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Contracts as Compliance Mechanisms

Legal Intermediation and the Failure of French Retail Regulation

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ABSTRACT

The legal devices crafted within large organizations are a key component of legal endogeneity theory (LET). While symbolically complying with legislation, legal devices allow organizations to infuse managerial logics into the legal field, which eventually diverts law from its initial political goals. Although the LET has considered legal devices such as anti-discrimination guidelines and grievance procedures, this paper argues that contracts also constitute a locus of symbolic compliance and contribute to the eventual endogenization of regulation. Supplementing LET with a focus on legal intermediation, this paper explores how contracts are crafted and used by large organizations to respond to regulatory pressure. While other legal instruments are unambiguously managerialized from the outset, contracts are highly versatile legal objects that perform the seemingly opposite functions of symbolically complying with regulation and serving substantive commercial purposes. This discussion of the role of contracts as compliance mechanisms is based on an in-depth empirical study of the French retail industry and its response to a set of regulations that aimed at making their business practices fairer.

Keywords: Contracts, Retail, Business Relations, Business Regulation, Legal Endogeneity, In-House Counsel, France

1. Introduction

In the sociolegal literature on contracts, it is a commonly held view that private agreements predate legal contracts and that those legal contracts predate state intervention. It is true that legal contracts are not the unique way of securing private agreements (Macaulay, 1963). Certain business communities never make use of these legal devices and systematically use informal dispute resolution mechanisms (Bernstein, 1992). This view of contracts is supported by the fact that courts, and public authorities in general, exercise discretion in enforcing those private agreements. To become legally binding objects, contracts must meet a set of formal criteria, such as legibility or the presence of the signature of both parties at the bottom of the document. The criteria are also substantial: a judge may strike down a contract if some clauses fail to conform to the standards of fairness mandated by statutes or case law (Knapp, 2013). The notion that legal contracts predate state intervention is also tangible in the way that socio-legal scholarship addresses regulation. In labor law, for instance, the term "collective bargaining" entails that a standardized contract replaces a wide array of potentially unfair individual contracts (Bessy, 2008). An aspect of this notion is that public intervention in private business relations has political goals, such as the protection of weaker market players against those who can use contractual freedom to their advantage (Talesh, 2009).

In this article, I put forth an alternative view of contracts and regulation. Rather than agreements that might or might not lead to public intervention, I consider legal contracts that arise in response to regulation. In such cases, one wonders whether regulation still achieves its goal of protecting weaker parties. To address this issue, I draw on the conceptual framework and empirical methods of legal endogeneity theory (LET) (Edelman, 2016; Edelman, Krieger, Eliason, Albiston, & Mellema, 2011; Edelman, Fuller, & Mara-Drita, 2001). Inspired by neo-institutional sociology and organizational theory, LET provides a model to understand how large organizations respond to legal regulation. Rather than adhering to the initial political goals of regulation, organizations infuse their own managerial logics into the legal field. This process can eventually lead to endogenization, whereby organizational interpretations of compliance shapes case law and new legislation. Part of this process is driven by compliance mechanisms, which refer to the objects that organizations craft to comply with regulation. I argue that contracts constitute one of those compliance mechanisms and contribute to the process by which organizations internalize and endogenize the regulations targeted at them.

Edelman argues that compliance varies along a continuum from symbolic and substantive to merely symbolic (2016). Due to their commercial importance, the role of contracts is rarely entirely symbolic. They play key substantive functions of commercial nature such as framing how firms interact with their strategic partners. This dual nature points to the paradoxical aspect of the rise of contracts as compliance mechanisms: these legal documents symbolically comply with legislation that aims at protecting weaker players and, at the same time, serve a key function in a firm's business strategy. Solving this paradox requires a departure from the field-wide approach that neo-institutionalist scholars have used so far. This article supplements the aforementioned approach with the legal intermediation perspective, paying close attention to how compliance mechanisms are crafted within organizations and to the different nuances of legality they contribute to produce.[1] In doing so, I shed light on the work of in-house counsel workers who craft those contracts. As they navigate complex organizational structures, those legal intermediaries struggle to maintain their legitimacy and to promote their framing of how their firms should comply to regulation (Pélisse, 2014 ; Pélisse, Bessy & Delpeuch, 2011 ; Talesh, 2015 ; Talesh & Pélisse, in press).

To outline the rise of contracts as compliance mechanisms, this paper relies on a theoretically-informed case study. It surveys the evolution of anti-trust legislation targeting French food mass retail. Faced with the increasing market power of French mass retail, suppliers successfully lobbied the state into protecting them. Starting from 1996, the French legislature intervened by introducing a new set of rules (known as "Title IV") that specifically targeted the annual bargaining process between retailers and suppliers. The explicit aim of lawmakers was to force all retailers, regardless of their economic power, to sell their suppliers' products at the same price. This plan, however, dramatically failed. I argue that the contracts designed by the retailers in response to regulation were a key factor in the latter's internalization, endogenization, and eventual failure. As puzzling as it may seem, contracts were both a form of symbolic compliance which contributed to the endogenization of French anti-trust law and a strategic legal tool that helped retailers pressurize their suppliers into giving them more rebates. The key factor of the rise of contract as a compliance mechanism is intra-organizational. Hence this article devotes close attention to the work performed by the staff of retailers' own legal departments.

[1] The paper introducing the current special issue contains a thorough presentation of the legal intermediation perspective and in what respect it differs from LET.

2. **Theory and Research Design**

The evolution of French retail regulation is typical of legal endogeneity, a process by which private organizations comply with regulation but eventually alter the meaning of what compliance means. Once legislatures pass laws to promote fair business practices or to fight against discrimination, large businesses respond by assigning new meanings to those legal mandates. Then, as Edelman and Talesh (2011) put it, those "institutionalized conceptions of law and compliance (…) become widely accepted within the business community and eventually (…) come to be seen as rational and legitimate by public legal actors and institutions" (p. 103). By holding court on their own, managerial terms (Edelman & Suchman, 1999) and by "internalizing the judicial function" (Pélisse, 2011), businesses have increased their legitimacy and turned scrutiny from official legal institutions away from them. Based on this approach and using the case of US anti-discrimination policy, neo-institutionalist scholars have covered multiple aspects of how large private organizations reinterpret and thus circumvent official legal norms and institutions (Edelman, 1992; Edelman, Krieger, Eliason, Albiston, & Mellema, 2011; Edelman et al., 2001; Talesh, 2009). The remainder of the theoretical section discusses the scope and limits of LET. The first subpart argues that LET can be extended beyond the typical empirical case of US anti-discrimination law. The second part identifies theoretical and methodological limitations of LET that have to be overcome to fully understand contracts and legal work within organizations.

2.1 LET Beyond the Case of US Anti-Discrimination Law

The proponents of LET have applied their theoretical framework to US anti-discrimination law, a highly political issue in the United States since the Civil rights era (McAdam, 1989). Due to the political implications of US civil rights law, some scholars have combined the analysis of the bureaucratic enforcement of civil rights on the workplace with a study of social movements (Lieberman, 2015; Stryker & Pedriana, 2004, 2017). Recently, Shauhin Talesh investigated the endogenization process of Californian consumer law protecting consumers against car manufacturers (Talesh, 2009). He claimed that this area of regulation pertained to "public legal rights" and thus could be analyzed through the lens of endogenization. Although public legal rights are not directly at stake, regulation promoting "fair practices" in business-to-business relations (the empirical object of this article) is an area of regulation with political implications. As Bruno Amable

has suggested, debates about market competition and economic policy have moral undertones (Amable, 2011). Analyzing those debates is important to uncover the "moral-political conflicts" that underlie capitalism (Fourcade, Steiner, Streeck, & Woll, 2013). As I have shown in a previous publication (Billows, 2016a), large food manufacturers have developed since the early 1980s a political narrative blaming the "unfair" business practices of retailers and calling for a halt to destructive price competition. Later on, this political agenda was taken up by mainstream French parties.

A second extension to the LET literature I make relates to enforcement. According to the literature, the key factor explaining legal internalization and the subsequent endogenization of regulation is the lack of strong enforcement agencies acting in behalf of disadvantaged social groups. The neo-institutional literature views the Equal Employment Opportunity Commission (EEOC), the federal agency in charge of enforcing Title VII, as weak. While some authors described its unorthodox approach to anti-discrimination law and its alliance with social movements as sources of strength (Lieberman, 2015; Stryker & Pedriana, 2004), most stressed its lack of resources and its fuzzy legal mandate. Contrary to Title VII where private enforcement prevails, French law protecting suppliers was backed by DGCCRF,[2] a powerful regulatory agency. By US standards, the human resources of DGCCRF were plentiful. On January 1st, 1997, 3715 officials worked for DGCCRF. By contrast with EEOC, whose agents "cannot file a lawsuit in every case where discrimination has been found",[3] DGCCRF has an aggressive litigation branch with extended powers to sue retailers on behalf of their suppliers. In my view, this does not preclude me from applying the endogenization framework to the case at hand. Actually, failure, the eventual outcome of this regulation attempt, becomes even more surprising. Why did DGCCRF fail to settle the economic imbalance between retailers and their suppliers *despite* a clear legal mandate, significant material resources, and broad enforcement powers?

Consistent with recent literature (Talesh, 2009, 2014), this paper proposes a third extension of LET by studying the interplay between institutionalized logics and political mobilization and lobbying. Similar to Talesh, I take into account the efforts made by business interests to alter

[2] DGCCRF stands for *« Direction générale de la concurrence, de la consommation et de la répression des fraudes »* (General Directorate for Competition, Consumption, and the Repression of Fraud)

[3] EEOC official website, https://www.eeoc.gov/eeoc/litigation/procedures.cfm

legislation. Contrary to US anti-discrimination law, where the US Congress rarely changes legislation, legislation targeting French retail has changed many times during the time period I investigate. While Edelman's contributions dealt mainly with courts and judges, the evolution of French retail regulation and its eventual endogenization results from the recursive interplay between lawmaking and how law is implemented by the organizations and institutions it targets (Halliday & Carruthers, 2009; Mallard, 2014).

2.2 Legal Intermediation: A Reassessment of Compliance Mechanisms and Legal Work within Organizations

As shown above, the main features of the case of French retailer-supplier relations are consistent with the main premises of LET. However, regardless of the specifics of the case, I claim that a full understanding of how contracts are crafted and used by large businesses requires two departures from the concepts and methods commonly found in LET.

The first departure regards contracts themselves. A key component of this theoretical framework is the fact that organizations, in response to regulatory pressure, craft internal legal devices which act as compliance mechanisms. An empirical example is how US companies responded to anti-discrimination laws by establishing their own codes of conduct and formal grievance procedures (Edelman et al., 1999). By introducing those internal compliance mechanisms, large organizations symbolically complied with anti-discrimination laws but failed to adjust their actual business practices. Once those compliance mechanisms became widespread across the organizational field, they started permeating official legal institutions and eventually weakened their scope. Over time, the legal practices of the industry have become the official standard by which compliance is measured. It has been shown, for instance, that courts are more lenient towards firms who have adopted those mechanisms than towards those who have not, regardless of their actual record in hiring women or members of ethnic minorities (Edelman et al., 2011).

Whether it is labor law, consumer law, or the promotion of fair business practices, contracts have been a locus of regulation since the Industrial Revolution. These legal objects are at the heart of the tensions between individual freedom (and freedom to do business) and the social movements representing weaker parties in contractual relationships, such as workers in labor contracts (Weber, 1978, p. 886). Despite their importance, contracts have been seldom

addressed by the LET literature.[4] Yet, as compliance mechanisms, contracts obey a logic that is similar to the legal devices described in the LET literature. They are designed within organizations but have an official legal status in the outside world. (Theoretically, they can even be enforced by courts.) As the empirical case presented in this paper will demonstrate, they can contribute to the internalization of regulation by organizations, and even to its eventual endogenization. Yet a key characteristic of the other legal devices addressed in the LET literature is missing. The latter features legal devices that give more autonomy to corporations *because* they play little more than a symbolic role. The ability of large organizations to circumvent anti-discrimination law has lied in the intrinsic weakness of those legal devices. By contrast, since they determine with whom and how they collaborate, contracts are at the heart of large corporations' business strategy (Dietz, 2012; Granovetter, 1985; Li-wen & Whitford, 2013). Standing between the public and the private legal orders, contracts are inherently ambiguous legal objects that perform symbolic compliance and key business functions at the time.

To move beyond the symbolic role of compliance mechanisms, one has to investigate whether and how they shape business relationships. This is in line with the constitutive approach to legal objects put forth by Robin Stryker, who argues that "law provides tools that help actors attribute meaning, existence, desirability or undesirability to their economic activities and environment" (Stryker, 2003, p. 349). To apply this principle, I draw inspiration from the legal realist scholarship on contracts (for a review essay, see Brooks, 2013). Stuart Macaulay laid the foundations of this literature fifty years ago, in one of the most cited papers in the history of US sociology (Macaulay, 1963). Ever since Macaulay's seminal contribution, taking a realist approach to contractual relations means challenging the legal fiction that contracts are ubiquitous. Consistent with this principle, the legal realist perspective insists on the diversity

[4] In her latest book, Lauren Edelman mentions how organizations "contract and manage around legal risk" (Edelman, 2016, p. 136). Yet contracts themselves play a secondary role in her theory. There are two occurrences of contracts in that paragraph of Edelman's book. The first refers to the contracts with insurance companies by which firms outsource compliance by buying employer practice liability insurance (EPLI) (see Talesh, 2015). The second refers to the mandatory arbitration clauses in work contracts which prevent workers from going to court. In both cases, the focus is not on the contracts as such but on other compliance mechanisms that they carry with them.

of business arrangements (Bernstein, 1992; Li-wen & Whitford, 2013; Marotta-Wurgler & Taylor, 2013; Teichman, 2010). Not all, businesspeople use formal, legal contracts to protect their commercial dealings. And, even when they do so, the problems that arise during a business relationship are hardly ever solved through litigation. This paper builds on those principles to address standardized agreements. There are many empirical examples of standardized contracts ("boilerplates") produced by large organizations (Bessy, 2008; Davis, 2006; Kahan & Klausner, 1997; Marotta-Wurgler & Taylor, 2013). Yet, those contributions have failed to open the organizational black box and to investigate how and by whom standardized agreements are crafted and why in some cases they are used by businesspeople and not in others.

Understanding how compliance mechanisms are crafted and used entails an analysis of professional work within and outside organizations (Abbott, 2005). Here lies my second departure from the LET literature. Proponents of LET have described how various professional groups define compliance. Empirical examples include managers (Edelman, Fuller & Mara-Drita, 2001), human resource professionals (Dobbin & Kelly, 2007), and insurance staff (Talesh, 2015). process by which organizational fields frame the meaning of compliance (Edelman, 1992). Although "legal intermediaries" (see Pélisse & Talesh, in press) are a core concern in this paper, the methodology I use differs from LET. Most of the research on how professionals shape compliance analyzes how professional groups operate *outside* large organizations. Rather than the daily interactions between professionals and their clients, scholars have focused their attention on the professional literature (such as magazines) and gatherings (such as conferences). By contrast, I take a close look at the "division of labor (…) in the cubicle" (Abbott, 2005) and analyze daily interactions *within* a large French retailer between In-House-Counsel and commercial staffers who are in charge of sourcing (i.e. doing business with suppliers). Behind this methodological choice lies a theoretical claim. I predict that the framing of what compliance means can happen at the industry- and organization-level rather than at the level of the profession at large. This is consistent with other contributions that show that a compliance expert's professional background is not, in itself, a predictor of the advice she delivers to specific market players (Pélisse, Protais, Larchet, & Charrier, 2012; Suchman & Cahill, 1996). On top of professional dynamics, the specific culture of the market players and the contingent power relations between laypeople and compliance experts also matter. One has to also take into account the material context in which the contract is produced (Suchman, 2003): as the empirical case addressed in this paper will show, the fact that contracts are ensconced in corporate software has an impact on how laypeople use them.

To reflect on the role of in-house Counsel in the French retail business, I draw from a rich literature on lawyers.[5] On the one hand, as suggested in a classical account of the legal profession, lawyers are likely to promote "legal casuistry" and "high logical sublimation," two core aspects of the formal rationalization of law (Weber, 1978, p.655). Compared to other legal intermediaries, they are closer to the core areas of the legal field (see Pélisse's contribution in this special issue). As such, they are more likely than others to use the symbolic resources of the legal field (Bourdieu, 1987) and to insist on procedural conformity rather than substantive conformity to regulation.[6] In his account of how US firms interpreted and conformed to anti-discrimination law, Franck Dobbin claims that due to their focus on formal legal procedure, lawyers retreated from compliance altogether, and recommended that their clients did nothing until courts clarified their interpretation of ambiguous legal mandates (Dobbin, 2009). On the other hand, in specific business contexts, it was found that lawyers put their professional norms aside and adapted to the commercial demands of their clients (Suchman & Cahill, 1996). In such cases, rather than narrow compliance with the law, they focused on creating trust among business partners. The work of Nelson and Nielsen (2000) provides a summary of those hypotheses.[7] Based on an in-depth survey of 50 "in-house" lawyers in large US corporations, the authors identified three different roles taken up by legal staff. As cops, legal departments "are primarily concerned with policing the conduct of their business clients" (p. 463). As counsels, they are closer to "businesspeople" and take part in commercial decisions. As "entrepreneurs," lawyers give up giving legal advice entirely and act as general business advisers.

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[5] French bar associations deny membership to those who work directly for corporations. In France, about 16,000 people have received formal training in law but are not considered as proper lawyers ("juristes d'entreprise"). Only those (58,224 as of 2013) who work in single practices or in law firms can claim full membership in the legal profession ("avocats").

[6] As Bourdieu wrote in the "The Force of Law" (1987), "the establishment of properly professional competence, the technical mastery of a sophisticated body of knowledge that often runs contrary to the simple counsels of common sense, entails the disqualification of the non-specialists' sense of fairness, and the revocation of their naive understanding of the facts, of their "view of the case" (p. 828).

[7] In the paper published in the current issue, Jérôme Pélisse uses a similar typology to describe the roles of legal intermediaries in various organizational and economic settings.

3. Data

The data I collected aimed at understanding the evolution of French retail regulation between 1996 and 2008 (from its inception to its eventual failure) and, using an intra-organizational viewpoint, look into how retailers complied with the legislation.

To survey the evolution of legislation and the shifting attitude of bureaucrats towards retailers, I used state archives and six semi-directed interviews with high-level DGCCRF officials. The archives were part of the holdings of the Center for economic and financial archives (*Centre des archives économiques et fiancières*) located at Savigny-Le-Temple. The documents I examined were memos, policy briefs, draft regulations produced by DGCCRF and the cabinet of the French Minister for Financial and Economic Affairs. The documents span across the 1996-2004 period and provide a comprehensive view of changes in crafting and enforcement of French anti-retail policy. Some documents report about investigations on retailers' practices and thus provide direct information about compliance strategies.

Yet the main findings about how retailers complied with the legislation are drawn from participant observation. In 2013, the legal department of Superchain,[8] the largest retailer in France for fast-moving consumer goods, hired me as an intern for three months. I was assigned tasks directly connected to contractual relationships, such as answering the formal requests for amendments sent by Superchains' suppliers. The legal department was aware that I was conducting research on Superchain. The legal staff allowed me to attend numerous meetings, including some involving interaction between lawyers and the commercial staff. I also conducted formal interviews with members of the sourcing department who interacted with the legal team. These commercial workers were tasked with leading the annual negotiation process with suppliers for a given product category. During my internship, I gained access to Superchain's boilerplate contract as of 2013 and to some of the previous versions (the boilerplate is revised annually). I also had access to other internal documents, such as correspondence between the legal staff and DGCCRF staff investigating Superchain, and a document reporting about each legal change since 1997 and how Superchain should comply with it.

[8] The name of the retailer was changed for confidentiality reasons.

Although most of my data comes from observation and interviews at Superchain, I conducted eight additional interviews with lawyers and members of commercial staff who work or have worked for other retailers listed in table 1 and for their major suppliers. Other interviews were conducted with employees of business organizations representing either retailers or suppliers. Retailers, rather than suppliers, were the best site to explore how contracts were designed and enforced. Because of their high market power, retailers can unilaterally impose their own standardized contracts on their suppliers.

– TABLE 1 about here –

The French market for fast-moving consumer goods is an oligopsony. A few retailers act as mandatory intermediaries between a large number of suppliers and the end-consumers. In 2013, the year I conducted observation within Superchain, I found out that their suppliers had little economic leverage on them. The combined weight of the 100 biggest suppliers represented a mere 60% of their annual turnover. By contrast, one retailer can represent up to 25% of the annual turnover of a supplier on the French domestic market. This economic power translates into contractual power. As stated earlier, the task I was assigned was to handle the requests for contractual amendments made by suppliers. I was asked to turn down most of them.

4. Findings

In the present section, I outline the major steps by which French retailers internalized the legislation targeted at them and eventually contributed to its endogenization. The approach chosen here is both processual and analytic. I start with a description of the main characteristics of the harsh legislation set up in the late 1990s and early 2000s in order to make retailers' business practices fairer (4.1). In a second paragraph, I describe the subsequent rise of standardized contracts, which helped retailers strategically comply with legislation protecting suppliers (4.2). Then I explain the intra-organizational origins of this unlikely compliance mechanism: legal departments, which had emerged as the key legal intermediary between legislation and retailers, chose contracts as a way to solve dilemmas regarding their intra-organizational status (4.3). Finally, I exhibit how this type of compliance influenced the content of new regulations drafted by French regulators (4.4).

4.1 Voluntary Legal Ambiguity

Retailer-supplier relations had been a contentious issue since the inception of French mass retail in the 1950s (Billows, 2016a; Jacques, 2016). At first, suppliers were reluctant to sell their products to the nascent mass retailers. They feared that price wars between retailers would bring their margins down and affect their brand image. The French state, however, had been supportive of mass retail. The *Circulaire Fontanet*, a regulation passed in 1960, mandated suppliers to sell their products to all retailers, even those that sought to reduce consumer prices. The late 1990s saw a reversal of state policy. In the 1980s and early 1990s, the retail industry entered a phase of heavy consolidation. In 1995, seven players dominated the mass retail market, down from 30 in the early 1980s. Such concentration allowed supermarket chains to exercise higher levels of pressure on their suppliers. Supermarket chains could set the price of grocery products unilaterally. No matter their size, suppliers had no choice but to comply: retailers would retaliate against suppliers who didn't bring their price down by removing their products from their shelves. The pressure put on suppliers was driven by competitive dynamics: large retailers were waging a price war against each other and expected the suppliers to pay its costs. Even multinational corporations such as Danone[9] were affected by the price war and were sometimes forced to operate at a loss on the French domestic market.

A legislative battle that lasted between 1995 and 1996 introduced stringent legislation against retail. A key contributor was Jacques Chirac, a conservative politician who was elected President in 1995. In 1996, he publicly declared that "mass retail had a negative impact" on society.[10] Before serving two terms as President of France, he had served two terms as mayor of Paris. Back then, he actively used his planning powers to prevent large retail chains from

[9] Danone is a global food products manufacturer based in France. In 2013, its combined worldwide sales attained €21.3 billion.

[10] Statement made by Jacques Chirac during a visit of the Rungis market on May 1rst 1996. *L'Express*, 15/05/1996. The statement drew a lot of media attention. See: « Chirac rajoute un couplet anti-hypers. Le Président n'en finit pas de stigmatiser la grande distribution », *Libération*, 2 mai 1996 ; « Grandes surfaces : l'accusation de Chirac », *Le Figaro*, 2 mai 1996.

opening new outlets in the city.[11] French politicians such as Jacques Chirac feared that large retail chains could undermine the French food industry, a vital part of the economy. Another contributor to this anti-retail policy was ILEC,[12] the business group representing the largest suppliers. Thanks to its resources and the solidarity among its members, it outcompeted FCD,[13] the business group representing the major food retailers. The Galland Act of 1996 was the outcome of this phase of political mobilization. The main provision of the Act ensured that the final price paid by the retailer should match the basic rate set by the supplier. This rule is similar to the one introduced in the United States by the Robinson-Patman Act of 1936, which outlawed "price discrimination." Suppliers hoped that it would put an end to the costly price war between retailers and would provide them with higher margins.

When the Galland Act of 1996 came into force, retailers complied with the rule mandating them to buy and sell their products at rates that had been set by suppliers. As intended, the main outcome of the Galland Act was the virtual freeze of price competition between retailers. But this piece of legislation had an unintended effect: that of boosting "back margins." Because virtually all products were sold at a price close to the basic rate set by the supplier, retailer's "front" margins became very low. Instead, retailers requested higher back margins, ie. fees paid directly by the supplier. Formally, this transaction was performed in exchange for services to the supplier, such as placing their product on the top shelf in the supermarket. In fact, these services were largely fictitious and were a mere outcome of retailers' economic pressure. No matter what suppliers needed, retailers sold more and more of these dubious services to them. Such commercial behavior sparked furor among suppliers and prompted the French Parliament to take action again.

In response to the rise of back margins, the French Parliament passed new legislation in 2001. The NRE ("New Economic Regulations") Act introduced a blanket ban on obtaining "disproportionate advantages." Although its primary target was back margins, the ban was

[11] Nowadays, Paris has only one "hypermarché" (hypermarchés are the biggest type of mass retail stores in France).

[12] « Institut de liaisons et d'études des industries de la consommation » ("Institute of Liaison and Study of Consumer Industries").

[13] « Fédération du commerce et de la distribution » ("Federation of Commerce and Distribution")

drafted in ambiguous terms on purpose. The state officials who drafted the ban wanted to create as much legal uncertainty as possible (around "commercial cooperation") in order to anticipate future legal inventions made by retailers (see Billows, 2016b).

> We looked at the facts and we try to have an open wording, because you can't imagine beforehand what retailers will do (…). Enumerating specific behaviors, would be counterproductive, because you'd assume that behaviors that are not listed are legal. In that case, you'd have to convince the judge that although the behavior presented before him is not listed, it can be still considered as abusive.
>
> Senior official, DGCCRF, 1998-2005

Those ambiguous statutes made the legal environment uncertain. Another source of legal uncertainty was broad and aggressive enforcement. DGCCRF, the French regulatory agency in charge of fair business practices and food safety had played a major role in drafting the new regulations. It was also in charge of enforcing those rules. The NRE Act of 2001 increased state officials' enforcement powers. The Act allowed DGCCRF to bring civil cases before commercial courts, on behalf of suppliers.[14] The NRE Act allowed courts to order retailers to reimburse the fraudulent back margins to the supplier. This proved very costly for some retailers. In 2007, a commercial court requested that Super U, a retailer, reimbursed €72 million to various suppliers.

4.2 The Rise of Contracts as a Response to Retail Regulation

Retailers were infuriated by the back margins system. Despite lucrative back margins, they feared that the freeze of price competition would drive consumers away from the large superstores they had been building since the 1960s in order to achieve economies of scale. To fight against the Galland and NRE Acts, retailers' lobbyists created a two-sided narrative. On the one hand, they reframed the rise of back margins as an inevitable side-effect of

[14] The suppliers, even the largest among them, refused to sue retailers themselves. A lawsuit by a supplier would have resulted in an immediate cancellation of all orders by the retailer. This could have disastrous consequences: for a given supplier, a retailer could represent up to 30% of the total sales. The reverse was not true: there were only 7 or 8 major retailers as opposed to dozens of suppliers. Lawsuits by DGCCRF represented an actual threat to retailers. Lawsuits targeted "commercial cooperation" contracts where the retailer failed to perform the intended "service," or charged unreasonable prices for those "services".

unrealistically anti-competitive legislation. On the other, they argued that their huge commercial power was an asset to offer lower prices to the consumer. Retailers initiated a series of media campaigns against the Galland and NRE Acts stressing their inflationary effect. In July 2001, the (yearly) rate of inflation for food prices attained 6.5%.[15] Between 1997 and 2002, France moved from fourth to second costliest country in Europe (Colla & Lambert-Pandraud 2007, p. 31). In their media campaigns, retailers targeted consumers directly, warning them of the negative impact of legislation on their purchasing power (*pouvoir d'achat*). At the height of this campaign, in 2003, E. Leclerc commissioned 20,000 billboards across the country to publicly attack back margins.[16] The mottos used an anti-elite rhetoric, with some advertisements stating: "opinion leaders can always talk about your purchasing power, they don't have the same as yours."

Despite those quasi-political media campaigns, the battle fought by retailers against the Galland and NRE Acts was mostly a legal one. The most conspicuous change triggered by pro-supplier legislation was the rise of standardized contracts. Retailers responded to the NRE provision that prohibited "disproportionate advantages" by coercing their suppliers into signing "agreements" where they spelled out the different "services" offered by the retailer and their "compensation" by the supplier. Archives from an investigation performed in 2002 by DGCCRF officials gave a detailed picture of the contractual practices that E. Leclerc set up in response to the NRE law. Each supplier was requested to sign several contracts. One contract, the "National Retail Policy Agreement" was national. It compensated the fact that the supplier's product was listed by the retailer's central purchasing body. The price tag varied from 1% to 12% of the total turnover. A second contract, the "Regional commercial and promotional agreement" was signed at the level of the 16 regional branches of the retailer. It compensated services such as the "assortment agreement," which defined where the supplier's products were placed on the shelf, or the "marketing agreement", which provided for the placement of products in the free leaflets given out by the retailers to the consumers. During the 2000s, those boilerplate contracts and the internal procedures linked to them kept growing both in size and in level of detail. In 2012, the

[15] Figures available online on the INSEE website: https://www.insee.fr/fr/statistiques/serie/001761326. Accessed April 4th 2018

[16] Pierre Kupferman, « Michel-Edouard Leclerc s'affiche en héraut de la France d'en bas », *La Tribune*, 10 février 2003.

last year Superchain sold "commercial cooperation" services to its suppliers, the retailer took and stored pictures that proved that the "service" was performed at the shop level.

In the 2000s and 2010s, such contracts were an institutionalized feature of the French retail market. As shown above, E. Leclerc and Superchain, the two leaders of the retail market both put contracts at the center of their compliance strategy. The smaller retailers listed in Table 1 had similar practices.[17] Suppliers took those standardized contracts for granted and accepted that the only way to do business with retailers was to sign them.

> Because they are huge and well organized, [retailers] have always anticipated and established a certain number of [legal] documents. (…) The only purpose of those documents is to say "this is how I buy your products, this is how I receive them, this is how I want our relationship to function. And of course, you owe me penalties if you don't deliver the products the way I want". There is no room for negotiation (…). Those are contracts of adhesion: either you sign them or you don't.
>
> Head of legal, large supplier

This quote illustrates the institutionalized nature of contracts in that market. It also shows the double nature of those legal documents. Their primary role is to incorporate the harsh legislation targeting retailers and to extract "commercial cooperation" payments from suppliers. On top of this, contracts acquired a secondary role, that of micromanaging the suppliers' behavior and streamlining their logistics to conform to the operational demands of retailers.

4.3 Turning Business Relations into Contractual Relations

Consistent with the legal intermediation perspective, I view different forms of compliance as the end result of an intra-organizational process. Legal intermediaries are a key contributor: depending on their socialization, the structure of their relationships with other intra-organizational actors, legal intermediaries shape different forms of legality. In the case at hand, the legal staff hired by retailers in response to the Galland and NRE Acts are a critical group of actors to understand why and how contracts were used as a compliance mechanism. While this subsection focuses on Superchain, I will provide evidence that similar patterns happened at the other retailers listed in Table 1.

[17] The interviews I conducted with the legal counsel of one of those smaller retailers and with various lobbyists confirm this.

Within retailers, in-house counsel swiftly became the key legal intermediary who participated in the interpretation and the framing of compliance. When I conducted most of my fieldwork, in 2013, I realized that the biographies of the senior legal staff at most retailers were intertwined with the history of Title IV legislation. Franck Le Vern,[18] who was still the head of the commercial legal department at Superchain as of 2013, started his career in 1997 at another retailer. Faced with increased pressure from Title IV legislation and DGCCRF lawsuits, his former employer requested him to create a legal department from scratch. He had been fortunate enough to write his master thesis on this subject, back in 1996, when he graduated from law school.

> To complete my masters, I had to write a small thesis and an internship report. I wrote my master thesis on the parliamentary debates that took place back then and which sought to regulate supplier-retailer relations, the first time this happened since the Balladur ordinance of 1986. My internship report was on the Galland Act. It's funny when I think about this, I didn't imagine that it would become the founding piece of legislation of a job I'm still doing. (…) I was fortunate to take part in all the debates of the following laws. The first one of them took place in 2001. This was the NRE Act.

Franck Le Vern, head of the commercial legal department, Superchain

As he arrived at Superchain in 2005, he became the head of the commercial legal department. He hired more lawyers, who specialized in supplier-retailer relations. Observation and interviews showed similar career trajectories at the legal departments of other retailers. The head of legal at Superchain's biggest rival was also recruited in the 1990s. At first, she was alone. Then, as legislation became harsher, she hired more and more staff. In 2014, she supervised a team of nine lawyers. All those legal departments had one thing in common. Although members of staff specialized in various areas of commercial law, the heads of legal always spent most of their time on retailer-supplier relations. In the interviews I conducted with them, they presented this area of law as their top priority.[19]

[18] For confidentiality reasons, I refer to members of Superchain's legal department using pseudoynms.

[19] This also applies to the legal counsel of a third retailer that I interviewed. When prompted to describe her daily activities, she focused on contracts.

Far more resources were dedicated to Title IV than other areas of legislation, such as consumer law. This is surprising since retailers conduct millions of daily transactions with consumers, who are defended by regulators and consumer organizations alike. Why did Title IV attract more attention than those other areas of legal expertise? The lawsuits introduced by DGCCRF in the aftermath of the NRE Act of 2001 and the extreme levels of legal uncertainty constituted a rhetorical resource for lawyers who were directly employed by retailers. Rather than responding to lawsuits and court decisions on a case by case basis, they emphasized the general risk of litigation. One of my respondents, a legal counsel for Superchain's biggest rival, told me that DGCCRF's lawsuits constituted a "legal hazard." By framing lawsuits as an almost-inevitable danger, those lawyers behaved the same as the human resource professionals described by Frank Dobbin (2009) or the US legal insurance staff depicted in Shauhin Talesh' work (2015, p. 221). The yearly training sessions, where a few members of the legal department gave talks to the entire commercial staff, provide a good illustration of the risk-based framing of Title IV. Those training sessions were held in a big lecture hall at Superchain's headquarters. During the one I attended, Franck Le Vern presented the main provisions of Title IV legislation and the precautions that the commercial staff should take in their dealings with suppliers. First, he emphasized legal risks: the lawsuits that Superchain had faced in the past and how illegal behavior could lead to harsher legislation in the future. Prescriptions came later: they were presented as the only way to mitigate the legal threat posed by DGCCRF's lawsuits. This focus on legal risk was combined with boundary work outlining the rift between the daily business activities of the commercial staff and the legal activities of Superchain's in-house counsel. Representatives of the legal department created anxiety by mentioning specific legal provisions or court cases, although the commercial staff was unfamiliar with this terminology. During the training session I attended, Franck Le Vern displayed a PowerPoint slide featuring a judge's hammer, a symbol of the power of the judiciary. When Julie Gendreaux, my direct supervisor, was preparing her own PowerPoint presentation, I saw her delete all the smileys because they made the slides look "too casual."

Going back to Nielsen and Nelson's typology (see part 2) the preferred role of lawyers working for retailers was that of counsel. They enjoyed situations where the commercial staff brought them problems that could only be solved thanks to the intervention of a lawyer. In those cases, lawyers could perform diagnosis, inference, and treatment (Abbott, 1988), three steps that define professional work. Yet due to their framing the Galland and NRE Acts as "legal hazard," most of the time they took up the role of cop. As I have shown above, this allowed them to

increase their resources. This role, however, had its pitfalls. Acting like a "cop" put lawyers at risk of excluding themselves from decision-making altogether.

> During my fieldwork, I interviewed a commercial worker who sought Franck Le Vern's advice about how he could rapidly remove a supplier which did not sell as much as in the past. Following common practice in his department, the commercial staffer suggested writing a letter to the supplier stating that due to a glitch in the IT system, all new orders would be suspended. Franck Le Vern knew that no matter how it was covered-up, the brutal suspension of a supplier was illegal.[20] Case law interpreting a vague provision of the Galland Act mandated a period of prenotification of up to three years, depending on the length and the volume of the business relationship. He had even set up an internal procedure so that people in his department could pre-screen the suspension of an established supplier. In the case in point, Le Vern faced a dilemma. One option was to act as a "counsel" and to use his legal expertise to help the commercial staffer covering up the suspension of his long-time supplier. But this would jeopardize his status as a credible "cop." Yet he did not go as far as reminding the commercial staffer that the proposed business practice was illegal and could affect Superchain as a whole in the unlikely event of a lawsuit triggered by the supplier. He knew too well that the commercial staffer would ignore his prescription and would proceed with his plan of suspending the supplier anyway. Instead, all Franck Le Vern had to say was "Yes it's a common practice, no it's not legal."

Due to lawyers taking up the role of cop, their relational resources were scarce. Close relationships with commercial staffers were so difficult to build that there were subject to infighting within the legal department.

> I witnessed an argument between Franck Le Vern and his boss. Franck Le Vern was the head of the commercial legal department, one of the several entities under the supervision of François Oussé, Superchain's Of Counsel. Le Vern was invited to attend the annual convention organized by the commercial staff. He had not let Oussé know about this. As Le Vern was driving to the convention, he got a phone call from an infuriated Oussé, who had just found out about the event being held that morning.

This incident shows that even at the top of the legal department, top managers can be sidelined. Since he arrived in 2005, Franck Le Vern had struggled to build and maintain relationships with

[20] This was another important provision of the Galland Act of 1996.

laypeople in key business functions. Those relationships were so precious to him that he did not want to share them with his boss.

For Superchain's lawyers, standardized contracts represented a way to combine the advantages of the roles of "cop" and "counsel." Rather than designing a specific contract for each supplier, lawyers created a standardized document to be used with all suppliers. From a material standpoint, it would have been impossible, anyway, to negotiate each contract separately. Only three people at the legal department specialized in sourcing. Therefore, providing individualized advice to all members of commercial staff involved in transactions with suppliers was simply impossible. In 2012, Superchain signed 1650 deals with suppliers, and that only included fast-moving consumer goods.

Due to the legal nature of contracts, nobody within Superchain contested the fact that lawyers would chair the committee in charge of updating the standardized contract every year.

> Very early in the year, around end of April, early May, right when negotiations are over, we convene a committee to prepare the negotiations of the next year. In this committee, we try to have people representing all the stakeholders who have a say in the decision-making process. (…) We make sure it's people high in the hierarchy enough. If a director cannot make it, we try to get his or her deputy. We make sure that we implement what we decide in committee meetings. So we have a representative of all the commercial departments. Those are the core members of the committee, because they are at the heart of the negotiations with suppliers.
>
> Franck Le Vern

In this committee, lawyers translated the commercial strategy decided by "businesspeople" into legal, contractual provisions. The legal nature of the contract allowed them to perform efficient gatekeeping (Nelson & Nielsen, 2000) and to keep laypeople at bay. At Superchain, once the main provisions were decided over, commercial staff had little say in the last stages of contractual design. Superchain's standard agreement was written in "legalese" (Hill, 2001), which made it difficult for laypeople to apprehend it. As an intern at Superchain, the hardest task for me had been learning the legal language used in contractual documents. The drafts I gave my supervisors were sent back to me because they didn't seem "legal" enough. Although it is hard to define what "legal" parlance stands for exactly, it differs from the vernacular language in several respects. One of the specificities is the use of capital letters to refer the parties ("the Parties", "the Retailer").

During the annual revision process of the standardized agreement, lawyers at Superchain sent around the draft to make sure other departments agreed with the changes they made. According to Célestine Lejoyeux, the lawyer in charge of emailing the draft version, very little people even bothered to open the attachment. In the end, because the contract was considered a "legal" document, lawyers were the ones who performed the final editing and polishing of the draft. This formal prerogative gave them some degree of control over the substance of the contract. During my internship, Julie Holstein and Charlotte Pépin were in charge of editing the final version of the boilerplate to be used in the following year. They complained to Frank Le Vern (their supervisor) that Superchain's insurance people asked them to introduce a clause forcing suppliers to buy an insurance policy covering up to 5 million euros in potential damages. Julie Holstein and Charlotte Pépin reckoned that such a clause would alienate suppliers too much and would lead to too many amendment requests sent to the legal department: "for grocery products [where suppliers are very big] I get it, but for non-grocery products [where many smaller suppliers operate], we'll be flooded with amendments." Eventually, Franck Le Vern decided to take away the clause without telling the insurance people.

As the standardized contract was built into Superchain's IT infrastructure, retailers were able to keep the commercial staff at bay while exercising control over them at the same time. All, commercial staff at Superchain in charge of procurement used BCP Simu, a computer program that assisted them in their dealings with suppliers. The computer program divided the annual negotiation process into different temporal stages. The supplier's "tariff" was used as a starting point in the negotiation. (Retailers and suppliers never negotiated directly the final price tag of the product.) Then they negotiated different type of back margins which were listed in the standardized contract. Once the negotiation was over, the buyer entered the different margins she obtained and BCP Simu automatically edited the contract.

By delineating and naming each phase of the negotiation, BCP Simu performed two forms of control. First, it ensured that commercial staff conformed to company-wide policy that ensured symbolic compliance with pro-supplier legislation:

> We have an entire system to monitor whether the contracts are signed and the progress of negotiation. We don't want to end up on February 28th with 70 unsigned contracts.[21]

[21] One of the legal mandates of Title IV legislation is that contracts should be signed before March 1st every year.

> That would look bad. (…) We are very careful with legal matters (…). We [the management] can find at all times whether a contract is signed or not.
>
> Dairy products category manager, Superchain

But it was not just direct compliance with Title IV legislation that was monitored through BCP Simu. Using the different types of back margin that were defined in the contract, managers of the procurement staff could directly monitor their commercial performance:

> At first, you enter your annual targets in BCP Simu. As the negotiation progresses, you're going to update the data on BCP simu. You also enter the appendices. This allows management to directly monitor the negotiation process.
>
> IT manager, Superchain

As this example illustrates, the commercial strategy (the definition of annual targets *vis-à-vis* suppliers and how the negotiation should be conducted) was translated into legal terms by the legal team. Through the IT infrastructure, those legal categories became a core aspect of the commercial work performed by laypeople. In other words, the legal categories crafted by legal departments became constitutive of the buyers' cognitive environment (see Stryker, 2003, p. 733). At the company level, due to the involvement of in-house counsel, the legal strategy (finding the best way to symbolically comply with Title IV) and the commercial strategy became deeply intertwined. While keeping commercial staffers at bay and imposing their legal framing of compliance, legal departments gained a high level of influence on strategic business decisions.

The head of legal at another, smaller retailer provides a similar account of her involvement in crafting standardized contracts:

> Let me explain to you the process of drafting the annual agreements. In June or May, we settle down, we look at how the negotiations went [They typically end in March]. We look at the evolution of regulation, we exchange views with the products chief, with the marketing division, with the actors of company. The CFO is also involved, to look at where we're going in 2015 [the interview was conducted in summer 2015]. In June or July, we start to have a good view, and starting in September we're all set, we know how the next negotiation phase will be structured. So we have documentation, we have the paper document, the agreement. Then we have the commercial-legal direction [*l'axe commercial-juridique*] (…). There are strategies. During this May-June period, we specify our legal strategy but also our commercial strategy based on what our

> competitors do and the context, on how we interpret what happened in the previous negotiation phase.
>
> Head of legal, smaller retailer

Although I conducted no observation within this retailer, the quote reflects a deep entanglement of commercial and legal concerns. As in the case of Superchain, the legal department sets the calendar and the priorities of the negotiation strategy for the following year. Those priorities are reflected in the annual contract that the legal department is in charge of drafting.

4.4 From Symbolic Compliance to Endogenization

This last paragraph of the empirical section assesses the impact of the institutionalization of standardized contracts on further attempts by the French state to settle the economic imbalance between retailers and suppliers. As I have shown, the contracts set up by their legal departments allowed retailers to formally comply with the Galland and NRE Acts without substantively changing their business practices. In response to this, new regulations were drafted by the French state, which triggered similar forms of compliance based on contracts. This cycle of new legislation and symbolic compliance contributed to the endogenization of French retail regulation. Over time, bureaucrats working for the DGCCRF drafted new regulations which recognized contracts as a legitimate locus of compliance. The contractual framing of business relations as an equal relationship between "business partners" made its way into French statutes. I argue that retailers' legal departments played a key role in both stages of this process (symbolic compliance *and* endogenization). The infusion of the logics of the legal profession into compliance shifted policymaking debates from ethical and economic concerns to purely legal and technical ones.

In 2001, the NRE Act introduced an openly worded blanket-ban on "disproportionate advantages." Despite this broad prohibition and tough court decisions against retailers, state officials failed to significantly reduce back margins. Starting in 2003 with the Dutreil Regulation, DGCCRF officials dramatically changed course and decided that the best strategy against back margins would be drafting very specific legislation. In 2003, DGCCRF issued a *circulaire*, a regulation that had less legal standing than an Act of Parliament, but could still be

used in courts to (re)interpret current statutes. This text was known as the Dutreil regulation.[22] Despite not having full legal standing, the regulation had a lasting influence. Its content inspired the Dutreil Act of 2005.[23] As explained above, early on, the law and legal decisions produced by DGCCRF were unorthodox. In order to fight dubious "commercial cooperation" contracts, officials drafted the NRE law in ambiguous terms. Starting from 2003, regulation started drifting towards more precise and more technical provisions. Gradually, the commitment to help suppliers at any cost declined and was replaced by a coolheaded approach to regulation as a technical field of expertise.

Like the NRE Act of 2001, the aim of the Dutreil regulation was to reduce the use of commercial cooperation and thus decrease the amount of back margins. However, the new regulation differed from the strategy used in the NRE Act, which had introduced a broad prohibition of all "disproportionate and uncompensated advantages." By doing this, it regulated supplier-retailer relations using an ethical principle of proportionality between the compensation for a service and its intrinsic value. In the NRE Act, DGCCRF refused to clearly define what sufficient "counterparts" were for fear that retailers would circumvent those rules. By contrast, in the Dutreil regulation, bureaucrats gave commercial cooperation a clear legal definition, based on two decisions made by the Cour de cassation, one of the three French supreme courts. The rationale was the following: retailers requested too much back margins from their suppliers. As of 2003, most of those back margins were made of "commercial cooperation" agreements. By narrowing the definition of "commercial cooperation," DGCCRF hoped that retailers would find it harder to "sell" back margins to their suppliers. The regulation specified that services pertaining to "commercial cooperation" should have a positive impact on the supplier's sales. This new narrow definition excluded from commercial cooperation the mere resale of statistics or vague "merchandising plans."

DGCCRF officials expected two things from the Dutreil regulation: reducing back margins and cutting inflation rates. However, defining commercial cooperation precisely, as the regulation did, was not successful in lowering the use of back margins by retailers. Between 2003, the year the Dutreil regulation was released, and 2005, the rate of back margins rised from 33.5% to

[22] Circulaire du 16 mai 2003 relative à la négociation commerciale entre fournisseurs et distributeurs

[23] Loi n° 2005-882 du 2 août 2005 en faveur des petites et moyennes entreprises

35.3% (Colla & Lambert-Pandraud 2007, p. 34). Retailers' legal departments circumvented the Dutreil regulation by changing the legal qualification of the back margins they sold to suppliers. Rather than reducing back margins, they preferred to develop new kinds of "services." The nature of those "specific" services was diverse. [24] The only thing they had in common (and the only thing that really mattered) was that they did not fit in the legal definition of "commercial cooperation." The Dutreil regulation restricted commercial cooperation to the services that could boost sales. Yet the retailers developed new services that rather than boosting sales, aimed at improving commercial relations through other means. The most typical example of this was the resale of statistics to the supplier.

To circumvent the Dutreil regulation, the lawyers who worked for retailers didn't go for pure illegality. They didn't ignore the legal mandate spelled out by DGCCRF in the Dutreil regulation, but they complied with it creatively. The creation of those "specific" services was an initiative of retailers' legal departments. They were mentioned by Franck Le Vern, the head of the commercial legal department of Superchain. The quote below helps to understand the role played by lawyers in developing those services. From a legal standpoint, they framed certain services as *distinct* from commercial cooperation. This legal qualification led to the contractual planning of services that were already performed by retailers, yet on an informal basis. As the following quote shows, lawyers also covered up the creation of those "services" by emphasizing the economic "interest" suppliers had in buying them.

> One understands well that retailers accumulate a lot of data and have the capacity to conduct surveys. We have big research departments to analyze the behavior of the customer and the needs of the customer.

Franck Le Vern

The other category of services that came about were the "international services." Retailers set up legal entities abroad. Then they requested the supplier to sign a contract with this entity. By signing this contract, suppliers were bound to pay a certain rate of their annual sales to the retailer's international entity. Those legal devices allowed increasing the amount of back margins without altering the contract signed by the French entity. "International" back margins were no longer under the DGCCRF's jurisdiction. Like "specific" services, "international" services were an outcome of retailers' legal departments' expertise. During my observation at

[24] The term « specific services » appeared for the first time in February 2004 in a DGCCRF memo (retrieved from the French state archives, PH279-05 DGCCRF B2).

Superchain, one of the lawyers mentioned the creation in the early 2000s of a legal entity based in Geneva, Switzerland.

The Dutreil regulation was not the only example of DGCCRF's failure to contain back margins by using more precise legal language. A similar process unfolded after 2005, when the Parliament passed the Dutreil Act that defined back margins in even more precise terms than the Dutreil regulation did. During that time, DGCCRF's emphasized "formalism" as its top enforcement priority.[25]

> Guillaume Cerutti, director general of DGCCRF, is less satisfied. Not of the Dutreil Act, but of its application: "There is not enough compliance to the "formalism" mandated by the Act (…). Commercial relations have become more transparent. However, compliance to formal requirements is not high enough. Rather than commercial cooperation, retailers use "distinct" services more and more. (…) Formalism is not anecdotical. It allows to have rules of the game.

What does enforcing "formalism" mean? Instead of capping back margins (to reduce the economic power of retailers), the aim of DGCCRF became retailers' narrow compliance with the formal requirements listed in the Dutreil Act. A clear sign of legal endogeneity, DGCCRF officials now viewed retailers' contracts as the main locus of compliance. The word "formalism" was not specific to DGCCRF. Over the years, it became a key notion for all the actors concerned with Title IV.

> This term was used for instance by in-house counsel who worked for retailers. In his memo that synthesized all the major changes in legislation, Franck Le Vern used the word "formalism" for the first time when the Dutreil Regulation came out: "The regulation emphasizes the formalism that must be followed in the commercial cooperation contracts and in invoicing." In subsequent memos drafted in 2005 and 2008, he used this term 5 times to describe the impact of the Dutreil and Chatel Acts on the standardized agreements used by retailers with their suppliers.

The Chatel Act,[26] drafted and discussed starting from 2007 and passed by Parliament in January 2008, was consistent with this new goal of increasing the formal requirements regulating commercial negotiation instead of paying attention to the economic imbalance between suppliers and retailers. Its main provision was to integrate into a single agreement all the

[25] « Incertitudes sur les relations commerciales », *LSA*, n°1969, 12 octobre 2006.

[26] Loi n° 2008-3 du 3 janvier 2008 pour le développement de la concurrence au service des consommateurs.

"services" (and hence back margins) that were negotiated between suppliers and retailers. Once the Chatel Act was passed, article 441-7 of the Commercial code provided that commercial partners should sign a contract listing "the commitments made by the retailer towards the supplier (…) aiming at improving the commercialization of his products and which do not merely arise from the operators' status as sellers and buyers." As it increased the formal requirements enforced on the commercial agreements, DGCCRF now framed supplier-retailer relations as a normal business relation where each party had a say in defining the terms of the relationship:

> It was better to have only one contract and to make sure that when people meet around the table, they discuss both the front [margins] and the back [margins] at the same time. This way they can reach a win-win agreement.
>
> Senior official, DGCCRF, 2006-2008

5. Conclusion

The major steps in the recent history of French retail regulation are the following: During the 1990s, business relations between retailers and suppliers became politicized. Suppliers and their allies accused retailers of unfairly taking advantage of their tremendous size, which led the French Parliament to pass harsh legislation. Those ambiguous statutes triggered the rise of standardized contracts, which became retailers' preferred form of compliance with the new regulation. In-house Counsel was at the forefront of retailers' efforts to ensconce their business relationships in legally binding agreements. Complying through contracts was detrimental to suppliers in two ways. First, while they applied the principles laid out in retail regulation, they also served as a coercion mechanism against suppliers, making them pay more and more back margins and streamline their operations. Second, the legal nature of those agreements and their compliance towards specific legal mandates protecting suppliers gave retailers a sense of symbolic legitimacy. As they became institutionalized, contracts became viewed by regulators as an inevitable form of compliance. Their language started permeating legislation up to a point where the French state deemphasized the economic imbalance between suppliers and retailers.

In those respects, the fate of French retail regulation is consistent with what legal endogeneity theory predicts (Edelman, 2016): organizational responses to regulation lead to institutionalized forms of compliance that can eventually undermine its scope. Similar to the cases described by

Talesh (2009, 2014) institutionalized and political logics go hand-in-hand: large organizations diffuse and legitimize specific practices and also exercise direct pressure on political and bureaucratic officials. Yet in its current form, legal endogeneity theory would not have been able to capture certain aspects of the endogenization of French retail regulation. Legal intermediaries are key actors in the emergence of institutionalized conceptions of compliance (Talesh & Pélisse, in press). While LET emphasizes professional dynamics, my case shows that interactions within organizations, or even "within the cubicle" (Abbott, 2005), are also crucial in shaping how organizations comply with regulation. Compliance professionals, including lawyers, show a great deal of adaptation to the local business norms of their clients (Suchman & Cahill, 1996). The role of ambivalent legal objects such as contracts should also be reassessed. It is their double-sided nature that allows the legal staff to act simultaneously as "cops" and "counsels" (Nelson & Nielsen, 2000). Standardized contracts gave lawyers access to strategic decision-making, while allowing them to keep laypeople at bay. The organizational dimension of contracts is also relatively downplayed in the legal realist literature (Brooks, 2013; Macaulay, 1963). Although it moves away from legal orthodoxy, this literature still views contracts as a reflection of how reflexive business partners decide to secure an ongoing relationship. Such a view cannot be applied to the asymmetrical "agreements" that French retailers created.

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TABLES

Table 1: Market Shares of the Main French Food Retailers, as of 2017

E. Leclerc	21.0%
Superchain	20.9%
Intermarché	14.1%
Casino	11.4%
Auchan	11.0%
Système U	10.3%
Lidl	5.3%
Other	6.0%
TOTAL	*100.0%*