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# REGULATION VERSUS COMPETITION

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Competition is the principle element of markets[1], in the princely sense of the term. The relationships that regulation maintains with competition are ambiguous. It is important to eliminate this ambiguity in order to reveal the ab initio opposition between regulation and competition, to shed light upon the dialectics between both of them. Indeed, regulation may aim at building competition, and is thereby presented as a tool that will cease being used when the competitive market functions effectively. In this, the two concepts are different, since competition is the end goal of regulation, but not opposed, because regulation is intended to disappear when it has fulfilled its mission (in other words, when competition has reached maturity). This opposition is more blatant in certain situations that definitively require that the principle of competition be permanently maintained in a sustainable, yet unstable, equilibrium with a principle of another nature, whether this be a technical principle, such as the prevention of systemic risk in banking, finance, or healthcare, or a political principle, such as access to healthcare or culture.

Admittedly, the amphibology of the very term 'regulation' is a barrier to understanding the relationship between competition and regulation. Indeed, when regulation is reductively understood as 'rule-making' or 'rules and regulations', it is nothing more than a system of government-administrated economics, since public economic law naturally contains the notion of police powers [2].When regulation is defined in such a way, the opposition shifts between competition, a notion attached to market liberalism, and rulemaking, which shields the economy from market mechanisms. Communism is the economic doctrine par excellence under which the State shields the economy from the market. Indeed, the competitive market is by nature an area that does not operate according to rules that were established before its existence (by an *ex ante* apparatus). One often finds not only in the English-language literature[3], but even in the French literature[4] on the subject, that regulation is defined as a set of rules that organize markets, make them work properly, and make them work in ways that do not naturally occur on a competitive market.

This is an analytical error[5], because it is an example of metonymy: rule-making is simply one tool that regulation has at its disposal, rules being one of the very numerous instruments that allow a regulator to control an industry, along with his power of granting authorizations, handing down sanctions, or resolving disputes[6].
Instead, regulation should be defined as maintaining a balance between the principle of competition, perfectly accepted and welcomed in an overall market liberal perspective, and a principle of another nature, justified by technical or political reasons[7].It is thereby clear that regulation and competition are false friends, in the true sense of the word (I). But one can be the instrument of the other in cases where a legal declaration that competition is now permissible in an industry (also known as the economic phenomenon of liberalization) is not sufficient for true competition to become established on that market. This therefore requires the power of regulation, in this case, a transient regulation. Regulation is the way to build competition (II). Furthermore, forms of competition that favor risk must be moderated in a more permanent fashion by counterbalancing mechanisms, especially when such risks are actually engendered. This implements a contradiction that is frontally opposed to competition, and the minimal solution that results is to maintain an equilibrium between the two (III).

## I.
## REGULATION AND COMPETITION, FALSE FRIENDS

The economic doctrine that claims that the competitive market is spontaneous and requires neither the State, nor the Law, nor institutions, is in the minority. This doctrine is represented by the Austrian School, within which the works of Freidrich Hayek are the jewel that has managed to maintain its influence to this day[8].Indeed, the competitive market requires a strong State, which is referred to by market liberal economists, and a legal system that establishes property rights, property law, and a judicial system that ensures the effectiveness of contractual engagements and resolves disputes [9].It is accepted that once established, the competitive market functions on its own dynamic ; this dynamism, which by the equilibrium between supply and demand, informed by their cross elasticity and information on prices, will produce exact prices, will serve everyone's interests, which is considered to be the public interest [10], and will encourage suppliers to innovate. In this way, the competitive market is self-regulated[11].

Against this backdrop, the Competition Authority intervenes in reaction to past behavior (anti-competitive behavior) or future behavior (merger review) that has affected, or could affect, the market (theory of the appreciable effect on competition). In this, the Competition Authority is characterized by the fact that it intervenes *ex post* relative to the construction of markets, while regulators hold the power, along with politicians, to intervene *ex ante*. The distinction is very clear and it is important to keep it in mind, not only because law is a language game[12] in which words must correspond to things[13], but also because of the its potentially very important practical consequences. Indeed, Regulatory Authorities, because they are in charge of building a market, have much more power than Competition Authorities, whose role is limited to repairing the market. The former is required to accomplish the feat of construction by projecting into the future, whereas the latter is simply required to perform a repair, either by erasing or preventing damage, in accordance with the principle of liability.

[1] FRISON-ROCHE, Marie-Anne et PAYET, Marie-Stéphane, Droit de la concurrence, coll. « Précis Dalloz », Dalloz, 2006.
[2] DELVOVE, Pierre, Droit public de l'économie, Précis Dalloz, Dalloz, 1998.
[3] POSNER, Richard A., Antitrust Law : an economic Perspective, The University of Chicago Press, 1984. For his analysis of the current financial, and especially banking, crisis, cf. Failure capitalism. The crisis of « O8 » and the descent into depression, Harvard University Press, 2009, 330 p.
[4] BONNEAU, Thierry, Efficacité et avenir de la régulation financière, in Le droit face au risque financier, Revue de droit bancaire et financier, Lexis-Nexis, 2010, n°6, Nov-Dec, p.67-70.
[5] FRISON-ROCHE, Marie-Anne, La distinction entre Régulation et Regulation, Revue Lamy Concurrence 2008.
[6] FRISON-ROCHE, Marie-Anne, Dialectique entre concurrence et régulation, in Actualité du droit de la régulation, Revue Lamy Concurrence, 2007, p.168-174.
[7] FRISON-ROCHE, Marie-Anne, Régulation, in Les 100 mots de la régulation, coll. « Que Sais-je ? », 2011.
[8] HAYEK, Friedrich, The constitution of Liberty, Coll. "Political Philosophy", The University of Chicago Press, See also by the same author, Law, Legislation and liberty, vol. 1 : "Rules and Order", vol.2 : "The mirage of social Justice", vol. 3 : "The Political order of a free people", Coll. "Political Philosophy", The University of Chicago Press.
[9] FRISON-ROCHE, Marie-Anne, Droit et économie, in TERRE, François (ed.) , Regards sur le droit, Académie des sciences morales et politiques / Dalloz, Paris 2010, p. 119-128.
[10] LAFFONT, Jean-Jacques, Intérêt général et intérêts particuliers, in l'intérêt général, public report of the Conseil d'Etat, Coll. « Etudes et documents » n°50, La documentation française, 1999, p.421-428.
See generally, ARROW, Kenneth, Social choice and Individual Values, Cowles Foundation, 1951.
[11] FRISON-ROCHE, Marie-Anne, Concurrence, in Les 100 mots de la régulation, op. cit.
[12] OST François, Raconter la loi, éd. Odile Jacob, 2004; TIMSIT, Gérard, Théorie des actes de langage, éthique et droit, PUF, ; HOECKE, Mark Van, Law as communication , Mart Publishing, 2002, 240 p.
[13] FOUCAULT Michel, Les mots et les choses, coll. « Bibliothèque des sciences humaines », Gallimard, 1966.

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> Regulation can be a tool for creating competitive markets

It is understandable that in a strategy of power, it is better to pose as a Regulator than as a Competition Authority, because the former is always more powerful than the latter, which often resemble highly specialized courts. This is why we often observe Competition Authorities intervening in regulated sectors, such as the banking industry[14], and promoting the idea that regulatory authorities are indistinguishable from Competition Authorities because they only deal with one sector of the economy (a sector-specific authority) while Competition Authorities are authorities that overarch all sectors[15]).

If competition were not "simply artificial"[16], but rather a general form of intervention to construct markets, Competition Authorities would become all-powerful, and we would have to assume that there was no such thing as structural market failure[17] or political choices previously made by Parliament or the Government, such as fundamental rights of access to common property. The balance of power in a democracy[18] is opposed to this, and Regulatory Authorities have been regularly attacked on the grounds of legitimate analysis[19] of regulatory agencies' prerogatives[20]. Thus, the French Parliament's recent report of September 29, 2010, was very critical of Independent Administrative Authorities[21], the form under which Regulators are usually instituted in France. Also, politicians do not know whether they should trust Regulators, and especially whether or not they should be granted legal autonomy[22].

Parliamentarians' contradictory laws and critical reports primarily reveal their inexact understanding of what a regulator is[23]. Regulators have indeed received a political mandate to construct markets or durably maintain, on the market they are in charge of, an unstable equilibrium between a principle of competition and another principle. They are supposed to maintain this equilibrium in a technically expert and neutral way[24]. This type of political mandate is never given to Competition Authorities, which exercise their *ex-post* powers on all markets for goods and services. Practically no markets of this type can shut the door on the power of the Competition Authority, yet nonetheless, the powers of this Authority are more limited and of another nature than those of Regulatory Authorities.
If we use expressions such as 'horizontal regulation' or other such ambiguous expressions, we risk mixing up our words, and calling regulation competition; or competition, regulation. Thereby, we allow Competition Authorities to exercise exorbitant powers over all markets. The political backlash is that the discredit brought about by such linguistic misuse falls not only upon Competition Authorities, but also on sector-specific Regulatory Authorities, for both types of authorities are thereby lumped together. While Regulatory Authorities are legitimate to exercise the powers necessary to the construction of markets and the maintenance of equilibriums between competition and another principle, Competition Authorities are simply market watchdogs.

Whether it be on purpose or a casual error, the European Commission often mistakes these false friends (regulation and competition). Thus, to take the example of the highly regulated sector of energy, the European Commission said in a December 2010 communication that it would rethink its regulation along the lines of "stable and sustainable competition," without even mentioning the change of pace that that represented: in light of the European decision to liberalize the sector adopted with the Directive of December 19, 1996, afterwards tempered by a succession of a great number of successive European directives and regulations, the notion of 'stable and durable' competition hardly makes any sense.

Indeed, by definition, competition is based on the idea of mobility. Demand shifts from one supplier to another. The infidelity of the demand side reflects the spirit of the market: competition leads rational consumers to abandon less-attractive suppliers for others who supply substitutable products at a lower price (for example). Demanders' loyalty to a supplier with less innovative, less appropriate, or more expensive products than other similar products supplied by competitors is called a phenomenon of "stickiness" in economics. This indicates an excessive commitment to a supplier; a sign of an immaturely competitive market. This phenomenon is often observed towards incumbents when an industry is liberalized[25].

The mechanism of the self-regulated market causes suppliers to remain in constant motion, too, in order to win clients over from competitors. This is external movement that takes place on the market. But, they are also in motion internally, in order to reduce costs or increase innovation. This kind of competitive frenzy results in prices that reflect, thanks to the aforementioned phenomenon of elasticity,[26] the equilibrium price, which is a price that endlessly varies. That is why the great economist Leon Walras believed that the financial market, through its system of listings, is the market at its purest[27].

Simply in order to know what we are talking about, we should stop confusing regulation and competition[28]. This obviously does not mean that regulation and competition have nothing to do with each other. On the contrary, because regulation does not refer to a planned econo-

[14] FRISON-ROCHE, Marie-Anne, Le bras de fer entre concurrence et régulation, in Commissions interbancaires. Le modèle relationnel en danger, Banque droit, numéro hors série, Décembre 2010, p.6-8.
[15] DAHAN, Thierry, La régulation concurrentielle, Revue Concurrences, 2009, n°3/n°4.
[16] Cf.supra n°5.
[17] FRISON-ROCHE, Marie-Anne, Défaillance de marché, in Les 100 mots de la régulation, op. cit.
[18] LOMBARD, Martine (dir.), Régulation économique et démocratie, Coll. « Thèmes et commentaires », Dalloz, 2006. See also DAIGRE, Jean-Jacques, CONAC, Pierre-Henri, LABETOULLE, Daniel et RIFFAULT, Jacqueline, Le contrôle démocratique des autorités administratives indépendantes à caractère économique, Economica, 2002, 64 p.
[19] FRISON-ROCHE, Marie-Anne (dir.), Les régulations économiques : légitimité et efficacité, op. cit.
[20] FRISON-ROCHE, Marie-Anne (dir.), Règles et pouvoirs dans les systèmes de régulation, coll. « Droit et Economie de la Régulation », op. cit., tome 2.
[21] DOSIERE, René et VANNESTE, Christian, Rapport d'information sur les Autorités administratives indépendantes, Comité d'évolution et de contrôle des politiques publiques, Assemblée Nationale, 2 tomes, 28 octobre 2010.
[22] Thus in France, legal personality was not given to Regulators, but this deprived them of the power to judge, since they did not possess the legal capacity to bring an action before a court of law. That is why the Financial Regulator, followed by the other regulators, were granted legal personality, which provides them with greater autonomy vis-à-vis the Executive branch, and a great amount of power in trials in which they themselves must be able to maneuver. Yet, just as a pendulum, politicians have expressed their dissatisfaction with "overly-powerful" regulators, who combine legal powers, control over an industry, and autonomy. Therefore, the ARJEL, the recently-created French Gambling Authority has no legal personality. This is unfortunate, for it may lead to procedural difficulties.
[23] FRISON-ROCHE, Marie-Anne, Autorités Administratives incomprises (AAI) JCP G 2010, act. 1166.
[24] Annual colloquium of the The Journal of Regulation, 17 March 2011, Paris, op. cit.
[25] Cf. . Infra n° 15 and following.
[26] Cf. supra n° 5.
[27] Cf. . eg. his 1867 book, La Bourse et le crédit. About him, see Morishima, Michio, Walras's economics : A pure theory of capital and money, Cambridge University Press, 1977
[28] Cf. supra n° 2.

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my and is compatible with a market-liberal perspective on economics[29], regulation has to do with competition. Indeed, it is the tool to build competition when liberalization has been decided by the law, or when, in order to preserve certain equilibriums, the law intervenes to stop competition from brutally attacking an industry that cannot handle it. Regulation always implies the presence of competition, and sometimes it is thanks to regulation that competition exists.

## II.
## REGULATION: THE PATHWAY TO COMPETITION

We have seen that the market is considered to be artificial by all but a minority in economic theory[30].Nonetheless, if the market is provided with the power to give people control over objects (then called 'property'), the power of commitments which usually take on the legal form of a 'contract', and if an disinterested and impartial third party is available to enforce contracts[31] , the market can function by drawing on its innate strength, which is derived from the opposing interests of suppliers and demanders But, it is possible that even in the absence of anticompetitive behavior, this conflict of interests is not sufficient to make the market function We have raised the possibility of stickiness[32], referring to a situation where demanders do not change their supplier, even when other suppliers offer more attractive products (lower priced, for example) than those provided by his supplier. This incongruous loyalty [33] is a market failure.

This may be due to the fact that the consumer does not know that the substitutable product is more advantageous than the one he is currently consuming. This assumption is even more probable when the relevant information is about something other than the price, such as the technical ability of the good, its guarantees, etc. In sum, any quality that is less immediately available than the price[34], and the demander is the "final consumer". Thus meet regulatory law and competition law[35].
This attachment can have a positive cause, meaning that it is not due to ignorance of the superiority of competing products, and a sociological cause, which is very clear in France when it comes to state-owned enterprises. Because the population has a positive view of the State, which is associated with the idea of general interest[36], citizens prefer to remain clients of state enterprises. This phenomenon is significant in telecommunications, and overwhelming in electricity.
Therefore, despite the fact that European or national legislatures have ordered the liberalization of these industries, this declaration is not enough. It is also easy for some States to play a kind of " trick " by saying that an industry is 100% open to competition, even though they know that the difficulties are so great that new competitors will not appear and, nevertheless, they will be lauded by the European Commission for being such great students of liberalization. This is what the German legislature did as concerns electricity by opening the industry to any competitor, but it in reality remained fully controlled by the Stadtwerke. France was more naïve, and showed its recalcitrance towards liberalization by adopting a minimalistic and late liberalization law. This caused the European commission to single France out as a dunce.
Nevertheless, once liberalization has been decreed, it is possible that formerly de facto or de jure monopolistic operators have enough economic power to block competition, regardless of newcomers' behavior, and regardless of the fact that the law has decreed the sector liberalized. This is particularly true when the incumbent owns a transportation system (such as an energy transmission system) an operator who attempted to replicate such a system could never secure a return on his investment.
This type of natural economic monopoly[37] definitively provides its owner or manager with enough market power to discourage any competitors from entering the market. Indeed, it is unrealistic for a competitor to enter a market (such as energy) in order to buy and sell electricity if he cannot transmit it to the buyer by accessing the transmission network for a fair price (since there is no competition between different networks, there can be no " exact price "[38]).
A regulatory system will therefore need to be set up in order to deliver competition " with forceps "[39].In such cases, competition is regulation's goal. Regulation thereby pursues its own annihilation, and that is why once it has accomplished its goal through, for example, *ex ante* rulemaking, the establishment of a Regulatory Authority, or the supervision of operators, and mechanisms of market dominance, that it must disappear. Regulation whose goal is to forcefully implement competition must disappear when competition has been implemented, and the regulated industry must be subject to competition law.

> Regulation is a definitive response to market failures that Competition Law cannot remedy

This poses two problems. The first problem is inherent to the necessarily asymmetrical character of such regulation, which must favor new competitors over incumbents, in order to make room for the former; the latter is inherent to the transitory nature of such regulation, which can only be established to enhance its own disappearance for the benefit of the different organization of ordinary competition[40].

Indeed, to build a competitive market in an area formerly entirely run by monopoly operators, who therefore have a 100% market share, we need to artificially make room so that potential competitors are encouraged to enter what will thereby become a market. Regulation is therefore "asymmetrical" since the Regulator favors new competitors. The difficulty inherent in the system comes from the superposition of the roles of the regulator and the judge, who reviews the former's decisions[41]. Indeed, the principle of impartiality forbids the judge to favor one party over another, and, when appeal is made of a regulator's resolution of a

[29]Cf. supra n° 2.
[30]Cf. supra n° 5. Cf. also for an economic analysis, ETNER, François, Histoire de la pensée économique, Economica. 2000, and for a legal analysis, ZENATI, Frédérice, Le droit et l'économie au-delà de Marx, in Droit et Economie., Archives de Philosophie du droit, t.37, Sirey, 1992, p.121-129.
[31]In political philosophy, cf. KOJEVE, Alexandre, Philosophie du droit, Gallimard, 1983 ; in economics, see EYMARD, François-Duvernay, FAVEREAU, Olivier, ORLEAN, André, SALAIS, Robert, Economie des conventions, coll. « Recherches », La Découverte, 2004 ; in law, MOTULSKY, Henri, Réalisation méthodique du droit. Eléments générateurs des droits subjectifs, Sirey, 1948, reprint Dalloz, 2002.
[32]Cf. supra n° 12.
[33]La fidélité , Série « Morales », éd. Autrement, 1990. It is true that the book hardly deals with this aspect of things. It is more when technicians describe the technique of "goodwill" (le fonds de commerce), which, according to Ripert's qualification, describes the future contracts entered into by faithful clients, that this notion appears. In this respect, faithfulness, like friendship in "friendly IPOs" are just as cold as business law wanted them to be, for such law sees the spontaneity of sentiments, which might lead to something being sold free of charge, as suspicious.
[34]It is true that the prices themselves may be hidden away, especially in long-term relationships, which is what the economic notion of a "relational contract" refers to .The example of what is curiously called " bank fees " is a good example of this because clients do not truly realize how much they are paying, since they do not put various banks into competition with one another. As a result, the French Government has used a regulatory technique (rather than a technique of planned economics) to impose price transparency.
[35] PAYET, Marie-Stéphane, Droit de la concurrence et droit de la consommation, Dalloz, 2001.
[36]See eg. PICQ, Jean, Il faut aimer l'Etat. Essai sur l'Etat en France, Flammarion, 1995. V Cf. contra , because the author only deals with economic considerations, LAFFONT, Jean-Jacques, Intérêts particuliers et intérêt général, in L'intérêt général, op. cit.

[37] FRISON-ROCHE, Marie-Anne, Monopole naturel, in Les 100 mots de la régulation, op. cit.
[38] FRISON-ROCHE, Marie-Anne, Qu'est-ce qu'un prix en droit ? du droit des contrats au droit de la régulation, in Etudes à la mémoire de Fernand-Charles Jeantet, LexisNexis, 2010, p.177-183.
[39] FRISON-ROCHE, Marie-Anne, Ambition et efficacité de la régulation économique, in Le droit face au risque financier , Revue de droit bancaire et financier, 2010, n°6, nov. déc., étude n°35, p.59-66.
[40] Cf. supra n°5 and following.
[41] RICHER, Laurent, Le règlement des différends par la Commission de régulation de l'énergie, in Mouvement du droit public. Mélanges Franck Moderne, Dalloz, 2004, p.392-406. See also, eg., TUOT, Thierry, Régulation du marché de l'électricité : une année de règlement de différends, AJDA 2003, p.312-323.

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dispute, does the judge also have to adopt the asymmetrical treatment of the parties, or place them on an equal footing ? [42].
Most often, the judges' wisdom lead them to simply perform a review of regulators' compliance with procedural rules.
The second difficulty lies in the necessarily transient nature of such regulation, as compared to competition law. Indeed, regardless of incumbents' ability to resist liberalization and keep their market share, it is sometimes difficult to identify their strategy of passive resistance, which can take the form of agreements with potential new entrants so that they refrain from entering the market. It can also be difficult to ascertain Regulators' strategy, who do not actually want their mission to succeed, since this would mean that they have to disappear, since mature competition makes the regulatory scaffolding irrelevant. It is easy to understand that Regulatory Authorities develop strategies to avoid the day where they themselves have to mount the scaffold.
First, some regulators in charge of implementing effective liberalization have proposed the astonishing concept of 'symmetrical regulation', which is not supposed to favor new entrants, because competition is often sufficiently effective in order for the warlike dynamic of conflicting interest[43] to suffice. We can consider that this is the case in the telecommunications industry, especially in the mobile telephone market. In such situations, the Regulator affirms that his far-from-invisible hand is still required, because it continues to govern the industry, now composed of competitors on an equal footing, by obliging them to cooperate with one another, for example. The French telecommunications regulator has clearly adopted this point of view, and has said that it now performs symmetrical regulation of telecommunications operators. Consequently, it has stated that fiber optic networks must be constructed throughout the country in a cooperative fashion between operators, even in unprofitable areas. This was approved by the French Competition Authority, even though other countries have allowed competition to take its course[44].
Besides operators' strategies, which fully account for Regulators and Competition Authorities,[45] there is a second, more substantial question: to what extent does a liberalized industry still require definitive regulation?
Indeed, transitional regulations were set up for the liberalization of the so-called " network industries, such as telecommunications, energy, postal services, and railways. The European Commission intellectually perceives this as using an *ex ante* power that will permit " sustainable " competition to govern these industries[46], but this conception of regulation at the service of its adversary supposes that competition will suffice thereafter. This is because competition cannot be decreed, and that it needs the legal power of regulation to encourage new entrants to build a market that otherwise would remain dead letter in the legislature's mouth.
But, this is not always so, because there is such a thing as permanent market failure.

## III.
## REGULATION, THE CONSEQUENCE OF DEFINITIVE MARKET FAILURE

When there is structural market failure, the market can no longer self-regulate through the game of competition, the system must either be removed from the free-market economy (through a planned economy), or be subjected to market regulations[47]. Whatever be one's ideology, today it is practically unthinkable to take industries out of the market economy, because markets are vaster than the territories controlled by States[48], and since the financialization of the economy has dematerialized the economy itself, we must try to tame the markets by intervening on the markets. In this, the regulation and governance are concepts that are growing increasingly closer to one another[49].

[42] FRISON-ROCHE, Marie-Anne, L'office de règlement des différents entre régulation et juridiction, in FRISON-ROCHE, Marie-Anne (dir.), Les risques de régulation , coll. « Droit et Economie de la Régulation », vol.3, Presses de Sciences Po/Dalloz, 2005, p.269-287.
[43] Cf. supra n°5 and following.
[44] BENZONI, Laurent, Comparative Analysis of national fiber Plans, The Journal of Regulation, vol., 2011, forthcoming.
[45] Cf. supra n°10 and following.
[46] Cf. supra n° 12.
[47] Cf supra n° 2.
[48] DEBRAY, Régis, Eloge des frontières , coll. « NRF », Gallimard, 2010,
[49] FRISON-ROCHE, Marie-Anne, Corporate Law seen through the prism of Regulatory Law, The Journal of Regulation, n°2, June 2010, 1-1-6.



But, Regulators of industries such as telecommunications have identified (if not invented) new areas of intervention beyond market liberalization. This is the case of 'social solidarity', which is used to justify access by the entire population to broadband internet service, which supposes the pre-existence of a fundamental right to Internet, which is said to be born from the fundamental right to information and to be in contact with others, and the social group as a whole. We observe that multiple Regulators create soft law on the so-called subject of " Net Neutrality[50] " because being the regulator of the Internet is certainly a coveted job/2[51] .In France, the Telecommunications Regulator and the Personal Data Regulator have been jockeying for this position, which has led the Government to propose merging them...
It is very difficult to identify true market failure. If market failure does not exist, than the incumbent operator can be allowed to go bankrupt, as long as this does not provoke a systemic crisis, and no vital economic function is affected or replaced. Why should we stop this from happening ?

This is an introduction to the regulation of postal services. Europe liberalized postal service within the European Union with a 1997 directive and progressively increased the scope of this liberalization, especially with the Directive of June 10, 2002 [52]. However, the Corbeau decision, handed down by the European Court of Justice on May 19, 1993, stated that the financial equilibrium of a public service provider is justification enough to maintain its monopoly over the market of express delivery service, which generated revenues that allowed the Royal Belgian Post to fulfil its public service obligations relative to ordinary mail. Currently, all reports show that national Post Offices, which are all state-owned enterprises regardless of their legal classification[53], are on the verge of bankruptcy. Should we prevent them from going under?

This depends on what the purpose of the Postal Service is. If the Postal Service solely exists to transmit information from one person to another via the carriage of a letter, other intermodal methods such as the telephone, fax, and the Internet could fulfill this requirement in a different manner. The distribution of packages is a different category of service, and European Directives have indeed stated that this is a monopoly of national postal services.

Furthermore, when the Political decides that the Post Office has to fulfill a mission of social cohesion by maintaining post offices open in rural areas, and that compliance will be ensured by regulatory surveillance, this is a task completely foreign to competition. This is an example of market failure, not technical market failure, but simply because this function is foreign to the market, the market is not a place of 'social cohesion', since it requires the demander to be financially capable of purchasing, and requires the supplier to be able to take risks to be capable of selling.
In such conditions, regulation will be definitive. The stability of this situation allows us to identify the primary definition of regulation: the permanent maintenance of an equilibrium between the principle of competition, and a principle of another nature that is a-competitive, or even anti-competitive[54]. Competition is simply one side of the scale held by the Regulator, nothing less, nothing more.
This balance is both unstable and political. In this way, Regulation is a triangle whose points are economics, law, and political science. No one is legitimate on his own. This results in a complexity that is often criticized in regulation: because of changing technologies, regulation also changes over time, and because political ideas also shift, the entire system shifts, too.

This is not a defect, it is in regulation's nature to be more unstable in its concepts and more stable in its operation than Competition, which is unstable in its operations[55] and stable in its concepts.

[50] See eg. BENZONI, Laurent, Net Neutrality , Economic Perspective, The Journal of Regulation, 2010, I-1.9.
[51] Cf. eg. the ARCEP's "recommendations" on the subject : RAIFFE, Alex, The ARCEP publishes 10 recommendations and propositions for Network and Internet Neutraly, The Journal of Regulation, 2010, II-2.6.
[52] On the detail of the calendar, cf. www.arcep.fr/postal .
[53] Constitutional Council decision n°2010-601 DC of 4 Feb 2010 relative à la loi relative à la loi relative à l'entreprise publique La Poste et aux activités postales.
[54] FRISON-ROCHE, Marie-Anne, Le droit de la régulation, D. 2001, chron., p.610-616 ; Définition du droit de la régulation économique, D.2004, chron., p.126-129.
[55] Cf supra No. 1, which provides the definition of regulation vs. competition.

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> Regulation is a sustainable balance between a principle of competition and another principle.

Let us first consider the impact of technical progress on regulation. They are multiple and can even reverse the relationship between competition and regulation. An example of this is the system of call back, which caused competition to intervene in the telecommunications market before European law decided to liberalize this sector. A close look shows that the legal liberalization of the telecommunications sector was not intended to open the sector to competition, because technology had already accomplished this, but rather to control this competition. Laws on Regulation (and therefore Laws on Competition) were therefore adopted.

An even more striking example comes from online gambling. It is because the Internet had allowed the illegal supply of online gambling, horse betting, and poker to flourish, that European authorities preferred liberalizing this sector, not in order to open it up to competition, but rather in order to regulate these activities. This is because the principle of competition had to be maintained in equilibrium with other principles, such as the prevention of addiction, the maintenance of public order, and States' taxation concerns. The ARJEL (French online gambling regulator) defines itself not so much as a specialized competition authority or a transitory regulatory authority, but rather as a definitive regulatory authority, because it is in charge of maintaining these equilibriums[56].

Similarly, regulation is a device that can, *ex ante*, make long term decisions, especially when the Regulator commits itself to a certain mode of action over time[57]. In this way, the Regulator provides an element of stability that allows for the creation of an industrial policy, which competition makes difficult because of its natural instability[58].Regulation's ability to create long-term conditions on markets, to spare them the market's natural instantaneousness, is essential, because an industry cannot change instantly.
This is where regulation and contracts are hand and glove with one another[59].Indeed, the competitive market operates using "barter contracts" which cause economic exchanges to happen in an instant, whereas regulation uses "organizational contracts"[60] , whose adoption by companies is simply a way to introduce long-term effects on markets. As long as competition will rule markets, it will be very difficult for companies to create true strategies because of the impossibility of identifying the temporal dimension that is necessary to any strategy, and which most often relies on a government-led industrial policy.

Moreover, as everyone knows, financial markets are regulated because they suffer from structural failures, especially asymmetry of information, and that as they are often intermediated, the intermediaries are sometimes in conflict of interest. Numerous studies have shown that financial markets are built on trust[61], which presupposes supervisory and prudential mechanisms against systemic risk and fraudulent behavior, in order for this trust to continue existing. Reforms in every country and on every level are created because of the regulatory failures that have been observed[62].
The point to be highlighted here is that financial markets are a pot that has boiled over in that they no longer deal exclusively with corporate stock, but have begun to circulate financial instruments[63].The subprime crisis came about because of the financial industry's aptitude, like King Midas, to transform the real economy into financial instruments, just as predicted by historian Fernand Braudel[64], and its inability to discipline itself in the circulation of such instruments[65].
Legislatures are currently seeking to regulate the transformation of the so-called "real" economy, an economy of competition, into a financial economy, which is not a "game of barter"[66], but a game of poker whose risks are a self-fulfilling prophecy.
This has been done in the area of energy futures derivatives[67], with a dialectic game between American regulators, judges, and lawmakers[68]. This system was recreated in France with the Act of October 22, 2010, which gave way to an agreement between the French financial and energy regulators[69].

But, other sectors of the economy are threatened and it is being considered to regulate them, because it is unthinkable to subject them to a planned economy, and also to leave them in a purely competitive system, notably because of the impossibility of this system to take the long-term into account[70].This is true of the agricultural industry[71].It is remarkable that the French Minister of Agriculture has asked the French Financial Markets Regulator for a report on this topic[72], because this demonstrates that the Agricultural sector's need for regulation is due both to the fact that the State no longer has the means to resist the global movement towards free trade and the financialization of true wealth in order to create virtual wealth, which ends up destroying the former and those who created it [73].
It is therefore apparent that the liberal market model can only survive if the articulation between regulation and competition is correctly carried out. This means that we must first carefully distinguish regulation and competition, and that we must accept the composite nature of regulation, a construction of economics, law, and politics, far removed from competition's purity.

[56]Cf. eg.VILLOTTE, Jean-François, vœux au nom de l'ARJEL pour l'année 2011.
[57] Les engagements dans les systèmes de régulation économiques, op. citpréc.
[58] COHEN, Elie et LORENZI, Jean-Hervé, Politiques industrielles pour l'Europe , Conseil d'analyse économique, 2000.
[59]Cf, for example, in a general fashion.DEFFAINS, Bruno (dir.), L'économie du droit , n° spécial de la Revue d'Economie Politique, 2002, spécialement la contribution d'Eric BROUSSEAU, Règles de droit et exécution des contrats, p.823-844.
[60]On this crucial distinction, cf.DIDIER, Paul, Distinction entre le contrat-échange et le contrat-organisation, in L'avenir du droit. Mélanges François Terré, Dalloz/PUF/éd. du Juris-classeur, 1999.
[61] Cf. for exampleCRETE, Raymonde (dir.), La confiance au cœur de l'industrie des services financiers, éd. Yvon Blais, Canada, 2010.

[62] CREMER, Jacques, Le retour à la régulation ordinaire au sortir de la crise, in Les risques de régulation, op. cit., p.59-65. Cf. in the same book and in the same way, CAZENAVE, Thomas, MARTIMORT, David, et POUYET, Jérome, Crise de régulation, p.1-10.
[63]For a prescient description of financial law, described primarily as a form of property law, see JEANTIN, Michel, Le droit financier des biens, in Prosepectives du droit économique.Mélanges Michel JEANTIN, p.3-10.
[64] La dynamique du capitalisme, Flammarion, 1985.
[65] AGLIETTA, Michel, et RIGOT, Sandra, Crise et rénovation de la finance, éd. Odile Jacob, 2010.
[66] BRAUDEL, Fernand, Civilisation matérielle, économie et capitalisme. Tome 2 : Les jeux de l'échange, coll. « Références », Armand Colin, 1979..
[67] RAIFFE, Alex, The CME Group challenges the Commodity Futures Trading Commission's , January 26, 2010 proposition to regulate speculation on energy futures, option contracts, and derivatives, The Journal of regulation, 2010, II-5.1
[68] RAIFFE, Alex, Provision of the financial reform bill (Dodd Bill) currently being examined by the States Congress would empowered the Commodities Futures Trading Commission (CFTC) , The Journal of regulation, 2010, II-5.3
[69] Agreement of 10 Dec 2010 between la Commission de Régulation de l'Energie and l'Autorité des Marchés Financiers. In his introductory speech, the Financial Regulator insists that this is the "first cooperative agreement between the French financial markets regulator and an industry regulator" ( www.amf-France.org/documents/general/9764 - 1 )
[70]Cf. supra no° 43 and following.
[71] FRISON-ROCHE, Marie-Anne, Appliquer le droit de la régulation au secteur agricole, Revue Lamy Concurrence, 2005, n°4, août/oct., p.126-130.
[72] JOUYET, Jean-Pierre, BOISSIEU, Christian de, GUILLON, Serges Prévenir et gérer l'instabilité des marchés agricoles, rapport remis au Ministre de l'agriculture, 22 septembre 2210.
[73] BRAUDEL, Fernand, La dynamique du capitalisme, op. cit