the dominant class. If, as according to a much quoted saying, "law firms resemble less a gentlemen's club and more a business like any other", it is also because they are open to newcomers who have neither the resources nor the civic aspirations of their predecessors. The behavior and career strategies of a 'yuppie lawyer' (Auchingloss), the pure product of a scholastic meritocracy, differ in every way from those of the 'heir of a WASP dynasty', whose position and class traditions demand, and at the same time allow, the simultaneous pursuit of aristocratic dilettantism and a vocation for public service – a characteristic of the "gentleman lawyer".

If the economic crisis, the deregulation and internationalization of markets favor calling into question the internal rules limiting inter- and intra-professional competition, the arrival of new generations of practitioners, whose qualities and appetites differ vastly from those of their seniors, serves to accelerate this process of generalized reconstruction of the professional field. Here again, comparison with the "Big Eight" cannot be ignored with impunity. New generations of auditors and business consultants, on the strength of their revalued expertise have played – and continue to play – a major role in this transformation of the system of professions. Their desire for expansion, their political aggressiveness in the conquest of markets is justified, in their eyes, by their ambition to dethrone jurists from their positions as privileged advisors to the economic powers (A.T.H., 1985). Individual and collective opportunism is thus one of the driving forces of the commercialization of business professions, which can be viewed as "technocratization" as much as "vulgarization". It is by no means one of the lesser paradoxes of the academic debate that the eclipse of the meritocratic and technocratic



components came about in the course of transformations for which they are, in large part, responsible. This blindness to their own role is not the least of the imperfections of their analysis.

Lastly, as has already been suggested, an analysis of these phenomena cannot afford to ignore the international dimension. The commercialization of business justice is in large part the result of its internationalization. For law firms such as the "Big Eight", the desire for a 'global strategy' is a prime motivation in the process of the policy of concentration (Stephens, 1985:99; Labaton, 1988).

Above all, one of the advantages of a comparative approach is to demonstrate the limitations of mechanical interpretations which are by far too simplistic. Indeed, if this process of 'commercialization of law' affects all legal cultures in industrialized countries, it does not affect them in the same way. To interpret the more blatant differences that can be observed between Germany, France, Great Britain and the United States one only has to draw upon the structural history of their national legal systems.

What strikes one at first is the similarity in long-term evolutions in the field of business law as contrasted to the discord between the ideological and political stances that provoked these evolutions. Wherever one looks, the market for legal advice is booming. Everywhere, the business world seems to have lost its old reserve towards the courts. Indeed everywhere, this vogue for business law is accompanied by a surge of concentration and renewed competitions between professionals. On the other hand, the range of reactions is more varied. Broadly speaking, whereas in Europe – with some exceptions such as the English Bar – professional authorities tend to 'fan the flames' to varying degrees and incite their colleagues to become legal entrepreneurs, across the Atlantic one rather has the impression that their North American counterparts are increasingly preoccupied with the risks of superheating the legal products market and are busy setting up a guardrail to contain an overflowing process they fear they can no longer control. It is true that if the evolutionary trend is to a degree similar everywhere, expansion and the restructuring of the market of business law has not reached the same level in each country. Europeans, on the continent in particular, are only beginning to discover a phenomenon which, in the States, is already two decades old. Therefore they feel that in order to catch up with the U.S. they have to run up the stairs two steps at a time. Because of their "third world attitude" they feel, rightly or wrongly, that the "excesses" and "overconsumerism" of legal products deplored in the States does not concern them.

The comparative approach thus provides the researcher with an enormous advantage: a sort of "flashback" which allows the simultaneous observation of several historical stages in the development of the modern market of business law, and thus allows an opportunity to reexamine the linkage of events. The vehement ideological debate that, in Europe, goes hand-in-hand with the emergence of this new market proves how utterly important these structural transformations are in bringing the new market about. This vehemence also throws into relief the fact that practitioners are not content to be the more-or-less passive beneficiaries of a renewed interest in law by the business world; they have abandoned their old reserve to throw themselves into far more aggressive marketing strategies; they have also put pressure on their professional authorities to ratify this new division of labour and these new legal structures without which competition in the new business consulting market would be impossible.

Lastly, this comparative approach enables an analysis of how diachrony and synchrony are combined in the transformation of legal justice. The belated (sic) arrival of the European legal professions to the forefront of business law, the result of political history which for a long time kept them on the sidelines of the field of economic power, is only relative. If today's professional authorities are so anxious to copy the American model of the corporate lawyer and the corporate law firm, or even to take reforms of legal institutions and practices further, this implies a question of survival. The field of European business law might well be in full bloom, but at the time of writing, profit has gone mainly to Wall Street law firms; European jurists fear either colonization or relegation to the level of dealing justice out to the poor. Diachrony and synchrony feed on one another in the pursuit of business justice transformation. The institutions that in Europe stabilize the division of legal tasks, encourage the expansionism of North American firms. On the other hand, fear engendered by this expansionism pushes radical reforms, such as the 'mixed practice'. The European legal landscape is thus particularly heterogeneous: if it still contains characteristic features of pre-industrial legal craftsmanship, it could in the long run become a laboratory producing a futuristic model of both trans-national and trans-disciplinary professional practices.

## For a reflexive sociology

Since we have criticized positivist approaches as being incapable of taking into account the role of producers of expert law within these transformations, as well as the strategies deployed in this field, the model we propose should fill in the gaps by integrating these aspects into its analysis. On the other hand, this is not merely an epistemological precaution. Keeping in mind that there exist, beyond their antagonisms, a true complementarity between theorists and legal entrepreneurs which reflects division of labour in the field of law, reflexive sociology highlights an often hidden aspect of current transformations: the fact that this 'commercialization' of legal practices also produces 'pure law' and the legal rationality (Nelson, 1987:286). This invasion of law by market and trade does not necessarily, as detractors say, herald the end of law, but foreshadows a political repositioning and shifting of the process of the social legitimation of law.

Ongoing debates on the 'decline of professionalism' never fail to evoke the eternal quarrel between ancients and moderns. One half deplors the defiling of professional ideals of collegiality and civism, the other retort that the aristocratic dilettantism and social authority of these 'legal notables' disguises only their incompetence and lack of dynamism. The intervention of academics into this debate is in keeping, it has been said, with their personal choices and professional functions. Their intervention also responds to the demands of professional authorities (Rehnquist, ABA Commission of professionalism). Because they are the self-appointed guardians of the collective symbolic capital which the public image of the profession represents, they are uneasy about the paradoxically disastrous consequences of the corporate law firms' sudden rise in fortunes. The very success of recourse to legal and judicial instruments in the management of business disputes jeopardizes the delicate balance the profession has tried to maintain between its image of defender of the social conquests of the dominant class, and its service to the tenants of economic power, in the same way as, when during the 'belle époque', the Cravaths flourished in the shadow of the "robber barons" (Hobson, 1984), the rapid expansion of corporate practice calls for a new promotion of 'ideals in the law' (Gordon, 1984). At a time when the tabloid press shamelessly features hit parades of the best-paid lawyers engaged in the biggest deals (Powell,

1987) it seems urgent to remind the public that practitioners of law are not only 'hired guns' at the service of 'Wall Street sharks', but that they are still "sages" and "scholars" before they are business people.

Obviously, this is a difficult task; but an indispensable one for a profession whose autonomy, power and prestige relies upon that delicate balance it has managed to maintain up until now between market, expertise and State. The fortunes of legal culture are due, in great part, to the equal distances this professional milieu has managed to maintain between business, academia and politics, thereby creating a necessary pathway between these various poles of the dominant class. Holding the middle ground is the basis of the roles it plays: as an antechamber allowing access to various areas of power, and as neutral terrain where 'professional brokers' can claim legitimacy in their management of tensions between the various components of the ruling class.

Such equilibrium is, by definition, precarious and requires unceasing collective cooperation. This is even more true during times of political or economic upheaval which more often than not call into question social compromises. In such instances, dispute is aimed not only at legal rules and institutions that express and crystallize previous political compromises. In such instances, dispute is aimed not only at legal rules and institutions that express and crystallize previous political compromise, a crisis also calls into question the role of counterforces of the different legal factions. Political upheaval has as its corollary readjustments in the professional field. Distribution of roles and equilibrium between factions are affected particularly by political ferment as it is only through this last that social and economic evolution can be inscribed in legal texts and institutions.

Internationalization of the market – and its corollary the invalidation of the welfare state institutions which characterized Fordian-type economic regulation (Boyer et.al., 1986) – affect the legal world in two ways: current law changes, but these changes are brought about through radical recomposition of professional structures and a redefinition of the images that contribute to the regulation of the legal game.

Transformations are not so much imposed from outside as generated from within through internal competition between different legal factions, each claiming the role of "spokesperson for the law" for various social forces. However, the actor-foremen of new legal

edifices change according to period and circumstance. If the New Deal was, according to Auerbach, a lawyer's deal, it is because Roosevelt used factions until then dominated by, if not excluded from, the professional group, to give his reforms the shape and legitimacy of the law. Today, because organized social forces are absent from the international scene in which financiers and business people play a cardinal role, cracks in the legal edifice are filled in by business lawyers. This distribution of roles between both complementary and antagonistic sectors allow jurists, no matter what the political circumstances, a quasi-monopoly on the shaping of social relations. Each era, each new power struggle finds its particular expression in law because the dominant interests of the moment can avail themselves of representatives, privileged and entirely devoted intercessors who, nevertheless, due to their recognized legal status, can mobilize the accumulated legitimacy of preceding generations on behalf of their clients. Paradoxically, this is valid even for predecessors who might have been part of a completely different system of political alliance. In this way, the legitimacy and know-how acquired by jurists who built the nation-state inscribing conquests and social reforms into law, allow today's big business consultancies to play a major role in building the new international economic order – upon the rubble of that very same nation-state. This division of roles which enables social plurality to be inscribed into law makes the business lawyer a necessary intermediary in breaking down the old order and ratifying new rules in the economic game.

This sort of strategy is only possible because it responds to potential demands of economic agents. These result, in part, from obsolete rules and institutions supporting economic activity conceived and elaborated during "the glorious 30's" – an era of unprecedented production. In the context of such expansion, competition between firms was conducted primarily in the field of technological innovation and the conquest of new markets. Public institutions and professional organizations on their part provided the essential dispute prevention or resolution. The disorder, if not the complete collapse, of these mechanisms of self-regulation provoked a renewal of activity for these intermediaries and professional brokers: the lawyers. Business people and economic actors in general can no longer rely on rules and institutions, more or less acceptable to all, for prevention, or even for routine resolution of the thousand-and-one daily problems arising from economic production and trade: they are constantly obliged to call upon professionals to manage disputes – after the fact and on a case-by-case basis.

Thus, in the short term, by calling upon them to manage potential disputes, or in the long term by providing them with the possibility of remaking rules, the new economic order opens a fabulous market to the producers of legal and judicial services. However, the market's infatuation with law and lawyers has a corollary: precisely that which the 'guardians of the temple' denounce as 'the commercialization of justice', that is to say, the invasion of trade imperatives into the stifled atmosphere of the legal world where, until recently, competitiveness was frowned upon as was maximization of gain. In the same way as towards the end of the nineteenth century capitalism invented the 'law factory' in response to demands of industrialists, international trade and the globalization of the financial market implies the transformation of methods of producing legal forms. Revived competition, and nebulous, diversified practices do not so much presage the dissolution of law into the market, as certain ill-humoured wits are inclined to fear, but may be a stage in the process of reconstructing professional space; a temporary deregulation indispensable in aligning the legal system with the new capitalist order.

## **Law in the financial game**

Even if boosted from within by professional factions making common cause with innovation, these transformations can only arise in particular economic and political contexts. As we have already said, Europeans, like North American businessmen, appear to have discovered the courts. This is hardly surprising when it is a case of "war without mercy" such as a hostile take-over where every conceivable tactic is mobilized by both camps; it is more surprising when the judge is called in to settle common or garden-variety business disputes. This milieu has always been characterized by its concern with settling its disputes in private, far from the public courts. How can we explain such a convergence that affects all modern economies?

Certainly in Europe the level of litigiousness is still well below that of North America, but converging signs show clearly that there too the taboo on using courts is gone. As against this, judge and trial are being transformed and adapted to suit the needs of their new clientèle. Europe in its turn has been introduced to 'litigotiation' (Ga-

lanter), or the overlapping of negotiation and legal recourse that has long characterized American justice.

The introduction of American-style behaviours into the business world is not as widespread as one might think. In the absence of objective indicators, it seems that this new phenomenon affects financial relations more than industrial and commercial relations as such. Or at least, this tactical use of law is more frequently found in companies and sectors concerned by financial restructuring. Thus, the introduction of new legal and judicial practices is a consequence of the 'financialization' of economy.

What is particularly striking on the European scene is that the differences introduced by new juridico-financial behaviours are not so much quantitative as qualitative. Not only do judges intervene more frequently at the demand of economic agents, they intervene in a different fashion. Amicable arrangements on the fringes of the Courts where the letter of the law is loosely interpreted is now out of the question; in fact, big juridico-financial disputes are hyper-legalized: every procedural resource is mobilized, the minutest legal detail is argued. In brief it would seem that the business world has suddenly decided to take law very seriously indeed. A fact that merits some thought.

Of course, industrialists in the past and more so in the future have taken and will take their suppliers to Court, and vice versa. But in commercial relations of this nature, referral to law and the intervention of a judge is reasonably marginal. The parties prefer the formulas of commercial arbitration or other methods ('mini-trials' etc) of ruling on commercial dispute in the shadow of law and its jurisdictions. The success of these forms of 'private justice' is such that legal authorities were tempted to adopt similar strategies such as monetary authority when they faced the euro-money boom: a "semi-deregulation of the courts", offering thus "a la carte justice" to a clientèle that otherwise might seek justice elsewhere. These various forms of legal mediation from the arbitrator-judge to the judge acting as a friendly third party aim, according to their promoters, to combat the development of private justice by encouraging recourse to the judge by litigants – particularly firms – in dispute management. This counter-attack results in a sort of semi-privatization of state justice which will provide the parties with a free choice of judge and of law, thereby avoiding the inconveniences of a public trial (Dezalay, 1989c).

If industrialists and traders persist in their preference for 'Shadow Justice' (Harrington, 1985) which operates discreetly, it would seem that financiers, or at least the new category of financiers who appeared during the restructuring phase, are not of the same opinion. When these new protagonists of the financial game submit to justice, they want all its pomp and ceremony. They are not looking for a conciliating mediator who ignores procedural rules and jurisprudence. Here, top level legal armies, under the floodlights of the press, debate in a very procedural and legalistic manner. In the largest cases with their multitude of developments that draw on every possible legal resource the practitioners' inexhaustible imagination can summon, we are without a doubt on a terrain of law where Charles Dickens would feel quite at home. Lawyers and justice are in their element.

The giant law suits that appear on the front pages of newspapers, that mobilize the resources of the most eminent judges, the best lawyers and the most prestigious law firms, take place around financial struggles whose outcome is finally the internationalization and restructurization of capital (Rice, 1989). As a rule, mergers and acquisitions, even when friendly, can become veritable soap operas where the developments and 'coups de théâtre' are as much legal as they are financial. With 1992 looming ahead, the ambitions and fears of European economic rulers have driven them towards adopting this modern juridico-financial offensive and defensive weaponry – junk bonds, LBOs, the poison pill and so on – invented, (Powell, 1987) then exported by Wall Street experts. These new offensive tactics in the service of a strategy of external growth spread like wild-fire thanks to wide publicity and the example set from on high. These juridico-financial techniques were historically the domain of "Sharks of Wall Street". Today, recourse to these techniques, as sophisticated as they are aggressive, is not only acceptable but highly valued as the sign of a modern businessperson's efficiency (sic). These new practices are contagious and spread progressively across the whole of the business community. In the light of this commotion within the managing community, small shareholders – traditionally the 'silent members of the capitalist system' – have discovered they have a voice and exercise it to the full before the judge as they contest management. The phenomenon has grown to such proportions that the latter are buying insurance to protect themselves from financial responsibilities. These new expertise practices have become so successful they are boomeranging – re-



cently, in what was known here as the "Petit Bateau" case, a firm turned on its own financial advisor following an unfortunate acquisition. Lastly, we might mention that the sudden prosperity of business justice has invaded the penal domain. In juridico-financial concert, the penal judge and government watchdogs of the market, slow in coming to the fore are now making themselves heard – witness the wave of scandals that have struck the major financial markets.

Thus everywhere, to varying degrees, the market – or at least the financial market – has rediscovered justice, just as the law has rediscovered the market. What is novel is that business justice no longer finds a quiet existence in the margins of jurisdictions acceptable, as used to be the case for commercial arbitration. The importance of financial stakes permits and demands mobilization of the professional elite who naturally take recourse to the most sophisticated instruments: the high courts and learned legal debate. Thus business justice is no longer on the margins of the law, but right at the core – a fact that cannot be ignored.

## **The growth of business law and the redefinition of the state**

Understandably, commentators' eyebrows are raised in question at such change. But interpretations advanced here differ from those current across the Atlantic – perhaps because, as has been suggested, this process affects only the greater industrial and financial groups in Europe. Unlike Wisconsin researchers who favour micro-economic models stressing governance and commercial relations, European commentators attach more importance to macro-political evolution: according to them, the States' retreat, accelerated by a decade of neo-liberal politics heralds a strong market come-back and thus the reinforcing of the role of the judge and the law in economic and social regulation (Cohen-Tanugi, 1985, 1988; Soulez-Larivière, 1988). Following this logic, the transformation of management, notably the rise of the firm lawyer is more an effect than a cause of these current changes.

That these authors are almost business practitioners themselves and call for an evolution they hope to be a part of detracts nothing from their lucidity. Of course, their diagnosis conforms to the legal and political interests of the professional faction they belong to and

the clientele they represent; but the success of the strategy they have helped define bears witness to the pertinence of an analysis that cannot be rejected under the pretext of non-neutrality. Trial by action overrides a myriad of learned scientific models. Moreover, such models are openly presented as professional and political strategies. This modernist faction of the Bar is close to the big international law firms whose blue-chip clientele, until now, tightly overlapped the civil service; for this reason these renovators are amongst the main beneficiaries of the state's industrial and financial withdrawal; their prosperity is in consequence to the loss of influence of national bureaucracies. Trade's expanding internationalization – which makes state intervention increasingly difficult – appears thus to be one of the keys to an understanding this new infatuation with the law, giving hope to these commentators that the “nineties could well be the decade of the lawyers” (Cohen, Tanugi, 1988).

Though in part self-promotional, their dossier does contain objective arguments. The construction of a quasi-federal Europe constitutes an important impetus for legal development. At least two hundred European ‘directives’ are expected before the end of 1992. And, as in any federal-type organization, lawyers are expected to play a major role in resolving the legal and jurisdictional disputes that cannot but increase. The market of European law is universally thought to be in full expansion, its annual growth-rate is in the order of 20-30%, and *The Economist* valued it at \$200 million. The wave of industrial and financial restructuring, in anticipation of the creation of a large market, has contributed greatly to feeding this growth. As a practitioner said: “the environment of discussion between Siemens and Plessey is of necessity legal” (Jézégabel, 1988).

This growth of legal services benefits the entire field. It would be foolish to see nothing more there than tactical and ‘aggressive’ use of law, a ‘manipulation of justice’ by economic agents. The logic of litigation is to give birth to a jurisprudence; recourse to lawyers and the courts during financial struggles helps clarify and formalize rules of the game; it produces law; it also encourages the emergence of institutions producing law. The judicialization of hostile take-overs gave rise, nearly everywhere, to their regulation, or at least, their self-regulation through semi-autonomous institutions such as the take-over panel or the COB (Commission des Opérations de Bourse, the French equivalent of the SEC). Because of the increa-

singly trans-national character of these mergers and acquisitions, the laws and institutions operate on an increasingly supra-national level. One can see the first steps on the ladder to a unified Europe, where the commission in Brussels has just instituted a procedure for preliminary judgements destined to play an important role in the regulation of industrial concentration. But this phenomenon could go further. Consider the recent Minorco-Gold Field take-over battle which finally ended up in the American courts, leading the *Financial Times* to emphasize the "need of a trans-national law for trans-national mergers" (Herman, *Financial Times* 1989-03-28). By encouraging the growth of trans-national legal practices, the internationalization of trade helps bring forth an international trade law, this "lex mercatoria" that lawyers have prayed for because it represents the acme of their art and their best marketing argument.

When one asks oneself the reasons for this growth of legal services, it is impossible to distinguish between client demand and "know-how" promotion by producers. The logic – and the strength of the legal field – is that commercialization of law produces pure law: by producing precedents, principles, doctrine or institutions lawyers reinforce their position in the market of trade services.

Business lawyers do not escape this logic of the legal field which leads them to be the main beneficiaries but also the main victims of their own making. The efficacy of business law, its credibility in the eyes of business people, and the authority of its mediators implies, as Gordon (1984) has demonstrated, that practitioners believe – at least to a certain extent – in the existence of an "ideal in law" that they help forward. Because it is more difficult for corporate lawyers than for others to distance themselves from the economy, the money, and the compromises with conscience that form the foundations of the social legitimacy of law and lawyers, they must contribute more than others to constructing legal rules and institutions that will guide their clients and themselves as well.

In a well known text, Galanter (1974), analysing the economy of the production of law demonstrated that companies, as 'repeat players', contributed to the production of jurisprudence more than individuals. The resulting growth and complexity of jurisprudence and rules in the field of business law also benefit the practitioners who are its agents and without whom legal strategies could not be devised and implemented. Thus their interests are interlinked. The growing complexity of legal texts applied to business demands greater specialization on the part of practitioners; in turn, the

existence of these highly-qualified specialists produces ever "keener" and more specific knowledge, barring entry to this market of sophisticated products, and protecting them from competing general practitioner lawyers and other professionals. This cumulative process, in which complexity of technical knowledge and specialization of certain practitioners reinforce one another, need only encounter a lucrative opportunity – which currently exists as internationalization boosts economic restructuring – and it cannot help but set in motion and accelerate a new field of competence and a new category of professionals claiming autonomy.

## **New markets and rationalization of legal instrument**

Infatuation with law and the awakening of the market are simultaneous because both lead to the opening of economic as well as professional frontiers. The redividing and recombining of the legal field through which the international expert on company law achieves autonomy, are but the counterparts and the consequences of the restructurization of economic trade circuits. The two phenomena work hand in hand and it would be fruitless to say that one was the cause of the other.

Bourdieu reminds us that "degrees of codification vary as do degrees of risk" (1986). The formalization and codification produced by these experts is necessary for groups who need things to be spelled out clearly and who are incapable of managing critical or conflictual situations on tacit understanding. The growth of international trade signifies the arrival on the scene of numerous new actors – which by itself makes personalized and informal business management impossible. The commercialization of law is both the effect of and the context for the opening of international trade to a greater number of actors.

The evolution of financial markets is a dramatic example. The time has passed when City brokers and jobbers could – and should – know their colleagues individually. The opening and expansion of financial markets, culminating with the 'big bang', have destroyed self-regulation by the 'private club', where personal trust reigned – "my work is by bond" – and formalization was out of the question (Kynaston, 1989). Within this "citadel", out of bounds to strangers,

the happy few were by definition, in the strictest sense of the term, the initiated. Access was through recommendation – or best of all, birth. Because of rigorous pre-selection, the privileged information circulating in this private world – without which the stock market could not have functioned – was managed collectively. The recent growth of financial ‘scandals’ is nothing more than a sign of this professional group’s growing incapacity – because of the rapid arrival of newcomers – to continue informal self-governing. On the other hand, intrusion by state justice has further splintered this social circle, which remain in many ways a “family-based cottage industry”, thus contributing to the institution of new rules better adapted to the technologies and stakes of a global market.

The same could be said of that other area of business practice where professionalism and juridicalization are developing on parallel lines – the restructuring of companies, better known as mergers and acquisitions (M&A). Historically these operations were the prerogative of a small group of business notables (bankers in larger cases, minor local notables in smaller cases) who, between themselves, discreetly managed the process of concentration and devaluation of capital, in other terms, the lateral growth of companies through marriage or their eventual death in bankruptcy. The accelerating process of industrial restructuring, brought on by the oil crisis and then, internationalization, has been translated into the professionalization and the technicalization of this sector of activity in which investment banks, as well as large law and audit firms are the main competitors (Dezalay, 1989a).

These observations could be extended to cover all international economic activities, be they commercial or financial. Previously they were the prerogative of a small group of operators who cultivated tightly-knit, personalized relations to suit the risks in question. Braudel, it should be remembered, saw international capitalist relations as a domestic rather than a trade system. Today they are the chosen domain of big international firms of experts who function as go-betweens in these new financial or commercial trade networks. The upsurge of inter-professional competition is a consequence of the commercialization of international trade relations – a sphere where competition was, for the most part, excluded by domestic or family networks and long-term relationships. International financial-services conglomerates are replacing the cosmopolitan diaspora of Jewish, Chinese, Lebanese merchant bankers who were for so long the backbone of international economic exchange.

The internal market itself has not come out unscathed by these transformations. The large, post-war firms, based on the Fordian model, sure of their market, with no other objective in mind than maintaining a profit-level thanks to the price-salary inflation spiral, have had to convert and readapt to a mobile, uncertain, economic environment. If, as some have suggested, "long-term business relationships" have lost their importance it is because, broadly speaking, the long term no longer exists in economic relations. Production and manpower management is not enough. Provisions have to be modified and production strategies readjusted – with one eye on new third-world or European competitors, clients, suppliers, and the other on technological innovations or financial or political fluctuations that can brutally change markets. Companies whose direction cannot, or will not, adapt to this new unstable, global market are doomed, thus accelerating the restructurization of the industrial web. The only likely survivors are those skilled enough to manage new information, and flexible enough to readapt endlessly. The decade of the economic crisis, inaugurated by the oil shock has not only thrown millions out of work, it has also profoundly traumatized management and turned its world upside-down.

## **Professional strategies on the market of advice**

One sector, however, views these brutal transformations optimistically: that of corporate consultants whose market is displaying extraordinary prosperity, with an annual growth of between 20-30%. The "Management Consultancies Association" whose members represent two-thirds of the British consultancy market claim that their business turnover increased by 36% in 1986 and nearly as much in 1987 (*Financial Times* 1987-10-26).

In this context of crisis and general uncertainty, management has turned to outside advisors for information and the elaboration of new commercial or financial strategies. Thanks to trans-national networks set up by practitioners during the fifties – in particular by the "Big Eight" – modern-day advisors are indeed in a privileged position to provide information, advice, or even to serve as go-betweens in a market that has become world wide. In other respects, the semi-permanent economic and financial restructurization envi-

ronment – with, on the one side, cessation or reorganization of activity, and on the other, accelerating concentration – represents a “juicy”: a nearly inexhaustible source of activities for these professional intermediaries. It is not simply a matter of evaluating, formalizing, authenticating commercial or financial exchange; today, whole companies are put on the market, either after having problems, or, the opposite, because of internal expansion. This restructuring affects small and medium-sized companies who must attain international stature in order to survive, as well as the big groups who, having opted for diversification to form the conglomerates of the 70's, are today doing an about-face to concentrate on a particular activity or series of products they are attempting to control on a world scale. This permanent monopoly creates endless problems of all natures – financing, marketing, tax, personnel management – that are, effectively or potentially, within the area of competence of these various professions advising companies.

### **Opening new territories to the ‘know-how’ of experts and the transformation of the professional system**

The perspectives offered by this new market are such that different professional categories willingly redefine their ‘know-how’ or change their image in response to potential demand. The system of professions has not only expanded, it has also undergone a fundamental internal modification of the ways in which these so-called liberal professions are practiced. Specialization, diversification, concentration are just so many facets exacerbating competition; it happens within professional categories that can no longer control competition through an ideal of collegiality and public civism. It happens also between different categories – engineers, accountants, lawyers or financiers – less hesitant about poaching on others’ preserves in the name of a “supermarket” (Noyelle, Nutka, 1986) strategy of growth at any price. Profit and efficiency are the new watchwords of this “religion of growth” that nobody escapes, under pain of extinction.

The gigantic restructuring phenomenon which affects industrial and commercial companies has a counterpart in the field of professions. As during the grand period of colonial expansion, the

opening of new territories has aroused a formidable appetite for power. To take the colonial analogy further, such conquests are susceptible to numerous ups and down, tactical alliances, uneasy armistices, as excessive competition imperils credibility. Competition is as much intra-professional as it is inter-professional. Depending on local circumstances, each tends to valorize his own anteriority and experience and to discredit the pretensions of newcomers. On the other hand, one would value one's independence, if it became necessary to encroach upon an established and, therefore, suspect competitor who can accordingly be dismissed as overly implicated and vested in the game to give impartial advice. Lastly, these strategies of conquest, even if they appear slightly eccentric in relation to the entire field of practices which defines one or the other profession, can have serious repercussions. To conquer desirable positions, these new entrepreneurs of services are only too happy to modify dramatically their 'know-how' and more broadly, the traditional image of the profession. Furthermore, these innovations are not necessarily contained within the business field from which they originated. Even if they represent but a fraction of the professional body, the position and the resources big consulting firms can mobilize permit them to ensure that these new practices are sanctioned and ratified by professional authorities. Thus it is obvious that reform projects under study in Europe, be they the 'mixed practices' proposed by Lord Mackay, or the 'grande profession', are in great part the spin-offs of the big business consultancies' concentration strategies which need to expand and diversify in order to remain competitive on the international market of service to enterprise. But in this huge game of musical chairs which affects the entire system of professions, the accountants – previously 'under-dogs' and thus with the most to gain in the general upheaval – gave the signal to begin.

Since the early 1960's, auditors – traditionally limited to certifying *ex post facto* the veracity of the firm's business transactions – have begun to lay claim to higher professional positions as advisors on future transactions.

To back their ambition, they can avail themselves of a precious advantage – their knowledge of tax law and their familiarity with tax bureaucracy. Indeed, in the increasingly competitive economic environment where margins are reduced, in the last resort profitability can depend on the cleverness of tax constructions. The diversity and complexity of national legislations offer the director of a big



conglomerate various escape routes (Picciotto, 1988) if he has available a good tax advisor when structuring new commercial transactions. By leaning on their skill (cf Stevens, 1985:120ff.) to bypass tax laws, by playing around with the letter of the law (McBarnett, 1989), ex-accountants have managed bit by bit to raise themselves to the privileged position of advisors to big business. Present at the beginning of a transaction they have helped structure, they are well placed to serve the other marketing, financial or organizational needs that inevitably crop up. This technical knowledge is thus the basis of a powerful position with multiple payoffs, be they in terms of fees, prestige or influence. Indirect or intangible profits cannot be ignored in an area which relies on a capital of human relationships to attract new clients or to recruit personnel. The two elements are inseparable and cumulative in a manpower industry: for instance, the "Big Eight", to attract talented, ambitious, well-born recruits, flaunts its relationships with the most prestigious clients; in return, the fortunes of and reception given to big firms in the economic power field depend upon their capacity to gather the 'best and the brightest' – those individuals capable of transforming technical expertise into symbolic capital (Bourdieu, 1986) of social influence. Obviously these strategies of diversification and valorization work reasonably well: the "Big Eight" boasts an increasing annual growth rate of 20-30% (Riley, 1986). Better still, their "corporate restructuring" departments which represent the peak of this strategy, show on their part an annual growth of 50% or more!

Diversification and the systematic occupation of this new terrain could hardly be viewed with indifference by the legal or financial professions, whose alliance strategy had assured them a quasi-monopoly of the role of intermediary in the field of economic power. But before going into the details of their counter-attack in which internal factors – demographic and educational – played as serious a role as external factors, some of the dynamics of this inter-professional competition should be gone over in detail.

It is even more necessary since a large part of all professional ideologies deny the existence or even the possibility of such competition. How could there be any competition between an accountant and a lawyer since their respective areas of expertise appear to overlap so little? A lawyer is by definition an advocate defending his client's interests whereas the auditor claims to be a neutral expert providing a technical and objective point of view. Each in his specific area responds to a well-defined social need. According to this

view, the present overflow is but the sign of a temporary upset, easily correctable if public authorities feel like calling the offenders to order. Indeed, only recently the French Bar, now claiming to be an organization of professional intermediaries, brought forth a plan to defend the legal advice market against the encroachment of the 'big anglo-saxon accountancy firms that have launched a veritable OPA on legal advice (le conseil en droit?) in Europe (de Ricci, 1988).

Research cannot allow itself to become tied up in this sort of ideological argument. It would ignore, as Abbott (1988) reminds us, that the "jurisdictional" links between a professional group and its terrain of activity are the product of its history and as such are repeatedly questioned. The various professions try to construct, or more precisely to reduce social problems to, a need which requires exactly the sort of treatment only they can deliver, because only they have the required knowledge. However, while each profession defines its own territory from the complex of polymorphic and changing social problems, and tries to control the territory exclusively by assuming that jurisdictional links are natural, these links are in fact contingent, artificial and precarious.

Certainly, when practices are defended by a legal monopoly, as is the case for audit or litigation, inter-professional competition is impossible. But this is relatively exceptional and a domain such as corporate consulting abounds with examples of ambiguous situations where boundaries are contested because they are imprecise or have been displaced by the course of history. Certain 'problems' or 'needs' have disappeared, or have become transformed by technological or political evolution. Thus, computer technology has made accounts ledgers obsolete, hereby obliging Dickensian accountants to convert to other practices. Other domains have more or less consciously been put out to pasture by the professions to which they theoretically correspond. Such is the case of tax which, having been long scorned by the legal profession, has almost been taken over by accountancy firms.

Lastly, some tasks are, by definition, more difficult to localize and appropriate in the name of a specific knowledge, either because various 'know-hows' are squabbling over it, or because a particular social group will not let it go. Such is the case with respect to the intermediary function in the sense that he can, thanks to his relationships, play the role of mediator or broker who helps resolve disputes or social problems by drawing together individuals or groups. As we have said, this was for a long time the prerogative of a sort of

business nobility where bankers or the employers of family concerns were highly-placed. In disputes they were called upon, and from their ranks, arbitrators were chosen. Justice was, in a manner of speaking, one of the attributes of a position of authority in the field of economic power. Merchant banks were the first to try to professionalize intermediation but their intervention was limited to the domain of large companies or international financial relations. Apart from the senior partners of big Wall Street law firms who conquered this position at the end of the 19th century, the professionalization of the market of intermediation is relatively recent: it coincides with the crisis which not only rendered a fair number of corporate world structures obsolete, but also made necessary the establishing of new communication structures more suitable to an international global market of economic trade. The recent emergence and rapid development of this new professional market explains why, today, it is so violently fought over by lawyers, investment bankers, and accountants.

Indeed, this type of territorial dispute, ever latent, becomes particularly acute where new territories are opened, or when traditional markets develop rapidly. Since in the beginning at least, possession is nine-tenths of the law (first come first served!), the various applicants are engaged in a race against time. The prime objective is to occupy a maximum of terrain by relying as much on technical competence as upon the relationship network one can mobilize. Ex-accountants, late-comers in this race for power, fall quite naturally into the strategies of their banker or lawyer forerunners: collaborating in the development of a complex system – on the stock exchange or in tax collection – then selling one's services both as expert and as mediator.

In the fashion of New Deal lawyers who, having put public regulatory agencies on their feet, joined the Wall Street firms, bringing with them inside knowledge of the workings of these bureaucracies, tax officers of today are joining the "Big Eight" in droves. Because their expertise is unanimously recognized, these big advice firms are frequently consulted by government agencies when tax reforms are being prepared. They are thus extremely well-placed to act as intermediaries between their clients and State bureaucracy. This allows them to sell their services at a premium when companies, before concluding a transaction, want administrative approval in the form of a "private ruling" on the legality of the juridico-fiscal construction they have set up (Stevens, 1981:150).

This intermediary activity is not limited to relations between the private sector and State bureaucracy; it spreads to the professional partnerships these firms collaborate with. Thus for example, having served in the first instance as auxiliaries to investment banker firms to whom they brought, en masse, needed, qualified manpower, the "Big Eight" is, in its turn, by exploiting its experience and familiarity with the Wall Street world, entering the market of financial advice to small and medium-sized firms. Thus, they are operating on three levels: that of providing prompt technical services to investment bankers, that of 'go-between' vis-a-vis strangers in need of introduction to the financial institutions, and lastly, they offer their own financial services – the finding of partners for mergers and acquisitions, the preparation of financial plans.

This triple-role that characterizes these service firms might, a priori, seem surprising. But in fact such practices are widespread in the advice market. It could even be said that this is one of the main components of the power of these experts, who, from the starting point of technical 'know-how', ascend to the key position of 'power-broker'. And, it can't be repeated enough, the "Big Eight", often attacked on this point, by no means monopolizes such practices. Before them, big Wall Street or Washington firms carried such practices to a fine art. Arnold Porter, to cite but one example, occupies a similar position in the political world where it simultaneously operates as neutral and objective expert, as advocate, without forgetting the role of go-between, in offering services to the government and/or to individuals.

Understandably, this sort of triple role cannot be protected by a strict definition of tasks: its fortune comes precisely from the constant transgression of frontiers to establish links between the respective fields of politics, knowledge and economy. The division of tasks and the defense of territories are no less so, but are organized on a more informal and personal level. If these practitioners often cash in on their 'go-between' services, it is because access to these circles of power is closed to the non-initiated. One must be introduced, and introduction is personal. Boundaries exist, but they are based on criteria of the size, rather than the nature, of a problem; areas of competence are defined mainly by the importance of the stakes, which are in turn related to the social and economic position and the quality and renown of the practitioners. The stratification of this 'go-between' market is a reflection of the various factions of the economic ruling class. The 'know-how' of these professionals is

inseparable from their capacity to mobilize networks of stratified relations where the 'big' mingle rarely, if at all, with the 'small', as an interview with a New York investment banker specializing in mergers and acquisitions pointed out.

Big deals and small deals are not the same thing. From a certain size up, the nature of the problems change completely. The little boutiques and the large firm don't belong to the same world. Looking after M&As for twenty years at Toche Ross doesn't help when you want to attack the big hostile take-over market. The rules of the game are very different. The people to mobilize or convince – bankers, businessmen, politicians – not only are they not the same, they don't know each other. If you want to work top level, on the biggest deals, you have to have made the grade. You don't learn all this in school... You have to be introduced.

Partitioning off and segmenting the intermediation market by no means protects it from competition. Frontiers between big deals and small are not defined once and for all. Furthermore, the renewal of the business ruling class, in particular as it accelerates thanks to the take-over wars, offers new-comers to the professional world the chance of ascending to the market's highest echelons. This strategy is explicitly that of the accountancy professions, traditionally on the sidelines of ruling circles; the social-climbing ambitions of these newcomers leans on the competence and familiarity they acquire when sub-contracting big transactions. In effect, if big deals remain the monopoly of an elite composed of a small network of investment banks and large legal firms, these, by the nature of things, are obliged to have recourse to the high pool of manpower and technical services of all the types that the "Big Eight" represents. But these great conglomerates of financial services are no longer content to play a supporting role in a market they entered by the back door.

## **The accountancy professions: An all-azimuth expansion to suit the ambitions of these newcomers**

The strategy of these conglomerates is to become increasingly indispensable through the variety of expert services they offer and their implantation in the main financial and commercial centers.

This politic of internationalization goes back a long way, seeing that these firms, British for the most part, became involved in the North-American market at the end of the last century as they followed-up on clients' investments. After this basically Anglo-American first phase, the globalization process as such began towards the end of the 1960's. The local offices of Coopers & Lybrandt grew from 35 to 352 between 1950 and 1979, while its personnel increased from 1000 to 22500 employees (*C & L Journal*, 1979). It responded then to the demands for an increasingly trans-national clientele. Thus, one could estimate that at the end of the 70's, 40% of clients audited by Price-Waterhouse operated on a multi-national scale (Leyshon, Daniels, Thrift, 1986:18). And this phenomenon is accelerating.

More and more, bidders with the strongest presence in all the world's commercial centers win the multinational accounts. For this reason there is a great pressure... to expand internationally by passing money and talent into overseas offices or by merging with established firms in Europe, Asia and the Americas. (Stevens, 1981:70)

Under these conditions, inter-professional competition must pass more and more through trans-national competition.

The financial services revolution has obliged the big firms to strengthen their international links. Medium-sized partnerships are in danger of being squeezed and the industry's professional structure, too, face the need to adapt. Globalization is the most powerful theme within the financial services industry today and accountants are scrambling to improve their international capabilities. The challenge is to develop a range of services which can be delivered almost anywhere in the world. (Riley, 1986).

Within this competition, the simple fact of their size and the earlier birth of their strategy of horizontal concentration means that the "Big Eight" are in a prime position.

As more traditional financial services firms struggle (or abandon the effort) to become global financial services groups, the big accountancy firms have almost made it. (...) The accountants have a better geographic spread than most financial services firms. KPMG has offices in 115 countries; Citicorp in only 90. Most banks and stockbrokers who had 'global' ambitions have had to settle for making money at home and hoping to break even abroad: 99% of Japan's big securities houses' profits are home-grown. But accountants have had more success in expanding away from their Anglo-Saxon bases. Europe contributed \$1.7 billion of KPMG's income last year only \$140m less than America. European fees are growing at 25% a year – twice as fast as America's. Asian and African fees grew even faster in 1988, by 28% to \$320m. These new markets are also more profitable. (*The Economist*, 1988)

The peak – so far! – of this globalization strategy was the merger of Peat Marwick with Klynveld Main Goerdeler (KMG) at the end of 1986 which resulted in the setting-up of the number one audit firm – KPMG – with its 5,200 partners and its \$2,350 million turnover. The principal argument for this merger was the geographic complementarity of the two partners, Peat Marwick was only weakly implanted in Europe whereas KMG's position was more solid; on the other hand, this network of European firms considered itself insufficiently represented by Thomson McLintock on the North-American market (cf Stevens, 1985:17).

So far relatively unexploited, European and Asian markets are a terrain of expansion – and of privileged competition for all those aiming at a lead position in a – from here onwards – global market.

Building the right links in Continental Europe and the Far East (mainly Japan) is a process likely to sort out the leaders from the laggards in the next decade. The European dimension has only recently become of major interest to the large international firms. Closed national audit markets kept them out in the past: the likely relaxation of these rules and the likely growth of business within the European Community when economic barriers be-

tween member states are dismantled have brought a flurry of activity. 'We are going to give a far more integrated service around Europe. One has to move down the road of closer cooperation' says Mr John Bullock, senior partner of Deloitte." (Waters, 1987).

It is in the interests of the European market as well to allow these conglomerates to infringe upon the division of tasks that in North America confine them to narrowly-defined, subordinate, technical tasks:

Across the Atlantic the 'big eights' are careful not to infringe upon the division of tasks. As soon as there is a legal problem they call in a law firm. When they arrived here, their politic was the same from the beginning since they soon realized there was nobody in front. Therefore, as the audit market is saturated and they want to expand, well, they occupied the terrain.. Today they employ 2000 lawyers and they have entire departments looking after legal management. Each year they take on some sixty youngsters, choosing the best. And these young lawyers, not sure of making partnership are tempted by the salaries they offer. They have already conquered the area of everyday legal management of firms. They have solid bridgeheads in tax thanks to the 'conseil juridique' firms they control and they are ogling more sophisticated and juicy legal products such as the M&A market etc... (Interview with a Parisian advocate).

One can understand that faced with this menace, Parisian lawyers, like British solicitors, consider the "Big Eight" their main enemy. "English accountants are far more of a threat to English solicitors than U.S. lawyers" says Max William, senior partner of Clifford, Turner, one of the ten big city law firms, and ex-President of the 'Law Society'; (cited by Campbell-Smith, 1985b).

Indeed, internationalization and diversification are but complementary aspects of this policy of expansion which characterize these conglomerates of services of all natures to a business clientele – the multinational financial services conglomerates. These giant consultancies' rapid growth rests on a systematic politic of new market conquest: the old departments, "old-timers" such as audit whose near-saturated markets can assure them only relatively slow growth, serve to finance high investments in terms of the recruit-



ment, training and marketing necessary for opening the new markets which are likely to pull the firm's growth up in the future.

Evidently, this diversification strategy is oriented upwards. Accountants try to develop more sophisticated products, giving them direct access to the top management. To get to be known, and highly thought of, by the decision-makers means more sizable fees and control over the regular supply of multiple services. Based on their size, the "Big Eight's" systematic approach has been to add value to their products by passing progressively from routine tasks such as accounts, to more prestigious and better-paid tasks like auditing. Now they are involved in 'in-depth investigation' where the balance sheet specialist will pass global judgement on a firm, its past management, and its future prospects. In the same manner, from less glorious tasks like tax advice, or the managing of failing firms, the "Big Eight" have developed into financial and restructuring consultancies. In these top-level specialities that flourish in corporate finance departments, or mergers and acquisitions (M&A), accountancy professionals, renamed "industrial and financial restructuring experts", lean simultaneously on their techniques of investigation and objectification – in-depth auditing – and the control of an international contact network to gain admittance – if only through the back door – to the very private financier 'go-betweens – club (Dezalay, 1989a).

The politic of diversification thus preceded that of internationalization. Some even consider it the main ingredient of these firms which, from the beginning, defined themselves as practitioners in the service of the business community willing to resolve the immediate problems of the day, no matter what they were (*The Accountant*, 1984). In fact, between the 1870's and the 1880's, management of failing firms represented 75% of the fees of the forerunners of Ernst & Whinney's. It is true that the market was flourishing: nearly a third of firms founded between 1856 and 1883 were being liquidated (Jones, 1981). Tax advice is also long standing, since the Finance Act of 1903 already authorized British accountants to plead in tax matters. It was not until after 1945 that this activity became significant by surpassing 19% of global fees. The growing complexity of tax legislations from the 60's onwards, and today, the financial restructurization, are the main driving forces of this activity (Leyshon, Daniels, Thrift, 1987:21; Tinker, 1984).

Thus, even if there were precedents, systematic diversification really only began towards the end of the 50's. At this period the first

Management Accountancy Services, (MAS) appeared: Touche Ross in 1952, Coopers in 1954, Peat Marwick and Arthur Andersen in 1957, Arthur Young in 1961 (Leyshon, Daniels, Thrift, 1987:14). This diversification policy benefited from the relative drying up of the audit market – in part because of technological innovations (systems experts) but mostly from violent competition that forced them to bring their prices down. From the 70's onwards, MAS became the activity driving these conglomerates. It had the strongest growth, attracted the best elements, generated the highest profits and transformed the professional model. The breaking down of advertising restrictions was thus justified by competition with other non-professional consultancy firms. To a large extent, this diversification took off from a politic of outside recruitment, to the extent of buying of other management consulting firms. Today, the "Big Eight" towers over the market, seeing that, of the twelve original firms, seven are divisions of the "Big Eight" and Arthur Andersen occupies the enviable leader position.

For those multi-disciplinary professional conglomerates who call themselves 'financial services supermarkets', the development of 'corporate financing departments' – since the 1980's – represents the ultimate development of this strategy of diversification and re-evaluation of tasks. The modalities of this progressive transformation into financial intermediaries – best illustrated by Deloitte Haskins & Sells (Waters, 1989) – varies according to country and tactical considerations. In London, the "Big Eight" have created corporate finance divisions and they intervene directly for firms wishing access to the Unlisted Securities Market (USM). On the other hand in Wall Street, Price Waterhouse has created a 'joint venture', PW & Partners, with four investment bankers to provide a similar service. However, despite tactical nuances, the objective is clear. Indeed, as has been said, these supermarkets do not – yet? – have access to the big deals which still remain the prerogative of the highest-rated Wall Street law firms and investment banks that call themselves 'boutiques de luxe'. Furthermore, their partnership structure hinders their access to necessary capital resources in order to provide a full range of services already assured by investment banks, such as the sponsoring and underwriting of hostile takeovers. But, despite such handicaps, these conglomerates are trying to increase their share of the market by every available means. They cut down on prices and try to develop a pool of promising young entrepreneurs who they hope will not be ungrateful towards the firm

that helped them at the beginning of their career. Their ambition is to gradually push their way into the well-protected market of big deals. The go-getting ambition of these new-comers is putting increasing pressure on the transnational and transdisciplinary market of supply of expertise.

A lot of clients have told me they find investment banker fees prohibitive. So they've gone to see what accountants or consultants can do for them, people who can offer them a nearly identical service at a much lower price. The pressure of competition is such that no one would dare present a bill like those Flom or Wasserstein sent to Carl Icahn. To keep their clientele, law firms and investment banks are more and more driven to providing a whole range of services, rather like sub-brands at inferior cost. The product is virtually the same, the difference being that the professionals are less well-known, therefore the whole thing is cheaper..." (Interview with a Wall Street investment banker).

### **The legal professions: Counter-attack strategies all the more radical when the obstacles or handicaps to overcome are important**

Obviously, when faced with this attack from all directions, the legal professions cannot but react. But this reaction is influenced by the local positions they occupy in the field of economic power. The greater the handicap, the more radical the solution to change their image in the eyes of a clientele they want to conquer or reconquer. From this stems the serious differences that can be observed in different nations. The main line of demarcation is that which separates Europeans from North-Americans. The absence or weakness of the European legal professions in the business market puts them in a dramatic position where their only chance of survival is through a radical "aggiornamento" strategy. The case is not the same for their North-American counterparts. Through their founders' alliance with the "robber barons of triumphant capitalism", the big Wall Street firms stole a march on these new competitors. All the same, even if these "boutiques de luxe" are not aimed at the same clientele as the new supermarkets, they cannot ignore the new ambitions ignited,

outside, as well as within, the legal professions, by the rapid growth of the business consulting market.

In this increasingly open game, the big legal firms occupy an intermediate position, jammed between the tiny elite of 'freelance' investment bankers monopolizing the highly-remunerative positions of 'go-betweens' and 'deal-makers' on the one side, and on the other, those industrious, but ambitious, "big eight" armies of technicians. So on both sides, competition is closing in. The huge European or Japanese commercial banks compete more and more against investment banks on the strictly financial terrain. In reaction, the latter are falling back on the role of financial intermediary by presenting themselves more and more as professional consultants. This evolution engenders tensions within the bosom of these establishments; tensions that can even lead to splits such as the one between Wasserstein and Perella with First Boston. These slighter new structures can function at lesser cost, which obviously attracts companies watchful of spending during the financial crisis. Such newcomers on the financial intermediation market are the more aggressive and inventive due to the strong pressure on the employment market. Since October 1987, Wall Street has thrown hundreds out onto the streets, so there exists a mass of professional manpower ready to seize, even to create, new opportunities. A lot of people are jostling one another to get to the same spot – that of the professional go-between, business broker who combines technical competence and social know-how. Competition has intensified around prices or products; everyone is trying to jump off the beaten track to find fresh sources of activity and profit, and in the process are breaking down the barriers between previously separated skills. Outside of the big supermarkets, new 'boutiques' are constantly springing up with the same objective of bringing together various specialists to offer their clients the specific multi-disciplinary package that fits their needs. This transgression of frontiers by no means spares the private hunting grounds the law firms had set up. Some of these 'boutiques' thus offer, directly or indirectly, legal services that go hand-in-hand with the financial or tax restructuring they offer their clients.

Because of this increasing competition hammering at their doors, law firms have had to abandon the aristocratic dilettantism that in former times allowed them a near-monopoly of the advice-to-firms field. From now on they have to battle on two fronts: towards the top by offering to the small 'rain-maker' elite the level of income

close to what they would get by joining the ranks of investment bankers; to lose that 'class' of elite practitioners would mean exclusion from the big deal-making circle. Through their close contact with top management, these 'super-lawyers' bring prestige, influence and profit to the firms that employ them. But at the same time, these large law firms have to fight on ground level to keep their portion of the technical expertise market by maintaining competitive prices in comparison to those of the "Big Eight". This dual pressure has engendered a stretching out of the hierarchical ladder, a further rationalization of the division of tasks, and a rising exploitation of that manpower at the bottom of the pyramid which executes routine and technical tasks. The rationalization has as its corollary an increased stratification between those associates destined to make partner due to their combined technical and social competence, and those destined to remain simple technicians. These transformations into a two-tiered structure have been adequately described elsewhere (Spangler, 1986; Nelson, 1987) and it is unnecessary to go into them further here.

Running parallel to these internal reorganizations (we shall see later on why they were only possible because they coincide with the transformation of the legal profession's mode of reproduction) the law firms' counter-attack has been deployed on two complementary levels: the enlarging of their market (Fitzpatrick, 1988), and an over-investment in legal rationality. As we mentioned earlier apropos the growth of business litigation, this second strategy corresponds to the fluctuating demands of economic agents. We shall go into some detail on endeavors to extend their market, because they have accelerated transformations in Europe.

The logic of counter-attack implies the use of the arms and tactics employed by the assailant. Concentration and rationalization of labour goes hand-in-hand with growing concern about marketing and profitability as they try to turn this new generation of law firms into a commercial enterprise like those with which they hope to compete. The legal world does not escape from practices such as dumping, outbidding where fees are concerned, concentrations through mergers or absorptions – even bankruptcy which now characterizes the professional world as keeping with an elitist strategy, the strategy of concentration is more geographical than vertical. Growth relies on the opening of new offices, the conquest of fresh markets. However, this orientation might be in the process of changing, initiatives of diversification are increasing, or in prepara-

tion, and it is doubtful that the legal profession will, in the long term, leave the monopoly of inter-professional poaching to its competitors (Fitzpatrick, 1988).

The internationalization of Wall Street firms is not a recent phenomenon, but it has made a quantitative and qualitative jump these last ten years thanks to the financial market's internationalization. As for the "Big Eight", the Far East and Europe are prime targets. The logic lying behind this form of colonization is the same: clients or businesses that are increasingly trans-national have to be followed – or preceded; the 'big bang' and the preparation for 1992 have thus provoked a veritable disembarkation in London, Paris and Brussels. "Where commerce flourishes, law must flourish too" (Davies, 1985; also Labaton, 1988; Rice, 1989, Pollock, 1989). But it is also a question of taking advantage of the weaknesses of the European legal professions to grab their market. Poaching, is, therefore, rather transnational than inter-professional. At the moment, Wall Street law firms are in a dominant position in Europe. They are leaders in the key markets: hostile take-overs, mergers and acquisitions and privatization of state-owned companies. It has been said that the turnover of 400 American and some British lawyers established in Paris represents, from figures given by the 'Direction Generale des Impots', the equivalent of that of 7000 French lawyers registered with the Parisian Bar (Logeart, 1987). By reaching way beyond their original territory, these 'mega-firms' are helping to accelerate this spreading phenomenon of legal practice commercialization (*The National Law Journal*, 1987). The broadcasting of a dominant economy's legal practices can as easily give an impression of mimicry, when the same logic – that of the contesting of established orthodoxy by 'young wolves' – is at work within the various legal cultures. The more ambitious or more motivated local professionals are careful to imitate the 'know-how' and methods of their foreign competitors and thus precipitate the homogenizing of the international market of professional services. If they cannot defend their territory, at least they can cash in on their present position by selling themselves – and their portfolios of local contacts – to the invaders, under various formulas like bilateral agreements, subsidiaries or franchising. The big international firms are usually only too happy with such solutions because they ease local implantation and the spreading of their market without serious inroads on their own human and financial resources. French lawyers and legal advisors seem inclined to follow this direction, taken before them by the elite

of the accountancy professions. The main question is, which sphere of national autonomy can be preserved by this sort of strategy.

In effect, the underlying logic of this form of counter-attack implies sacrificing institutional Maginot lines, behind which the Continental legal professions have sheltered from competition, or at least try to restrict it to the less prestigious categories of professionals like the process-server, the notary or the conseil juridique (Dezalay, 1986). In France as in the UK, hierarchy and the strict definition of functions was supposed to preserve the professional aristocrats – barristers and advocates – from the contamination of competition in advice, legal representation, and the registration of legal acts, so that they could dedicate themselves entirely to the process of legal rationalization and legitimation. Strict rules limited the size and territorial expansion of the legal services enterprises. These various provisions channeled competition into the terrain of pure law. Lawyers were prevented from ever being tempted to become legal entrepreneurs. Their only path to success was to acquire knowledge and fame, and thus reinforce the legitimacy of law through the rationalization and the permanent updating of legal tools. Precisely these measures partitioning off law from the market, are those that current transformations aim to break down, to permit free market play within law (Rice, 1989b) – the counterpart and condition of legal intervention in financial market regulation. The importance of the stakes implies that the business community can avail itself of the services of the leading practitioners whom they control to a large degree because of the size of the fees offered. As Weber (1968:880) noted, the advantages of those in power are less their capacity to escape from, or bypass, legal rules, as to benefit from a sort of ‘made to measure’, ‘private justice’ – where men as well as rules take into account the specific needs of business.

On this condition, only, will the business market open its doors to law and agents of the law. Graham Whybrow (1987) thus defined

the new approach of lawyering (as) working more closely with business clients, paying more attention to commercial realities rather than legal niceties, overcoming the traditional lawyer’s aversion to figures and company accounts. (...) It therefore needs new attitudes to recruitment: legal ability, though vital, is not enough without social skills and negotiating flair (...) You can’t have boffins who blink in the sunlight, you’ve got to feel happy about leaving them at Warburgs.

This last reference was not accidental since the bank created by Sigmund Warburg, long considered an 'outsider' by City gentlemen, has finally managed to impose its new conception of merchant banking and is now one of the leaders on the market of financial restructuring.

Business law practitioners are all the more conscious of the need for a "forced march" modernization in that the careful distance kept for years by the professional elite from trade, has left the door open to upstart professionals less finicky in their attitudes towards the world of money. British, French and German lawyers have openly and unanimously presented their reform projects as a counter-attack against what the 'President du Comité Consultatif des Barreaux Européens' (CCBE) calls an "invasion by the new dinosaurs". According to this author, these "new monsters" are the "big Anglo-Saxon accountancy firms who have launched in Europe a real raid on legal advice" in order to take over "an extraordinary source of potential profit which up till now has hardly been tapped" (de Ricci, 1988). The naming by these practitioners of the "Big Eight" as 'the enemy', comes from the fact that they are caught in a 'pincer movement': Wall Street banks and firms have skimmed the cream off the big deal market, but by definition, this market is limited, and, in particular, out of the reach of local professionals lacking the required expertise and contacts for 'top level legal services'; inversely, the market of small and medium-sized firms upon which they could reasonably have hoped to fall back is being devoured by these advice 'supermarkets' which attract their smaller clientele through the reflected glory of their familiarity with the big business world, and through their ability with tax problems; lastly, 'one-stop-shopping' is an attractive proposition for small entrepreneurs more concerned with professional service costs than juridico-financial sophistication, and quite happy to deal with one general practitioner rather than a whole group of specialists. For the time being, the European legal profession hopes to reconquer this "small fish" clientele as their sort of apprenticeship to the business world, which remained rather foreign to them: the old adage "judex non calculat" expresses their aloofness from money and figures. Of course, old-world European lawyers are envious of the Wall Street law firms' prestige and prosperity, but even if the latter have the biggest and best share of the European legal cake, they are still thought of as role models rather than adversaries.



The objectives of this counter-attack strategy express both the modalities and main themes of the proposed counter-reform. Unlike what the ongoing debate in Britain would lead one to think, the force of this *aggiornamento* movement has been not so much imposed from outside, as impelled by the practitioners themselves – or at least, the sub-group most likely to gain from this potential market opening to legal instruments and services. Political intervention comes only during a second phase, once reform has steadily – and probably irreversibly – begun, and is used to authenticate, sanction and legitimize these transformations. During the same process, the more recalcitrant practitioners are brought to heel – i.e., those remote from the business world, or perhaps of the older generation who feel invested with the role of ‘temple guardians’.

The vehemence of the debate raised by Lord MacKay should not hide the fact that City law firms began their moulting process some years ago (Campbell-Smith, 1985a). They may all the more remain quietly behind the scenes in that today they are in a position of force in the professional field where they attract the best recruits: 60% of the most qualified graduates claim they want to join them. Furthermore, the “big bang” and the Financial Services Act has opened a near inexhaustible market for them (Hampton, 1988). Lastly, the policy of mergers between big firms has permitted them to attack the Continental market where they deal with the medium-sized affairs which have been neglected by the Wall Street ‘boutiques de luxe’ and which French or German practitioners have been behind hand in dealing with (Hughes, 1987). Time is thus on their side; whatever the outcome of Lord MacKays’s projects, the process of transformation is here to stay and their speedily departure in the race towards modernity and the market has given them a good few lengths in advance of their potential competitors. As John de Forte wrote in *The Times* (1989-03-28), “The battle to make lawyers into businessmen is over. The struggle to convert them into entrepreneurs has begun”.

In part, the current debate is serving these ends: it is playing a near therapeutic role by ‘delivering’ the new professional model. A formal announcement is being made to a potential clientele that the past, no longer corresponding to the present demands of the international financial market, has been broken with. And within the professional field debate serves to propagate these innovations. In Britain as on the Continent, some of the transformations proposed by the reformists are already under way. Even prior to formal authori-

zation, innovators have found complex formulas that allow them to offer their clientele the 'global' geographic cover, the 'full service' and the specific treatment they require, while at the same time providing the new sources of financing rendered necessary by rapid growth.

The simple fact of debating these innovations publicly has brought about their circulation because nobody wants to be left behind in the race towards modernization. This is valid as much within the legal profession as beyond their perimeters. The recognition of the "mixed practices" and the transformation of legal firms into companies has allowed the "Big Eight", like the investment banks, to play openly in the market of legal services; people in Britain as well as on the Continent are busily preparing for this eventuality by recruiting young lawyers, and even taking on whole departments (Waters, 1989). It has been reported in Paris that the "Big Eight" has boasted that they shall "in the short or medium term buy up the Bar by apartments or entire buildings..." (Soulez-Lariviere, 1988). The immense backing and ferocious appetites of these new competitors has made pressure rise high, as much on the clientele market as that of professional recruitment. The 'consulting' sector is a manpower industry, and the future distribution of parts between the various competitors – lawyers, accountants or bankers – depends to a large degree on their capacity to attract qualified manpower, as much from their strictly technical abilities as from their renown or the social relations. The European professional landscape towards the end of the 80's looks rather like the pack groups of a cycle race where everyone is eyeing his neighbor for fear he might thrust to the fore.

This cumulative imitation waxes even more where internal deontological codes, which until now assured the group's homogeneity lose their strength through being publicly challenged and are made to appear like vestiges of the past, doomed to oblivion. It thus becomes easy for these specialists in structuring and formalizing business deals to work out formulas to bypass rules as solidly implanted as those that vetoed 'contingency fees', or prevented all moves towards concentration. For instance, in Germany where multipostulation is still in theory illegal, two big Frankfurt and Düsseldorf firms have given the go-ahead for what will inevitably be a vast movement of local office regrouping, thus giving birth to Europe-scale firms (*Manager Magazin*, 1989). In the same manner, slightly underhanded formulas of franchising or joint agreements al-

ready allow banks, accountancy or legal firms to offer their clientele a complete range of the tax, accountancy, financial and legal services required by the majority of industrial and financial restructuring operations. The only limits on this widespread inter-professional poaching come, not from formal rules but from a sort of 'gentlemen's agreement' which moderates competition between the main operators. To 'go to far' is to risk retaliation. This new market's growth has been so rapid, open conflict has been unnecessary; for the moment at least there is still room for everybody. But strategies to annex new territory, although discreet and muffled, are very real. For the moment, the most widely spread model is that of organizations with a dominant activity – legal, financial, or accounting – upon which they build their notoriety and which they use as a leader for more routine tasks, with the implication that other 'knowledge', perhaps on a less sophisticated level of competence, are available. When very big cases are being dealt with and the most renowned professionals of varying disciplines have to be mobilized, a number of service firms will collaborate to provide an ad hoc team. All the same, this does not exclude a degree of competition, for, as one of these practitioners said: "as soon as a bunch of musicians playing different instruments get together, you need a conductor..." And of course, everyone wants this role where profits and prestige are at a maximum.

Essentially, these rather muffled competitive struggles are played out on the level of recruiting experienced practitioners who have an already established clientele. But this inter-professional mobility is checked for the time being by its official nature which prevents the most prestigious practitioners from publicly joining firms controlled by another category of professionals. They would risk losing in status and endangering their career. However, it does happen and increases pressure for the formal recognition of 'mixed practices' which will allow the 'elite' greater mobility and greater career possibilities. The breaking down of barriers preventing the free inter-professional circulation of the best endowed individuals might help the most talented lawyers to make a particularly brilliant career within other professions, as is the case in Germany for those who enjoy the dual qualification of *Wirtschaftsprüfer* and *Rechtsanwalt*, or of *Banker* and *SyndicusAnwalt*; it can also open the door to the transformation of legal consultancies into simple sub-contractors for investment banks or advice consultancy supermarkets. As a "Big Eight" senior London partner said during an interview: "When we

recruit a first class barrister by offering him a very attractive proposition, he is marvelously efficient for the first six months; but then, he becomes sort of like a fish out of water: he has lost most of his contacts with his peers and therefore most of his value. He no longer represents lateral legal authority. For this sort of recruitment to be profitable in the long term, one would need, not just an isolated barrister, but at least one, if not more, 'chambers' to constitute a viable nucleus...". The game is open in a dual sense and the outcome depends especially on the respective strengths of the various organizations in question and the professional and social fame of the personalities fighting under their banner.

Even if most of the European legal professions share more or less the same objectives and the same business market conquest strategies, all are far from being equally advantaged.

The English are a few lengths in advance by the simple fact that they were forced onto the international and inter-professional competitive scene earlier, and that reformers can dress their projects in the colors of Thatcherite politics of deregulation. They also benefit from London's situation and influence. But, again, they have to deal with fierce competition on the part of the "Big Eight", or Wall Street firms that are firmly implanted in the City. They are also handicapped by the traditional image of the solicitor more competent in the estate market than in the economic or financial consulting market (Abel, 1986)). As a 'Times' journalist remarked: "the quality and legal renown of a firm like Clifford Chance is not quite up to the level of its size." Hence the strategic interest in all the stakes of current reform projects.

For their part, German lawyers are handicapped by professional rules that have very efficiently controlled foreign competition, but which have also prevented the creation of big legal business firms by limiting the number of partners, preventing geographic concentration and furthermore, prohibiting hourly fees (Rueschemeyer, 1973, 1986). Because of this latter rule, banks and big companies have developed the habit of managing their legal problems through their own legal departments. Also, for a long time, the Rechtsanwalte handed over the key sector of tax law to the Wirtschaftsprüfer or the Steuerberater, thus finding themselves in an outsider position. As one of them admitted, "*we are lagging behind in the race for the international consulting market and we'll really have to hurry if we want to catch up*".

However, in contrast to their British counterparts, they hold a major trump card: the solidity of the positions held by the legal elite, a much within the field of economic power as within that controlled by the State. As in the States, legal culture is the link between the dominant classes' various components. This is true for public administrations as well as for large companies – particularly the big banks that dominate German economy. It is even valid within the accountancy profession where, as has been said previously, practitioners with dual qualifications are, in a sense, disproportionately represented in leading circles. Moreover, the fact that there are only 10,000 'Wirtschaftsprufe' in comparison to at least 50,000 'jurists', seriously limits their possibilities of growth. Lastly, the dominant class's homogeneity and solidity renders foreign invasion into the German home market next to impossible. For these reasons, despite all, these late arrivals in the race to the international legal market have a good chance of winning a fairly honorable position in the 1990's European professional landscape. This might explain why the German professional group does not feel the same need for a radical revolution as did the French and the British; the professional elite's major concerns seem to be to arrive at an accepted necessary modernization through methods, both discreet and continuous, that will not upset the compromises nor the equilibriums that characterize the professional edifice.

French lawyers are in a far more delicate position (Coulon, 1988). They have the handicaps, but none of the advantages of their British and German counterparts. They share the English 'legal aristocracy's' disdain for trade, tax and figures in general. In addition the division of practitioners into multiple hierarchical categories, separated by immutable barriers, weakens the position of legal professionals on the consulting market. The 'grande profession' reform project is meant to remedy this situation by openly introducing into France the 'lawyer' and the 'law firm' model, thus offering the whole range of consulting services, from tax advice to litigation. But will this sort of sacred alliance, which the Bar adamantly refused to hear of when it was proposed by the public powers twenty years ago, be enough to open the business market to lawyers?

It is doubtful for various reasons. First of all, because North-American, and now English or Dutch competitors are solidly implanted, not only in the international, but also in the internal market. Public powers as well as big firms give priority to these foreign consulting firms. One has to admit that French lawyers, apart from a

tiny minority, are still very 'provincial'; witness the fact that only about 10% of the younger generation speak today's business world's "lingua franca" – English! And then, as opposed to what we have seen as regards Germany, law faculties no longer give access either to power within the State, or within big business. Economic and State power remain the private hunting grounds of the "noblesse d'Etat" of the 'grandes écoles' (Bourdieu, 1985, 1989). This is a major weakness of their position: as has been said above, if one is to play the role of intermediary in the business world, a capital of social relations is as important as strictly technical knowledge. It is not by chance that Arthur Andersen prefers to recruit amongst the old boys of a 'grande école' like HEC (leading French business school), rather than from the law faculties, even if afterwards they have to provide them with the necessary legal technical knowledge. For all these reasons, and despite the radical character of the proposed reforms, one might remain a little sceptical of the success of this aggiornamento strategy, which, as they acknowledge themselves, these professional authorities have engaged in "a little late in the day and with their backs to the wall". Even if these reforms do pass, as they have in England, they are far from being welcomed unanimously. And there is a serious risk that not only will they not open the door further to allow the French Bar access to the international market of advice to companies, they might even leave the home-front law market wide open to big, international consultancies. Admittedly, these latter are already holding the fort seeing that they all have 'conseil juridique' status and that they could, if the reform sees the light of day, offer their clientele a complete range of legal services by recruiting the litigation specialists they so far lack.

Thus, in these three countries, the breadth and radicalism of these reforms are in proportion to the handicaps to be remediated, and by no means do they guarantee success.

### **Overbidding on the terrain of law based on the scholastic abilities of the newcomers**

With varying fortunes but the same objective in mind, the legal profession of the Western World has tuned into the market. Rationalization, marketing, and profitability have become watch-words in the

counter-attack to make up for lost ground – or to avoid loosing even more in the market of business consulting. Traditional values such as collegiality and public civism have been sacrificed on the altar of competition. Does this mean, as some have suggested, that legal services have become commodities, similar to any other? Or worse still, possessed by demon ambition, the legal world is losing all that gave it its ideals and character?

This sort of conclusion would seem a little premature. It would be to forget that even the more aggressive legal entrepreneurs are well aware that they draw most of their symbolic authority in the business world from their status as clerks of the law. Because the survival of law and their own survival is in question, competition on the market place also means competition within the law, for the law. At most one could say that the system of legitimization has been displaced: the gentleman lawyer's moral authority has been replaced by the technocratic ability of the new generation selected and trained by schools. This shift – the effects of which, on the political front, are far from negligible – could be ascribed as much to the transformation of the 'jurist reproduction process' as to the commercialization of business justice.

Caught in the jaws of such merciless competition, the gap between modern law firms and the 'gentleman-club model' which the 'distinguished, socially aware, dilettante patricians' felt obliged to put forth, was widened. The rather schizophrenic (Gordon, 1984) co-existence of moral and civic virtues demanded of the man of law with all the inevitable compromises that service to capital requires is the price that had to be paid to maintain credibility. Rupture of this delicate balance means reconversion. To conserve the legal legitimacy which is their prime capital, these new generations of law firms and lawyers are driven to over-invest in the terrain of knowledge and technical authority to compensate for lost moral and civic authority.

Competition in the services market provokes overbidding on the judicial terrain. Recourse to the judge, the placing of dispute onto a judicial terrain is one of the best defense strategies in the increasingly open, competitive consulting market. Within the perimeters of courts, the ability of legal clerks has no equal; their non-specialist competitors on the ordinary legal consulting market of routine tasks are obliged to take a back seat. They alone are qualified in the last instance to set the norm that transcends particular, local or technical norms. Thus they are assured a choice position when high stakes

justify recourse to all the armory of tactical argument. The revalorization of the place held by in-house lawyers in the hierarchical structures of management, the weight and the value of legal practitioners on the consulting market are thus related to the permanent renewal of the learned debate within the law, on issues of jurisprudence. Whatever their visible antagonism, or the distance separating them, the 'law merchants' and the 'temple guardians' form a united front. The commercialization of law reinforces legal rationality and autonomy.

This strategy of territorial defense also represents, as has been said above, an excellent marketing strategy at a time when economic agents are concerned with reconstructing the rules of the international game without which production and trade cannot be stabilized. This new law of economic relations, produced through and by market forces is also, to a degree, the law of the survival of the fittest. It ratifies rather than corrects power struggles and trade logic. The high costs of judicial and jurisprudential strategies reserves them for the dominant faction, which is thus in a position to impose new rules of the game, sanctioned by the judge, on their less fortunate competitors.

Above all, it is an optimum strategy for the use and profitability of all the resources of the big law firms. As Galanter (1983) suggests, "mega-law" requires "mega-firms" and vice-versa. In effect, this is the perfect terrain upon which to deploy all the hierarchical machinery they have built, meaning as much the logistic, documentary and human material, as the concentration of top-level specialists that only they can afford. It is also an area of activity where they can put to full use the scholarly type knowledge acquired in the big law schools by the younger generation from among whom they pick the best elements.

If this litigation strategy has progressively gained ground, it perhaps corresponds to the new needs of the various operators on the legal consulting market, but it has also only been made possible through the changing of methods of training producers of law that have in turn transformed the characteristics of the people these law firms employ.

The conjunction that can be observed all over the Western world between the post-war demographic boom and the widespread distribution of secondary education to the middle classes has not been a negligible factor in the evolution of the supply of jurists and the definition of professional excellence.



Traditionally, the formation of these clerks belonged more, even in codified law countries, to a model of quasi-aristocratic reproduction based on apprenticeship, social selection and a rigorous *numerus clausus* policy. The dissemination of the scholastic model has favoured a more meritocratic approach where social relation and social 'know-how' are being replaced by technical abilities (Dezalay, Sarat, Silbey, 1989). Thus, in the last twenty years the more powerful Western countries have known a new generation of lawyers, made distinct from their elders by the nature of their social ambitions and the resources they have at their disposal; they rely less on familiarity and complicity, the classical characteristics of the muffled law world of yore, and proclaim themselves expert-technicians, sure of a competence they have every intention of employing in order to carve out their place in the sun. The ambitious driving force of these new professional generations fed the aggressive marketing techniques of the 70's law firms, which helped them survive a far more competitive market. Thanks to them, law notables, propped up by these young 'parvenus' to whom they had opened their ranks could react against the invasion of the 'newcomer' accountants. Simultaneously, the scholastic ability brought in by these new-comers helped bring up to date the process of the social legitimation of the law from a civic to a technocratic model.

For generations, the big law firms recruited their members almost exclusively from amongst the inheritors of the WASP dynasties who, certainly, had been carefully educated in schools and colleges endowed by their fathers (Baltzell, 1958, 1964). It is obvious however, that their careers depended less on acquired scholastic achievement, than on the inherited social ease and contact networks their social origins automatically provided for them, and that allowed them quite naturally to play the role of 'go-between' between the political and the business world.

The first circle of the power-elite also includes professionals of law or of finance belonging to the big law factories or investment banks. They play the role of professional go-between in all deals that simultaneously touch the political, the economic, the military and thus help unify the elite in power" (Domhoff, 1967:60).

"Often, one of the more characteristic traits of the lawyer is his cosmopolitanism: not only must he tear down the veils of legal mystery, he must also have access to individuals or social circles

too exotic for his provincial client. (...) Wall Street lawyers, for instance, were familiar with the European banking milieu and often served as 'go-betweens' between North-American industrials and the old continent's merchant bankers (Gordon, 1988).

This professional elite of corporate lawyers – which formed with their principal clients, the investment banks, the inner circle of a business aristocracy – boasted of their distaste for abstract syllogisms of pure legal reasoning (Baltzell, 1958:146) or the arcane of legal procedure that they left willingly to such 'upstarts' as Jewish lawyers who made up for the 'indignity' of their origins with scholastic achievements. In the professional world, 'Ivy League' law schools were more a private club where young 'gentlemen' were prepared for a professional life based, too, on the model of a club for

distinguished patricians desirous of maintaining elitist legal practices within a private club for the right sort of people – meaning individuals enclosed within the rites of traditional business practices, that, however, were not too demanding upon the time of any adult, male WASP worthy of the name, thus allowing him to take his share of other social responsibilities his rank allotted to him" (Gordon, 1988:69).

And so, up to the Second World War, corporate law remained the prerogative of a small minority of heirs for whom (apart from a tiny minority of Jewish students) scholastic knowledge was not the main prerequisite. The situation began to change in the 50's, with, notably, the establishments of financial assistance programs that allowed veterans to enroll in advanced education.. But the greatest visible changes began in the 60's under the combined effect of the 'Baby Boom' and federal scholarship programs when the professional field was progressively transformed into a scholastic meritocracy. In 1960, the number of students enrolled in law school was approximately the same as in 1927, but nearly all had a college degree and were full time students in establishments approved by the American Bar Association (Abel, 1986:383). The base of the structure of the field of scholastic law thus broadened considerably, and increased in amplitude – in 1960 there were 44,000 students whereas in 1974, their numbers grew to 110,000. The prestigious East coast law schools by no means escaped from the meritocratization tidal wave.

Places became even more sought after (ten candidates for one place whereas the normal ratio was three to one (*ibid* p. 387)). The aristocratic model of the gentleman-lawyer-dilettante-heir rounding out his education in a sort of prestigious finishing school, where the establishment of a network of contacts was as important as the knowledge transmitted, could not resist the expansion of selection and competition engendered by this influx of hungry newcomers whose qualifications were in accord with their ambitions.

The development of scholastic competition by favouring the arrival of experts owing their position less to kinship ties than to educational endeavor, allowed the legal professions their counter-attack on the field of legal rationality. Simultaneously, the arrival of all these newcomers, selected by and through competition helped introduce competition to the field of legal practices where the 'gentlemen' lawyers had tried, if not to banish it, at least to control it. A competition, we have attempted to demonstrate, that was taking place in other professional areas, fed by the opening of new markets to professional 'know-how', because of the internationalization of the economic power field.

In their professional practice, the "heirs" played on their vast social contact network and that bank of 'trust' fostered by the freely-adopted contract to "respect the unwritten rules of the club" under pain of exclusion. The newcomers, their only capital their school diplomas, have no other choice, if they do not wish to remain mere executors of technical tasks in the wings of economic power, than to pioneer new territories abandoned, or ignored, by the 'gentlemen' as being too risky or contemptible. It is through no accident that a certain Jo Flom, born of Russian immigrants, but achieving a Harvard Law School diploma began his career in 'proxy fights', practices considered rather dubious and held in contempt by the big Wall Street firms (Nora, 1987:94). The same could be said of all the "barbarians" who launched their attack against big firm management, be it the raiders themselves, or the 'hired guns' they employed to do their dirty work.

The period of financial restructuring increased possibilities for brilliant young people whose ambition was fed by the accumulated frustrations and resentments of the middle classes against the gilded heirs of the country clubs. When T. Boone Pickens proclaimed himself the defender of small share holders against top management's exorbitant privileges, his resolution should not be dismissed as so much rambling hogwash. The strength of financial and eco-

conomic restructuring comes – at least in its beginnings – from the fact that it fed class rivalry between members of the establishment and those beyond the pale. If this basic need for social revenge is not taken into account, it is impossible to understand how much of the characteristics of this new field of professional practices owe to middle-class pushiness: from the non-stop pace of these ‘workaholics’ to the technical ingenuity of juridico-financial innovations invented by “eggheads”: junk bonds, poison pills (Powell, 1988) etc.

The feeling of enforced exclusion and the desire for revenge which motivated many of these new practitioners can be ignored even less in that it helps explain professional collaborative links formed in this new field of practice between operators like Milken, Wasserstein, Flom, Lipton, who constantly and amicably call on one another and thus can be found playing in every episode of the juridico-financial power-struggle serial; all, or nearly all, consider themselves at war with the establishment, and boast of being the first generation of professionals to have come out of the garment industry (Bruck, 1988:23). These new-style “angry young men” have built up their own network of knowledge and professional relationships, a sort of “go-getters club” weapon against the “old boy country club network” that excluded them.

This conflict between “gentlemen” and “upstarts” runs through the ongoing debate on the decline of traditional professional ethics. Professional morality is a luxury reserved to those members with a rightful entry to the politico-financial establishment; rather like good manners, it can only be acquired with time. It constitutes thus a formidable protective defense for the “heirs”, against the “upstarts” who have no other solution than to play, in one form or another, at “ambulance chasing”. The upstarts are thereby obliged to somewhat dirty their hands, at least for a time, by performing tasks held in disdain by White Shoe firms – such as proxy fights, bankruptcy, hostile take-overs or junk bonds. That is, practices where the codes of honor and decency, and the good manners of ‘gentlemen’, are out of place. However, there is a degree of risk. The more skillful – or more fortunate – “convert” in time, such as Marty Lipman who has become, henceforth, a defender of the establishment against “predators”, or Jo Flom whose firm now tried to present itself as a champion of “pro bono” work. The others, such as Ivan Boesky or Michael Milken end up in the role of scapegoat and are brutally called to order by financial and professional boards of

ethics – despite the fact that the innovations they introduced are adopted by the general body of the milieu whose practices they have helped modernize.

The gradual integration – or brutal elimination – of “young Turks” revitalizes the ruling class by a renewal of elites that happens simultaneously in the fields of enterprise and of the professions. This phenomenon is not limited to the small world of Wall Street. Everywhere, the expansion of the consulting market has opened doors to the children of the middle classes and feeds off the ambitions, the technical knowledge and the labour of this scholastic meritocracy. It is true for the law firms that have considerably broadened their recruitment criteria; it is even more so for the “Big Eight” whose expansion is closely associated with the promotion of the professional world’s “poor relations” – those former “Dickensian” accountants (Jones, 1981:137). More broadly speaking again, financial and industrial restructuring, of which these experts are the professional operators, favors the access to economic power of the new generations of entrepreneurs brought forth by the business schools, the “MBAs” – also considered by many as “parvenus”.

It is this homologous effect (Bourdieu, 1989) between the field of law and that of economic relations which opens the door to all sorts of simplistic explanations, that sees causality where there is only an effect of simultaneous evolution and mutual reinforcing of co-related factors. But, as has been said above, to do justice to the various facets of this phenomenon, the producers of learned discourse should “put their own house in order” by questioning their own role in this “commercialization of law”, inseparable from the transformation of the methods of reproducing these professionals.

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The main difficulty of such a subject stems from the phenomenon’s multiple dimensions which call for, despite a certain risk sounding repetitive, an endless travelling back and forth between the different levels of its structural history. It also lies in the fact that, the current process being as yet far from stable, it is virtually impossible to come to a firm conclusion. Thus, the outline presented here not only lacks precision, it is incomplete. So, instead of a formal conclusion, rather than play the tricky game of predicting eventual possibilities,

we can only recall to mind the main dynamics and strategies that have helped contribute towards a remodeling of the professional fields.

The opening and broadening of markets is coupled with the growing complexity of available legal instruments which promote professionalism in business relations. These professionals in their turn strive to consolidate and rationalize the new management technology and trade networks they have contrived to establish. If this strategic objective is shared by all the groups of experts addressing the consulting market, the tactics followed by each category concerned depends much on the positions they previously occupied in the field of economic and political power. On this level, differences are considerable, not only between disciplines, but between nations. The two variables interact strongly with each other.

The breadth of reforms envisaged in Europe and the violent confrontations they have caused is in proportion to the gradually widening gap between practitioners of law and economic ruling circles. This is a serious handicap reformers hope shortly to correct using an "aggiornamento" policy as hardy as these practitioners who feel they are playing their all. In effect, they have nothing to lose and everything to gain: taking advantage of their absence, other competitors have claimed 'squatters rights' on the terrains of legal and tax consulting for firms, and of business intermediation, that the European 'jurists' claim today.

Confrontations about 'mixed practice' (in Britain) or the "grand profession d'avocat-conseil" (in France) are but so many local episodes of the restructuring of the market of professional services which affects all developed economies and challenges, not only national boundaries, but the redistribution of tasks – and profits – between different categories of professionals: jurists, accountants, financiers, consultants. Each of these experts whose separate 'know-how' are as competitive as they are complementary strive to occupy the privileged position of advisor to economic power: a place the great Wall Street lawyers have assumed since the turn of the century by becoming the right arms of those "robber barons" like J.P. Morgan or J.D. Rockefeller. This is a situation their continental counterparts have never enjoyed, but that the most ambitious of them are eyeing as the internal market of 1992 approaches.

The success of the American model is above all that of concentration and that the division of legal tasks adequately conform to the expansion of industrial capitalism. This early start has allowed Wall

Street lawyers and investment bankers to be at the forefront of the internationalization process – and at the same time to be its greatest beneficiaries. It is thus also on the other side of the Atlantic that we have seen the first signs of the legal system's implosion beneath the twin effects of multiplication of producers and the transformation of demand. Formed to respond to the needs of trade and traders, the law firms model was predisposed to evolve at the same time as the market of corporate legal services. The quantitative growth of business and producers has provoked qualitative mutation: trade imperatives have invaded the terrain of law. The explosion of the legal services and legal market have extended beyond the limits of internal mechanisms controlling competitions and concentration; it has also given birth to the "mega-law" firms which still dominate the consulting market – even if they have to defend their territory inch-by-inch today against the newcomer accountants by deploying the latter's weapons.

The eruption of competition on the terrain of legal practice – which thus loses its characteristic "gentlemanliness" is not a mere deregularization induced by the gradual decay of institutions and professional morality. It would thus be pointless to attempt amelioration through the ceremonial reassertion of traditional codes of ethics. If it is not understood that this is the product of the field of power's restructuring thanks to the internationalization of the financial market, which at the same time is inseparable from the transformation of methods producing experts in the service of economic power, one is condemned to a simplistic reading of these phenomena and hence, to political powerlessness. If, despite all the learned exhortations addressed to them, the new generations refuse to behave like "gentlemen", it is because, first of all, they are no longer 'heirs', meaning individuals born with social advantages predisposing them to play "gentlemen of law" on the terrain of economic relations. From now on they have to fight, first in school, and later on, in their practice, to conquer the position of expert, among others, which now belong to them and which corresponds to imperatives of rationalization within economic space as well as on the terrain of law.

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