I-2.0: Is there a compelling need for neutral action ?

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1. The question is on today's agenda because it has emerged as a political claim.

2. Accepting that regulations were initially designed to structure markets or remedy market failures, which presupposes that regulation-writers advocated the need for artificial and interventionist regulation, either because market-driven competition did not have the environment needed to establish a market space without outside help, or because its failures were permanent[1]. Regulation was therefore artificial — the reflection of a choice having an effect on how agents conduct their business.

3. That said, the financial crisis has now visibly confirmed, further down the road, what many saw as definitive failures intrinsic to the original government regulation itself, which came at a cost of stifling dynamic free trade[2]. From this perspective, advocated by the British, regulation systems should become "neutral business", i.e. having zero impact on how enterprises conduct their business to achieve their ultimate purpose, which is to create profit. Does this claim carry legitimacy? Assuming it is viably achievable, how far is it rationally endorsable?

4. Moving forward, and into a whole different sector, a visibly new principle, popularly dubbed "net neutrality", is being touted as a structural rule set rather than any action-driven policy[3]. If so, this new principle would fall outside the scope of this study, which extends solely to neutrality in its actionable principle. Nevertheless, from the outside looking in, net neutrality is not an organically-formed principle but a conscious construct, since it posits that any consumer should be able to access any internet content at any time, without any specific concession or consideration. Net neutrality, then, if enforced, would not be a fact of life but a fundamental rule of law.

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[1] FRISON-ROCHE, Marie-Anne, Ambition et efficacité de la régulation économique, *in Le droit face au risque financier, Revue de droit bancaire et financier*, in n°6, Nov-Dec 2010, études n°34, p.59-66

[2] CAZENAVE, Thomas et MORTIMARD, David, Crise de régulation, *in FRISON-ROCHE, Marie-Anne (dir.), Les risques de régulation*, coll. "Droit et Economie de la Régulation", Presses de Sciences Po / Dalloz, 2005, p.1-10.

[3] See not. CURIEN, Nicolas, Innovation and regulation serving the digital revolution, *The Journal of Regulation*, I-1.32, 2011, vol.7.

There are arguments for and arguments against: this is what sets law apart from factuality which, once proven, wins through.

5. This net neutrality debate also interferes with our opening question on what taking 'neutral action' means: if the neutrality principle were enforced — say, a scenario where policy sided with the fundamental consumer right to access net content over the fundamental right of internet service providers to contractualize their services — then action could taken by some but not by others, and against some but not against others. Clearly, any structural choice will necessarily have an impact on the scope of behaviours available.

6. As things stand, neutrality as a concept is still relatively poorly grasped, even though the term is constantly being mobilized, in accounting spheres among others. The methodological approach adopted in this paper is to redefine the root meaning of these terms before moving on to re-engage them in the economic theory.

7. However, the first hurdle, from the outset, is that the very notion of "neutral action" is oxymoronic. This stems from two reasons.

8. Firstly, a prerequisite to action is a choice or a decision. In common usage, "to act" translates as 'to achieve one's will, purpose or intent'. In the process, the person-actor increases their power over the world, while at the same time also decreasing it, since they are forced to forego all other actions they could have undertaken and all other intents they could have materialized. Action thus entails a choice, therefore a preference judgement in relation to the person-actor's own will, and consequently a commitment-constraint on the person engaging the action. In other words, action is the polar opposite of self-neutrality. [4]

9. Second, action by definition entails an effect on its object-focus; an effect on the target market, an effect on target market structure, or an effect on the behaviour of other agents and — if we stay coherent — of our own subsequent behaviour. Just a single action can thus shape and structure global economic effects. Dean Carbonnier illustrated this domino effect with the adage "*à petite cause, grands effets*" [small cause, big effects]. We now stretch our point further to show how the dividing line between microeconomics and macroeconomics is only relative.

[4] This very general analysis nevertheless has concrete material repercussions for regulated systems, since if action is the polar opposite of self-neutrality, then regulator neutrality is no more than false illusion, especially in a world where the regulator's own personality plays an increasingly key role in leading successful regulation. For a sociological reading, see FRISON-ROCHE, Marie-Anne, Esquisse d'une sociologie du droit boursier, *in* TERRE, François et FRISON-ROCHE, Marie-Anne (dir.), *Sociologie du droit économique*, L'Année sociologique, 1999/2, vol.49, p.457-494. For analysis of how this issue can be resolved through the separate concept of impartiality, see *infra*.

10. These observations argue against neutrality if it is defined as that which has no impact on or is transparent to a separate, independent setting. To cite legal-sphere examples, third parties to a contract are, in theory, neutral, as their action does not interfere in the process of establishing contractual ties. Privity of contract creates the reciprocal bond, as the contract does not impose obligations for which third-parties are accountable. Similarly, in public international law, a sovereign state is declared neutral when it does not intervene in a conflict opposing two belligerent states.

11. To escape this oxymoronic device, there is a makeshift solution, which is to define neutrality by inaction. This is the most common legal definition lent to neutrality under traditional public law, especially when dealing with religious issues. A State is thus religion-neutral, in that it refuses to intervene in normative orders and religious doctrine, keeping a secular outside stance instead. Similarly, our traditional understanding of the civil court judge is that they are neutral to the dispute, since civil proceedings belong solely to the parties involved (the *non ultra petita* disposition principle), leaving the judge to simply oversee and uphold the rules and procedures governing adversarial trial, in much the same way as the State oversees and upholds the principle of religious freedom — as custodian, but not as actor.

12. Within the regulation sphere, there is also scope for escaping the oxymoron issue via a more proactive, two-strand solution. First, in regulated sectors, strand I is that certain agents — whether on the state-government side or the business-enterprise side — should never be compelled to act neutrally. Second, and conversely, strand II imposes the neutrality imperative on both judge and regulator (II). The roles would thus be distributed according to who has done business with who, and any blurriness between the different situations would prove highly detrimental.

13. However, in real-world practice, this role distinction and distribution is not so easy to effectuate. There is ample room for blurring of roles, as actors often find themselves straddling two sides of the fence, in conflict between role-categories requiring non-neutrality and role-categories that need to be kept neutral. To illustrate, a regulator that adopts norms or regulations is ultimately wielding supreme authority, which would place them in the first role-category releasing them from any obligation of neutrality, but when that same regulator sanctions or arbitrates a dispute, they are exercising judicial functions, which would place them in the second role-category, which comes with an obligation of neutrality. However, observation of positive law in practice reveals that regulators do not always make such a sharp and yet fundamental role distinction, thus creating a potential threat to civil liberties. The neutrality of the regulator-watchmen is intertwined with the freedom of the agents, who — seeing the loss of neutrality — will turn to ask *who watches the watchmen ?*

I. FIGURES WITH THE LEGITIMACY TO ACT NON-NEUTRALLY IN REGULATED ECONOMIC SYSTEMS

14. We can comfortably concede that State-led action on regulated sectors of the economy qualifies as non-neutral action, especially when the purpose is to safeguard civil liberties or organize access to public goods, and thus stands in the way of regular market-economy pricing mechanisms. This is what has prompted a number of legal scholars to classify regulation under public law, showing that the State is a figure with the legitimacy to act non-neutrally in regulated economic systems (A). The demonstration gets more complicated when businesses are concerned, as business behaviour is driven by business interests, which does not fit the definition of "choice"[5]. The picture is different in regulated systems that fit the special business category dubbed "crucial businesses" (B).

A. THE STATE

15. The State's role in regulated sectors is a vast subject area that we need to rein in to tighten focus. We begin by setting out the core principles, before moving on to apply them to regulated economic sectors.

1. Definitional recap — Politics

16. Politics is not a straight externalization of functions — especially functions the free market proves unable to handle — that the wider community, adopting a different, community-based organization, is somehow able to jump in and internalize. It is the expression of collective decisions adopted by society for its future. If this political *ex ante* definition of the State is overlooked, leaving an essentially economic and managerial definition of government administration, then the social contract component gets taken out the equation, which leaves market organization as reference frame, and remedying any market failures as focus of action[6].

[5] See *infra*.

[6] This underlying discussion surfaces strongly in debate turned toward the regulation of medicines and the healthcare delivery sector, where in Europe, over and above the externalities issue, there is a social pact for not-market handling of otherwise market-driven services. For a broader picture, see FRISON-ROCHE, Marie-Anne (dir.), *La régulation des secteurs de la santé*, collection "Droit et Economie de la Régulation", Presses de Sciences Po / Dalloz, vol.6, 2011, particularly the contributions covering the USA, Germany, Poland and Switzerland, p.117 *et s*.

17. Technology has undeniably blurred the boundaries, and in the process undermined the capacity of States to lend effectiveness to their sovereignty, but it has also ushered in a legal international order meshed into a purely political international order, and a new interdependency between States that forces them to cooperate and thus erodes their supreme independent authority, which is not the same idea as sovereignty[7].

18. Furthermore, intense regulatory intervention does not mean non-neutral regulatory intervention. A telling example is the financial markets, which the global financial crisis crucially revealed as unable to self-police. Among the first whistleblowers was former Chairman Paul Volker, who immediately concluded that the financial markets were unable to self-regulate, and who went on to propose a brutally coercive form of banking sector intervention dubbed the "Volcker Rule"[8]. However, the role still boils down to remedying structural market failure or negative externalities, i.e. technical-level tasks the administration was forced to take on because the market was incapable of doing so.

19. The key distinction lies in the fundamental difference between the administration as a mechanism for internalizing market failures, and the State as an expression of Politics grounded in a foundational social contract connecting citizens. The two hold wildly different positions. It is because it is built on a Social contract, in its role as Politics, that the State cannot and must not be neutral. State needs to express choices made for the future. This is glaringly obvious in policy on healthcare, or equally in policy on innovation, where the boundary creates its own issues as innovation plays a driving role in technically-regulated sectors.

20. At this juncture, we need to track back to the issue of our definition of what choice means. Choice is defined as the preference given to one solution over another, where the second solution may be just as good or just as bad as the first. Note that if one of the two solutions was better than the other, the decision would not involve the exercise of choice but of rationality, as it is entirely rational to prefer the better solution over the weaker solution, and everyone would do the same, provided they had all the information in hand and were not bounded by any other constraint, which a Rousseauist model would translate as the exercise of free and rational will.

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[7] PICCIOTTO, Sol, *Regulating Global Corporate Capitalism*, Cambridge University Press, UK, 2011, 468 p., specifically p. 26 *et seq*.

[8] *The Journal of Regulation,* L'Ecole de Droit de la Sorbonne et KPMG, *Débats autour de l'évolution de la régulation bancaire et ses impacts*, juillet 2012.

21. The choice made revolves around the future because the future is part contained in the developed present, and part new. In the first part — potentiality — the future is shaped by expertise, as it hinges on knowledge, whereas in the second part, the future is unknown and so is shaped by political choice. This is how Politics builds the future. The balance between expert knowledge-holders and governing authorities is played out between, on one side, that part of the present that is already being shaped by the future, and on the other, the genuinely new component that Politics can mobilize. The power stakes here are self-evident. Regulators, who often cast themselves in a dual 'expert-builder' role, are striving to hold both function-profiles.

22. Politics, then, is visible in the exercise of choice. This is how the idea of sovereignty usually gets pinned to the State. This is also why it was a conceptual mistake to embed "sovereign debt" as a term when authors were already correctly discussing "sovereign currency"[9], as sovereign debt now only extends to government deficits and so the term, through an ironic misuse of language, now only serves to underline how States have lost control over their own destiny. In short, there is nothing less sovereign than sovereign debt.

23. That said, the sovereign State is no arbitrary rule, at least in countries that have not been captured by governments wrestling power into their hands. This means the State cannot prefer what best suits those it administers, taking their interests as its sole guiding criterion. Since the political choice is first and foremost a choice for the future, the interests weighed up most also include future people and generations, which is the justification behind the political enforcement of environmental regulation, since responsibility cannot be left solely within the civil liability sphere[10].

24. What sociology and economics theories have dubbed a "private agenda", which is when the person tasked with acting in governance interest actually advances their own self-interests, is no sound basis for decision-taking. Thus, although the State has no grounds to stay neutral, in that it expresses a social contract and not the technical-level internalization of market externalities, it must not let itself get "captured", and must therefore, in Raymond Barre's terms, keep itself "impartial"[11].

25. This gap between the person-figure who governs and their exercise of power in the governing role, frameworked under contemporary law via the concept of legality, has enabled rule to replace relational linkage. The State is therefore impartial, since it is not totalitarian, but this does not make it neutral, since it makes choices for society between equal-value solutions for the future.

[9] AGLIETTA, Michel & ORLEAN, André (dir.), *La monnaie souveraine*, ed. Odile Jacob, 1998, 386 p.
[10] MARTIN, Gilles (dir.), *La régulation environnementale*, coll. "Droit et Economie", Lextenso – LGDJ, upcoming.
[11] See *infra* for discussion of the relationships between neutrality and impartiality.

26. Much of Alain Supiot's work argues loudly in favour of this non-neutrality stance. Supiot, working from the principle that law itself is an *artefact*[12], reintegrates the ethos of the 1948 Declaration of Philadelphia to affirm that States must purposively take ownership of their non-neutral position in order to establish rules — and therefore realities — without a precedent of existing facts upon which to establish universal social rights, so that they can be ushered into existence through the force of law and State power over what Alain Supiot dubbed the "total market"[13].

2. Applying the principle of non-neutral State to regulated sectors

27. Regulation equates to the triangulation of law, economics and politics. Regulatory intervention may be needed if there is a technical failure in the competitive market machinery that usually readjusts supply and demand. Clear-cut cases are the structural failures that allow natural monopoly, as is the case in public transport networks, or information asymmetries, as in finance, insurance and banking, in which case the switch from free competition to regulation is justified by efficiency issues.

28. However, for argument's sake, intervention could — and this is just a hypothesis — be driven by political will, in a scenario where Government expresses a social contract that can no longer consent to the naturally excludability of the market. Indeed, a market can only run efficiently if it can exclude on both sides of the equation: exclude suppliers unable to offer both good quality and attractively-priced goods and services (bankruptcy forces them out of business), and exclude demanders unable to acquire these goods and services due to insufficient funds.

29. Bankruptcy takes the weakened supplier out of the marketplace. The money barrier, like knowledge or distance barriers (both of which can ultimately stem from the money issue, as money makes it possible to gain knowledge or move places) prevents weak-positioned demanders from entering the market. As endorsed by conventional law, business law means "only the strong survive".

30. However, citizens may not want this scheme of things, and so may mandate Politics to stop it happening. At this juncture, law is used to "save struggling businesses". Positive law has demonstrated how competition law clashes with insolvency law

[12] SUPIOT, Alain, *L'homo juridicus*, Paris, Le Seuil, 2005.
[13] SUPIOT, Alain, *L'esprit de Philadelphie. La justice sociale face au marché total*, Paris, Le Seuil, 2010, 178 p.

whenever it attempts to do more than simply wind-up the liquidation process quickly enough for the market[14].

31. Along the same lines, the State may decide that the price of certain commodities will not be dictated by the intersect between supply curve and demand curve but instead by the supplier's ability to pay, which could be zero, which would ultimately mean free supply. Since in reality this is what should be termed a "political price', it is down to the taxpayer to pay more than the consumer, because it is the citizen — not the market demander — who sealed the social pact[15].

32. The State, then, as a fundamentally political entity, is acting non-neutrally on the markets since it operates to whole different rationales. It is easy to see how, why and how much competition law, which is the judicial expression of how markets should be allowed to work, is opposed to this non-neutral action, and how, why and how much competition regulators want to get States "back on the right track".

33. This is a first, radical illustration of the way that the State stands up against market forces, as the State, mandated through the social contract forged with its citizens, expresses a will, such as the will to regulate the healthcare sector, whereas the market is a mechanism geared to deliver efficiency and its suppliers and demanders are simply agents that, driven by their own interests there and then, consent to bilateral transactions, whereas the social contract is an original, collectively-forged position covered under the "veil of ignorance"[16].

34. Thus, when tackling structural market failures, interventions will be similar whatever the country, as they all share the same goal of absorbing the burden of objectively-identifiable externalities and differ only in terms of the way they go about achieving optimality as efficiently as possible; political regulation, though, varies not only in form but also in basic substance. The net result is that different countries may or may

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[14] The clash intensifies when regulatory measures run counter to competition/antitrust law and its tendency to accept bankruptcy as a natural or even potentially beneficial mechanism — nowhere more saliently than in the banking sector; SAGERS, Chris, *Too Big to Fail: The Role for Antitrust and Bankruptcy Law in Financial Regulation Reform*, Cleveland-Marshall College of Law, Cleveland State University, December 1, 2009, legal studies, paper N°09-181.

[15] Note, then, the remarkable turnaround in French law on government pricing of natural gas for household end-consumers. On 20 December 2011, the French *Conseil d'Etat* [Council of State] issued a summary judgment lifting the government-set price freeze on natural gas prices billed to household consumers, defending its decision on the grounds that the freeze was harming competition with the historic public utility service operator. Competition law is winning out against political sovereignty. V. LORME, Gonzague de, The French Government's price freeze on natural gas prices has been suspended by the French Council of State*, The Journal of Regulation*, 2012, II-5.11.

[16] RAWLS, John, *A Theory of Justice*, 1971.

not leave market forces to handle healthcare, or culture, or farming, and so on, depending on the political narratives being played out within their own domestic political spheres. When it is not just the administration stepping in to deal with negative externalities but also State government stepping in through Politics to enforce the people's consensus by stipulating that a commodity must stay a common good, then we join Savigny's definition of law as *The expression of the spirit of a people* (Volksgeist), which ties a nation's law to its people's history. Economic theories, universalized through a battery of figures and so comfortably entrenched in the first hypothesis, here find themselves completely out of joint.

35. The second face-off polarizing the State and the markets, and which prompts the State to regulate them, is the time factor. Under the classical conception of the market, time is not a factor: transactions are made in an instant, trade is a series of transactions, and from this loose-knit organic nebula emerges the fair price, with share price listings providing the purest Walrusian example.

36. Law mirrors this view, since the contract, which Professor Jean-Pierre Mousseron depicts as a "lightning flash", takes only an instant to form through the immediacy of the requisite formality-free consents, and the French civil code does not dwell on the issue of subsequent execution. The contract is umbrellaed under the law, which is reputed abstract and perpetual. However, neither the instant nor eternity are concepts bound by time. The market has therefore been conceptualized as outside of time, and with little exploration of setting. Thus, even through the lens of Ronald Coase's transaction cost theory of the firm, the business firm is an alternative organization to market contracts[17].

37. Markets, which operate within a moment-scale, are continually adjusting. Any criticism of the instant immediacy of financial markets is a criticism of their very nature. The State, in contrast, is a political agent that grows and evolves over time[18]. Recast in this setting, it becomes vital that State is able to hold onto its core political essence, i.e. that it keeps hold of the sovereignty legitimized by a social contract, that this sovereignty remains uncontested, and that public finances do not force States into beggars on the markets or into students graded on their at-the-instant test records, which irreparably damages the State's authority.

38. The State entrenches itself over time, and constructs such as "public policies" and "public-sector action" underline how this existence is anchored sustainably. The State therefore introduces long-term industrial policies, knowing that the long term is what

[17] *The Nature of the Firm*, 1937, Economica, New Series, vol.4, n°16, Nov.1937, p.386-405.
[18] Such is the definition given by HEGEL, particularly through *Lectures on the Philosophy of History*

markets struggle to integrate. This key dimension of regulation materializes as non-neutral action by the State, which injects a time factor into markets that otherwise operate in the moment. For this purpose, public-private partnerships are incontestably a useful platform for regulation between the State and the markets.

39. Note that markets are not unable to integrate the future. Financial markets carry this paradox wherein they live solely for the present, adjusting and re-adjusting at every instant, and yet consider the future from within their own anticipatory vision, and consequently participate in it, via the self-fulfilling effect that spills over from their power. However, this future is simply the growth of a present that has already budded, and therefore the ability to perceive virtuality[19], combined with a calculated probability. Investor risk-taking reflects the degree of latitude taken in relation to this probability of rollover from present into future. In the functioning of the market, then, there is no real newness in the future.

40. Conversely, though, the State, compelled by sovereign will, in possession of the sovereign instruments needed, empowered by the Social contract and the authority to levy taxes and mint currency[20], can set and impel long-term agendas in order to deploy projects across market spaces, build infrastructures, impose political will, such as securing a future for later generations as part of its mandate as custodian, incentivize research and foster innovation[21], etc. When the regulator steps in, they too should have an explicitly political mandate, i.e. cemented in a law, since their action is not neutral and therefore can only be exercised by a Sovereign authority.

41. The State, as sovereign agent, can intervene directly in marketplaces to deploy long-term industrial policies intended, for example, to pull in investments on public transport networks[22]. The concept of "lastingness" woven into the concept of policy is delivered through State, sovereignty, and will, which regulation injects into selected sectors to counterbalance competition and help end market neutrality.

42. Indeed, as Marx demonstrated, the market is a space that neutralizes the concrete dimension of the commodity-objects traded there. Money is the instrument through which the market enables rabbits to be traded against deer as if rabbits and deer were the same thing, simply because both can be converted to measurable units of

[19] FRISON-ROCHE, Marie-Anne., Le droit à double sens: la virtualité, *in Drôle de droit*, Mélanges Elie Alfandari, Dalloz, 1999, p.263-273.

[20] This cues up the question of where EU Member States are left standing once they put pen to paper to sign away their minting authority and sign into the Euro, despite the continued absence of a common Europe-wide financial and economic policy.

[21] Among other examples, see CURIEN, Nicolas, *op. cit*.

[22] For a look at data transport over fiber optic architectures, see BENZONI, Laurent *et al*., From copper to fiber: an optimal regulatory policy, *The Journal of Regulation*, 2011, I-1.34, pp.588-594.

the same money, and thus given a price that can be cross-compared to serve as the basis for exchange. This is how the market neutralizes real-world objects. These are "the wheels of commerce"[23]. Are businesses also under this neutrality pressure?

B. BUSINESSES

43. All the people in a market space get neutralized in the same way, demoted to the rank of "agent", which hinges on the supposal of an action whose rationality has been borrowed from someone else (the agent must have its principal). He who obeys another is effectively qualified as agent — subordinates included. Agent therefore qualifies he who obeys forces they themselves are unable to employ. This doubtless applies to most ordinary businesses, even if they are public-sector (1), but it does not fit the case of crucial businesses in regulated market sectors (2). Finally, it is useful to look at how different forms of personhood fit in, since as holders of fundamental rights, they hypothetically also resist the neutralizing effect of the market (3).

1. Recap on the *per se* rules and principles

44. Competition law does not define businesses in terms of form but in terms of activity, as an entity involved in a given economic activity in a given market. Thus, if we gave a crude definition of neutrality as the absence of effect of action on an object[24], then businesses would have to be considered non-neutral economic actors, since they do not remain passive and their action has an effect on the market. The competitive law theory of "tangible effect" adds strength to this assertion.

45. However, if we steer away from this definition of neutrality as the absence of a causal effect of action on an object and towards its meaning as an absence of choice between two solutions of equal merit[25], we get a different reading. From a microeconomics theory perspective, the functional purpose of economic agents is to maximize their profits. Their actions in the marketplace, like their governance (management control) approach, are geared to this outcome. They will thus adopt the optimal stance for achieving what we could call their "blind" purpose. This joins back up with the first definition proposed for neutrality — the definition in relation to

[23] BRAUDEL, Fernand, Les jeux de l'échange, *in Civilisation matérielle, économie et capitalisme*, t.2, Librairie Armand Colin, Paris, 1979, 723 p.
[24] See *supra.*
[25] See *supra.*

self[26]: the business mechanistically, even obsessively strives for profit, battling it out against the interests of the other economic agents it is competing against.

46. Competition law expresses this liberalist economic philosophy, and it does so explicitly through the much-feted "capital neutrality" principle. Here, the fact that the capital owned by the legal person — legal personality being the instrument that enables the business to trade legally and organize its governance strategy[27] — is in the hands of private- or public-sphere persons should really make no difference. This rule was laid down as early on as the 1957 Treaty of Rome, and is built around the idea that every business has to pursue its own interests, regardless of whether it is controlled and run by private-sector capitalists or public-sphere persons.

47. Furthermore, the notion of "State-shareholder", that current doctrine is desperately trying to revive by blowing its smouldering remains[28], does not exist in competition law. The State can only become a market actor if it is ready to consciously accept the resulting adulteration of its own personality, i.e. its neutrality. Whenever public funds are used in economic market sectors, which equates to the kind of State subsidies that are theoretically banned under community law, then the overarching community law requires the State to act as a "careful and conservative investor", i.e. an ordinary investor, divorced from the supreme executive role of a State evolving on a much higher plane.

48. However, the State resists against the neutralization forces of free-market competition law, even when it plays directly as an economic operator and no longer just a regulator. A salient example comes from France, where the Ministry of Finance and Economy was initially restructured so that State holdings in businesses could be handled in the same way as would any well-informed investor, reflecting the French State's concern to sensibly and safely manage it assets portfolio and provide solid returns on investments. This restructuring effort culminated in the creation of the *Agence des Participations de l'Etat -APE* (standing for government equity investment agency), as an internal Ministry organization backed by the Treasury. Then came the financial crisis, and with it the realization that the State had to stop behaving like any ordinary corporate capitalist venture in the businesses it owned or held stakes in, and instead get back to its true nature, i.e. to defend the community interests. This is why in 2010 was prompted the Statute creating the "*Commissaire aux Participations de l'Etat –CPE* (for government equity investment commission), co-led alongside the APE. The APE is the State's playground as an economic agent, whereas the CPE

[26] See *supra.*

[27] FRISON-ROCHE, Marie-Anne, Corporate Law seen through prism of Regulation: the Financial Services industry and investor protection, *The Journal of Regulation,* 2010, I-1.6, pp.88-102.

[28] CARTIER-BRESSON, Anémone, *L'Etat-actionnaire*, Bibliothèque de droit public, t.264, LGDJ, Paris, 2010, 495 p.

effectuates a political role through which the State seeks to coerce the market into boarding considerations that would not otherwise have come naturally (community interest, lasting sustainability, security, social cohesion, and so on).

2. The "crucial businesses" hypothesis

49. We now break clear away from straightforward competition law, where we argued that businesses have to act non-neutrally on markets as they mechanistically pursue their own profit-driven interests. This direction is prompted by the fact that regulated sectors show evidence of "crucial players"[29].

50. Over and above the raw-cut distinction between operators and regulators, certain sectors effectively revolve around core players whose presence is "crucial" in the sense that they are pivotal to sustainably and reliably anchoring the sector. This confers them an added role as a sort of second-tier regulator. Examples would include transport network operators and natural monopoly holders in general, plus financial institutions, and holders of the intellectual property rights that will shape tomorrow's innovational futures.

51. The focus of these firms' activity is thus "crucial" for the sector, and so they themselves become "crucial". The European Commission is visibly aware of this, since it has qualified auditors as "systemic players" on financial markets, but this is a misappropriation of the term, since a systemic agent is an agent so important that were it to collapse, it would take down the entire sector, which is not necessarily the case for a crucial player[30].

52. That said, the action of crucial players is not market-neutral since they are the ones propping up the entire market, which is why they warrant special supervision and oversight — the banking sector being a glaring example. Furthermore, crucial players have more obligations, such as giving more command, and yet more market power than ordinary players. Market-leading businesses therefore hold both disciplinary power and power over the admission of securities to listing that, instead of stemming from the contract, actually stem from a unilateral administrative-type power[31].

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[29] FRISON-ROCHE, Marie-Anne, Proposition pour une notion: l'opérateur crucial, *D.*2006, chron., p.1895-1900; The auditor, a crucial player on financial markets, *The Journal of Regulation*, 2011, I-1.26.

[30] For a in-depth point-by-point demonstration, see FRISON-ROCHE, Marie-Anne, The Auditor, a crucial player on financial markets, *op. cit*.

[31] BONNEAU, Thierry, De l'inutilité du droit contractuel pour assurer le respect des règles de marché, *RTDCom.*, 1999, p. 257-271.

53. Crucial players, given the purpose of their activity which is reflected in their special status, can and must claim ownership of their status as immune to neutralization by market forces. Given that they are propping up a specific regulated sector, anchoring it lastingly and ensuring its long-term development, crucial players escape the standard machinery of competition law to take on specific rights and obligations.

54. The process takes place without having to go through the sovereign State, since here there is no need to secure legitimacy through a primary intent embedded in a Social contract, but instead to simply acknowledge the existence of a sectorial structure that enrols crucial players as second-tier regulators.

3. Recognition of the fundamental rights of personalities acting on markets

55. Definitions of fundamental rights as a legal category are still fairly hazy, especially on what sets them apart from human rights. However, it is reasonable to assert that the recent emergence of fundamental rights as a construct reflects a shift away from rights as attached to personhood — itself a fairly abstract definition, as in the 1789 *Declaration of the Rights of Man and of Citizen* — and towards an expression of the rights of the natural person[32]. This is why fundamental rights surged in the wake of World War II, with the onus on social rights and people living domestic family life.

56. Once again, the neutralization turned on by the money-backed wheels of commerce can be countered by regulation, but this time not because it makes up for technical market failure but because it expresses the prevalence of public rights and freedoms[33]. This is because regulation counteracts the market-driven neutralization process when public rights and freedoms are at stake, even when the stakes are market goods.

57. The first hypothesis — the power of sovereign political will — is regularly touted, as it is the Social contract that posits that health-related goods, for instance, are not just marketable but also fall within the sphere of fundamental rights, such as the right to stay alive even if you live in poverty, and therefore open into regulatory law rather than staying boxed into competition law[34].

[32] See, for instance, ROCHFELD, Judith, *Les grandes notions du droit privé*, coll. "Thémis droit", PUF, Paris, 2011, 564 p., specifically p.11 *et s*.
[33] TUOT, Thierry, La planète des sages, *in* FAUROUX, Roger (dir.), *Notre Etat,* ed. Robert Laffont, Paris, 2000, p.688-712.
[34] See *supra*.

58. This also explains the high degree of relativism in this third category. Indeed, while the previous category, with a State intervening to remedy structural market failures, resurfaces in the same way in every country, this fundamental rights category varies from country to country depending on their history and the political consensuses they have forged. Hence, looking back at healthcare, some countries, like France — although not before 1995[35] — have laid down legal foundations to assert a universal care service, while others have let market forces govern the issue[36].

59. It thus emerges that figures with personhood status are "entitled" to act non-neutrally on regulated sectors, with the State qualifying first, followed by a second tier of crucial businesses or those persons laying claim to their fundamental rights. Conversely, the neutrality model may still apply to these same sectors for the regulator and the judge.

II. FIGURES COMPELLED TO ACT NON-NEUTRALLY IN REGULATED ECONOMIC SYSTEMS

60. We step back to examine the situation in which both regulator and judge evolve (A) before moving on to investigate the solution that, against all odds, could secure their neutrality.

A. THE REGULATOR AND THE JUDGE

61. The regulator may be called on to execute jurisdictional-sphere tasks, but he is not a judge[37]. Likewise, even though the judge reviews the regulator's decisions and is invested with devolutive power, he is still not — except in the widest and loosest sense of the term — a regulator. This is why their two situational settings should be looked at one after the other.

1. The regulator

[35] In the so-called " Ordonnances Juppé" dated 25 January 1996, concerning the repayment of national social security debt and emergency measures for restoring financial stability to the French Social Security system. A description of the movement can be found in MORIN, Denis, La régulation des dépenses de santé. Le cadre institutionnel et les instruments, *in La régulation des secteurs de la santé*, *op. cit*.., p.9-18.
[36] For a comparative analysis of the models, see *La régulation des secteurs de la santé*, *op. cit*.

37 QUILICHINI, Paule, Réguler n'est pas juger, réflexion sur la nature du pouvoir de sanction des autorités de régulation économique, Actualité juridique de droit administratif (AJDA), 2004, p.1060-1069.

62. In every country in the world, academic doctrine[38] and certain members of parliament regularly re-air the fact that since the regulator is designedly independent of the executive branch, the price to pay is that he cannot borrow its political legitimacy, since the line of authority has been broken.

63. At this point, despite belonging to the State, and especially if they are self-proclaimed because they operate as private associations[39], regulators tend to cut short any discussion on their legitimacy by asserting that they have no real sway, since their action is reputed neutral.

64. In reality, say the regulators, the choices they effectuate are only on a technical level. Any political choices needed would have been made by the legislator, in the groundwork preceding the regulator's action. Thus the neutrality of the regulator's action, framed between the fact that the political choice lies exclusively with the head of the legislature and the purely technical nature of the regulator's own choicemaking scope, eliminates the (consequently irrelevant) question of their political legitimacy. The question is taken off the agenda.

65. However, this line of argument appears shaky at best. Note that the regulator, in contrast to the competition authority, is an *ex ante* authority, posted not to guard the markets but to help build them[40].

66. The Regulator instrumentalizes very real choices. If we look back at the definition of choice given earlier[41], the goal is not to champion a better solution over a weaker one, but to devise a master plan roadmapping the social community's future. This is the process at work when the ARCEP [French regulator of the electronic communications and postal sectors] decides to endorse a national-scale optical fiber access network[42], or when this same regulator organizes postal service coverage to maintain social cohesion in France, which still has strong agricultural roots.

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[38] LOMBARD, Martine (dir.), *Régulation économique et démocratie*, coll. "Thèmes & commentaries", Dalloz, Paris, 2006, 248 p. For work advocating a synergistic truce between regulation and democracy via contractualization of government agency action, see HARTER, Philip J., Negotiating government policy: better decisions through democratic synergy, p.133-152.

[39] A case-file on the ICANN highlights the kind of difficulties this can stir up with the governments concerned: CHEVALIER, Claude, European and North American authorities notify the ICANN, a private association in charge of the self-regulation of Internet domain names, that it must adopt more transparent "governance" and adopt public structures' recommendations, *The Journal of Regulation*, 2011, II-4.8.

[40] FRISON-ROCHE, Marie-Anne, Competition versus Regulation, *The Journal of Regulation*, 2011, I-1.26, pp.470-481.

[41] See *supra*.

[42] For an international comparison, see BENZONI Laurent, *op.cit*.

67. Consequently, the Regulator is non-neutral, not just because its decisions impact the market (crude sense of the absence of neutrality[43]), but more so because it makes technical-level choices that have a knock-on effect on future of the social community, which ultimately makes them political choices.

68. At this point, we run back up against the very imperative that the regulator hoped to avoid, namely that its choices have to hold political legitimacy, even though it is independent of the government. A thorny issue, then, that can prove particularly painful where financial regulation is concerned. Look at the case of the new European regulators, brought in to deal with the major shortcomings in financial supervision exposed by the late-2000s financial crisis, of which the European Financial Stability Facility is a prime example. The ESMA is struggling to overcome this political legitimacy issue, and the Federal Constitutional Court of Germany has reiterated that such agencies cannot make autonomous decisions without prior authorization from the German parliament[44].

2. The judge

69. The judge, with his experienced background in procedural law, is more than familiar with the neutrality agenda. Judges everywhere have always been led to satisfy one party and dissatisfy or frustrate the other, without falling target to criticism for holding this office which the judge inherently embodies.

70. The law considers that the judge conducts the trial satisfactorily is if he is impartial. This constitutional principle of justice is defined as the distance taken by the judge in relation to the dispute and the parties to the proceedings. Consequently, the judge is naturally going to have a major effect on the situation, which indeed is precisely why his presence is required: the judge is there to arbitrate, pass sentence, award compensation, and so on, and any idea that he remains uninfluenced by his own opinions, knowledge (what he knows and what he doesn't), personal circumstances, etc., is no more than wishful thinking.

71. So if, as in centuries-old depictions, justice is "blindfolded", it is only because the judge neutralizes all personal prejudices, outside pressures and personal bias, which he does by staying with procedure. It is procedure that lends foundation to the judge's impartiality, forcing him to weigh up competing claims and return judgment guided by the imperative of causation[45].

[43] See *supra*.
[44] Decision of the Federal Constitutional Court of *Karlsruhe*, dated 7 September 2011.
[45] FRISON-ROCHE, Marie-Anne, L'impartialité du juge, *D.* 1999, chron., p.53-57.

72. This is where relations between judge and regulator split, but also become tenser. If the regulator is not neutral — because the technical choices he makes are in effect political choices — then how can the judge leading the review stay impartial when asked to deliberate an appeal claim against a regulator's decision? Either he has to act beyond his appointed office, or else refuse to review the regulator and step down from his own reviewer role.

73. Caught in this *zugzwang*, the judge could tend to not review the substance of the decision the regulator had adopted. This is pretty much the position of the French judicial-law judge[46]. However, if the review judge is closer to the regulator, then he will tend to lean heavily on the power devolved to him through the appeal process, which is a logically understandable move given that i) the French administrative-law judge shares the same cultural background as the regulatory authority people, and ii) that French publicist doctrine had developed the legal doctrine of "judge-administrator", wherein the administrative-law judge can act in place of the administration itself. Note that the agenda prompting this move revolves more around culture and education than around points of law.

74. With this clearer vision of the very different situations in which regulator and judge find themselves, we are ready to think about the kind of measures or frameworks that, now we are forced to acknowledge how regulatory action is *a priori* political when it should — but cannot be — neutral[47], could guarantee neutral actions. The solution can be found via a key theoretical paradigm in market: rationality.

B. MEASURES AND MECHANISMS TO NEUTRALIZE JUDGE AND REGULATOR ACTION VIA PROCEDURAL RATIONALITY

75. Neutrality is debatable concept that inspires thoughts of Pontius Pilate's over-passive, morally-weak and ultimately cowardly non-stance than any actively virtuous courage[48]. Were there an order of virtues, we could safely say that neutrality and courage would be polarized at each end of the scale. Does this mean that both judge and regulator, required to be neutral, must refrain from courageous decisions?

76. This delicate issue needs to be painted out in meaningful terms (1) before we can tease out a practicable set of methodological solutions (2).

[46] FOSSIER, Thierry, Neutralization using techniques from procedural law, *The Journal of Regulation*, 2011, I-2-3.
[47] HAAS, Jérôme, The principle of the neutrality of standards (the example of accounting standards), *The Journal of Regulation*, 2011, I-2.4.
[48] See *supra*, discussion of the tight relationships between neutrality and passivity.

1. The difficulty created by the intrinsically non-neutral action of regulators

77. We earlier highlighted how regulators often stake a claim to neutrality, using the fact their remit only extends to technical expertise to justify an absence of attachment to government bias and thereby sidestep any challenge calling their political legitimacy into question, since the question — as they have presented it — is simply not on the agenda[49]. However, taking this argument full circle, the backlash is that visible proof of their absence of neutrality, such as when a regulator prioritizes national interests, only serves to further weaken their position, and thus puts the political legitimacy of regulators back high on the agenda.

78. To counter this, a tempting scenario could be to repatriate the entire market and sector regulation and governance apparatus back in the political fold, reunifying substantive law with institutional law into one sphere.

79. Another halfway measure could be to look at infiltrating Politics people, such as parliamentary members, into seats on regulatory authority councils, and keeping the appeal judge's scope of control limited strictly to procedure without letting him look at the substance of the adopted decision.

80. Without wanting to add to already negatively-charged words, any move in this direction could only be qualified as regressive and reactionary. It ultimately boils down to the relatively binary line of thought that since regulation is not neutral, it should be taken out of the equation and swallowed up into Politics.

81. This explains why the US has unleashed what have become drastic systems for straightjacketing regulators, and why France is pushing to fall back into a more comfortable system of "advisory groups", chaired by government ministers, as evidenced in the *Conseil de régulation financière et du risque systémique* [French Council on financial regulation and systemic risk] created under French law dated 22 October 2010[50].

82. Neutrality, as a notion, is better served by shifting its meaning closer to a procedural interpretation of impartiality and, better still, the notion of objectivity, into a senseful three-way reading of neutrality: impartiality, objectivity, rationality.

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[49] See *supra.*

[50] FRISON-ROCHE, Marie-Anne, The hybrid nature of the French Council of financial Regulation and systemic risk, *The Journal of Regulation*, 2010, I-1.11, pp.180-183.

2. The solution: impartiality, objectivity, rationality

83. The first way to neutralize the politicality of a choice is to proceduralize it. The regulator then becomes impartial, as is dictated by the judicial system, making regulator impartiality a constitutional principle. The regulator thus acts like a judge, adopting the same distance from the parties and in relation to proceedings.

84. Indeed, all thinking that has challenged Politics has consisted in demands to proceduralize political action, with the theoretical system philosophized by Hans Habermas leading the way. The judge-figure is thus adopted as authority model and decision-making model.

85. The drawback of this solution is that it remains weak, since procedure only expresses weak rationality, and hearing out each party does not itself guarantee the right decision will be taken. The much-touted advantage of a decision accepted in advance, since each party has been heard, i.e. consensus decision-making, which is a model found in regulated economic systems where it surfaces through consultative market-based mechanisms that go beyond financial regulations, remains debatable, because again, a consensus decision is still not necessarily a good decision.

86. The chief advantage of neutralizing the regulator's action by proceduralizing it resides in the homotheticity between judge and regulator that emerges. If the regulator has to act like a judge in order to become neutral, i.e. acceptable despite being an independent counter-power to Politics, then he becomes a similar figure to the person who would be appointed to judicially review him in the event of an appeal against one of the regulator's decisions[51]. This homogeneity between 'controlled' and 'controller' is precisely what lends effectiveness to the control mechanism, which remains the strongest and surest sign of democracy in motion.

87. Moving on to the second criterion, i.e. objectivity, it is difficult to assert that the regulator's action is objective *per se*, but easier to claim it has to "self-objectivize", or put informally, materialize in causation. The regulator relies on causality to justify the exercise of his power, in contrast with Politics which is simply "invested with" power.

88. There are good grounds for going further than causation — the halfway house between substantive law and procedural machinery — and on to the notion of accountability championed by regulation theory. However, the goal here, more than simply to justify the regulator's use of his power, is to show that the regulator uses his power *scientifically*.

[51] See *supra*.

89. The traditional French school, as translated by Marcel Boiteux not just through Ramsey-Boiteux pricing but equally through his term as CEO of State-owned nationalized monopolist utility company *Electricité de France* (EDF), posits that State government intervenes using mathematics, a legacy left by Descartes to serve as an neutral instrument for understanding the world, to resolve cases where the market proves unable to set adequate prices. The State makes up for this market failure by parachuting in a ruling — here, a ruling driven by costs — designed to fix a neutral amount, mathematically devised, that the market would have produced had it been capable of operating competitively.

90. Here, then, causality and methodology both reach way beyond the basic remit of procedure. This is why guidelines, requisite conditions, "legal grounds" and so on form an essential methodology platform enabling the regulator to objectivize his exercise of power, independently of the solidity of the source of that power, i.e. the law. Should the regulator's power stem from another source, such as a contract, a profession, moral standards, common practice or custom, etc., in the self-regulatory machinery, then it can only become more forcible.

91. Here again, this causality would be perfectly homothetic with the causality underpinning the judiciary decision of the authority controlling the regulator. This homogeneity is important in that it enables any observer to gauge the effectiveness of the control mechanism.

92. This brings us to the final question: should demands stretch further and require both judge and regulator to stay rational? This again depends on stronger conceptions than those tied to procedural logic.

93. It may be that today's judicial systems, which are fast mainstreaming notions moulded around "due process", which are heading for tighter estoppel on norm-setting authorities, and which now grant persons a "right to good faith" enabling them to lay claim to the credit they had afforded the representations law had given of itself, may eventually require regulators and judges to be rational, in the sense of not contradicting each other's decisions.

94. The European principles of proportionality and effectiveness are already governed under what would be a prototype principle of rationality. If, in a broader sense, rationality became a legal requirement for regulators and judges, even if only through the binding principle of non-contradiction doctrine, as classical theology would have us believe is the case for God himself, then it would increase and enhance and the neutrality of their action in the market arena.