GENERAL REGULATORY LAW

PART 1 FUNDAMENTAL RULES OF GENERAL REGULATORY LAW

Regulatory Law can be defined as a combination between the market functioning and the state and administrative functioning. It's neither public law nor private law but a mix of both. Because it is linked to the intervention of state, which is a strong mark of political decision made by the state, and because the decisions that are made concern the market, it is also the translation of economic theory (such as the offer and the demand, or the rule of the incentive theory, or the agency theory and this sorts of economic theories).

This is why regulatory law is not only a legal matter such as competition law or patent law but also an economic subject. This is why regulatory law is not enclosed in a legal perspective but also strongly appeals for political perspectives. Every state decides what it thinks is good for its own nation about the market, and even beyond the market. For example the European have not the same conceptions of regulatory intervention as the American.

Section 1 Definition and nature of general regulatory Law

I) The broad definition of general regulatory Law.

A) <u>The broad definition by reference to domestic public goals</u>

The authors mentioned are economics, for instance Posner is a specialist of competition law and an American Judge and we will see how much his perspectives are important in the field of regulatory law.

<u>The confusion between the term of regulation and the term regulatory</u>

The English definition

In English, regulation is only a device, a law. For example there is an opposition between regulation (reglementation: only a tool of regulation) and judgements (rules made by jurisdiction). Concerning English vocabulary issues, there is regulation which is only a term who points at a text in opposition to a decision made by a court, and regulatory law is a mix of texts or rules made by legislators, parliaments, and by courts. This is why it's difficult to translate regulation in English: regulation only represents sectors which are organised by texts and not only by competition law.

For example telecommunication, banking sector, financial sectors are regulated by special texts, not only by competition law. So we have an opposition between

1) simple markets organised by competition law (ex post intervention only, reacting to the behaviours of conspiracy and abuse of dominant position), so a simple rule for every markets (Competition is a simple, general and ex post law), and
2) some special economic regulated sectors, for which the simple rules of markets could not be efficient, State thus being forced to adopt special rules (even in the US), special regulation because the sector itself needs this special rules.

<u>Example</u>:

In the energy sector, it's not possible to organise or let competition set the organisation of the transportation of energy, electricity, gas, etc. So special rules and texts have organised this transportation and granted a monopoly to transportation.

It's the consequences of economic rules and the application of the theory of natural monopoly in economics theory. In an energy sector, if a company, public or private, has a system of transportation of electricity, no one will build a second system of transportation, because pursuant to the rule of return of investment, the second transportation system will not be viable. So if one system of transportation is built, we can be sure nobody will build another one. This is why it is called a natural monopoly, by nature, by legal decision by economists.

However, the one who has the power to transport can abuse of this power and thus the state can decide to transform the economic monopoly in a legal monopoly because the system of legal monopoly gives to the state the power to control the company which has build this unique system of transportation of electricity. This is why we have a regulation and is the same way everywhere in the world because it is an economic rules, and this is why we have special rules in telecommunication, because in telecommunication state must give licences and one company, private or state owned company, must build a system of transportation and it is also a natural economic monopoly. It's the same in banking system because in this special area of economy the system is functioning with the bank and the bank is very strongly controlled by the State. So every State organises a regulatory boundary law. And since last year we see every day how this regulatory law failed. In banking law it's a problem of organisation of system risk and not natural monopoly. Because if a bank goes bankrupt all the system of banks go bankrupt and we can see every day now that State must give a lot of money trying to find new regulation in this sector to stop the financial crisis which is after all a banking regulatory crisis. So you can't link the banking system to a simple competition law system (we don't have the rule of transparency rule in competition law which is a great principle of regulatory law). In financial markets, it is not possible either to let the competition handle the functioning of the market because we need to organise the protection of investors. So every state organise this financial protection, financial information, we try to maintain and create the trust in financial markets through special texts. So this is why we have special regulation and not only competition and not only administrative law. This is the core of the matter of regulatory law.

2) **The European conception of regulation**

There is a choice between a direct intervention of State (i) by state adopted directly by Parliaments or government or (ii) only by direct intervention of State owned companies. EDF is a big French company in the electricity sector.

In Europe, since 20 years, we have adopted this thought of regulation. So we leave the simple markets organised by competition law, and for special sector, and for economic and political reasons, we organise direct intervention by the State. But now in Europe, governments prefer to let this power to independent public bodies (independent administrative agency) named the regulators. In each sector, we will find a special public independent body. For example in the US and in each European State we will find financial independent body, banking independent body who regulate the sector, independently from the government. It is very criticised because when we have a crisis as we have now in the financial market, every one will ask to the State to intervene and give money, and State will ask to independent bodies. But these bodies don't have money. So it is a return of State intervention in time of crisis. So in time of prosperity State gives its power to independent body, but in time of crisis sectors need money, especially banking area, everybody ask the State to give money. The State agrees to give money to stop the system risk but will ask to have power in return. This is a very big political issue.

The difference between competition and regulatory law

Another important thing to precise is the difference between competition and regulatory law in this crisis

Competition law is a technical law because it's a simple ex post intervention against the violation of the rules of competition. For example conspiracy. The consequences is the necessity to give money and punishment by the courts (national or European, it's the same in the US where it's even more common because it's the ordinary court who punished the behaviour but in Europe it's special courts which punishes the behaviour. Competition law takes the markets are they are. If they are not functioning well, it's not the problem of competition law. This only problem of competition law is to repair the damage made to the market by violation of rules by companies.

In regulatory law the purpose is not to preserve the market because in many sectors markets don't exist. The purpose is to build the markets themselves. For ex in Europe, 20 years ago, every member states had a legal

monopoly in many sector. For example Dutch telecoms for telecommunication in Germany, France Telecom in France, British Telecom in the UK etc. But Europe, by directive, decided to liberalise these sectors; Professors of economics named this movement of deregulation. It's linked with the liberalisation of this sectors. And these sectors were telecommunications and energy, the network industries. But because in these sectors there are natural monopoly it's not enough to declare the competition possible, but we need to organise by special texts and special bodies the Competition. So at the same time Europe liberalised these network industries, organised the creation of rules and regulation to build the reality of these competition. In this case, the regulatory law is a way to the Competition, to the real competition. In this case, regulatory law is just a legal system in transition. Because in a few years competition will be strong enough to function by itself and for the moment we can give up the regulatory system and stop the power of the regulator and gives the powers of the regulators to the simple competition authority. But this is not true for every sector, but very true for telecommunication.

Example

For example, in the energy sector, it's possibility true for transportation of energy and creation of energy. For ex the creation of energy though water, but it's not true for the creation of energy by nuclear means because nuclear is a dangerous activity and it is not possible to let simple markets to organise the nuclear activities. In this energy sector we will have a permanent regulatory system if we keep the nuclear creation of energy. It is a decision in France and Germany. In the UK, who loves markets, they decided to let the nuclear industry to simple markets and it was a catastrophe so they came back and recreated a regulatory system.

It is the same about banking and financial system. In the banking system the system is build on the solidity of banks. We need to be sure that banks are really strong because the bank is not a company as a usual firm is. So we have lot of rules, prudential rules (BALE 1 and 2 are global rules for every state in the world). We put many ratios to be sure of the solidity of banks, to prevent the systemic risk. It's a permanent system because it's impossible to imagine the banks themselves to be strong enough to prevent the systemic risk.

(prudential ratio: the governments of central banks met in Bale and decided to launch financial norms: prudential norms. These norms are a ratio between the funds of the bank and the capacity to borrow money. Bank lends money and hopes that the bank will return the money borrowed. In 10 years the bank hopes on the return of capital and between the first moment and the second moment, we have interests. If the person doesn't give back the capital, it's a problem for the bank and if we have many credits, of many person not returning the capitals, the bank will end up being bankrupt. So if we have a bank going bankrupt there can be an effect of panic and everyone will ask to their own bank to give back their money. By this effect of auto-realisation all the banks will go to bankruptcy. Right now in Switzerland we are afraid that all banks will go to bankruptcy because all Swiss bank are near bankruptcy. To prevent the system risk, the governors of central banks, central banks are regulators of banking systems, went in Bale, Switzerland, and decided that Banks are obliged to have in their own fund a percentage of money in relation with the money given to clients of the banks. By this system of prudential rules, it will be possible for the bank to lend 1 million but if the bank wants to lend a second million it won't be possible if it doesn't have a sufficient fund: it becomes illegal; By this way banks are obliged to be prudent and it is not possible in theory for a bank to go to bankruptcy. Because these rules are created spontaneously by government of central banks in Bale, the name is Bale 1. After Bale 1, the same governors tries to perform the system and adopted new rules: Bale 2 and right now are trying to find better rules: Bale 3 to ensure the solidity of banks. This system is permanent).

As for Financial regulation (financial law is only simple company law because a company is a legal person which has shareholders who will give money to the company, the legal person, and in return the company will give to the share holder a title, a share. In exchange, the shareholder has 2 powers: financial power because he wants to have the return of his investment, and also a political powers because he can participate at the assembly. But, if we have a public, a listed company, the company creates directly a share, for example an obligation or many sort of financial products, and puts them on financial markets. The financial market is organised by a simple private company. For example in Europe « Euronext » which is a simple private company which has also created shares because it's a company, and put its own shares on its own market). In this financial markets, investors, banks come and buy and sell shares. To do this, they need to have information. The problem of financial markets is thus information. The managers of companies don't give information spontaneously. So we have a regulator in every country which obliges every listed company to give information to investors through the principle of transparency. If the managers don't give this information, especially

bad information, they must be punished by the regulator and for example, in the United States, they can go to jail for that crime. So regulatory law on financial markets is a permanent regulatory because the information of investors will never be spontaneous.

Details on regulation

Regulation is a text adopted specially for special sectors, which cannot function with competition law or administrative law alone. So regulation is only a tool for the functioning of this special economic sectors and the regulatory system is a more broad system that regulation because it's made not only with regulation, with texts but also with individual administrative decision, and also judgements, and also with contracts and with self regulation. The deregulation is a phenomenon which designs the way, the path between monopoly to a competition system. For example, in Europe, just after the second war, countries decided to organise electricity sectors in monopoly system but it's only a political decisions. 30 years after that Europe decided to make deregulation, which also a political decision and hope that competition will enter this area. It was a success of telecommunication but not yet for energy because of the powers of the electrical firms. If we have a special way of deregulation. The author Posner, from the Chicago School, think that everywhere competition law is sufficient. In this way of thinking it's sufficient to organise deregulation and to organise the path to competition and after that stop regulation. This is more the US and Chicago School conception that the Europe conception. The professors of economics advice the government of other country to follow the example of United State but it did not always work because competition without regulation is not a good idea. The regulator is a central body, more a public body, or sometimes a private body in some countries. For ex in the advertising area the regulator is private, but more generally the regulator is an administrative public body. It's the case in the US and in Each state in the Europe. This regulator has the mission to supervise in permanence its sector and to prevent the violation of rules but also to build the competition not only to prevent the violation but also to build competition, to organise the access of the system of transportation (energy, telecommunication) and to organise and prevent system risk in the banking and financial systems and organise the information on financial markets. So the regulator is very powerful because it has all the powers and is independent from the government. So the nomination of the President of these administrative bodies is a very important political decision because usually it's the President of the Republic who decides who will be this President (for 4 or 5 years).

B) The broad definition based on the ambition to regulate relationships

General considerations between relationships between a strong structures or body, and a not strong person, structure or body.

The contract.

In the liberal theory of contract law. We have 2 parties. In a traditional way we say that every contract is always fair and always just because we have negotiations. This is why a contract by itself is always fair because if the proposition made by this party is unfair, then the second party did not accept. So if the second party accepts, or for example the second party proposes another proposition, and if the proposition is accepted, the contract is then fair. So the contract is a sort of self regulation because it is always possible to refuse to contract during the negotiations and until the proposition is fair not only for A but also for B. So it's a type of self regulation based on the right to not contract (not the right to contract but the right to refuse the contract and to accept the contract only and until its benefit for you); It's a liberal conception: the party A can be strong and the other party B can be less strong: it's not a problem in the liberal way, for the Chicago school for ex, because it's sufficient for B to refuse the contract. I n a financial market we have many offers made by A1 A2 A3 towards B, if B don't want to contract for A1 but rather contract with A2 it may. So it's sufficient enough to have a contract on a market which also self regulated, regulated by the meeting of offer and demand, through a contract regulated on the meeting of offer and demand, based on the right to refuse the contract and chose another contractor. So the every contract is fair, then the functioning of the market is fair and thus competition is fair. In a liberal way, a person is only protected by this liberal self regulation conception. It's a wonderful conception.

The theory of agency and corporate governance

BUT in reality, it is not exactly the way that relationship functions in certain circumstances and especially in cases of anticompetitive behaviour. For example, in company law, there are shareholders (for example shareholder 1, 2, 3, 4). They chose the manager of the company. In a classical conception, shareholders have the power because they have the power to design and chose the manager and also to chose to take off this power ad *nutum* by a simple movement of the head, that is a decision without explanation and without compensation. It's a simple political decision in company law. This is because the manager has been chosen by shareholders and what shareholders gave, they can always take away. In exchange, the manager, who work for the common interest of shareholders, has financial benefits. Every year and every time the shareholders want, they look at what the manager did for them, control financial benefit they give manager and agree to give him again this power or refuse to continue to give their trust and refuse that the manager no longer represent them. This is a classical presentation. Bt Pr of finance and scholars of the *law and finance*, say that it is absolutely wrong. Why? Because the manager, simply because he does the job to manage the company, has the information and doesn't not obey strictly the shareholders (although in appearance he is the mere agent of the shareholders), and prefer to privilege its own interest than the shareholder interests. **This is the theory of agency**. It's not a legal theory but an economic one from the US. The problem is to organise a real control of the manager from the shareholders to the regulator because the manager can keep for himself the information and doesn't tell to shareholders for example the financial benefits he has. For example, the stock options or the golden parachutes etc. And for the moment we discoverer that a lot of managers have enormous financial benefits while the company goes bankrupt. And shareholders gave up their own investment at the same time as the manager has strong financial benefits. In a classical way, it's absolutely legal because share holders decided to give to the manager these financial benefits. SO there is a strong gap between the legal approach which has nothing to say against this regulation, and this economic conception which has strong reprobation through the protection of shareholders and the control by the regulator, and through the use of public money. So we will try to reorganise the classical company legal system and create a corporate governance. It is a way to regulate the relationship btw shareholders and the management without self regulation.

Thus, the parliaments tried to create new legal rules to help shareholders to really control managers by trying to create **corporate governance,** a new sort of regulatory law, not only on markets but inside the company. This is legitimate especially if the company is listed because then we have a financial market beyond the company and the protection of shareholders is a protection beyond investment. Is hard to create a real corporate governance. If only we could trust the manager and think that they are special persons who don't prefer their own interests as the interest of shareholders, which is a sort of ethic management which exist specifically in banks (the manager has a sense of protection of its own shareholders and prefer to give money to shareholders). It's a moral conception of self regulation which one can trust. But for the moment it is hard to trust this conception. For ex in the City of London, managers like to say that they are moral persons, Protestants, and prefer the interest of shareholders than their own interests. But to be honest, this conception should not be trusted. Managers prefer their own interest. This conception was adopted in legal systems but Pr of economists will say that it's not possible for a simple human being to prefer every time the interest of an other person that its own. A simple person, a simple *Homo economicus* will prefer its own interest that the interests of another person. Its a base in the law of economics and science. So the strange conception of the managers of the City in London are the opposite example of *Homo economicus* .

Now, the problem is to give the information to the shareholder because the manager will not do it by himself. Who will do it if not the manager? At first, it will be the accountant through the accounting of the company and the certification of the accounting. So if an investor of shareholder wants the exact information of the company, it is enough to look at the counts and trust the person of the accountant who certificates the accounts of the company. This is why the countability is very important in the corporate governance and important of the protection of shareholders, for the protection of investors and important in the regulatory area of the financial markets. The subprime crises before all tout a problem of countability. As we have seen for the prudential norms of Bale 1 and Bale 2, the accountants adopted the norms called IFRS. They adopted these themselves, which is also self regulation. Through these norms, counts were build for every company on every financial markets every where in the world. These norms made to inform investors and protect shareholders, to organise the good information and transparency of financial markets, are now criticised because they were the cause of the subprime crisis (because we don't have the right information though the counts of the companies, especially though the banks). So the first way to organise the information of shareholders is to organise the right accountability tools. So now in the G20 we try to find new rules to adopt countability which informs shareholders, but actually nobody knows how to do this.

The second way to obtain the information in favour of shareholders, and if the company is listed in favour of investors**, is to give shareholders or investor to give the right to ask questions to managers and to obtain answers.** Formally, in the tradition company law, company organised compulsory assembly, nobody use to come (only 1 or 2 shareholders, and ask only one or two questions with the manager almost not answering). Now in every legal system in Europe and US, shareholders could ask to a court to oblige the manager to answer. Moreover, shareholder could ask a court to order an expertise of the counts, of the countability, or directly about the management of the company by the manager. The experts chosen by the courts will thus give to shareholders information about the manager and with this information, the shareholder would lead the company or attack the manager for tort before a court. So it's a strong regulation of relationship between shareholder or investor and manager, in consequences of agency theory which is an economics theory based on the principle of *Homo economicus*. So big difference between tradition conception of company law and company law though a regulatory conception. For ex some companies created inside themselves comities on compensations, on corporate governance, on accountability , etc. but it was not a very successful, simply because these comities were created by managers who put in these comities their friends who said that the behaviour of manager was great. The members of comities also have financial benefits. SO there is no good regulatory system inside the company for the moment. This is why if the company is listed, the financial market regulator comes inside the company and for example decides what sort of financial benefits the manager must have. It's not the classical conception because the regulator must be outside the company, but it's a real regulatory conception because there is a strong regulation inside and outside the company, which explains why the regulator of the markets can come inside the company to control it.

But for the moment, as we can see in the newspaper, there is a very strong decision about the financial benefits of the managers, and this for 2 reasons (in the US and in France, texts will be voted on the behaviour the manager must have to obtain these financial benefits). In the traditional conception, there is no limitation and so we have financial benefits but also (also an economic theory) the mechanism of incentive (for ex stock options). By this way, the best way to create incentive for managers is to give them stock options (definition: a right to buy or sell your option and transform it into a share. You can keep this option for ex for 5 years and the company decided at the beginning the price at which it will buy the stock option or the share). For example. If a bank (we have right now a scandal of stock option in France), a bank give stock option to the manager. Then, the price of the option is 5 euros. During 5 years the bank agrees to buy this option which is free at 5 euros. So the company gives the option for free and is engaged to buy the option as a price fixed at the beginning. But in reality, the quotation of the share during these 5 years could drop to 1 euro and still the manager can decide to ask the company to buy this stock option at 5 euros. In France, the president of the Société Generale asked the company to buy its stock options (société general which, like each bank, was in a bad situation). The manager who had actually made a fault in its management still ask for the payment of the stock option. Furthermore, because of the crisis the State gave a lot of money to that bank in order for the bank not to go bankrupt, while at the same time the president ask to the company to buy its stock options! It was the same in the US. SO it's a problem of corporate governance and Obama decided that if a bank received public money, the State could enter the company and decide what to do instead of the bank, because the money becomes public. In France, we vote the text that if a company receives public money, it's not possible for the manager to receive financial benefits like stock options. It's a sort of more compulsory regulatory system because it's not possible to let a manager to keep as he wants these stock option when the company has difficulties, especially when the company receives public money. For obama, the decision is to create a link between public money given to the bank and to forbid to let managers to receive financial benefits. In France, the idea is to create the link between public money given to the company and not only to the financial benefits given to the managers but also to the possibility to stop the work of employees. So it is a very strong step in from State in private companies but it is also because State gives public moneys in order for the bank not to go to bankruptcy. SO it's a fair trade off.
IN the UK they nationalised the bank, the State thus becoming the shareholder. In the US the State intervene in the decisions taken by the management but not to nationalise the banks. Same in France where we prefer to create limitation of advantages to the manager. For the UK and the US it is only a temporary solution. For ex Goldman Sachs decided to give back the public aid to the public treasury of the US in order to recover its freedom of decision. SO if you give back the public money you regain the freedom to decide. Goldman Sachs ask the financial market to give him a lot of money to give back to the State the public aid and to have the freedom to decide the management of the bank (which is a good decision because it is hard to find public investors).

II) The narrow definition

The relationship between the legal rule and the object of the legal rule.

Traditionally the system between the rule and the object of the rule is a flat line.

The object is a firm, or a family. Outside this object is the legal rule. The legal rule is created by the legitimate will of the State. By the powerful power of the law, and because the law is created by the State, the law is applied by courts to single situations (for ex to companies). In theoretical regulation it's the rule of exogeneity of the rule. It's sufficient that the State decides to create the rule and ask the application of the rule to the situation, and the court is here to punish the violation if someone doesn't respect the rule applied to the situation. So the rule is outside the situation. So the law is a legitimate creation of the State and the State decides to create the rule because it is legitimate and this will is applied to a situation. If someone doesn't respect the will of the State through the law, this person is punished by the court. So, to every State, one legal system. For ex it's the same for the contract. The contract is like a little law: we have an object (for ex an economic exchange) and we have a will of parties of the contract who decide that there are legal organisation of the economic exchange and if one party don't respect the will of the contractors, a court will punish him. So to every contract, one rule. In the same manner: the system for every state, one legal system. And every time, the legal rule is outside the object of the rule.

IN REGULATORY LAW, it's exactly the CONTRARY.

Because, the rule of regulatory law are build by the economic situation itself. For example, the natural economic monopoly, for ex asymmetry of information, for ex lack of transparency. This is inside the situation. So, the law in order to be efficient, will be built inside the situation, and more precisely inside the market itself. This is why the regulator is always inside the market and not outside the market. This is also why the regulatory law is not different from one state to another state. Because for ex the transportation of electricity, or the trading of financial objects are seen in global markets. For this reason, we have global regulators, for ex the WTO or at least a relationship between regulators, for ex competition authorities or accounting bodies and so on. So the State cannot have the same power because 1) he is outside the object (when we need a regulator inside the object) and 2) the legislator is limited by its own frontiers in front of markets which are abroad frontiers (the legislator is limited by its own frontiers). So regulatory law is the contrary to more classic conception of the law itself. It's impossible to have an efficient national regulator because it's a reference of the State, that is a State outside the situation, a State which can impose its will to the situation. This is not possible because the regulation of internet or information, it's impossible for a state alone to regulate because a State cannot alone impose its will to internet which is a global and immaterial element. So we need a regulatory system to regulate internet from the inside, inside Internet. So regulatory law is a new conception of the law. It is also why the regulatory law is built on the economic technical characteristics of each sector. So for example, we have an economic sector of telecom, we have a regulatory law of telecom. We have technical specificity of energy, we have a regulatory law of energy. So the law comes from the object and not from the will of the State. Imagine a State, a Parliament which votes that the transportation of electricity is not a monopoly: this is impossible, it's like saying that the sun is shining during the night : it is not true so it's not possible. The organisation of transportation of energy is a rule from the sector itself and the State can't impose a Competition for the transportation of energy. It's the same rule: a State cannot pose that financial markets could be govern by non transparency: it's not possible.

So 2 types of rules*: economic (this is why the economic theory built the regulatory law) and technical rules for each sector. And after that, and on these rules we have the law. So the law is not outside the object but inside the object. And if you don't have this way, the rules cannot be efficient. Question on the 2 types of rule: 2 oppositions, the rules outside the situation, and the rules inside the situation where we have economic rules, like asymmetry of information and technical rules like natural monopoly. The addition of these rules inside the situation are the foundation of the law. In every country, it was engineers and Pr of economics who wrote the law (bad news). This is why for ex in the US this matter is the speciality of people who have a PhD in law and in economy. In France for ex and for patents, its usual that specialists have a diploma of technology and economics. But a State alone cannot interfere with these foundations and the law it creates. It's will only come at the end. It's impossible to regulate the global financial market alone; this is why we have the G20.*

A) The narrow definition regarding the regulator's activities at stake

The regulatory law is only inside the sector. So if you don't know the sector you don't understand regulatory law. For ex lawyers are specialised in one sector only (for ex network sectors).

1) <u>The economically regulated sectors</u>

The first reason to regulate a sector is the precedent regulation of public monopolies. So if a country builds a sector on a state owned monopoly, only by its own will can he decide to liberalise the sector and at the same time to privatise the enterprise, he must regulate the position (as the UK did) because the transition between legal public monopolies to market and competition is not possible without a regulator and regulated rules. Why? Because the public monopoly is too strong to allow another competitor to enter the market. So you can't declare the end of a public monopoly without a regulator. He will apply an asymmetric regulation. The asymmetric regulation is the use of power against the public monopoly, in favour of other competitors. For example, in the UK, to liberalise the telecommunication sector, the government gave freely a license to Mercury in order to allow this firm to compete with British telecoms. In France we don't do it become we like France Telecom. Same for energy, the energy could pass to a public monopolist in a competition market, but we need a regulator to apply an asymmetric regulation. When this asymmetric regulation has obtained a fair competition between the historical public enterprise and the new competitor, the regulation can disappear and the single Competition law can organise the market. So in a sector like telecommunication we can hope that it will stopped to be organised by the regulator and only be left to Competition law. This is why especially in telecommunication sector, the regulator and also the competition authority has stepped in to organisation the sector.

But it's not exactly a good definition of regulatory law to present the law just as a translation of these economic and technical rules. IT's very liberal doctrine like the Chicago school. Why? Because a State can decide that the competition and the rules is unfair, not in itself but because it is too strong for some people. For ex for the transportation, we can say that we need to regulate the transportation sector for 2 reasons and by 2 ways. 1) we have an economic natural monopoly by the train and 2) you can also decide that everybody has a right to go to a place to another place (because you think that it's a freedom to go from a place to another). This is only a political decision and after that, you can witness the cost of transportation for people will not be only the price of the market because someone will pay this price but not everybody because everybody has the right to travel. Then the price will be the price that the demand agrees to pay. So the price can be free. In France and Europe we think that if we have more that 3 children , you may pay less for your tickets to travel with them. It's a political decision. In this consideration we can have a first definition of what is the regulatory law. The regulatory law is thus a balance with the principle of competition and another principle. The "another principle" could be an economic principle, technical principle but also a political principle. If it's technical or economic principle, then the regulation will be global and inside the sector. But if it's a balance between a competition principle and a political decision, then the regulation will be outside the sector, a decision taken by the State and it will be national. In Europe, there is a strong discussion with the European commission which doesn't admit the balance between competition principles and political national principles. This is a problem for member state as Competition law punished member states who don't respect competition law but respect political decisions.

2) <u>The pre-regulated and regulated sectors</u>

The air transportation is a good example because of the principle which states that each country has a national company (air china, air France). It's not possible to let the organisation of the sector inside the country if you want to go to Paris from China. So you need an agreement between China and France. The air transportation was the first regulated sector because we need a multilateral co-operation thus multilateral regulation. It's a matter f international public law.
But other problem: when you travel in a plane, you need to land in an Airport (Beijing Capital, Charles de Gaulle). If you can't land, you can't travel. It's an example of how important regulation is. There is a path to which you must have access. Without access you can't have the service. This conception was thought by the Supreme Court in the US called the Essential facility doctrine. An essential facility is a thing you must access to without which you can't access the service itself. So the regulatory law and not the competition law (which is build on contract, thus you can refuse ; then Charles de gaulle could refuse to contract with air china) will handle those cases : if Charles de gaulle refuses the contract with china air china cannot travel to France (Competition law). In regulatory law you will have an obligation to contract when in presence of an essential facility. So it's important to detect what is an essential facility. If it's an essential facility the owner has an obligation to contract. If it's not en essential facility, no obligation to contract. As for the obligation to contract, nobody knows at what price; The contract is always economically fair, in balance, because

there is a right to refuse the contract (I refuse the contract because the price is not convenient for me). But if I'm obliged to contract, at what price will I contract? What body will step in? The regulator. Always the regulator, because it's not possible to contract with a fair price if you don't have the fundamental right to refuse to contract. So you have always a regulator to step in and obtain a fair price between the owner of the essential facility and the person who wants to enter the essential facility.
BUT the problem of the airport is not only to land but also to obtain the authorisation to land at a particular time. If air china has 2 planes, Charles de Gaulle had 20 pistes, and a day has 24h. Then the company will buy from the airport the permission to land the plane a 12 o'clock for the first plan and 8 o'clock for the second. He ask in regard of a certain rule of the market. This is also regulated because without regulation Charles de gaulle could refuse air china this permission because Charles de gaulle prefers air France. Charles de gaulle would thus prefer to give good hours to air France and not to air china. This is why the regulator will punish the airport to have this sort of behaviour: because it's unfair.

A second regulated sector: the rail sector.

The was the sector the first regulated by the US by a decision by the SC. It's important because for the air the tool was the international public law, for the rail it was a decision of the court (here the Supreme court). The owner of the rail in the beginning of the last century (it was a technical problem and not a political one) refused to give access to the owner of the train. The owner of the rail said that it was its right not to contract. But the owner of the train could not find another rail owner because the rail owner had a natural monopoly on rail. So the Supreme Court decided that the rail is an essential facility and it was the SC of the US which invented the notion of essential facility. And because it is an essential facility, the owner has the obligation to give access to the owner of the train in exchange of reasonable price. This is not the same as a fair price on market. On a simple market it's the meeting between offer and demand which makes the price. So in a simple market you can have a fair price. In essential facility it's not possible to have a spontaneous fair price, so we need a regulated fair price (by the SC in the US or the regulators in Europe, or the government in more classical country). In Europe, we have economic vertical integration: we have in the same enterprise as national society of rights. SNCF which is vertically integrated and which have the mission to organise and build the right of transportation of people and which has the monopoly for every thing. But it's not a gift because the firm is always in deficit. Why? Because in France the government puts the principle of reasonable price (special price for family etc.). And so every every year the enterprise is in deficit and every year the government gives money for the SNCF to continue its duties, its mission of public services (for ex allow children to travel). For that, the state pays. But Europe didn't accept this organisation and said: I agree for this possibility for people because they do have a right to travel, but I don't accept the same right of fair price for the fret. So in the case of a large family travelling, you can have an regulated organisation. But for fret, the transport of merchandise, the Europe issued a directive and put a necessity to open the sector of fret to Competition. In 5 years, The European Competition will do the same for people.

The postal services:

This sector is not left to simple Competition because of a political decision: everybody has the right to send a letter and receive a letter everywhere he lives. This is political. So for ex in France we have a state owned enterprise which has the duty to transport letter every where in only one day and with a compensation of only a stamp. In this interest of the sector is that we have today a monopoly of postal services and it was only in 1997 that a European directive obliged member state to open the sector. But it was before that the European court of justice which decided what was the good reasoning of regulation f this sector. So here it was a decision of a court which puts the fundamental law of the sector. So the regulatory law is not only made by legal rules but also courts, (Supreme court in the US, CJCE in Europe). The case dates back to 1993, Paul Corbeau. It was about the transportation of letter and a regulation of Belgium. There was a permission by Belgium for the monopoly for regular transportation of letter and fast transportation of letters. So we had 2 markets: normal letter for which the price is regulated by the State, and another market for the quick letters, for which To access this service, the price was the regular price times 30. The issue was the giving of monopoly to both markets. M. Paul Corbeau wanted to access the second market, which is very lucrative (the first market is not very lucrative). This is a cherry picking: you take the cherry and leave to the state what is not profitable. The state refused the entrance of Paul Corbeau to second market because the state gave the monopoly of the Second market to the royal post. Paul corbeau attacked the regulation before the ECJ and said it's a violation of competition law because it should not be a mission of public services. To send and receive a letter is a right, thus a public service. But to do it quickly, is not a mission of public service. It's a simple service left to competition. Everyone thought that punishment would be issued. The ECJ said that because we have two markets, because the transportation of quick letter is a simple service which

should be submitted to competition, the monopoly given to the royal post would then be a violation of competition law. BUT if the market is opened to competition, then it would put the royal post to bankruptcy because it would be left only with the 1st market which is not lucrative. So to obtain a good realisation of the mission of public service we need to give to the public enterprise not only the 1st but also the second market: it allows to obtain a balance into the enterprise and allows it to do its mission of public service. It's a good decision, which could have been made by the State.
We could have the same solution : the State could give every year money to the first market and then open the second market to competition, or to permit the State to recognise the balance between the policy of competition and the importance of public mission.

3) <u>The pre-regulation of the relation between producers and mass distribution</u>

Remember what is the market: in a market, you have several offering parties, and demanders (mass distributors or consumers), who make contracts, and consumers or distributors could create competition if they refuse the offer of the 1st offering party and prefer the 2nd one. This works when there is only one or two offering party and demander.
But 20 years ago appeared mass distributors. They created a buy centralised system. A legal person would buy from every producers but for all the shops of the mass distributor. By the tool of the contract, we have one contractor, one party, which is Carrefour, for all China, and one offering party who proposed apples. Careful will buy apples for every Careful shops in China. In such a case, this offer will become completely dependant from Carrefour because of the contract, because the contract centralised. The contract builds a situation of economic dependence. This economic dependance permits the mass distributor to fix the price. Because if the producer of apple refuse that price he will not find another buyer for its apples because he only has one client in front of him. In Europe, we refuse to regulate this situation, but only regulate if the mass distributor abuses from its dominant position. Dominant position is not a violation per se, one must prove its abuse of dominant position. However, in France, we don't accept this sort of economic dependence and the state decided to regulate the relation between producers and mass distributors. The parliament adopted a law the 4th august of this year in order to put a better balance between offering parties and mass distributors. So it's a pre regulation of special relationship such as what we have seen in company law between shareholders and managers (the absence of balance is produced by the absence of information). The absence of balance here is produced by the power of the contract in the favour of the mass distributor. Now that company law is regulated, the relation between mass producer and offering party is also regulated. This is very important in regards to the role of the contract. The contract is natural in competition law and not in regulatory law. For ex the access of facility essential is a contract, but its price is fixed by the State, not by the market.

<u>Water</u>:

Water is a global product, but nobody knows how to regulate the water. We have problems with the regulation of water because it's a natural product, also problem with the safety of water '(it's hard to fix norms), also problem with the price of water and of course a problem with the lack of water.
The UK which loves very much regulation, tried to regulate water by contract with firms (because in this sector firms are really rich). In a competition system, it's not possible to have rich companies because immediately competitor try to enter the market and compete by price. So if a country have really rich companies, it's not a good sign. The regulator of water, which only exists in the UK have proposed to the firms different rules on prices and on contract. It's a contract btw the regulator and the sector. The regulator offers different sort of prices, duties, obligations and regulation. The enterprise has the freedom to chose what it wants. Why does the regulator do that? Because while they chose themselves, they give the information on their own profits, structure etc. to the regulator. In every sector, where there is an asymmetry of information, the problem of the regulator is this asymmetry of regulation because the enterprises have more information than the regulator who should control them. But if the regulator adopt the system of regulation by contract, the firms gives only by their choice the information given. They chose not only the system more profitable to them but at the same time give information on them. The perspective of regulating the agriculture industry: The agriculture, as a special barrier, with a technical rules and natural rules (for ex the seasons, the necessity for people to have something to eat), we only have policies. Policies on agriculture in Europe, in the US. But for the moment we don't have a regulatory, but only “policies”.

<u>CONCLUSION on regulation definition</u>:

The regulatory law is a combination of regulation (individual decisions taken by administration or by courts), to obtain a balance between competition principles and another principle. The other principles comes from each sector. It could be an economic principle or technical or political principle. If it's an economic or technical principle then regulatory law will be global, technical and permanent. If it's more political principles, the regulatory law will be more national and based on public services. But the purpose is always to obtain the balance between competition and another thing. That's the problem with financial markets: there are global with technical standards, but also entrails important political decision.

B) <u>The narrow definition based on balance</u>

At the centre of the system we have the regulator because he is inside the technology, inside the sector, inside the company. So regulatory law is always about the regulator.

The autonomy of regulatory law in the legal system.

Regulatory law is a new branch of legal system. Doctrine says that regulatory law started existing 10 years ago. Why? Because before it was quite simple: we had the market with offer and demand and contract, and it was thus private law. And outside the market we had state, state owned enterprises which has mission of public services, and it was public law. But it is impossible to put regulatory law in private law because of the intervention of state inside the market. Nor in public law because it is always involving the market functioning. So it's a branch of the legal system which is impossible to place if you stop at the distinction between public and private law. This is why the legal system such as the common law could understand what is regulatory law. Indeed, the common law was only build by succession of decisions taken by courts. So in the UK, then in the US, it is not necessary to place rule in a sort of fundamental distinction of public law and private law. In common law, if you have a problem you go to the court and ask for a solution. Another problem, another trial, another judgement. Nobody every asks if it is private or public. This is why regulatory solutions, for example essential facilities was adopted by the SC of the US because it's based on the common law system. In Europe the first decision on regulatory law was adopted by the Uk since it's a common law system. So the regulatory law is not really a liberal system. But it's a system which is not built on the distinction between private and public law. This is why it was the UK which adopted this way of thinking and not France or Germany, because they are continental legal system which are built on this catastrophic distinction between public and private law. Every new distinction in regulatory law is thus created in the UK or US not because they better but because only they are built on solutions (decisions). Thus, it's hard to place the regulatory law in the legal system of a continental legal system as it is a mix of public and private law. We will also see that it's also a mix of contract, but also jurisdictional system. We have seen the part played by political science in this regulatory law system.

What is regulation? The teleological method

So hard it's to find a definition of regulatory law. The best way is to adopt a methodology which could characterise regulatory law. This methodology is the “teleology”.
Traditionally, there is the general rule named the law. In a second step, we have a particular situation of facts. After that, we apply the general rule to the particular situation of facts to obtain a particular solution (for ex a contract or a judgement). This reasoning is named the syllogism. A syllogism is the relation between a general rule and particular situation. The general rule of law is made in two parts: the first part of the rule of law is a situation of abstraction (for ex if somebody makes a damage to someone else), the second part is that the situation must be repaired (the second party must repair the damage to the other). The syllogism created a connection between the two parts of the rule of law. If someone makes a damages, he must repair the damage. Imagine, A steals from B. This is a particular situation. The judge will only make a correspondence between the first part of the general rule (A caused a damage(to steal) to someone else (B)). Every terms has a correspondence with the general rule and the particular situation. So you can apply the second part of the rule and of course the judge will punish A and condemn him to give money to B. This is a syllogism.

In the regulatory law, it's absolutely the CONTRARY. In the regulatory law, because it's a technical, economic and political matter, and not only legal matter, the law is only a tool. It's a tool for the regulators, for the European commission, it's an instrumental conception of the law. So the rule is not built as we just presented but rather otherwise: first (first part of the rule) we have a purpose (for ex build competition after a public monopoly, organise the access to an essential facility, to protect investors etc.), a generally it will not be only one goal but several goals. For that, we have to tools such as judicial decision, administrative decision, self regulation, interview in a news paper. Imagine we have a particular situation. The regulator (and then the judge) will apply the system of regulatory not by confrontation of the legal terms but of the purpose. In European law we have the notion of the "effective effect". The judge and the regulator must apply the rule in order to obtain an effective effect (To really satisfy the goals, for ex to really build competition). This is why the regulator has all the power a State can have. The regulator are the most powerful body we could have cause they must satisfy the goals, and the goals in Greek the "tellers", which gives teleology (the relationship between the goals and the situation). So the application of goals through teleology gives a lot of power to regulators.
SO the regulatory law like the competition law is characterised by this methodology which is the teleology because it's too difficult to place the regulatory law in the legal system because it's beyond the distinction between public and private law.

Section 2 The new articulation between normative system and the conflict of legitimacy

I) The reversal of the co-operation of norms

A) <u>The traditional alliance between politics and economics</u>

The choices and the planning

In some countries such as China and France, the economics is first of all a political choice. So a government decides how the economy must function. The reasoning is "the State can understand and can make choice to satisfy the general interest". Based on this conception, which is a strong tradition, there is a huge difference between market and a political choice. Why? In the market everyone tries to satisfy his own interest. For example every consumer tries to obtain goods of good quality for a better price. At the contrary, the seller tries to sell the good for a high price. The functioning of the market is to build a contract and through negotiation try to find a fair price. The market is thus built on private and individual interest. If you adopt a liberal conception you will say that general interest is the addition of particular interests. And because market is able to build fair prices and guarantee the quality of good the general interest is satisfy because the general interest is only the sum of individual interests. In this way, it's sufficient to have a efficient competition law against anticompetitive behaviours and to preserve the ability of the market to build fair prices, and in this way the general interest is served.
But, for ex in France or in China, general interest is not the simple addition of particular interests. General interest in more than this addition. It is beyond this addition: it's the interest of the nation.
For example, it is the necessity to organise a good education for everyone. And the market is not able to create a good education for every one, because the market will build a good education for everyone who could pay for it. So in a more political tradition, the general interest is the interest of a nation, and for everyone, even if everyone cannot pay for it. So, in France, the education is free. Everyone can go to university for free (but not in the UK or US where they don't have the same conception of general interest).
Based on this distinction, the liberal conception is only for good you can buy and sell. BUT some common goods exist, such as fresh air. And a market cannot protect fresh air. So states can decide to take the big money to protect the air. In this conception, the economy must follow the political decisions taken by the State. Thus we have just an alliance between economics and politics. For the moment, in France, we have a strong struggle in the political area about the capacity for everyone to go to University because one or two universities such as sciences po make a selection at entrance, where in other universities are not allowed to do it (selection equals to liberal). This is a political choice because the State put a lot of money in universities, but there are too much students. This is why this is an alliance between economics and politics, because we adopt a definition of general interest not only as the addition of particular interests but a special general interest of all the nations and for the protection of common goals. This general interest is

the object of the State because in this conception, and this is a strong historical conception, a simple person cannot have the idea to satisfy the general interest (it's an ideal). On the contrary, the government and the administration can satisfy or try to satisfy very special interest which is the general interest. We will see that it is difficult to believe, to believe that one person on the market is only able to try to satisfy his own interest, but that if its a person of the administration he will suddenly try to satisfy the general interest.

How can the State use the economics tool to satisfy the general interest?

At first the State has a budget, a public budget. The use the public money for example to give it to a state owned enterprise to organise the postal services, or give it to organise the universities. And tax payers give money to the State. He doesn't give money to the state for his own interest but for general interest. This is very important because we are right now in a financial crisis. This is important because if you are only on the market, and if you let the market rules govern, money will go to bankers. But because it's a question of general interest to stop the systemic risk in the banking area, the state uses the public money to re capitalise banks. This is the first power of the state. If you don't have this financial tool of the State to step into the market you cannot have a good regulation (if you are in a crisis or have a problem of deficit).

The second tool is the long term policies. On the market we only have a very short term operation (buy and sell something : it's a short term operation, made in one moment). The market is built on short terms operations. The market can product fair prices because the economic operations are always in short terms. But the market has not the ability to build a long term policy. And if an operation tries to do it, it becomes an anticompetitive behaviour. For example, a long term contract on the market is an anticompetitive behaviour. For example, in anti trust law, if the seller has an agreement with B and decide to sell to A apples for 4 years, with a condition of exclusivity, then this is a violation of competition law because this is price fixing on a long term basis. But if you are in the regulatory law, and need to make a big investment to build nuclear industry, or to build a system of transportation, or build financial market, you have a necessity to have a long term policy. And this long term policy can only be taken by the State because it has the legitimacy to decide for the future. This is why we have public contract which are public and administrative contract between state themselves and big firms (and there is a sort of ministry of this sort of planning contracts).
Is it a necessity? Because if you don't have a State who engage itself in the long term, we would not have private investors. So if one needs to make investment in the long term, the State must exists. This is a traditional conception. In France, you would have continue on this path if it hadn't been for Europe. But Europe made the dislocation between politics and economics.

B) <u>The dislocation etc.</u>

Reasons for dislocation: <u>The weakening of sovereignty</u>

Traditionally each country has the power to decide for itself, because the government, the parliament is elected by the people, and thus is the representation of the nation and the nation has the political right to decide for itself. It's a political conception mentioned by Jean Jacques Rousseau. He said that the nation elects the parliament and government and what the government decides is what the nation wanted. But just after WWII we created Europe. Since this moment, each country became a member of Europe, a member State. We organise a hierarchy between Europe and every state member and Europe made a lot of regulations, a lot jurisdictional decision made by the European court of Justice. For example in 1962 the ECJ decided that European law is an autonomous legal order. IT's thus impossible for a member state to oblige the European body, but conversely everything the Europe does must immediately enter member state. Europe tried to build a European market, a common market between every member state and the political idea was absolutely different from tradition. The idea is; when two countries sell and buy goods from each other it is impossible for them to make war. We built Europe like that to create a common market and to make impossible in the future a 3rd war. This political idea is very strong in Europe. To obtain this goal (the common market) we had the obligation to organise a very strong competition law, to prevent and to punish anti competitive behaviour, and also to create a very strong hierarchy between Europe and every state member. In this condition, the ability for a state to decide for itself in representation of its nation became impossible. JJ Rousseau is thus finished because in this conception the State cannot decide anymore for example to give monopolies during a crisis. More precisely, it's not possible without

justification. In the traditional frame, because the state tries to satisfy the general interest, it was possible for him to give legal monopoly to one enterprise without justification. He had a strong political will, and it was possible to pass a law without justification. In the new system, because the principle is now to have a common competitive market, and because every one member state must obey, a State cannot give a legal monopoly without justification. It can do it if it can present an economic justification. For example, a state can say that it is an essential facility, and then decide to give legal monopoly to one enterprise. But if it is not a natural economic monopoly, the State cannot give a legal monopoly to one enterprise. Now the economic decisions taken by the State must be justified by economics justification through economic theories.

Professors of economics, especially from Chicago schools, say that it is impossible that when a person is on a market he tries to satisfy his own interest but would work for general interest if he were part of the administration. Professor of economics say that even if a person works in an administration, he is still a normal person who tries to satisfy his own interest. He works correctly but would like to be paid correctly, would like to work less etc. These professors apply the agency theory. The State represents the nation through the administration. If you have the agents of administration who are the representatives of ourselves, it's the relationship of agency. So there is a relation between normal people and people of the administration. But the relationship of agency is problematic. Just like a firm manager, the administrator of administration will prefer to satisfy his own interest rather that general interest. So there is an asymmetry of information between the administration and people. Thus, for example, public money is used by the administration very largely, but conversely if you try to buy an apple you will try to obtain a good price. But if one works in the administration, the money will not be his thus the money is not spent the same way it would have been if the money was his own (spend more loosely). Thus, professors of economics have a big problem with the traditional conception because we have 1) Europe, and 2) we have a problem with agency theory.
In this condition there is a strong suspicions against the State and the administration. We don't say that the administration is corrupt or lazy but is normal (where in traditional thinking, administration was not normal because it was made of people who understand public services). The first conception was thus built by JJ Rousseau and the second one built by professors of economics.

C) <u>The alliance between the economics and the law</u>

1) <u>The movement of liberalisation</u>

<u>The liberalisation is the decision to open a market or a sector to the competition.</u>
Before: a sector with barriers to entry against other competitors. After: the law opens the sectors to competition and destroys the barriers to entry. But this is just a legal decision spontaneously taken by the State, or by European obligation or international obligation through the WTO. The declaration of the opening of the market is a law voted by the Parliament. Then competitors enter the market and try to make cherry pricking (take the difference between the old monopoly price and the new competitive price) by proposing to consumers new prices less high. But, it could be difficult because you can have not only legal barriers but also technical barriers. For example, it's necessary in order to enter the market to make a big investment or to have information (and information is in the firm who had the monopoly). For example in a technical area (financial market, banking, telecom, energy etc.) the technical ability, the information, is *in* the legal monopoly. Naturally, this firm doesn't want to give information to the other potential competitors; For example, EDF has the technical information about electricity. This is why Europe decided to liberalise the sector of electricity of the European directive of 1996 and France took a law of transposition of this directive in 2000. But for the moment EDF has today 95% of the sector for 2 reasons: EDF has the technical information, every engineers would like to work for the enterprise, and because we have an economic viscosity because people love EDF. The viscosity, an economic theory: you have EDF and the possibility to give up EDF but it doesn't de-glue from EDF. You prefer to keep EDF. Viscosity if very strong for political and sociological reasons, and because nobody really knows how the electricity works: you don't want to take the risk to change that. But it's not the same for telecommunication because even children know how cell phones work, so people change operator easily.

<u>So in these area there are technical and economic barriers and we need to organise regulations and to build regulator notably to oblige the past owner of monopoly to give the information to new competitor or other potential competitor</u>. For example, the regulator will oblige the past legal public monopoly to become transparent, and notably transparency of accounting. But it is not symmetric: the past owner of the monopoly cannot monitor the

accounting of new competitors, only the other way around. Moreover, in many cases these legal public monopolies were integrated vertically. The vertical organisation is a type of organisation which put in the same enterprise the production, the transportation, the sell and the distribution. We organise a vertical integration because we put all these activities in one legal person, for example EDF. But if you let this organisation like that, it is not possible for a competitor to enter only enter the market of distribution, on only the production market. So the European rules oblige to destroy the vertical economic integration in the past legal public monopolies, to obtain a real liberalisation of this sectors. For example, EDF was at the end obliged to create a new legal person, RTE, which is in charge of transportation. Furthermore, the law obliged this autonomous firm (RTE) to have an independent accounting from the general accounting of EDF. By this way, the regulator and the other competitors can see the accounting link with transportation and the accounting link with production and distribution. In order to prevent the mechanism of subvention between for ex production and transportation. It is thus not possible anymore for the activity of transportation to give money to the activity of the production. Through the transparency of the distinction between the two accounting, there is a possibility of liberalisation of the sector. But it is still difficult as EDF still has 95% of the sector. This is why the next European directive could oblige EDF to sell the transportation activity. So it is not only the destruction of economic integration but also the destruction of the economic construction of the sector itself because in such a case, EDF could give up the activity of transportation in a few months, or choose between the activity of production or transportation, but could not keep both. So the next step of liberalisation could be to force EDF to sell the transportation activity, because in European conception, transportation is an essential facility, then the transportation activity cannot product financial profit. The price for the access of transposition must be the cost of transportation. It's not the same for the production activity, which is an activity of the market: you have the costs and the profits. But for the transportation, which is a regulated activity, it is a natural monopoly. So the price for companies to access the transportation is only the cost without profit. This is why it is often the State who organises the transportation activity through public companies. In a second step, EDF could be forced to sell either the production or the transportation activity (in fact even production could not be sell because it's a nuclear activity, and the State would refuse for a nuclear activity to go into private hands, and this for safety reason).

2) The privatisation

This is more about UK because the movement was a bit difference than liberalisation. It was when Margaret Thatcher realised that the public finances were empty. The government had thus the obligation to open the sector, because the prime minister wanted new money for the country. As she was very liberal, she decided not to take money from tax payers, not from consumer but to take money by selling the last legal monopoly. She thus organised the privatisation to get money without asking British people. But it was not sufficient, as we can see though the financial crisis, to offer shares to buy. You need to find investors to buy these shares. But investors did not trust the British government because the british state had the power to regulate the sector. When the British prime minister decided to privatise British telecom the investors didn't trust that she tried to privilege the own interest for example by changing the law. SO she had a problem with the trust of investors; The problem of trust had for source the ability for the state to change the rules just by passing a new law. Indeed, the British government could sell the British telecom and then adopt a new legal rule against the new privatised British telecom. There was thus a trust against the legal power of the state to change the rule. The investors thus didn't wanted to invest in a firm if the State can change the rules. This is why Mrs. Thatcher organised a regulator. This regulator was a professor of Cambridge, just one person, but a very charismatic one in whom every one in the UK had great trust and respect. She let the regulator decide the price in this sector. Under this condition, investors started to trust the rules of the sector because the regulator would not change them. Thus, the privatisation was a very big success. By this way, the prime minister found a solution to the problem of public finances without asking the consumers and tax payers. But for that aim, she had to create an independent regulator to give to him the power to fix the prices and everyone trusted the regulator because it was a very old and very charismatic person. Indeed, in many country, being old is important to be able to be believable.

This was the movement in the UK, but not the same in France, because technically, telecommunication, energy is the same throughout the world, but economic and social conception and the history of each country is different. For example, in France we don't think that the mere fact of being old is sufficient to be trusted. In France we love diploma. This is why in France we have a national school of administration from which all the Presidents and Prime Minister and regulator come from this school (ENA) because it is the school of the State, and we believe in the State. In the UK, the british believe in the universities so they chose as regulator an economic person. And because it's a more charismatic regulation, they give the power to fix prices to one person.

In the US, they adopted a technocratic regulation. The regulatory rules were built in the last century by the Supreme Courts and other courts, but a trail cannot create institutions, only rules. And regulatory law is built on regulators. So in the US we have a lot of regulators which are very big independent administrations such as the SEC for the financial market with 2000 people working in this administration. But the SEC is a very technical regulator and people who work for it come from law school with a PhD in law (but not political sciences). In this American case, the regulation became more and more technical and legal, and gave up political consideration. Thus, the lawyers began to invest the regulatory area; before these people were not lawyers but rather people who graduated in political sciences. But lawyers invested the area of regulation, which in build on administrative bodies, but because we have a lot of lawyers, they attacked the decision taken by the court. This is a common law tradition and not a continental one. This is why in the US the regulatory decision could be taken directly by the court or though an attack before a court against an administrative body decision and because lawyer are everywhere: this is the common law tradition: law is made by courts, and thus by lawyers. Thus, in the regulatory law field, lawyers became more and more powerful. It is now a real legal subject. There is indeed a struggle between politics and lawyers because the government say that it represent the general interest, it has the legitimacy to take decision, but lawyers became a technocratic organisation, a technical organisation and invested the area and contested the decisions of regulators before the courts. It is thus a large and deep movement because we have now an alliance between economics and lawyers (and politics anymore).

Why do we need a technocratic regulation? The reason was given by professors of economics. They don't trust governments because the governments and the administration is made by normal people and also because government and administration can change the rules. People like the prime minister of the President of the Republic have a great incentive to change the rules because they want to be elected at the next election. If they decide to put the price at a higher scale they might not be elected in the next election. There is thus a political agenda, which is a difficulty to let the rule not changed. The regulator is never elected. The President, the parliament, the prime minister thus hate the regulator but it is not a problem because the regulator is never elected and is thus really independent. He can also by this way take the engagement not to change the rule. This is why investors trust the regulator and don't trust governments. Indeed, if the government needs money it will change the price of commodities. But the public finances is not the problem of the regulator, and he can thus take the engagement to not change the price nor the rule.

This is why we created central banks. The creation of the European central bank was at first a mystery because the creation of the money was at first the power of the State. Why did member states in Europe decided the creation of one European central bank which has now the power over the Euro? Because it is important for the people to trust money. The money cannot function without trust. If you let the power to national government to change the power of money (devaluation), trust will not exist. You must thus transfer the fundamental power to fix the money to an independent body, which is the central bank and is autonomous from government. In this way, if the central bank is independent from government, it could be independent from every member state. This is why we had to adopt an autonomous European central bank. This is against tradition and the traditional definition of the power of the State of the money. There is also now a pact of stability (Maastricht pact) which oblige the member state to not create devaluation. Of course, the president of this central bank is a powerful man, more powerful than a President of State, and for the moment he is a trench person. He decides to fix the weight of European money in the face of Chinese money etc. He is the regulator of financial market and comes from the school of public administration (ENA).

3) **<u>The consequence: The economic analysis of the law...</u>**

The economic analysis of the law is a theory created by the Chicago School, especially by R. Coase. This professor was a professor of economics and wrote in 1960 “The social cost of transaction of the law”. THe theory is : you take as an object the legal law (he took the example of tort law, the accident on a high way) and then analyse the economic consequence of that legal rule. For example, because we are in a tort law case, we have a damage, which is a fact (cf. Syllogism), and legal rule who oblige you to repair the damage. The economic consequence is thus to give money to the victim. If you make an economic analysis of the law, you will presume that anyone is an *Homo economicus* with the ability to calculate his own interest (because he has the information). In this case, this person who does the damage will be punished by the obligation to give the money. But if this infraction equals to a profit of 20 000 (you take a picture of someone) dollars but you are ask to pay back 100000 for the damage, If you make an economic analysis of law it's an incentive to make a violation of the rule because the cost of transaction is not only zero but a benefit. The influence of the economics of law is thus that Everyone can calculate the price of his action and anticipate the consequences of his

actions. In tort law for example, if A takes insurance against the possibility that he will commit a tort, then the insurance will pay B for A. This economic analysis permits to anticipate the price of the legal rule. What we need to remember is the existence of the incentive that the economic analysis of the law reveals, because if a behaviour can produce a profit of 20 000 and if the person creates the damages for only 10000 dollars, then there is an incentive to create the damage. Thus there is a link between the economic analysis of the law and the economic incentive.

The law is just a tool in regulatory law. This is why we will have such technical regulators. Back to the teleological analysis, if you have a purpose on the one hand, such as the prevention of system crisis, and for example access to transportation on the other hand, then the most important in regulatory law is not the law itself, as it is just a tool, but rather the purpose of the law. We must thus obtain the satisfaction of the purpose and not the mere respect of the tool. We must thus put not just an application but an incentive to obtain that everyone will respect the law. And by this way the purpose will be satisfied and everyone will respect the law, not out love for the law (this is JJ Rousseau conception) but only because the respect of the law serves its own interest. So because everyone is an *Homo economicus*, he will respect the law because it is in its own interest. By this way, everyone will respect the law, the law is only the tool and automatically, by a sort of self regulation, the purpose will be satisfied.

In this conception, the difficulty and the issue (for ex right now in the crisis) is to find the right legal incentive. Because ask not to be obeyed, but the law just put a rule as a tool and this tool is respected because everyone has its own interest satisfied by this respect, and thus the general purpose is satisfied. And now, every government though the G20 try to find the good incentive who would satisfy the interest of everyone. So if the rule of law is correctly built, there will be a good inventive for everyone to respect the rule of law, which serves its own interest as the general purpose is satisfied. But by this way, every rule of law must be put under an economic analysis. Only the economic analysis could give the solution to create a good incentive.
For example, what sort of sanction must we take to obtain the respect of the rules of the market. For example, the new economic law said that we don't take a sanction for conspiracy of 20 000 dollars because it huge for little firms and nothing for big ones. So we gave up this kind of thinking and decide to take a percentage of global profit of the firms. By taking 10% of the global profits of the firms around the world. If you put a big amount of sanction you put a little firm out of business. It's better to create a system of sanction to obtain good incentive because you want Microsoft to respect the law and little firms not to go to bankruptcy. This conclusion comes after the economic analysis of the law.

For example, if you create a punishment system. The problem is however the asymmetry of information. The regulator has a problem because he doesn't have information and it is the firm he controls which has the information. How to obtain this information? It's a mercy program. It was created in the US. It's a sort of contract, of transaction. For example, in a conspiracy, if a firm comes to see the regulator and give him information against the other parties of the inspirational, it's free. This goes against legal tradition because it's a contractualisatijon of the sanction. It's a good incentive to give information to the regulator against the claimants in the benefits of the firms which violated the law in the conspiracy. But it is not a problem since the economic analysis is not a moral analysis.
Another incentive for example is for the regulator to propose to the firms of the sector different sorts of regulation, amongst which they can chose, in exchange to give information to the regulator. The contract can be a particular contract between the regulator and a single firm (the television can accept duties to propose to the public educative shows, and the regulator accepts to give subvention to the public television). There is even a percentage of how much information you give about the conspiracy, which will make vary how punished you will be (or not be). This is absolutely against moral, but the economic analysis is not about moral. Because the rule is just a tool under the economic analysis and incentive analysis, it is not a problem to give to a firm a give, such as clearance, if the firm gives information about other firms.

Last example: class action. It exists in the US but not in Europe. Every member state is wondering the adoption of the this mechanism. France is against because with the class action you can obtain big punishment of Firms. So for the moment, and for many philosophical reasons, the firms tried to import class action, three years ago, but because of the political agenda, the government made a deal with big French firms and gave up the project of law to adopt class action.
Class action; for example in Chicago, during 2 years, every taxi driven charged 0.25 dollars more that it should have for every job. If you want reparation you don't go to a court and pay a lawyer just to get back 0.25 dollars. And so the company of drivers made big profits. It was an inventive to make the damage because the company knew no one would sue them alone. But if one lawyers says he represents a class, the class of everyone who took a taxi during the last 2 years, and then goes before the court and ask for the punishment of the taxi company for every course of taxi. After the

trial, all the parties represented could have a share of the money. So class action is a very good incentive to oblige companies to respect the law. This is why enterprises don't want European country to import this mechanism. But if you want the law to be respected, it's a very good incentive.
This is why European Commission allowed the allocation of punitive damages. Punitive damages is to not only oblige the firm to pay the amount of the damage but only punish the firm but multiplying the amount of the damage by 9 to punish the firm in order for the firm to now to the same violation again. This is a good incentive because the firm must then pay not only the price of the damage but also the punishment which comes with it. But since it is also a wonderful profit for the victim, it is only a possibility in the US and the UK but is illegal in France (because in the US and the UK the economic analysis of the law is very important, always thinking through the incentive theory); but regulatory law, because it is a law where the law is only a tool, it is important to take into account the incentive theory and have tools such as punitive damages.

Section 3 Discussion between public and private law in regard to regulatory law

I) The distinction between public and private law in the different legal systems

A) Metaphysics and pragmatism of the distinction between the public and the private law in front of the general regulatory law

Technically in continental legal systems, there is a sort of *summa divisio*. It's the first and fundamental division in a system. The first questions and distinction in every continental legal system is the distinction between private and public law. How can one know if one is in public law or private law? It's quite difficult; but fundamentally it is where you can be before an administrative court and for private law if you are before a judicial court. In these sort of legal system there is an order of jurisdiction. The order of administrative courts: for ex. In France there is the Council of State- Conseil d'Etat; then administrative court of appeal and administrative courts of first instance. For judicial courts there is at the top *Cour de Cassation (*a sort of Supreme Court) then judicial courts of appeal and judicial tribunals. The public law can be discussed before and decided by administrative courts. Judicial and private matters can be discussed before judicial courts. How can we know if you are before an administrative court or a judicial court? There is another judicial court names tribunal of conflict between these two order of jurisdiction (in France tribunal of conflicts) and you are in public law if in a concrete situation you find a public person (a State, a city, a state owned enterprise). These sort of public person belongs to the public law and the situation will be considered by an administrative court. In private law, you only find private persons. This is why for example the family law belongs to the private, because couples or parents and children are only private persons. And because the concrete situation concerns only private people, the situation is under private law and is considered by judicial courts. So, technically, it's very easy, because it is sufficient to consider the particular situation and you examine if you find a public person or only private persons. If you find only private persons it's only private law, and if you decide to start an action it will be before a judicial court. But if you find a public person, the case will be examined by an administrative court. So the final criteria is the nature of the person. Public law is for public person or bodies (even the State) and private law is for private person and the trial must be organised before a judicial court.

For a continental system it's not only a technical perspective but also a metaphysic perspective. But public person, firstly administration, has the mission to serve general interest. For continental countries, and for JJ Rousseau, the general interest is beyond the simple addition of private interests. This is why the general interest cannot belong to private law, because private law is only the addition of private interests of private persons. This is why the public law, the administrative law, is fundamentally the *summa divisio*, the metaphysics conception in the legal system, and under this division, it's very important to organise trial for special jurisdiction, administrative jurisdiction, which can understand what the general interest is.
For example, this is why in France the judge who works in administrative courts come from the school of High administration (ENA) and the judge who works from judicial court comes from the national school of magistracy (ENM). This first school thus provides at the same time the high administration itself and the jurisdiction who will examine the case of administrative law and the behaviour of the administration itself. This is the theory of the *judge administrator* and the administrative court because special judge who can understand what the administration is in

regards of the general interest. So the ENA provides at the same time prime ministers, high administration, the director of budget, treasury, and at the same time the administrative court which will judge this administration : the same people. But for the private law, it's another school and in this school, they learn law. It could seem like an evidence, but in ENA they don't learn law but only the rule of administration. And only with that knowledge they can become administrative judge: it is sufficient to understand what the general interest is, how the administration works to judge the administration.

It is thus a metaphysic conception because it's a *summa division:* the State is like a New God. This administration is like a sort of agent of this sort of new God. Of course it might not be the case for common private people, **but administration is this sort of metaphysic theory, the State is the new god and administration is the servant of the god.** So, the administration has a natural jurisdiction, which is administration court, and the administrative judge come from this very special school, and in this school they don't lean law but only how the administration works. For example, it is easy for an ex member of the administration to be the second chair of the Conseil d'Etat, since the President of the Council of State is the Prime minister himself. This is of course not the case for the judicial order. It's impossible to imagine that anyone from the administration could become a judicial judge but also the president of the Cour de Cassation.

The Conseil d'Etat has different missions: the first mission is to give advice to the government. If the government wants to pass a law, he asks to the conseil d'Etat to give an advise. This is why the President is the Prime minister. It's just a section of the Conseil d'Etat which is a jurisdiction section which will judge the administration. So it's quite bizarre to have in the same body people, or sections, which give advise to the government, and another section which will judge the administration (for example the texts adopted by the government). In this system, if the government wants to adopt a legal text, he will have to ask the council of State to give advice. The Government can respect the advice or even ignore the advice and pass the text. But after the regulation is adopted, the legality of the text could be criticised by anyone before an administrative court, before every legal text must be legal in the legal system. And because it's a text adopted by the government, and since the government is a public body, where are thus in public law and the issue must be examined by the administrative court. IF there is a problem of legality, the issue is brought before the Council of State; it's a special section which will examine (re examine) the same regulation. This is why it is a sort of judge administrator. So it is possible that the council of State to declare the text illegal. This is very strange for a person coming from common law, but in continental law this conflict of interest inside the administrative court is not a problem (it's strange to give advice to the government and after that examine the legality of the regulation adopted). **It is natural for a continental legal system because the actions of administration, and since the administrative judge is a sort of administrative agent, there are not normal people like any private person, but sort of extra ordinary people who understand and serve general interest: this is why it's a metaphysic conception, because they prefer to be the guardian of the general interest, the guardians of the law, the guardian of the State than to serve their own interest (because the State is this sort of God)**. So the conflict of interest doesn't exist in this conception. Because the administrative judge and agent of the administration are exceptional people who serve exceptional interest without conflict. It's the definition of the public services.

1) The allocation of the tasks

In common law system this *summa divisio* between public and private don't exist. For example in the UK or in the US, there are only legal specialities such as contract law, tort law, administrative law etc. We cannot say that the UK and US administration doesn't exist. But administrative law is only a speciality like any other. In the Common law system there are many sort of legal area, for example tort law, or for example contact law, or company law, or administrative law. How can we know if we are in administrative law or contract law? It is when a particular situation concerns an administrative questions. So it's an objective problem of issue and not a problem of person. For example the organisation of a public service is an administrative issue, so this particular situation belongs to the administrative law. It is of course the same if it's a private enterprise, or a public body, or a state which is in charge of this public service. It's always an issue for the administrative law because this special situation is objectively a special situation. So it's not a personal criteria but an object criteria: for ex the creation of a public service. But this public service could well be organised by a private person who tries to serve its own interest, but of course will be controlled by the State or by a regulator. And because it's very specific and very complex, we need special jurisdictions. But, at the beginning, and today the case in the US, it is the ordinary jurisdiction who takes care of administrative cases. It's not a problem. It's sufficient to have judges who know very well the administrative issue to have a good system. Because it's not a problem of metaphysics conception, it's not a problem of philosophy, of JJ Rousseau, but only a problem of technical performance of the system. In the US for ex the competition law is examined by ordinary jurisdiction. Of course, in this

court the judge is very well educated with a PhD of economics. But it's just a technical question of allocation. **So this judge doesn't not have the metaphysics sense of general interest, but only a speciality in economics. So in the US and UK, it's just a question of technical performance organisation. Thus we need specialised judges; it's the only thing we: judge who know very well the issue, not only in a legal way but also in the economic way. This is why they don't come from administration like in France but directly from business school of economic schools.**
For example, Posner, the judge, who is a very important judge in the US is of course very well educated, is an expert not only in law but also in economics. He knows the relationship between market and patents, market and regulation, the incentive theory etc.
In this conception, it's not necessary to design the nature of the person, it's not a necessity to design if the situation belongs to the private r public law, but only to look at whether it's an administrative issue or a competition issue. If it's a competition issue, the trial is put before the special jurisdiction (the competition body). In European, it will be the European Commission which is a simple administrative body but specialised in competition law. But nobody cares and it's not the question whether competition law is public or private. The question is the knowledge of economic theory, economic analysis of the law etc. So the first question is the economics consequence of the law, the relationship between state and market etc. Since it's an economic and a political issue, one must forget the distinction between public and private law, but get outside the law and mix the legal problem with economic issue, political decision. Thus, the common law is very in adequation with regulatory law because regulatory law is a mix between public and private law. This is why in Europe the reasoning of Common law is very important, as the continental legal system has many difficulties to be understood by for example the European Commission, by antitrust law, by regulatory law.

In this conception, it is also a conception in line with globalisation: if the market is globalised, the common law conception is easier to apply to that market that continental law.
But this is a very technical conception; an in complete opposition the metaphysic conception. The problem could be though that in this common law conception, we could have a technical, and thus a technocratic conception of the regulatory matter. If you have a technical conception you have a technocratic conception, because technocrats are experts of one matter and if you build a regulatory body, you try to take person who know the sector very well, and also the techniques, the issues etc. Thus in a technical conception, you have automatically a technocratic regulatory body. But if you have a metaphysics conception, you would thus have a more political conception for the regulatory body, and you will try to find person who will represent the nation, who will represent the State, the people, the history of the country etc. This is why many academic people say that the metaphysic conception is more Republican and Democratic system than the technical conception, which is too technical and too technocratic. Which is absolutely true. Why? Because in the metaphysics conception, the State decides for the nation which it represents. So the State has the legitimacy to decide based on this source. This is why its decisions are republican and democratic decisions. In the second system however, if very important decisions are taken by regulatory bodies, composed by people who are very good technicians or very good technocrats, coming from the school of the administration, and not elected, there is a big problem for the republic and for the democracy. And for ex, in many countries, especially in France, many people, not only in academic area, but also in politic area, are really critic about the second system; they say we must delete the regulatory bodies because they are not democratic and have too much power. So it's very difficult to respond to these critics.
It's true that it's not a republican system because people who compose the regulatory body are not elected. And because the regulatory body is independent from the government which is elected, this independence is a problem in itself, because we have no link between the regulatory body and people, the regulatory body and the nation. **Because people inside the regulatory body are not elected, and also because the regulatory body itself is independent from the government which is elected. So we have no link between regulatory body which has so many great powers and the nation.**
It's not a problem in the technical and technocratic conception, but it is a problem in the political conception.

You can answer you prefer to leave in a technocratic organisation based on the economy. But another answer could be that in a political conception, we could have a republican organisation but you can have also a democratic conception. The two are not the same. In a political conception, the Republic is linked to the elections. But in the Democracy conception, the conception of the democracy is only based on the election, which is only the source f the power, but can also organise a democratic functioning of the system: for ex by the transparency of the functioning of the administration or the regulatory body, and also by judicial review. For example, for the obligation of the regulatory body, to give the motivation of every decision taken. **So if you oblige the regulatory body, not elected and independent from the government, to respect the transparency and the obligation to give motivation to its decision like a simple**

jurisdiction, and let people contest its administrative decisions before a court by judicial review, it thus becomes a democratic organisation of the technical regulatory system. So the political solution, and this is the case in Europe and in the US, is to admit that technical and technocratic sources of power of regulatory bodies, because it's a problem of economics and techniques and not only of politics and law, but, by compensation (and we need not only a technical expert inside the regulatory body, and we need independence from the government) we must give up a Republican conception of economic power and organise a democratic functioning of the regulatory system by different duties of the regulatory bodies. How? At first the absence of conflict of interest for every person in the regulatory body, secondly the due process before the decision taken by this regulator, the obligation to give a motivation for its administrative decision, the possibility to contest this decision before a court (judicial review). This will create a democratic regulatory system which can be at the same time a very technical, a very technocratic system, but also a democratic system (because every one can contest the decision of the regulatory body before its taken, though the due process of law, and by the judicial review after the decision). The movement for the moment is to accept that we don't have a republican system since we need not elected people, and independent body, but can have a democratic conception of the regulatory body itself.

Question: the options: **you can either give up the republican system or give up the regulatory bodies**. In France, many people say that regulatory bodies are not legitimate and so we must give up regulatory law and give up regulatory bodies, and must transfer their power to the government itself, which it is the only one which is legitimate to have these power. **Many people ask to the parliament to give up regulatory bodies and transfer these power to the central government. It is possible in theory, parliament can do what it wants and pass new law and delete a regulatory body, but it's not possible in practice for a global sector: it's not possible for a state alone to organise the suppression of domestic body, because there are networks of regulatory body of financial market** for example all over the world (it's not true for energy, because gas or electricity could stay inside the country so the Parliament could decide to give up the regulatory law, the regulatory independent body and transfer the power to the government). But It's a possibility (to cancel a regulator and give back the power to government) when there is a crisis. Even in financial market, we can see that many powers are transferred to the government itself, and we have strong critics against the regulator (for ex in the US there is a strong critics against the banking and financial regulator. Obama said that know he will decide himself because the money used is the one of the American people, who elected him. In a crisis, you need to get back the powers you gave the regulator. In a crisis, it's not only a problem of legal system, but a problem of the protection of money. It's only the State which has the ability to inject a lot of money taken from people, from tax payers.

B) <u>The distinction of interests and their dialectical functioning</u>

The general interest: a sum of interest or the overshadowing of interest

In the market, there are agents who are *Homo economicus*. We can take information specially information on crisis. This is why the market must always give the prices, and this information, this rational person who is *Homo economicus* can calculate the way to serve its own interest. It's a very basic and fundamental and liberal conception of the market.
Spontaneity the Homo economicus, with this information, will chose the best solution for him. But, the interest of agents are contrary. For example the interest of the seller is the contrary of the interest of the buyer, because the seller would like to sell at a very high price and not the consumer a low price. The consumer know the price of the product, of the service, proposed by the seller and every other sellers. The sellers are thus in competition among themselves. So there is a relationship of competition between producers and sellers on every market. And every consumer knows every price proposed by every seller. Of course, consumer if he is really an *Homo economicus* will have the profit of this competition to chose the best price for the best quality. And for example, chose a second producer because the first proposed a product at a higher price that the second seller. So of course, for the same quality, the consumer prefers to go see the second seller. In this competition, the first seller can go to bankruptcy if he keeps its high price. This is why the Prof. J. Schumpeter said that the bankruptcy is a good functioning for the market as it is a creation by destruction, because the market creates the destruction of bad companies. And because it was only bad companies which proposed product at a high price when another firm for the same product proposed a lower price: it's thus a creative destruction. The second condition for the first high price seller is to change its price and for example propose its product at the same low price as the second seller (the consumer thus stay his consumer) or even propose its product for an even lower price than the second seller: he thus keeps his consumer and obtains the transfer of the clients of the second producer because he suddenly charged a lower price as the second consumer. This is how the market creates fair prices only by the

mechanism of competition. This why the market the market is organised by self regulation, because we don't need regulator nor states, we just need a good information of prices, of quality of the goods and services, and we must presume that everyone is an Homo economicus. Which is not absolutely true (for ex children are not really Homo economicus and spend their parent's money without being able to calculate between different product). But in theory everyone, even children, are Homo economicus, and this is why a real free competition can create fair prices. In this conception, it's sufficient to sanction anticompetitive behaviour, to protect the free and fair competition, and to obtain a good prices and good quality by self regulation. This is the mission of competition bodies. So there is a big difference between the mission of competition bodies and regulatory bodies, because competition bodies are only in charge to sanction anti competitive behaviour against self regulation (ex a conspiracy between sellers and every sellers proposes the same price). If there is an agreement between seller by conspiracy and consumer cannot profit from free competition and are thus obliged to pay only one price: there is thus no transparency, thus no competition, thus no fair price. The competition authority must thus sanction this behaviour. But if we don't have anticompetitive behaviour, the market is on a normal bases self regulated. Other Anticompetitive behaviour: If you have a firm, which has a great market power, he can oblige a consumer to weak to pay a price imposed a very powerful company. Usually , this company is very powerful because it has information, and don't want to give information to its competitors. So it could be qualified as an abuse of dominant position.

In this liberal conception, if there is a good functioning of the market, without anticompetitive behaviour, it's only a self regulation, and the general interest is satisfied because we have fair prices.

But if you don't believe that the market is able to create fair prices because for example you don't believe that we are *Homo economicus*, and don't believe that we are able to have information about quality or prices, or don't have time to go to every store to look at prices, and you are small person faced to a big firm like Microsoft, then it's hard to believe that we are in a simple contract and that I have every information that I need to know on Microsoft and its software, and it's difficult to know if the price is worth what the software is worth etc. If you don't believe that we are Homo economicus, then you don't believe in the market. Many people think that the market is the place where strong people abuse of their market power to impose tough condition on weak people. This is why we have political movements against globalisation, because it's the expansion of the market around the world. And though expansion is the domination of strong firms on weak people and weak countries and weak companies. This weak countries and companies cannot be Homo economicus because they are too weak to create free competition. If you don't believe in the capacity of the market to create fair prices, because you think the market is just the place where strong bodies impose their power to weak parties (for ex. The power of the US to impose their own legal rules to other countries around the word), you must then find the general interest outside the market. This is very important for globalisation: because if you believe the market can create by itself fair prices and high quality, then globalisation is good for every one, and especially for poor countries. But if you don't believe that the market is a place where fair prices are spontaneity created, then globalisation is a catastrophe for poor countries, cause it's a way through global market for strong countries to impose their prices, legal rules and bad quality on poor and weak countries. This is a problem of Africa for example with patents, medicines etc. Patent law for example is a possibility to create a fair market

In Europe, the first step was to create, with treaties like the fundamental treaty of Rome, a common market, but Europe only decided to organise free competition and only forbid anti competitive behaviour, but not more. For ex national monopolies were not forbidden but it was easy for the commission and ECJ to punish member state when their national public companies abused of their dominant position (for ex in France EDF was often punished for abuse of dominant position). In a second step, 10 years ago, members states and especially France which has a metaphysic conception, said that a free market, even if it functions correctly and anti competitive behaviour are punished, in not enough to serve the general interest. For ex a free market can have free prices, but people who need this good must give their money. If it's an ordinary good then it's a normal functioning of the market. But if it is a special good, a public service, a common good, the good price is the price which the consumer can assume, and if the consumer is poor, the price he can afford could be 0. This is why France say that the general interest is not the addition of particular interests and the fair price is not the one created though a free competition with the possibility of the consumer to pay for sure the price, but the fair price is a price that every consumer can pay (but only for particular good: transportation, school, energy, postal services, basic banking services, justice which is also free etc.). Thus the price who serves the general interest is not the price created by the of functioning of the market but the price that consumer himself can pay, which could be 0. For ex. The difference between the price ask to the parents to pay for their kids' lunch and the real cost of the lunch will be paid by the city.

So there is a regulation beyond the simple conception of self regulation by the good functioning of market, because the market is not able to solve by itself the general interest for special goods. Not for every good of course, only the one related to public interest. SO there have been technically a legal evolution in Europe, and a distinction between the goods: the goods which can be organised by the market alone, and which can be bought by consumer though a fair price created by the market, and on the other hand, for the public services, the public utilities we need another rule. Europe adopted 3 years ago new regulations to recognise the specificities of public utilities and to adopt special rules against the market. Because price the consumer is willing to pay is the right to obtain a good for nothing, for less than its own cost, which goes against the rule of market, but is possible for public utilities. Europe now recognise this sort of regulatory system for public utilities. Finally, the European law recognised 5 years ago the margin for member state to organise by themselves what is a public service and what is not. It can be easy to identify when for ex it's a technical conception: energy is always a commodity thus always a public utilities. But to say that education is a public service, for ex to say that university is a public service, and thus to say that university is free and non selected, is a political choice. And every State has the right to decide for itself whether or not education should be given to every student. For France, the interest of the nation is to let every one enter university for free, and the State represents the interest of the nation and is thus allowed to designate what is public service and what is not.

Section 4: fluctuation between the different geographic level of regulatory organization.

I) Fluctuation btw domestic regulatory organization and European regulatory organization

A) The normative articulation of norms

1) The impact of the European directives

Reminder on Hierarchy of norms:

Kelsen created it. Every norm must comply to the other. It's sufficient to be conform to the other norm to be legal. So the national legal rules are legal if conformed to the European law, and national law is conform if it respect the treaties. But in fact it's more complicated: who is the guardian of this hierarchy? Who is the guardian of the system? COURTS. We don't have special courts for each level. Every court is the guardian for each level. A national court of another state is a guardian of national law, European law and international law. But when the judge applies the law, he also interpret it. It's hard to create a reciprocity of European law because at different level we can have different interpretation. The real power belongs to the national court because it is at the same time the body who can both interpret national and European law. To stop this mechanism, Europe created a special system: the prejudicial recourse. In Europe, we have treaties, the first being adopted in Rome, and we also have regulations and directive. At the national level, the government doesn't need to adopt legal rule for regulation because European regulations created directly rule for people in countries without transposition. In directive, it's the contrary: it created a obligation for the state to create a regulation to create a national law which will be applied to people. So each member state must create transposition law to create rules for people. The problem is that member state don't want to pass these transposition laws if the principle of the European directive is against its interest;

In national parliaments, 80% of new law are transposition law of European directive. So in business law, competition law, regulatory law, national laws disappear and we only have now European law. Every court is now European and the laws are too. But the governments of the members states don't like that and prefer to adopt their own rules and impose their own will. This is why for ex in France we don't transpose the European directives. To react to that, Europe put a limit of time on how long it must take to implement the directive. If the state don't do it, the European commission can take action. So after 10 years, we finally adopted transposition to national law. But in fact, Europe has less power that it thinks, because European directive is a negotiation between member state and European bodies (commission, parliament). So it's not possible to adopt a national directive if a national state don't want to obtain a agreement of a

member, the directive created a sort of imperfection for national states to adopt new rules through transposition law, against the European directive.

In 1996, Europe adopted a directive about the liberalization of the electricity sector. The directive was about the liberalization of the sector of electricity. In France, the law of transposition was taken in 2000 but was entitled the law of public service of electricity: the exact contrary of the European directive. Why did we do that and why did Europe not complain? Because it's a way of obtaining acceptation at the national level. Especially in regulatory matter, the political margin is very important. So, in France, the public services is the place of the electricity sector. So the transposition to national law is about the public services of the sector, and represent an application of the directive of liberalization. This gap is a good functioning because we have an acceptation at the national level of the European doctrine, which allowed Europe to continue working on directive packages on electricity (the 3rd one will be out soon). Thus both the State who keeps its sovereignty and the Europe who is taken into account are satisfied.

We also have a reaction by the courts themselves. For example, the Corbeau Case. Also the Commune d'Almeno case, of 1994. The issue was about the regulation of electricity. It was involving Spain and the public monopoly enterprise which had decided to put the transportation of electricity, not in the Air but under the floor. This was very expensive (because if you put the system of transportation for everything under the ground, it's very expensive). This national monopoly asked a lot of money to tax payers to compensate the cost of this technical choice. The consumers attacked the technical decision and the basis that it was an abuse of dominant position: because the company could find a less expensive solution. Since the company had a legal monopoly could have obliged all consumer to pay the high price, without the consumer being able to go to a competitor. This was thus a abuse of dominant position. This seems simple and reasonable to think this way.

But in regulatory law, the reasoning is not the same. The reasoning of regulatory is also built on the goal, the purpose. Furthermore, the legal rule is always a tool. As this interpretation of the law is made in consideration of the goal and not in consideration of the law itself. And what is the goal of transportation of electricity? To permit efficient transportation of the energy, but also the respect of the environmental organizations. And when your system of transportation is put in the gourd and not in the air, then you respect the environment. So when you have several goal: efficient transportation, and also protection of the environment, then the high cost is still justified and in consequence the high price is also justified. Thus, the price is legal. In European mind, the most important is the choice of the goals themselves, and because wee have several goad, the text tries to organize the articulation between the goal. For ex the next directive on energy will also be a directive on the environment. Why? Because European decided to create a strong link between energy and environment, and thus adapt the same text for energy and environment. Thus the price is fair, even without market, even if the price is high, because it respects the goals; This is why we now have the technique at the European level of “package of directive”. This package of directive is a technocratic system, and the goal is to adopt many directive at the same time (one about energy, one about, climatic problem, one about electricity) and you organize the unity between them. After that, the package of directives must be transposed at the same time, into the national legal system.

But we have also a resistance from national states, though the government. And not only by simple negotiation, but also when the European directive let the transposition law to have some margin of manoeuvre. The constitutional council in France for ex adopted a new rule in November 2008 on electricity. The Title was : sector of electricity, because it was a control of constitutionality of the rule of transposition of the directive of the second electricity directive of 2007. This decision taken by the constitutional court. To understand the decision, one must know that In France, we adopted the system of the first European directive of 1996 on the liberalization of the sector, so though the transposition to national law in 2000, only consumer and professional can chose between prices fixed by State or prices fixed by market. Usually consumer prefer prices fixed by the State. For example, 2 euros by the State, and by the power of the market: 1 euro. So because the market was liberalized, and there was many consumer, they preferred to take the prices fixed by market. But they didn't know that in the market, the price is not fixed. The following year, the price can become 3 or 5 euro. The consumer then changes his mind, but the State refused to allow consumer to switch to State prices. Followed a strike, and the president who wanted to be elected, adopted a new law in 2008 which gives the right to consumer to give up the system of market and to return to the price fixed by the State (political agenda). But this new law was attacked before the constitutional council, because it's against the European directive. The directive is a directive of liberalization and the law is the return to the monopoly, the come back to the fixing of prices by the State. This decision thus at first said: what is the purpose of the European directive: it is to liberalize the sector. So it's the opening of the market by adopting

legal rule in favor for the market. If France adopts a law of transposition to create the right to return to price fixed by the State, is against the purpose of the European directive. So it's a violation of the European rules. It's a new type of reasoning. BUT the constitutional council said that the national law must always be conform to the European law, to the European goals, but it's not true of the European law is in contradiction with the fundamental culture of the country. So if the European law is in contradiction with the fundamental constitutional culture of the member state, the law of transposition which says the contrary of the European directive can still be legal. In this sense, the constitutional council put the constitutional culture of the country, beyond Europe. And in this case, it case it was the right for everyone to access to electricity at a fair price and not only at a market price. It's a rule of national culture in France. By this way, the constitutional council put the constitutional national culture beyond the European rules. So it's an evolution, complex and dialectical articulation between National and European rules, because it's not simple technical rules of markets, but also a political choice. So it's a question of decision taken by the nations themselves, and also a question of history, of culture of each country. This is why we have this very important decision taken by the constitutional court.
For the organization there are 2 choices:
Either ?? Or have a superior body which leads the other member states.

2) The network of the authorities

We organized a network between not only each national regulatory body inside member states controlled by the European body (commission) and the European court of justice, but also a European network between every national regulatory body. And so the framework is not like a hierarchy but more like entities (each member state regulator such as the domestic competition body) surrounding a European entity (composed of the commission and the ECJ). So there is an network between all domestic bodies organized by the center, the European commission. This system was adopted by the European Regulation in 2003 named regulation about the modernization of competition, imposing a network between the different competition authorities. It was also built the same way for financial regulation, because technically financial markets are European or global.

This is why the administrative European bodies asked to an Italian Professor to think about the best articulation and framework to organize the articulation of financial market: ALESSANDRO LAMFALLUSY. He said that Europe need a network between each regulatory bodies of the financial market. The European commission began a plan of action on the best regulation possible for financial markets in Europe. The network Is named C.E.S.R comity for an economic securities regulation. They chose this acronym because they want to remember the name of the Roman Emperor Caesar. The general secretary of C.E.S.R is in Paris. This network is very efficient because it functions at different levels. IT's based on comitology.
The Lamfallusy system has 4 levels: The first level of course is European, which takes directives and regulation but only on general principles about financial markets. SO the first level is principles.
The second level is still at the European, and still regulations and directives, but more precise regulations and more precise directives. So we have precise regulations and principle regulations at the European level.
The third level is at the national level, with transposition of European regulations though national law or through national texts adopted by national regulatory bodies. So the third level is based on precise national texts or norms adopted by domestic bodies. For ex in France by the financial market authority.
The fourth level is a control of the good functioning, the right functioning of the system of comities. It is based on the comitology system, a way through which Europe can control that national regulatory body will correctly apply European rules in their principles and also in their precise rules. It is CESR which will supervise the system; it is a very technocratic system. The real power is in CESR. Why? Cause the general secretariat of CESR is not the only way to control the right functioning of the system, but is also thinking about the next general rules. And for example, CESR organizes meetings between every type of actors: European administration, banks, academics, national administration etc. and asks what solutions for example could we find to solve the financial crisis, and which rules should be adopted to solve the crisis etc. After such meetings, it all goes back to the 1st level, because this meetings was made by each actors involved in the system, which explains that when it goes back to the 1st level, the recommendations of CESR are adopted. It works as a circle. Even before adopting laws at the 3rd level, we are already thinking about the next rules possible at the 1st level. This system was built by Lamfallusy, which explains that academics play an important part in regulatory law.

The same system of network between all domestic bodies with at the center the European Commission for banking market. The site of the comity is in London. We also have the same system for insurance markets, the site of comity is

in Frankfort. Why adopting such a system for these technical area and not for others? Because there are strong economic relations between finance, money and insurance. So we need to have the same system of network. But for example, we have no strong relation between telecommunication and finance or energy. So we don't need the same sector for telecommunication and energy. So you don't need the Lamfallusy organization for these sectors. It is the Lamfallusy process.

The problem is to build a common policy between finance, money and insurance. And the other problem is that we have global market, which makes even more difficult to regulate them, how to regulate the relationship between all the different financial markets because we don't have a unique world state. So we have regulatory bodies network at regional level. For now, every government though the G20 try to build this kind of global administrative body.

II) The fluctuation between localized regulations and global regulation

A) The Ambiguity of the globalization regulation

1) The regulation of the international exchanges

The subprime crisis. The law could be one of the cause of the crisis itself, because the regulation on mortgage in the US was badly built. The beginning of the crisis started in the US because of the mortgage market and the people who wanted to buy houses. They were two markets: the market of houses, and the monetary market. Furthermore, the US government decided under Clinton that poor people should be able to buy houses, and imposed to banks to lend money to all people, including the poor. The monetary market was regulated by each State of the US. It is not a federal regulation but State regulation. For each national state was a national banking regulation. This created a problem because for financial market, there is only a federal regulation. Inside the banking area, they are three sort of companies: 1) the banks which give credits, sort of regular bank who are strongly regulated by state regulators. These state regulators oblige regular to have for example a wide diversification within the type of credit issued (because where you have money you have a risk), and to have a correct and good weight of risk: it is a prudential regulation, a regulation against a risk. But there are also 2) investment banks, who don't give credit, don't give money and wait to obtain the return of capital with interest; These sort of banks work on investment. The supervision of this type of banks is made at the federal level, by the SEC (securities exchange commission). Finally there are 3) what are named the “no bank”, which are companies which lend money without any regulation nor supervision because the US are a very liberal country. This would not be possible in Europe, because in European it's impossible to do any banking activity, or create a bank, without an administrative agreement. If you do in Europe, you can go to jail. But in the US, it is possible.
So in the US it' not the same type of banks, nor the same type of regulatory body, nor the same level of regulation which landed money, including banks which are no banks. This is why the crisis did not begin in Europe but in the US.
SO these “no banks” accepted to give money to people who did not have any money were jobless. Reimbursement of the money was thus impossible. But the regular bank and the no banks took a mortgage on these houses, while people kept on buying houses. The bigger the demand is, the higher the prices get. So during that period, the prices of houses got very high. Banks kept lending money, and even though they did not got reimbursed, they thought they would simply seize the house and sell it, since because prices went up, the value of the market also went up and the value of a house bought at 10 000 dollars would end up being 30 000. Thus because it is very easy to buy houses and obtain a credit without any money and without any ability to give the money, the price of the houses, it became very easy for banks have financial profits. SO banks had financial profits at two levels: at the beginning, because banks take commission when they lend money (for example “no banks” take commission at the beginning of the global operation), and after, when the client could not reimburse, and when banks seized the houses which would have got more valuable.
But the market value of the houses is made by the fluctuation of the market. It is based on the fair value. The fair value is the value of the object according to the market price. So in the accounting of the bank, the value of the ability to sell the house is not the initial price of the house, the market value of the good, the price at which it would be sell for example 3 years after. And the fair value is an accounting named imposed by the US for global accounting norms called the IFRS. The IFRS ask that the value to be taken into account during an accounting session is the price of the market (the fair value), and not the initial price.
The president of the financial authority Allan Greenspan, who is a guru is the financial world, said, five years, financial markets are irrational. The problem is that we always presumed that every one is an Homo economicus and market are rational. But the fact is that market and people on financial markets are irrational, because they believe that the price

keep on getting up, and hope that trees can go to the sky. Thus, based on this irrational thinking, people thought that the same little house first bought at 10 000 dollars could end up being worth 100 000, which involves that in the accounting of the banks, the value will then also be of 100 000, because the accounting norms are now in reference to the fair value, the market value, because we believe that trees can go to the sky. This was a terrible mistake.

After all these credits were issues, regular bank, credit bank, no banks, they all created a new sort of shares. This thus started involving the financial market! You can create share with your credit. You can get money only by the coming back made by your debtors. If you have many debtors, because you gave money to many people to buy houses, then you can build a share which will be composed by a lot of capacity to obtain the reimbursement of the money lent to buy the houses. We put in the shares the different type of possibility to obtain that money. The first part of the share is for example made by the debtors of the bank who are very reliable (lawyer, 2 children, i.e. Very good debtor), but on the last layer of the share, at the last level of the share, the banks but the money supposed to be given back by the very poor debtor (the non reliable debtor). They put all these different type of debtors and the money they represent together, on the same share and sold them to agents. SO banks put these shares on the markets, and people started buying these types of share. The problem is that European banks bought a lot of these type of shares, especially Swiss banks such as UBS. For example, in investment banks where we don't have to respect diversification, for example the Lehman Brothers bank bought a lot of these types of shares. The problem was that it was the same agents who gave the evaluation of the value of the share. This system of notation would say that the share was a AAA share, or BB share (notation system). The problem is that these notation agencies were the same agent who built the share. So of course these agent gave very good notation to the shares. Why is it a problem? Because there were in a conflict of interests; the interest to give a high evaluation of the financial product they built at the request of the banks, and their work as notation agencies. After that, no distinction could be made of what was the different content of the share. So the investment banks believed that the share only built on the credits gave to very good debtor (the lawyers type of debtor), but did not know that the share was also composed of bad debtor. So at the end, that type of financial share was a bad share, it was a TOXIC ASSET (it's a new expression).

The return of the problem was that since trees can't go to the sky, the market value, the real value, was not 100 000 dollars, but for ex a 100. This is why Lehman Brothers went bankrupt in 2 days. Same in France, and for Bank of America.
But if all banks go to bankruptcy, then the global economy collapses in 2 days and create an enormous financial crisis.

What to do? The first decision was taken by national governments. At first, the first reaction was in the UK where the beginning of the financial crisis started by the near bankruptcy of a Big bank, and when people suddenly wanted to get their money back from the Bank. So Gordon brown nationalized that bank so people would trust they would get their money back eventually, and thus left the money in the bank. In other States, government said that it guaranties that if you want your money and the bank can't reimburse you, then the government will. This create a climate of trust. This is the system in France, Swiss etc. IF government had not done so, the banking system would have collapsed because all bank clients would close their accounts.
The problem is that the banking system is a globalized one. The solution could thus be to oblige bank to reveal their toxic assets. But for the moment, banks don't want to reveal them. We thus have a global problem with accounting norms. Because since the accounting system of the banks were based on the market value, based on the fair value, with very pleasant numbers (100 000) but if you reveal that the asset is not worth 100 000 dollars but only 100 the accounting system makes the bank go to bankruptcy. SO is it a good idea to oblige the banks to reveal their toxic asset, and in compensation to give them public money. If they reveal these assent they can not continue their activities without public money. This is why in the US banks asked the government for public money in compensation for the revelation of the toxic assets. The problem is that in Europe, public aids are forbidden. The States don't have the rights to give money to companies. SO immediately the European Commission adopted a new communication last October to temporally, during the financial crisis, to accept public aids given to banks. But it is also a problem because for example we have not only a problem in the banking area because with the banking area, banks now refuse to give credit, for example credit to buy a car. This is why general motors, which is the first car maker in the world, told President Obama that now no one wants to buy a car because no one can obtain a credit anymore, which would push general motors to bankruptcy. The problem is that it's not a systemic risk on the financial market, but only a economic problem. But Obama still accepted to help General motors, because general motors has another company which is a bank and which is thus involve in the possibility of a system risk. The government also accepted to give money not only to banks but also to enterprises, to firms. Normally it's forbidden, the central should not be allowed to give money to any other type

of institution but banks. But because there is a huge systemic risk, the federal banks of the US accepted to give credit directly to normal companies, because companies can no longer obtain credit from banks because banks with their toxic assets do not want to give any credit anymore. SO the federal banks give credit to firms. But in European the central do not accept to give credit to the usual companies like US does.

For the moment, we have a problem with the agent of evaluation, the notation agencies, because in a conflict of interest. We also have a problem with accounting norms, but also a problem with the relationship with financial, insurance and banking market, also a problem between state level, European level, Us federal level, and also a problem because we don't have a global state but only the G20 to resolve that.

2) How these problems can be solved ?

1st problem: the conflict of interest within the agencies of rating. They are in conflict of interest because at the same time they build the product and evaluate the value of these product. Of course they put a very good rate to the product they built before for the banks. But this organization is not right, because the market is built on opposition of interests. The seller wants to sell at a high price and the consumer wants to buy at a low price: this is how the market is self regulated, because we have information on the price and quality, and thus the consumer and the seller opposite interest create a fair price. It is not the same for agencies of rating because they have interest in the evaluation. If you build a product, you become a sort of seller, and after that you have the power to evaluate the quality of the product, and of course you will say it's a AAA product. This is why consumers will buy this product with trust, and the demand will be high, and thus the prices will go up. The commission taken by the agencies of rating were also very high when they built the product. Because the system of rating, the price of the financial market will be high for the benefit of the bank. So the bank has the same interest than the agencies of rating because the banks can sell at high prices financial products built by agencies, agencies which gave high evaluation.
What can we do? At first, we can regulate the agencies, because we don't have an opposition of interest between agencies and banks, it is not possible to have a self regulation. So we need to regulate them. This is a necessity because around the world we have only three agencies of rating. So the rating is also a market. But, the market cannot function we only 3 firms, because we don't have a real free competition between these three agencies of rating. For example, we can nationalize the agencies of rating. Or we could forbid agencies of rating to build at the same time the product and after to evaluate them. We could oblige agencies to choose between building the product and evaluating the financial product, but not do both at the same time. This is completely possible to do this around the world.

the second problem is the IFRS norms. These accounting norms organize the market value for assets. The market value, the system of the fair value, is a value, the price, of the asset when you want to sell it on the market. Because we believe that the market can give the real, the fair price, we thought that the real price, the fair value, is the value created by the market. But the share becomes toxic because if the price of the house is 50 000n the number in the accounting of the bank is 100. We could give up the IFRS norms, and return to the ancient system: the historical cost of goods and assets. The historical value was the system before the adoption of the IFRS norms. Before, and it was created in Germany, in the accounting, one house would then still be written based on the price it was bought, but taking into account the degradation of the house over the years. Thus, the value after 3 for ex will be 8000 dollars, and after 20 years, the value is 0. SO it's a historical value, without consideration of the market. It's an accounting value. It's a very prudential system because when you look at the accounting, we also see for the old house bought 20 years dollars a value of 0 dollar. It is thus impossible for bank to put in the accounting that the value is 20 000 dollars. This makes it impossible to use the Bale 1 and Bale 2 system. Because in the system of Bale 1 and Bale 2, you take the fund of the bank and you say that you give the possibility to give credit through the percentage of the prudential norms; if you have 150 million euros, you can give credit for 1000 million euros. If you adopt the system IFRS, it is easy to have 300 million euros of assets, because the houses all worth 10 000 euros, and thus can give away a lot of credit. But in the historical value system, your assets will only be of 15 million dollars since the houses you have mortgage on are worth 0, and thus you cannot give away that much credit.

SO the prevention of systemic risk is more efficient with the historical value system that with the IFRS, because of the relationship between the accounting norms and the prudential norms of Bale 1 and Bale 2. Now, many governments and academics think we must stop the system of IFRS and must return to the old accounting system of historical value of goods, because the accounting is not based on the market but on the propriety itself. There were a lot of discussion during the G20 meetings.

3rd problem: the problem of the relation with the sectors. The real problem is that we have the economy, the one with the real goods (clothes, apples) and under the economy, to help the functioning of this real economy, there are banks which give credit to consumer to buy books, clothes, houses, and also financial markets. It's a traditional conception. In this conception, the banking and the financial system are just under the real economy. And if you have a problem in the banking system, or in the financial system, for example the banks don't want to give credits because banks now have toxic assets and are afraid to go bankrupt, then consumer stop to buy goods. Thus happened a contamination between a banking crisis and the real economy crisis. This is a effect of domino. Because when one collapses in the banking sector, other bank collapse and then affect the real economy. What can we do? President Obama said that he prefers to help directly the real economy, so let's give money to general motors for example, which help the economy work correctly again. Ten years ago there was a financialization of the economy. Why? Because we had a deconnection between the real economy and the financial markets. The real economy for example used to grow of 2% and the financial markets gowned of 13% every year. So people started to want to buy more financial product than real products. Now, in Europe, this year, we will only have 1% of growth in the real economy. But in the financial market, we will have a return of investment of 15%. So there is a real deconnection. Because of this disconnection, the financial markets created a sector in itself. You can earn a lot of money only with financial markets, and without consideration of the real economy. Of course, it is very dangerous because trees cannot grow to the sky. This is why, when the real economy does a come back, it created a financial crisis. And professors of economics had already said that we would have a financial crisis, because a financial crisis is only a re-adaptation between the real economy and the financial system. So the financial crisis is just an information about the world economy. It's a casino economy. But for politics and for states it's not possible to let the financial system collapse and leave people to go bankrupt. They rather have consideration for people. So, because everything is linked, we must try to create a link between banks and financial markets. You can do it by building a network between all regulatory bodies. IT's made between banking regulation, financial regulation and financial markets regulatory bodies. For example through the Lamfallusy process. The UK Solution is more radical because in 1998, they use to have two regulatory bodies, one for the banking area and the other for financial market sectors, and in 1998 they decided to transform these 2 bodies into 1 body for banking and financial area, because in the London, through the City, banking activity and financial activities are very linked. The solution could thus be to have only one regulator for the sector.

The 4th problem is the problem of level. In the US for ex the banks are regulated at a state level, and the investment banks are regulated at a federal level. The solution would be to put all regulatory system at a federal system. President Obama would like to transform the system to obtain a more political and a more unified regulatory system of banking regulation. In Europe, we try to build a financial market authority at the European level, but because we have the Lamfullsy system, and this network of regulatory bodies, it is not necessary to build a single central regulatory body. But because in the US they have 2 levels without a system of network between the different levels, they need to build a new system at the federal level.

B) The creation of global regulations

What are the problems and maybe the solutions for global regulatory issues?
What sort of global regulatory bodies can we have if it is not possible to build a global state, and since it's not possible to let the global market function by itself because self regulation doesn't work.

1. ***The first solution would be to give the power to organize the bankruptcy of the state themselves.*** This was the Kruger proposition who propose to give this power to the world bank. She said that we must give this power of the world bank to organize the bankruptcy of state. At this time, 10 years ago, the idea was to save south America. But today we think about Switzerland as it is now in great danger. But the Kruger proposition was rejected. We don't have a global court to organize the bankruptcy of multinational firms or state themselves. For the moment, the proposal is to reinforce the power of the IMF (international monetary fund). We have seen that in the last meeting of the G20, they gave one billion dollars to the IMF. This global regulatory body could now give directly money to firms. The general director of the IMF, a French Professor of economics of Sciences Po, asked for more money, and asked for 4 000 billion dollars, to give money to global banks. The G20 accepted to give 1000 billion dollars. For the moment each state gives its money to their own national banks (for ex Swiss now gives money to UBS, because UBS would go to bankruptcy if it didn't receive this money). The problem now is to know how much money will be given to the IMF as the director

keeps asking for more. We spoke about problem about financial crisis. What is the problem for regulatory financial regulation.

2. The potential for the WTO system*

There are only 3 international organization on economics: the WTO, IMF and the world bank. The rest are diplomatic organization. Now the state are trying to find solution within these organization or to create a new one.

In a global perspective, there are states and regional organization. For ex US and Europe. For the WTO, member don't exist, the only subject representing Europe in the UE.

The principle of the WTO is the right for every company to propose its product to consumers of another country. Sony can thus propose its product to French consumer And because trade must be free, it's impossible for Europe to impose buyer to stop important of the Japanese product into EU and France. This principles were built just after the second war, to build a common market not only in Europe but also around the world. At first, the monetary barrier were forbidden, but only that. Thus, if US put up barriers to forbidden the import of Thai products, it creates a dispute; The dispute could then only be solved through diplomatic case. So the WTO organizes a diplomatic meeting between US and Thai representative. After the meeting, a WTO judge say the US are wrong, and was not allowed to impose an interdiction on importation of Thailand. But if the US didn't agree with this judgement , they could ignore it. That's why the GATT didn't work because dispute didn't end in legal solution , and the most powerful countries always ignored the diplomatic settlement, and little countries had to compel to the resistance of powerful countries. This is why the global free trade, the global free competition didn't function. In 1995, we organized with Marrakech Treaty a new system for WTO, including 2 new solutions: firstly, the barriers which were forbidden are not only monetary barriers, but also every sort of barriers and especially legal barriers. For example, rules taken by the congress of the US, or for example, European directives. So the law could be analyzed as a barriers, and as an illegal barriers. Secondly, we adopted another model to solve the disputes. And if there is a dispute for example between Thailand and the US, each country will designate a panel, and each country, for example the US, will designate one panellist, the Thailand another panellist and both will designate the president. Inside the WTO and for each dispute, each country can designate anyone they want (a professor of law, or economics, or a lawyer). After that, the panellist will organize a sort of trial, and lawyers will come to Geneva. For example, Europe is represented by the direction of Commerce. The general director of the WTO is also French (Pascal Lamy). After this trial, the panellists adopt a report and this report will decide who is right and who is wrong. If no one disagrees with the conclusion of the report, or if it is not possible to find a member state of the WTO who disagree with the report, the report is then adopted automatically by the WTO. Thus, if Thailand agrees with the report, the report will be accepted. It is the system of automatic consensus. Can other member dispute the report? If they do, the dispute will go before the Dispute settlement body of the WTO. This DSB is a permanent organization inside the WTO. It is not like the panel, chosen for every dispute, but a permanent body composed of 7 members. And the first president of this DSB is a Japanese professor of international law. This dispute settlement body will adopt a report which say which country is right in the dispute, and if one country says that this report found the right conclusion, the report will then be adopted. But if the DSB thinks the opposite of the Panel, then the report will be at least agreed upon by the US and thus be adopted by the WTO.

The problem is that we don't have a global state. What can we do with this sort of judgement? Why is it a problem? Because in a traditional legal system, when it comes to enforcement, we have courts, courts decision and the enforcement of these decisions is organized by the State. For example, if you violate the law and punished by the court, then the State puts you in jail. But without a State, what can one do with only a decision? The WTO says that if a country lost before the DSB, the punishment is not organized by a body outside the system, but will be organized by the victim of the violation, for example by Thailand. Thailand will be authorized to build a barrier against an American product. This the retaliation system, a sort of private punishment, organized by the State who is the victim of the violation of the global rules. It is a very efficient system and for example we had a very strong dispute between the US and Europe about beef. Europe had adopted a directive which forbid the importation of beef with hormones. The US attacked that directive saying that's is a illegal barrier. But it's not a barrier against the importation against the imported beef but a regulation to ensure health, because hormones are not good for health. So it's a regulatory decision and not an importation decision. But the US obtained satisfaction before the DSB and the US built a private punishment through new barriers against European products. And because in this case the most aggressive European country was France, then the interdiction of importation for Europe was not simply European products but also wine and cheese and more specially Roquefort, because the Roquefort cheese is only made in France. So it's a sort of gift for the UK because it's inside UK but is very close to the US and are thus not punished because they don't make wine nor Roquefort cheese. So we have a big political problem against globalization, against the WTO though this case because anyone could see that

the measure of retaliation was against France. Here is another dispute which illustrate the problem: We have now a dispute between US and Europe, but in reality the dispute are between companies: Boeing and EADS.
So since we don't have a global state, the system in based on the power for state to impose retaliation, which are a sort of private punishment, and very strong private punishment. Nor is it possible for little countries to impose private punishment of the US. And the country who lost the most important number of cases in the US. So the WTO since 1995 is working against the most powerful country, because it's a sort of private implementation given to the States without having a global State.

Under these circumstances, we can imagine to use the WTO and to transform the WTO in a global regulatory body. For example, we can imagine another body for the regulation of another sector, and more especially for environment. Many people propose to organize the WEO (world environment organization) with the exact same system. And if a dispute must be resolve, then the choice of panellist, a system of negative consensus, then the system of DSB and the system of retaliation. In this way we could preserve common global goods, like fresh air.

The second way could be to give to the WTO not only the supervision of free trade, but also the preservation of another interest. So we can transform the WTO and ask to this global organization to preserve the free trade, then the free competition, and add reports made inside the WTO on this subject, while building the balance between free trade, free competition, and the preservation of global public services. But this would demand a new treaty, which is impossible because each treaty much obtain the agreement of each treaty and organize another round (which includes first finishing the Doha Round). Se we don't have a new treaty to put in the WTO the necessity of preservation of environment, but at least we have a DSB.
And in one or two cases, this sort of court, of judge, said that we must organize the balance between the free trade between countries, but also the biodiversity. The biodiversity is an environmental principle, and must be put in balance with the principle of free trade. This new rule was provided by the panellist and by the DSB. So it is a sort of regulatory rule, made by the WTO, no through treaty but through cases. And by the exercise of this sort of judicial power exercised by panellist and dispute settlement body. So perhaps we could have a sort of regulatory system though the WTO (and the decisions of the DSB).

C) The importance of traditions, cultures and national laws

1) The different states of economic development AND The ripeness of the economic model.

This is important because most of what we have seen is based on occidental considerations, considerations based market. Everything we said so far was always on the occidental conception of the market: agents, consumer, mass distributor, sellers, without feelings, who calculate their own interest, who can see the right information, on price, on quality etc. So basically educated people, without consideration for other people. So this person is alone and he tries to obtain the best quality from the fair price. This the model of the Market. But this is a very occidental model. We can safely say that the occidental, the western way of thinking. To obtain this model, western countries had to wait 6 centuries. Before, economy was not organized like that.

Let's take the example of Africa. In Africa the model is not at all the model of market. Why? Because people are not alone. And for the market, we need people who are alone. In Africa, people are in a family. And if a person inside the family, and the family is very very big, and you put in the same family all relatives, each people will help other people. If somebody wants to build a little company, a little store for example, then these people don't need to go to a financial market, i.e. To a bank, but will turn to his own family, or village, or community and ask for money. For example, in an Arabic example, the bank in Lebanon are only family banks. This is why the global financial crisis doesn't have the domino effect on Lebanese bank, because the banks are organized by families, and thus the economy is based on family. Then, as you must obey to your father, you must obey to your debtor, and give back the money.
In Africa, the principle is the necessity to stay inside the family, the necessity to obey to the father, thus the economy is built to function on the principle of family. So for example we don't have any competition law in Africa, and it is not really a necessity because we have another economic organization. SO their economic system might not be ripe, but that their economic system is different from the western economic system, since the economic system is based on the market. If you destroy in Africa the system of the economy based on family duties, you can put the economy of the countries in danger, because we are not able to build a market. In Africa, it is very difficult. We will see why it is difficult, to build a market system and a regulatory law, this is because the legal system is not ripe.

Why?

2) <u>The difference caused by the reliability of the legal system</u>

There is a difference between impartial system and captured system. What is the principle of impartiality in a legal system? When there is a relationship between two persons, A and B, this relation is organized by a rule, for example a legal rule, but not necessarily a LEGAL rule. Imagine B has the power to decide something about the first person A and to take a decision which will affect the situation of A. For ex, because B is his father and A is a child, or because B is the employer and A is the employee, or B is the judge and A is the party, or B is the administration and A is simple people. If the system is partial, or is personal, then B will take his decision by consideration of the personality of A. For example, the father loves the child; so he decides to give him a lot of cake. The judge loves the girl who is a party to the trial and decide to give her advantage. Or the administration decides to adopt the solution proposed by simple people because simple people give him money. In all this situation, the situation is a personal and captured relationship. Corruption, personality and other relationship create this partiality.

Before the State, the decisions were taken by the system of personal relationship. But, when the State was built, we preferred the impartiality because it is a better system. Because, for example, the first system is not safe, not sure, because you can't be sure that you are so pretty that your choice of this judge will be right, and you can't be sure that you will win your trial. So the system of partiality is not sure. If you organize legal rules, neutral rules, applied in the same way to A1, A2, A3 etc. by the judge, then the system becomes more reliable system, a more ripe system. This system was thought by a German professor of politics, named MAX WEBER. And Max Weber said that it is better to organize a society, a community, with a rule of law of impartial application by the administration or a judge, without the consideration for the relationship between B and A, without consideration for personal situation of A1, A2, A3 etc. with impartiality. With this system it's easy for everyone to anticipate the application of the law because A2 knows the solution which was applied to A1. And A2 is an *Homo economicus*, and *Homo juridicus* who can know the legal rules, the precedent solution and thus anticipate the future. Then the *Homo economicus* can trust the law. Then he can have trust in the market and have trust in the law. The *Homo* is a theory made by a French professor of law 3 years ago, named *Alain Supiot*. But it is hard to build this system of impartiality of the legal and hard to build a system of the market because we need *Homo economicus, Homo juridicus* and of course we need impartial courts, impartial administration, and of course impartial regulators. And if the regulatory body is not impartial, the sector stops to trust the regulator and the system thus collapses. Because the sector is very powerful, the companies for ex banks, energy companies all have a lot of knowledge, more information than the regulator itself, the companies have the benefit of the asymmetry of information, so the sector must trust the regulator. And the sector itself trusts the regulator only if the regulator is impartial. Why? Because A1, A2, A3 are competitors. So A1 is a competitor of A1 and A2 must trust that the regulator will apply the legal rule the same way it applied it for A1. And if A1 is very powerful, for ex is EDF, and A2 is a little competitor, or a potential competitor, must trust that the regulator will apply the legal rule to him the same way it applied it to the powerful company. So we need a ripe legal system as an impartial system.

But in reality, around the world, we don't have legal systems with impartial bodies. We only have that in Europe, in US, a little South America, perhaps in Japan, but for the rest it is hard to trust the impartiality of administration and jurisdiction. This is why we need to build new regulatory bodies with new rules such as the transparency, because if you have a very ripe legal system, like in the US, where the courts are impartial, then you can give to ordinary courts the power to take solutions for regulatory law. In Europe it is more difficult, and for example in Africa it is not possible. You must build new regulatory body because we have corruption of the judges. So no one trust the courts and of course foreign firms cannot trust national court against national firms. So the solution in to pay the courts themselves, or chose another country to invest, or to build an regulatory body with new rules of impartiality.

<u>3) The differences of legal traditions</u>

The difference we talk about here is the difference of the legal system itself. There are 2 traditions: civil law common law. In the civil law, the rules are made by Parliaments, by States, because the Parliament is legitimate to adopt them. In the common law, the UK and the US is based on case law, and centuries after centuries, courts adopted many solutions. This addition of the hundreds of new solutions created new principles.

The common law system was built because if you don't trust the state, you turn to the case law, because you don't trust the state. And the state for example can adopt law in its own interest; And by a natural movement you then adopt the system of adaptation of particular solution to particular situation, and thus transform you solution into case law.

If you are in a global perspective, the functioning of financial market for example, you do not have a global state. So the trust question doesn't exist because you simply don't have one state to trust or not to trust. So you adopt particular solutions. Why? Because when it's too hard to adopt a new general rule by consensus, on a civil law basis (parliament), then you must recourse to decision of courts to create rules. So we need a common law system in the globalized world, because since we don't have a global state, we need to find solutions case by case, and these solution can be adopted by international courts for example by the DSB of the WTO. In Europe, for ex, we don't trust State, we don't think people in the administration are special person, thus we also adopt solutions case by case. This is why, for regulatory law in particular, the common law will become the most powerful and the more global law.

This is of course because the US and the UK are very powerful, because American are very powerful, but not only. We don't have to be paranoiac: it is not only because American are very powerful politically and economically and thus also legally, but also because the common law is more adapted to the problems of States, with the global markets, with politics, problem of trust in State etc. especially in a globalized world. So if we try to anticipate the evolution of legal system, it is probable that the common law will become the global law. And the more powerful figure will be the court, and the independent regulators because the courts, for example with the system of private retaliation in the WTO and the independent regulatory bodies, independent from any states, will be adapted to the global perspective, and to find better solution adapted to international matters.

TITLE II THE COMMON RULES OF REGULATORY LAW

Section 1 The place of general regulatory law in the legal hierarchy of norms and powers

I) The hierarchy of norms and the legality control

We could have difficulties because legal norms are made by state and it distinguishes at the national level and the European level. The regulatory system of market could be at different level if the market for example is global: for ex for financial market. SO you could or you must prefer to organize a self regulation without legal norms, not because you don't like law but because the object of the rules for example the market, is global, and the states which can create legal norms is only smalls parts of this global entity. But we need sane common rules for these entire global common markets, competition rules for markets of goods through the rules of competition, or regulated market for financial markets. How to do? You can do it with self regulatory law, or with co-regulatory law.

A) Self regulation, co- regulation and exogenous regulation

1) The autopoiesis organization of regulated industries

- ***First, The solution could be to forget the legal rules, or at least to forget the legal rules created by states, even by Europe, even by regional area, and to create and to adopt self created rules, rules created by the market.***

If you believe that the market is able to create by itself prices and high quality of goods, then you let the market functioning. And you only let, through the WTO, the global market merely organized by itself. But, if you take regulated sectors, it is more difficult because for example the market is not able to organize the energy sector, or the financial sector or the banking sector, in which the market cannot organize by itself natural monopolies, which are network.

The solution could be to give a simple power to an international organization, for example the OECD. It makes the addition of what happens in different countries and after makes a bench marking, a comparison, between each practice, then tries to define the best practices, and after that to build a code of best practices through this bench marking.
And this international organization just published these codes of best practices and because these practices are the best, of course every state will adopt through their legal system these practices. And for example, against corruption, against the practice of money laundry, the OECD adopted or proposed rules, published a lot of studies and after that States can come and adopt legal rules. So at first it's a first of academic work, a sort of work of comparison, with bench marking, then at the second stage, states will adopt legal rules based on these works.
Remember the system of Bale 1 and 2, the process is the same. Governors of central banks met together is Switzerland, worked together in order to find best practices in the monetary and banking area, then every governors of central bank in every country adopted these norms and made them legal rules.

SO the first step is only a soft law. Before the financial crisis, we thought it was the best way because it was indeed a study of best practices made in every country, we selected the best practices of all, published a book by the OECSD and after that every country enforced these rules, in a second step, through the hard law. The transformation of soft law into the hard law is thus the second step. We thought it was perfect because we don't need a global state to create the rule and to organize and efficient and controlled legal system, because there are 2 steps: the fist moment is made by discussions with every one which create a soft law, and for example the system of Bale 1 and 2, the meetings in Switzerland are with all governors of central banks, but also all president of private and private banks and many professors of economics, of banking economy and of law. They study many different cases of best practices and after that it is easy for each governor to import these rules into its own country. So we don't need a global state for that.

And if you merely want to have self regulation, we even don't need the second step! It is sufficient to have the step, so only soft law, if when one person says something the other obeys automatically. This is the self regulation. This is not the same self regulation as the self regulation of the market. Because in the market and competition law, we need the market but we don't need someone. In the self regulation of regulatory law, we need someone who says something, to whom the others will immediately obey. For example, in the context of the financial measures taking to help banks, the President of one of this bank can say in the morning he will take stock option and the President of the AMF said that he is against this decision and said it on television, only on television. And immediately the President of this Bank changes his mind and gives up the money. This is a self regulation system. Why? Because the president of this regulatory body has a great authority in himself, it is a sort of charismatic authority, and if the manager continues to keep the money he will have a great problem of authority. So if you are in a sector where every one knows every one and have in the center a regulator and even more if the regulator speaks on television, then when the regulator says something, every one listens and every one will adapt his own conduct to comply with what the regulator said. So it is a system of self compliance.
And why does the company complies to what the regulator say without legal obligation? Because if he doesn't, the others will give him up, perhaps because the regulator is his own brand, perhaps he has admiration for the regulator, because the regulator was the best scholar at his university, or the best academic or his own teacher, or because in another case, the regulator will remember that for example bank A didn't apply what the regulator ask before, and the regulator will next time punish this bank in another matter. So with this sort of self regulation the system is efficient by itself with only soft law.

This is why, before the financial crisis, we thought that the global financial markets were correctly regulated by self regulation through soft law. This is the theory of autopoiesis law. This Greek rules means to by made by one self. So autopoiesis law is a law made by myself. The implementation is not a problem because there is an auto observation and the regulator always look at companies, the companies always look at the regulator. And when the regulator say something, the companies comply with what he said automatically. If they don't, the regulator will remember. So, we need area with few companies. And it is the case in energy, telecom, banking where there are few companies. EDF always look at the regulator and the regulator always look at EDF.

- ***Another system of self regulation is the deontology.***

There are moral rules adopted by a profession. There are 2 sorts of moral rules: moral rules adopted by each person, which is not a problem of the law because there is a gap between moral and law, and it is the bets organization because when the law begins to control the moral of each individual it's not good for freedom. But we have also collective moral rules in professions. This is deontology.
For ex the intervention of conflict of interest: if the rule of deontology is not a legal rule but neither a simple moral rule for each person, and if you are a very strongly moral person, because we have a strong sound of public service, the conflict of interest is not a problem, and it is not a legal problem. But if you are in a liberal profession such as a lawyer, or an accountant, or an agency of rating, you must not have a conflict of interest. And you must respect this deontology because you are educated by the profession itself. So for example, the lawyers are educated in schools, not at the university, and after the universities, lawyer students go to special school for lawyer (same for judges) managed by lawyers. And these lawyers teach them the deontology of the profession. They didn't learn this deontology at the university, but in special schools. And this deontology rules and taught by lawyers but not by professors of law, because it's not a problem of law, but of deontology. And it is only a lawyer who could really explain and teach deontology, and not a professor of law. It's the same for doctors. In this sense it is exactly the same for self regulation: we have a lot of lawyers firms, and you have a self regulated institution, for example the global order of lawyer, and they take self regulation, and this sort economic companies domestic, complies with this education. This special education is not only a legal education but also a sort of collective moral education through the deontology. And you find system of deontology in law firms, in banking area, in financial professions. These professions all think they have a great deontology, and this is why they are self regulated, and say that the world wan have trust in them, and it is thus not necessity to create legal rule, it's not necessary to give the power to the state to create legal rule, because there is already a self regulation because there is a great deontology. And after that came the crisis. Thus, we don't trust that anymore.
So There are real regulatory rules, without state, through self regulation, it is a system of auto observation, auto poesis law, and auto compliance, through deontology, because because people are educated through themselves. States need not to build the system cause it already exist.

But Europe think that it don't believe that they are so well educated, but rather are simple Homo economicus, that banks are only simple companies, and thus don't accept self regulation. Self regulation is a system to organize satisfaction of their own interests. For example to obtain huge commission for banks, or huge fees for law firms without competition between law firms. And for the moment there are battle between the EU commission and law firms, and accounting firms, because the Commission would like to apply the competition law and these companies try to convince the Commission that self regulation exists. But if you want to convince the commission that these moral thing exist, you must convince the commission that you have a special deontology. It's hard cause the commission only accepts the system of the Homo economicus. And the Homo economicus doesn't have any moral consideration.

Question: difference between self regulation on a simple market and on the financial market.

On the simple markets, you only need competition law, consumer who look at prices and go for the lowest ones. In regulatory sector self regulated, we need special rules, but since we don't have states to edict them (because we don't want them or because the market is global so you can't have it), then you need a sort of regulator but without states some operators, must create spontaneously rules through the codes of best practices, and for example through meetings and academic theory. And after that you must create a special relationship between the central regulator with the regulate. For example the regulator made his studies with the president of the banks, and when the president ask money to the regulator, the regulator says yes and when the regulator says he's not happy with the bank's president behavior, the president stops; It's self regulation. The more regulators you have, the more the market functions. With this regulatory model of self regulation, you need to have only a few companies because you must organize an auto observation and every one must know every one.

In a simple market, the offer and demand is blind. It's only regulated by competition law and for the consumers are alone and handle what they want and need. In the self regulated system, because the President of the bank is you friend you can create a simple relationship. In the banking area it is possible to resolve the crisis only by phone in one afternoon because the president believes the regulator and vice versa. This is possible only by decision without state, without a judgment of cost, so without law. IT is not possible in a simple market but we have not a real possibility of global crisis in the simple market because we don't have a system risk. Because when companies go to bankruptcy, it's not a problem because there's no domino effect, and it's only a proof that it was not a good company. Whereas when a bank are financial institution it's a very huge problem because this area is governed by the prevention of system risk. And because every one trust every you can solve the crisis only by phone. So this regulation is a sort of self regulation. And what it is said by phone, no one knows (outside of the system). And after, they all play golf in the US, and in England, they all drink tea; So a financial crisis in the US immediately all president of banks go to play golf, and if we are in the UK immediately all president of banks, governor to bank of England and prime minister go drink tea together. And then the crisis stop though self regulation.

- ***The shared regulation***

In a classical conception, we have a body, for example the State, which takes rules and applies these rules on one object. For example you and me, or for example a sector. In this classical conception, you thus have the issuers and the receivers of the legal rules. The first step is this issuing by administration, parliament, regulator , etc. And the second step is you me, companies, state owned enterprise, private enterprises etc. Without communication, because in the first step you find the legitimate bodies for adopting rules and in the second step, you find only receivers of these rules, without legitimacy, but it's not a problem because they just obey the rule. This is a classical presentation of the system.

And especially in the administrative law, because and it's not the same exactly for contract, but in the administrative law it's important to have a legitimate body to adopt the rule, state, administration of regulator, and after that, we have all the people who obey to the rule, or try to not obey a rule. So we have a problem of information and efficiency. Because if the interest of the receivers are against the rules adopted by this legitimate issuers, like states, this companies, or you and me, will try to disobey to the rule. And if you disobey and try not to comply with the law, you will be punished.

But, by definition, if we don't have a state, there will be problem of efficiency of the rule because if it is against your own interest you will try to no comply to it, and there will be no State to punish you. This is the same problem for competition law and for regulatory law, because we don't have the State. This is why we don't have a global anticompetitive behavior law.

Another problem: the state or the administration or the regulator don't have the information. The information is not at the first step, but at the second step, at the second level (you, me, companies) because companies or the market itself or the sector itself have information. Of course, companies know that they don't comply with the rules but regulators do

not know that. So it is hard not only to punish but also to know when we must punish. So it's a second difficulty named the ASYMMETRY OF INFORMATION.

For example EDF knows the functioning of the sector, and knows how itself functions, more than the regulator does. In each country for the moment, banks know what sort of toxic assets and how many toxic assets belongs to them. And the regulators and the State themselves don't know. For example, in the US, the white house don't know how many toxic assets the banks own. Banks know but don't want to give the information. So there is a big problem between asymmetry of information, and we don't have a state to punish the person who doesn't respect the rule. So if you don't like self regulatory system, because you don't believe the reality of deontology, the solution could be CO-REGULATION.

Asymmetry of information is an economic rule, so you can't really adopt a rule and be sure it will be applied by the actors because asymmetry of information is real. IF you have a self regulatory system and taking into account the problem of asymmetry of information and the fact that you can't create a legal rule and be sure it will be applied, then the solution could be CO-REGULATION.

You take a sector, you put the regulator at the middle of the system. IF it's not a global sector, then the sate (parliament, government) is outside of the sector. The sector is composed on companies. This is co-regulation.
For example, about the media organization, you can organize a strong relationship between companies and the regulator inside the sector. And the regulator can always look at the companies. And for example, he can always examine the accounting of each companies. He can watch every where in the sector, monitor every where, and each companies can discuss with the regulator when they want. It's a sort of transparent relationship between regulator and companies. This is why companies must trust the regulator and the regulator must trust companies. And the regulator must watch every where. This is why we said that this sort of new political conception made the regulator a Panopticon. It's a Greek word designating something which can watch every where. This political theory of Panopticon was made by a French author, Michel Foucault.
It said not especially about regulatory problem, not about economic problem but just about hospitals, and state, that it could be a dangerous system because you have power inside the sector, or inside the society, and this power can watch every time and every where and every one it wants. For the moment, in the academic area, many professors say that this new system of regulatory system is very dangerous. These type of regulators are dangerous because they can watch every where. AND we will see that they also have all types of power. French academics say that we didn't do the French revolution for that, because it's a come back to the middle ages with this co-regulation system.
In Prof. Roche's opinion it's the best way to resolve the global crisis and organize the regulation area.

In this sort of conception, there is a permanent relation between the sector itself and the regulator, and for example when the regulator would like to adopt new norms, we ask the sector and it is the same for each sector.
It's the same for the European commission: it opens a consultation. You can go on internet on the site of the European commission. For ex it wants to adopt a new directive on energy, and ask to everyone of the sector or consumer to say what you think, what you can propose, and after that the regulator will think about what you would have said and consider your ideas.
In the financial area, it's less academic and more strong relationship and there are general regulation on the financial market not only made by the regulator but only though the regulation adopted by the regulator: it's made by the regulator and the actors of the sector. At the same time the regulator of the financial market can the propose the text for adoption to the ministry of finances; And the minister adopts the text without qualification. So it's a regulation adopted though strong relationship between regulator and companies, because you are at the same time inside the sector, they adopt rules together, and after that the government just puts a signature on the paper. It's a co-regulation and this co-regulation could fight against the asymmetry of information. Because in order to cooperate to the adoption of the rules, the companies gives the information to the regulator.
So it solves the problem of the asymmetry of information, the co-regulation can resolve it because companies give information to the regulator in order to let their own private interest be taken into account in the new rule, and after that, the problem of the intervention Of the State is also resolved because the regulation is also made by the companies, so they will comply to the rules they adopted themselves! So it's a new form of regulation, in which we don't need a State. Of course there is a problem of legitimacy but there is no problem of efficiency. The co-regulation is efficient but it's not very legitimate because we don't have the intervention of the State and the sector can organize the capture of the regulator. But at least there is a more performing efficiency of the system.

In a traditional functioning, there is no problem of legitimacy but a great problem of efficiency. Even the problem of punishment will be resolved in the co-regulation system because every one understood the regulatory norms because they are made at the same time by the regulator and companies, through general discussion, through informal meetings (for ex the Lamfallusy process, and the regulator have many friends) and it is thus self accepted. Because the companies have satisfied their own private interest, there are no problem of implementation because they don't try to disobey the rules they created themselves. There is a balance between the interest of the regulator and the interests of companies but this balance is satisfied through the meetings. And generally each country will modify its regulation because for each financial market there are changes.

What could a solution to the punishment problem? Because companies will still not for sure apply the rules even though they made with the regulator? You can organize the system between co- regulation and incentive theory and get class action. You give consumer the power to attack companies. This is why for the moment regulators have asked the State not to give more power to consumer, in order to have a better implementation of regulatory law and of competition by companies. SO if you cross co- regulation and the incentive theory you can be sure that companies will obey to the rules.
For the moment we can only recognize the best way is the regulatory perspective, but to build it is very hard.

Response to a question: there are 2 types of regulation. When you open to competition a sector which was organised around a natural monopoly, it is not enough to just pass a law and declare that there is competition because there will still be barriers because the formal natural monopoly is very strong. So to organize a free competition you must organize regulatory system for a moment, and when potential competitors can come and enter the market, the regulator can leave; and when you have a technical sector, then the regulator will be there forever. SO the balance is only between competition with simple markets, without legal public monopolies, without technical networks, without essential facilities, so the balance is between competitive system, competition law and regulatory law. And it's made by engineers, because it's based on technical consideration.

The second conception is a political one: the market is not the only way to live for people. So we have a market but we also need education, health, culture , etc because we are human beings and not only consumers.
So the government or a Parliament can decide to use public money in order to give people an access to its own culture, or the culture of other countries. For example, because we say, and this is a political decision, that culture is not a simple good. This is not a technical consideration but a political consideration. And the balance must be built between markets and political consideration, for example education, culture, health , etc. It's a decision by State. And the State decides with norms and with public money given by tax payers. And both are regulatory system.
If you are liberal, you accept of course the first part of regulatory system, because it’s part of economic rules, and you can't organize a financial market like a simple market because a simple market don't give information. And in a simple market you don't have regulator. But on a monetary market you need a regulator who gives for ex the rates of money. So if you are a liberal Professor of economics you accept of course the first type of regulatory system. And when you have a crisis, for ex a blackout of electricity, then you immediately say that you need more powerful regulator.
But in the other conception, which is more political, and is different in each country. For example, in France, culture is very important. And thus we adopt a rule saying that all museums are free. And because French people love food, we say that wine belongs to culture, so we organize a sort of regulation for wine to protect it. So it's a political system which organizes the balance between free market and the protection of goods which are not simple goods, not for technical, economic and neutral consideration but based on political consideration.
And the European commission accept the first system but don't accept the second system. And when for example you take the law firms, the law firms say that they are very special person because they have a high moral conception of their work. For example you can work for nothing. And in the US it's a pro bono work, a work to work for people without being paid. In law firms, some lawyers make pro bono cases. Why? Because they think there are special, and it's a moral duty to take a case from little people. It's not the same people on a normal market, but lawyers are a sort of aristocrats, such as in the middle age. But the European Union says it doesn't understand that: it only sees law firms, which give services of legal knowledge, and ask a lot of money. This is why the EU will apply to them rules of competition law. And for the moment there is a great triangle between the European law firms and the European union, because it's a political conception: are law firm firms like any other ones? This is not a technical question; it's not a problem of the balance between the simple market and companies, and political and moral consideration. And there are many variation between different countries, since for ex there is not the same battle between competition law and technical regulatory in both type of regulation.

B) <u>The role of the legality control in regulatory systems: The submission of the regulator to the general demand of legality</u>

You must give a scope to the different powers given to the regulatory body. We have the sector, and inside, at the center of the sector, there is the regulatory body, with companies. We don't have the State, or we say we don't dispose of a practitioner State which cannot only adopt general rules but also take individual administrative decision, and also organize the implementation of its general through judgment. This is why, 20 years ago, because in Europe we decided to build a common market, and because 10 years ago some markets became global, we decided not only to build regulators, national, European, global, but also to give them all the powers it was possible to give them. This is why these regulators are so powerful, because we need not only legal rules but also efficient legal rules, without State**.**

1. ***First of all, the regulator has normative powers.*** We have the sectors which need rules, and a regulators to whom will be given all the powers possible, so at first they will have the normative power. This normative power can be not only hard law but also soft law. This normative power are controlled by courts, through the control of legality. In a civil law system, this controlled is made by administrative courts. In common law systems, this control is made by ordinary courts. For example, if the regulatory bodies or financial markets adopt a general regulation for the financial market which is not conformed to the law itself, then the administrative court, for example in France the State Council, will cancel the regulation adopted by the regulator.

There are two sort of controls: the external control and the internal control. So the administrative courts in the civil law system will control the regulation adopted by the regulators through 2 sorts of control: external and internal.

<u>The external control</u> is only the control of the power and the use of the power in itself. For example the legal competence of the administrative body or regulatory body. For example have given the power to the regulator to watch this sort of deal of the market, then the regulator adopted a regulation about another sort of deal. It's not conform to the law and it's a problem of competence of the regulator. It's a problem of external control. Because the regulator, which is an administrative body, an independent administrative body uses a power that he didn't have because the law didn't give this power to him.

<u>The internal control</u> is more difficult because it is a control on the decision itself. For example, the administration or the independent administrative regulatory body has taken a regulation in order to obtain a goal, but it's not the goal which the law would like to obtain. So there is problem of contradiction between the goal of the law and the goal of the regulation adopted by the regulator. And this is a problem of internal control. But at last, we have like for every administration, a power of opportunity for the regulator. The power of opportunity is let to the administrative body and the court has no power to control the decision taken by the regulator. And because the regulatory body is independent from the government, the Parliament and independent administration, his power of opportunity is very large. Definition of power of opportunity: a discretion power. For example, the reasoning of teleology gives a great power of discretion to the regulation because he don't apply legal rules adopted by the parliament, but first determines the goals and then applies the rules. By this way, and because the regulatory body is independent, he has a great power of discretion. This is why the regulator have also a great problem of legitimacy towards the politics. Because he is not elected and yet has a great power of discretion.

This normative power is an ex ante power. It's a Latin expression adopted by professors of economics. This is a big distinction between competition law and regulatory law because competition body exercise their power after the anti competitive behavior, so it's an ex post power. And the competition body doesn't have any ex ante power, but only an ex post power. But the regulatory body has more power, is more powerful because it has an ex ante power, by adopting general rules because it has normative powers. And competition bodies don't have this sort of power.

2. ***The second power of the regulator is the power to adopt individual administrative acts, adopting administrative individual decisions.*** It's also a very important power. It could be an ex ante power. For example, if you want to create a bank, and because the system risk exist and the prevention of the systemic risk is given to the regulator, you cannot exercise the banking activities without obtaining an agreement from the regulator. If the regulator agrees, he will grant you the authorization to exercise the banking activity in the area; The regulator thus take an administrative individual decision about the bank. The bank may attack this ex ante decision before a court if you don't agree with this

administrative decision. You will do it before an administrative court since it's an administrative decision, and not before a judicial courts before this is not a simple market.
But it could be also an ex post power. For example, on a financial market, if you would like to take control of a public company, a listed company. You will begin a take over (OPA). And at the very beginning, at the 19th century, take over were not regulated at all and the bankers, who invented the system of take over, only published in the newspapers that it will buy each share of the company. But now the system is organized and if you decide to take the control of a listed companies through a take over mechanism, you must first decide to begin a system of take over, and to obtain the authorization of the financial market regulatory body, and the regulator will examine if the price which is offered by the you is fair. If the regulator accepts, you can continue the take over mechanisms. If not you can discuss with the regulator, and propose another price, or there can be a battle between several companies to take over a single companies. If you disagree with the decision of the regulator you can attack before a court the ex post decision taken by the regulator. This is complex because the kind of ex post decisions can be attacked before a judicial court. So when it's an ex ante exercise of power, the control is thus made by administrative court. But when it's just an exercise of individual power, the control is made by judicial court.

Competition bodies don't have any ex ante power, and don't have any general normative power. They just have some soft law power such as guidelines.
This is why, we can say that the regulator is a little state: a little parliament, a little government of the sector it is assigned to.

But imagine that a network, for example energy, and a company, EDF would like to sell some electricity to this firm, for example Suez, which is a huge company which uses a lot of electricity, you can imagine a contract between the 2 in which EDF agrees to sell a lot of electricity to Suez. The difficulty is the production of electricity and the transportation of this energy between the area of EDF and the localization of Suez. So, EDF and Suez made a contract with the facility owner, which is in France RTE. So there are 2 contracts: a contracts btw EDF and RTE and another contract btw Suez and RTE for some billions of euros. Imagine there is a conflict btw RTE and Suez, because they disagree on the price, and because Suez says you must build a better network, not only on the principal network, but also on the network btw their principal network and Suez's localization. So this a dispute, a dispute about a contract. But a dispute about a contract about an access to a network which is the center of the regulated sector. This is why, now, since 10 years, the regulator also has the power to resolve the dispute between companies when the dispute is about the access to the network. Remember in the WTO the central role of the Dispute settlement body. It is the same for network industries because now the regulator has the power to solve the dispute btw companies when the subject of the dispute is the access of the network. So it's a dispute settlement power. This power is controlled by the judicial courts not by administrative courts, because the access to the network is made by simple contracts, so it's a sort of private law. But because it's a problem of access to the network, it's a problem of regulatory matters, and so it's not given directly to a simple court but given to the regulator. And because it's made though simple contracts the control of the decision taken by the regulator is given to a judicial court.
The decision of the regulator is important because it can talk about the price, the technical condition, but also a decision on whether the technical owner must or must not open the access to the network. It's obvious for energy, for gaz, but not obvious for media. When the regulator resolves this sort of dispute, it functions like any civil court, because it solves the dispute between two parties. And because he's not only a guarantee of the access of the network, guarantee of the access to the network , etc it's like a court itself.

And because the regulator is thus like a court itself, it must respect the principle of due process. For example, he must organize a trial, a sort of real trial before itself. And if he doesn't do it, the country will be punished though the European Convention of Human Rights. Article 6 of this convention says that every one has the right to a fair trail, to an impartial tribunal. And because a regulator which solves a dispute btw 2 companies acts like a civil courts, it is obliged to respect article 6 of the European Convention, and first the due process. And for example, France was punished many times because regulators didn't respect article 6. And for example, up to 1998, the State council didn't want regulator to be oblige to respect art 6 because the State council said that the regulator is not concerned by art 6 because there are only administrative bodies, but not courts. But France was still punished because in the European conception a regulator is a court where a regulator solves a dispute and thus must respect art 6. In France, we have a special case about financial markets before the council of State of 1998 called DIDIER. Through this case the council of State recognised that the regulator must respect art 6 cause when it solves a dispute btw 2 companies it acts like a tribunal.

So 1st normative power, then administrative individual power, 3rd power of dispute settlement, and 4th the power of sanction. When we look at the addition of these powers, we see that the regulator is absolutely like a little state of its sectors, with every power as possible. This regulator is not elected. He is only controlled by courts. Thus he will have a problem with legitimacy and problem with accountability. It's only a little state for little sectors. But it's difficult to say that the energy to say that it's a little sector, same for the financial sector etc. Those sectors are crucial.

3. ***Last but not least, the regulator has an important power of punishment.***

The regulator can punish anyone who don't respect regulations. It is the same body who punished companies, because this company has the violated the regulation taken by the regulator. It's like a circle. The company has violated the 1st power of the regulator. It's a strong control cause if the regulator wants to punish very strongly, it's easy for him to give the interpretation he wants of his own regulation. In the traditional organization, it's not the same body who takes rules (we have the Parliaments, courts; and subjects of law). But in regulatory law, it's a circle, with all power given to the regulator. Its thus easy to punish everyone everywhere and every time in consideration of its own normative power. So in reality regulator are very dangerous. But for the moment, we trust regulators. For the moment we say it's not a problem because it only concern technical problem and not political problems. We can trust the regulators because they are so technocratic. But the problem is that perhaps the regulator could be corrupted, or unfair. And in this case, the more important is the procedural rules. Indeed, you can either trust the regulator because he's the best in financial problem, or because you've know him for 30 years , etc. Or to be more sure of this trust, you oblige the regulator to follow procedural rules, and to be more transparent. In regulatory law, the regulator itself must be transparent. It's not the same for judicial or administrative courts, because courts have less power that the regulator. Thus, for the moment, we try to organize the regulatory bodies inside, for example we continue to give them all these powers (ex power to organize the transaction on punishment in compensation for information) but we oblige them to be conformed to article 6.

Also, we organize the way it is organized internally: we will thus have the President, and the secretary general, then a third party who will be in charge only of taking legal action, then a sort of board which will take the normative and administrative individual decision, and with an absolute barrier, we have inside the regulatory body a sort of comity for dispute settlement and sanctions with another President. Like that we reconstitute absolutely the State, inside the sector. In this very technocratic conception, we have inside the sector the Board which acts like a Parliaments with an ex ante and ex post normative power, then the civil and criminal power taken by the sort of courts after the sort of trial. This is why the regulatory body is conformed to article 6 of the Convention.

Some people say that we don't understand why it took 20 years to build this sort of body, because it's absolutely like the state. So why don't we keep our State? Because now we have a real replication of the State, but whiteout legitimacy!
The liberal answers is based on technical consideration, since the regulator is more specialized on its sectors, and knows better what the sectors need. Another argument is that because the State don't exist anymore on a global scale, we prefer small State inside the sector, and since the sectors can be globalized we thus have a new type of governance. Thus the regulatory system is very near the problem of global governance. Because to organize a global governance not only for simple markets but also for economic area which need governance, we need regulatory bodies inside sectors with a lot of powers, but also a strong control through procedural rules.
And the first principle is the due process. And for every body can verify that the regulator complies with due process, the regulator must be transparent. That's what the EU commission means when it talks about the "apparent" impartiality of the regulator. The "apparent" impartiality is the impartiality that every one can see. It's an English notion. The EU commission adopt this notion to impose on the this type of regulators. Indeed, since we can see when we look at the structure of the regulator that of all its components are separated and not handles by the same people, thus we can see that it's transparent. Being transparent means that the body is objectively impartial because you can see all the different bodies within the regulator, and judge by yourself that there are separated, and thus the whole body is impartial.

II) The regulator

A) The independence of the regulator

2) The principle against the holding of several function concurrently

Europe adopted the principle against the holding of several function currently for one operator which could be also the regulator. There are 2 functions in a regulated sector: if you open the sector to competition, the first function is to compete against the other offers (because the competition is now free) and the second function is to regulate. Before 1980 States at the same time were the operators and the regulator. They organized legal public monopolies, such as EDF, which was owned by the State, and at the same time the State regulated the sector. So the State dealt with the 2 functions at the same time. It wasn't a problem then because the State, when it exercised its economic function of production, transportation of electricity, it only tried to obtain the satisfaction of the general interest but not its own interest. So this wasn't a problem for people. And this State owned monopoly was managed by an administration, and this special people had the sense of public services. So as a State, they didn't want t satisfy their owned interest, they only wanted to satisfy their general interests. So it's not a problem to have a vertical integration inside the legal monopoly and it wasn't a problem to have an addition of these two powers (to operate inside the sector and regulate the sector) and the government only had the power to control this owned state enterprise and to chose the manager, to chose the president of this public enterprise. But you must believe that administration is composed by special people who try to satisfy general interest which is not the simple addition of private interest. IF you believe that, then the system is very efficient because you don't have an asymmetry of information, because it's one structure which has the information, because this structure creates, distributes and transports electricity and it's the same who regulates the sector. So there was no problem of asymmetry of information.

But Europe, especially the EU commission didn't believe that people in the administration or in the government are so special. They believe that every one every where try to satisfy its own private interest. If you open a sector to competition, you will have many competitors and every competitor will try to satisfy its own particular interest. Image you give to one competitor, because he was the state owned enterprise, you give him the power to regulate, then you can be sure that he will use this power to create an advantage for him against the others. This is why if you continue the link between the power to compete and the power to regulate, the others competitors will not want to enter the market. This is why to organize competition after the system of monopoly, you must create not only a distinction between these 2 powers (power to compete and regulate) but you must forbid the addition of these 2 powers for the State.
If the state has one enterprise in the sector he must give up the power to regulate, because the state, the government or the administration would like to give an advantage to its own enterprise, the public enterprise through the power to regulate. This is why the EU commission and every EU directive said that its forbidden to exercise at the same time the power to compete against the other competitors and the power to regulate. It's a sort of constitutional rule of the regulatory law. It's based on a sort of political conception because the EU bodies don't think it's possible for someone to prefer the general interest over its own particular interest. This is because EU bodies are very liberal and in a liberal conception every one prefer his particular interest, and in a simple market every one prefer his particular interest. So it's important to understand this sort of constitutional rule, state and member states are obliged to chose between keeping the power to have a state owned enterprise inside the sector (for ex to keep EDF) and give up the power to regulate, or keeping the power to regulate but in this case they must give up the organizing opening to competition of the enterprise. So what is forbidden is the addition: France preferred to keep the State owned enterprise and give up the power to regulate.

[illegible] How to give up this power to regulate? For sector who need to be regulated, it's possible through the creation of independent regulatory bodies. This is why regulator must be independent from the government, because the government of the State is the owner of the enterprise inside the sector and this firm is in competition against all other firms. This is why the independence of the regulator is also a fundamental rule of regulatory law.
Why? Because if this regulator is only a new sort of state organization, more efficient, a sort of decentralization of state organization, but not really independent, it's not a solution for this issue of addition of powers. So the creation of the regulator is not a sort of organization of the state, or a decentralization of the state, but a real political evolution of independence. And remember what we said about central banks: Europe has created European central bank without a European State. So it's not just a decentralization but only a new system, without the state.

Before 1980 there was no competition against EDF so EDF had a legal monopoly in the electricity sector. So How to compete against EDF? It had both powers: The power to regulate and the power to exercise the economic activity. It was not a problem before because we thought that people in government only served the general interest which is not only the addition of private interest but now every EU bodies say they don't believe that, and that national government will certainly give an advantage to its own enterprise. The EU directive said that at the same time I oblige member state

to open the sector AND to chose between these two sort of powers. Many countries preferred to keep legal owned state enterprise, which now compete with other operators. But by this way it is oblige to give up the power to regulate. The power to regulate must be given to regulator, to administrative regulatory body, and this regulator must be independent from the government, because if the regulator is not independent from the government, it's a come back to the same system as before the directive. But if you build a regulator, it must be autonomous, and this was the case for the central bank. It's the same thing to say I build a regulator and to say I build an independent body. And if a member state doesn't build a real independent body, or a regulator independent from the government, it's against the EU rule and this member state could be punished by the EU commission.

After that, the 1st directive was only the principle, the first package directive for every sector, which put forth that the regulator must be independent. After came the instruction on how to build the regulator. If you don't build independence, and if the regulator is composed of member of the government is composed of not special people, without sound of general interest, then the other potential competitors will not want to enter the market because they don't trust the regulator. Competitors don't trust the regulator which is not independent from the government which owns one of the enterprise on the market. SO if you want to create TRUST in the mind of other competitors, if you want the new competitors to enter the market, so if you want to create a market, you must obtain the trust of these potential and new competitors. And this trust is possible only if the regulator is independent. And it's exactly the same reasoning for money, we need a EU central bank when we created the Europe, because we need people to trust money, and for that we need the EU Central bank independent from the power of member states.
This is also true for financial markets: we need a regulatory body for financial market because investors must trust the regulator and investors don't trust the government (because government for example will give advantage to its own banks against the other banks. This is why the other banks, or the foreign investors don't enter financial markets without an independent regulator of financial market). So this notion of trust is very important: strong link between the independence of the regulator and the trust. If you don't have this trust, it's impossible to create a real competition, because potential or new competitor don't want to enter the market, and its more impossible for financial market because investor don't want to enter the EU market without trust in the independence of the regulator from the member states government (because no government any more tries to satisfy the general interest).

Before, 30 years ago, we believed that some people had a culture of stoicism: these people prefer the interest of other people and prefer to suffer for them. This was the case in administration, in governments and for the high bank. The high bank was composed of people who are sort of stoicist person, who prefer the interest of other.
The actual crisis gives us the demonstration of the contrary. So now we definitely gave up this conception of stoicism applied to State or bank managers.

¥ This was the principle of independence. The difficulty is to obtain real independence. But it's not sufficient to declare, through the law for example, to merely declare independence (same for competition). It's not sufficient to declare it but rather we must build the independence of the regulator. It is very difficult for the regulator to be really independent. It's a powerful body, but without political legitimacy (cause it's not elected) and is also independent from the government, but it thus cannot say that he's legitimate cause it's the government who him the powers.
In a classical state there is the government and the administration, and the power of the administration is legitimate because this power is given by the government and in many countries the government is legitimate because he is elected (for ex because there were election for the Parliament, which then has a majority, which then build the government of the country. In the US there is also the Courts). So there is no problem of legitimacy because the administration has the power to adopt legal acts because this power is given by government in a theoretical organization. But if the regulator must be independent from the government, the link with hierarchy is gave up. So there is always a problem of legitimacy. SO how to create independence and legitimacy at the same time?

2) The guaranty of the regulator's independence regarding the political power and the regulated industry at stake

The regulator is left between government which want to privilege it's own interest, its own enterprise, its own friends, and the sector interest. The regulator must be independent from both; the government, and the sector. The government is quite powerful and the sector is also powerful. As the regulator, this is why legal system gave to the regulator so many legal powers as possible.

So how to organize? It's not sufficient for the law to just declare independence. So it's more based on tradition and observation. In the US for ex the regulator are very independent because it's a tradition it this country. For example the SEC is very powerful because every one respect the regulator. But in civil law countries, for ex in France, every one prefers the government by tradition. Why? Because the government is elected, and after the French revolution we preferred an elected power to a non-elected power. Because the regulator is a sort of monarch, a monarch of its own little sector. And many academic people proposed to give up the system of regulator and to give back this power to the government. So it's difficult for many countries to accept the principle of independence and to organize it because many countries don't understand and don't respect the regulators. This is why we have other way to organize independence.
The first way is the charismatic way. The charismatic way is a solution to choose one person who represents by himself the value which will be recognized by every one. And naturally, not through legal rules, every one will respect the regulator. It's the charismatic phenomenon. It's a sort of self respect of the regulator. For ex in the UK because the University is very respected, they always choose professors of university. And it is the same for Germany, it is the same for the US, because the University is very respected. That have chosen professors who wrote many books about the sector, and who are very old and very famous; but in a country such as France, where the University is not as respected as in other countries, the administration is very respected on the other hand. So the people are chosen through the administration itself to become a new regulator. Every regulator in France came from the national school of administration (ENA). For example, the President of the EU central bank who is French comes from this school, and the President of the financial market authority too, the President of the Competition body too , etc. And in France, every one respect the administration because it's an old tradition, and thus respect anyone coming from this very famous respected school, which explains why every regulator comes from this school and thus from administration, but never wrote any book on the sector, because the criteria for university is not the same as from the administration. In the US and UK it is important to write books about these questions, but in France because administration is very respected, it's not necessary to write any book, it's more a question of natural respect for that school.
A third possibility is to create a technocratic regulator. It means to give the power to regulate not to a politics for example, but to an engineers of the network of the sector, or to a bank manager for the banking sector , etc. It was the case for the network industries. In these cases, the regulator first came from the administration, educated by the ENA, but if the regulator is technocratic, then he comes from the sector itself. He thus know very well how the sector works.

So because the task of the regulator is very complex, the regulator comes from the administration or from the sector. This is why every one knows him, this is why every one respects him, this is why the problem of asymmetry of information can be solves. But at the same time it's hard to obtain independence of the regulator, because the regulator has many friends in the administration and in the government, and many friends in the sectors. It is thus complex because at the same moment you solve the problem of asymmetry, you obtain respect for the regulator, but at the same time you can fear the capture of the regulator, obtained by the sector or by the administration, the government. So the goal is to obtain an efficient balance between the independence of the regulator, the symmetry of information and the respect of the regulator not only by the government but also by the sector itself, while at the same time the regulator is very criticised because he lacks legitimacy because he is independent from the government, is not elected and is so technocratic (only has a diploma). But he can't not be independent because all the system is built to the independence of the regulator. So it's a sort of vicious circle to try to gain all of that at the same time.

How to build a real autonomy then? A real regulator has many important powers. In reality, this regulator between sectors and government, government which has a great political powers, and between the sectors which has a great economic power and much money, and many information. The sector has information and money, and the government has money through the general budget, and many power.
So the law first organize the principle of nomination of the regulator. The regulator himself is only a person, the person inside the regulatory body compose an administrative regulatory body. So the nomination is for many cases and many sectors, made by the State. If you have self regulatory organization, for example about media, or lawyers, or this sort of sector, there is a sort of self regulatory organization, and in this case the sector will then choose the regulator. For example the lawyer will chose the person who will represent them, and he is a sort of self regulatory organization, and self institution organization. But for the other sectors, telecommunication, energy, financial market, banking sector, it is the state who nominates. This power of nomination is given to different governmental powers, for example the president of the country chooses the president of the regulatory body, and for example the president of the national assembly will chose one member, or three members. After the president of the country will chose 3 members, but this power of nomination is of course a risk of capture by the regulator of the government.

Because the government or the president of the country could organize a nomination of his own friends and could say that in exchange to have this power to regulate the market, don't forget who gave you this power: this is the phenomenon of capture. Because if you want to be independent, you must forget who gave your powers. You must adopt the attitude of ingratitude. So a regulator is really independent from the person who gave him this power if he can offer to himself a real ingratitude, and to forget the gift of nomination. This is very difficult. So how to give to the state the power to nominate the regulator while preserving the independence of the regulator in order to fight against the capture of the regulator by the government which gave him this power?
The solution is to forbid the continuation of the power of the regulator. The solution is for the law to say that the power of the regulator will only last 5 years. After that, it's not possible to give him the same power. So even if it was a wonderful regulator, and even if the President of the Republic remains his best friend, it is not possible to re nominate him. If it's not possible, then immediately, from the beginning, the regulator can forget who gave him the power because he knows that after 5 years the president will not give him the same power. He can thus easily adopt the ingratitude rule, and thus be independent from the President of the Republic, from the Parliament , etc. SO the nomination is made by the State but at the same time the impossibility to re nominate the same person after the term insures that the regulator cannot anticipate the second nomination, because the regulator is also an Homo economicus and he will always anticipate, because he wants to have a carrier. This is why, and it's more a sociological rule, we'd rather nominate an old and famous regulator, because when you are at the same time old and famous, you don't wait for nothing. In this case, you can offer yourself independence from the president.
The problem of this is based on the anticipation of people, of the regulator, of his carrier. So if you want independence of the regulator, you must offer no carrier after the nomination. This is why we have a little problem which arises: because if you want a real independent regulator, you must then chose a person who after 5 years will not have any carrier after that.
This is why they chose people from the university, because after their nomination they can go back to university. For ex in the US C. Rice after she finished a term, she went back to university. And choosing professor who will go back to university is better because they won't be offered to go work in the sector. But this carrier problem is a problem because then young people don't want to become regulators. Only old people with strong interest for general interest will accept the job.

[illegible] Another problem is the capture by the Sector. 20 years ago, the problem was only the opposition between analysts and the government. But there are also in regulatory law a problem between regulator and the sector. In the UK, 10 years ago, there was a scandal because the person who regulated the gaz sector, who was a professor of university, only one day after his term of regulator, entered an enterprise of the sector.
This is why now the law oblige the regulator to at least wait and for example, to wait for 2 years before entering an enterprise in the sector they have regulated. It could be 2 years or 5 years. This re created independence because then the regulator will not be able to anticipate his entrance in the market because 2 or 5 years is to far ahead to plan that. But the problem is that these sectors are so technical and complex, if you must wait for such a long time, you will no longer no anything about the sector. So it's another reason to refuse to become a regulator. And many persons refuse to become regulators because it's not possible to continue to be regulator and neither is it possible to directly after that enter the sector. But it's the price to pay for the real independence of the regulator because if the law doesn't oblige the regulator to respect these rules, because the regulator can make the anticipation, there is no independence.
We have a case about the regulatory commission of Media, CSA, about capture of the sector. A member of this regulatory body bought stock options of one firm of the sector. Not shares but only stock options. So a member of the regulatory body cannot have share of the company of the sector because if the regulator is the owner of shares of a company of the sector, of course he will give advantage to this firm because by this way he will do himself a favor. So every law forbids the regulator to have shares of a firms of the sector. But in this case the facts were different. She didn't have shares but only stock options. And stock options for 5 years and the term of her own mandate was before these the end of these 5 years. The mandate finished 2 years before the possibility to transform these stock option into shares. So the question was before the Council of State: is this particular situation forbidden or not in the eyes of the general legal rule? 2 reasoning are possible: in a traditional way, or in competition law, you can say that freedom is a principle, in general but also on a market. And the interdiction to buy or to sell or do anything is an exception. If you adopt this reasoning, you only have to see that the stock option is not a share, but a different situation, and thus you must adopt the principle of freedom and you must let the member of the regulatory body buy stock options. This is the traditional reasoning. But because we are in the regulatory law, we must adopt a reasoning through the goals, through the teleology system. We must then ask the question: why does the fact of having shares of company of the sector is forbidden? Because the goal of regulatory law is the independence of the regulator. Then, in consideration of this goals, it is the

same thing to have shares or to have stock options, because if you have stock options of a company inside the market, you can anticipate the moment you can sell stock options or transform stock option into shares, and by anticipation you can be tempted to privilege this company. So it is against the independence of the regulator. This is why the council of state said that the rule forbids not only the possibility to buy or accept shares, but also to buy or to accept stock options. Because it's the same in consideration of independence of the regulator. And the law is only a tool to obtain satisfaction of the goal because regulatory law is based on the teleology system.

[illegible] After that, the question is not only who can nominate the members of the regulatory body, but who controls these regulatory bodies?

Let's say the regulatory body is a box. There are 2 conceptions: you can say, in a liberal conception that the regulatory body tries to satisfy every type of particular interests, not only the interest to sell or to buy, but any kind of interests. In this case, you can put inside (in the box) the regulatory body the representative of consumers, representative of politics, representatives of technocrats, and this is the right composition of the regulatory body. And this proposition gives the legitimacy to the body because like that, through the collegiality, and through the discussion between consumers, representatives of companies, politics and technocrats, you can organize discussion and then adopt decisions which protect at the same time the interest of the consumer, the interests of the politics and the interests of the technocrats. And you don't have problem of legitimately because you have politics, elected though the national assembly or who come from the government, you don't have asymmetry of information because technocrats know the sector very well, no problem of tension btw regulator and sector because you put companies themselves inside the regulatory body, the box, and finally you can also protect the interest of the consumers. This is why for the moment in many legal system this sort of building of regulatory body is preferred.
But it's not so simple because for ex it's easy for companies, representatives of companies, to capture the representative of consumers and at the same time it's easy for the representatives of consumer to capture the representative of politics, because the politics want to be elected and the consumers represent people. So, for ex, professors of economics and technocrats, prefer regulatory bodies only composed by technocrats and expert. So only technocrats and experts in the box, without politics, without consumer and of courts without companies. Because they think that there is always a risk of capture of the regulator by the sector on one side and by the politics on the other side. And in the first design we put the sector and the politics inside the regulatory body. So it's the worst solution cause we put them inside the regulatory body. So Professors of economics rather only have technocrats and experts inside the regulator and organize the relationship of this regulator with the sector and the politics, and only give the power of decision to the technocratic person. For the moment many countries prefer the first solution, but it might not be the best cause you put all the different interest inside the regulatory body, and thus put the danger of capture directly inside the regulator. IF you only put technocrats, then they will think by themselves how to solve the problem of asymmetry of information and resolve only between technocrats, but not to solve the problem of asymmetry by putting all the interests in the same box.

[illegible] Question: How is that compatible with co- regulation? In co regulation, technocrats organize meetings between the regulator and the sector, many meetings, perhaps phone calls also, and after that they adopt common text, or common guidelines. But the sector is not in the regulator. And before we organize the co-regulation we make the distinction between the regulator and the sector. So the system of the box is not a system of co-regulation, which is more safe, but a sort of mixed regulation.

3) The articulation between autonomy and impartiality

Why do we want to obtain a real independence of the regulator? What other type of body must also be independent? In many countries, it's a constitutional rule that courts must be independent, and in many countries it's a fundamental rule for the President of the State to guarantee this independence of courts. Why? The court must be independent because should have to choose the solution based on the fact that it prefers one party to the other. He need not be captured by the first party. If the court is not independent, there is no legal system. We don't have a rule of law if the court are not independent. This is why it is the first rule in the Constitution. This is why it's the first duty of the President of the State to guarantee the independence of the court because without, we don't have legal rule. If the judge is captured by corruption, or by his feelings , etc and thus adopts a judgment trough these captures, the law don't exists. So then you don't need any law, or constitution. In France in 1996 the Constitutional council adopted a good decision which says that if the courts are not independent, we don't have any constitution. So why is the same for regulators (because we

don't say that for administration, for companies, for you and me, from parents to their children etc.)? Why must the regulator must not be captured, even if it is so difficult to guarantee his independence?

The regulator has a lot of legal powers: normative powers (general and individual), dispute settlement powers and also punishment power. This regulator is by definition independent from the government and from sectors. SO the regulator exercises all of his powers to the sector independently from the government. This is why he is the must powerful body as you can imagine. But of course this is a legal problem cause it's not possible to image someone who could have all the powers over a sector without control. So we need to organize a sort of control without diminishing the Independence of the regulator.

B) Liability and accountability of the regulator

The regulator must be independent but it is possible for him to be liable and he must also be accountable. So if we organize the Independence of the regulator, from the government and from the sector, you must at the same time organize the accountability of the regulator.

1) The liability of the regulator

For the moment, in many sectors the regulator is not reliable for his actions. It's the same for courts. In many countries, jurisdiction are not liable for the exercise of their powers. For example, in the UK courts are never liable for their actions, even if judges are or have committed faults. It is not possible, because it's against the independence of courts. This is why when a regulator have committed a fault, the consequence is the liability of the State, because the regulator is independent from the government, but at the same he is also an administrative body, this body is inside the State, independent from the government but inside the State, and so the liability of the State can be engage by the fault committed by the regulator, which the State will have to pay with its own budget.

☒ If you don't want this consequence, if the State don't want to be held liable for the regulator because the State is not able to give any order to the regulator, and the regulator in autonomous, he cannot punish the regulator, he cannot fire the regulator because he is independent, then the State refuses this liability rule. The movement is thus to give to the regulator a legal personality. If you give the legal personality to the administrative regulatory bodies, with an independent budget, then in this case the liability of the regulator itself could be engage for example by consumer, investors, before a court, and the regulator itself can be punished and must pay with its own budget. And it's not the problem of the State. So now, for example, for 5 years, with the new financial market regulatory body has the legal personality, and because it has now a legal personality it can thus have an autonomous budget. This budget is the guarantee for his independence from the government, and also it give the possibility to consumer or the sector to engage the liability of the regulator before a court. For the moment, Now, only financial market regulatory body has the legal personality and this organization of an autonomous budget. This budget is given directly by the Parliament, not by the government, because if this budget was given by the government, it would go against the independence. So now it's given directly by the Parliament to the financial market regulatory body, and because this body has a legal personality, his liability could be questioned before a court.

☒ It's very difficult to obtain the liability of the regulator: Because the regulator is an administrative body and this is why when you want to engage the liability of the regulator, you must prove a GRAVE FAULT and not a simple fault. And it is very difficult. Imagine a regulator which has taken an individual decision, and after that, the company concerned by this individual decision decided to attack this decision before a court. If the company obtains that the decision is voided by the court, for example through the take over procedure, then this annulment is obtained because the regulator has taken a decision but not in conformity of his own regulation. Then the court can indeed annul this decision. But is it automatically a case of liability? Not really, because the absence of conformity could actually not be a Grave fault, but only a simple fault. Then you can obtain the annulment of the decision taken by the regulator, while not obtaining at the same time the liability of the regulator. But if the absence of conformity is grave, then in this case the company will obtain at the time the annulment of the decision and the liability of the regulator (if it has legal personality) or the liability of the State (if the regulator has no legal personality).

☒ But which court will examine this question of annulment and the question of liability? Is it the same court which will examine both questions or does it involves two different courts to examine the question of annulment and of

liability? For example when a regulator takes an individual decision, because a firm made an abuse of market and the regulator punishes the firm, then the decision can be attacked before a judicial court. The firm can obtain the annulment of this decision because for example the regulator did not respect due process. But at the same time, the firm might also want to obtain the liability of the regulator, or the liability of the State for the regulator because the regulator don't have legal personality. Because it's an administrative body, the question of liability must be asked to an administrative court, for the same decisions. If the regulator for ex didn't respect the due process, then the decision can be annulled and the regulator could be liable for that decision and for that fault. Imagine the judicial court says that it agrees, the regulator indeed didn't respect the due process, then the court can pronounce the annulment of the decision. But, if at the same time the administrative court says that the regulator respected the due process, and decides that the regulator isn't liable (or the State isn't liable), then it creates a real problem of coherence of legal system. Because for the same decision, for the same question of the non respect of the due process, the judicial court says no and the administrative court says yes, even though they are both part of the same legal system. This is thus a problem.

Application of the theory of the block of competence

This is why the issue was brought before the tribunal of conflict to answer the question of choosing between the order of the administrative court and the order of judicial court. The tribunal of conflicts said in 1992: I will apply the theory of the block of competence. It means: normally we must have for the same dispute on a decision of a regulator, the competence at the same time of the judicial order or the administrative courts order. But this could create an incoherence in the legal system, and sometimes it is indeed hard to know to which court give the problem of resolution of a dispute. To avoid the problem of having two different decisions by two different courts on the same problem, the tribunal of conflict created a block of competence and gave all the competence to one order of courts, and like that we obtain only one answer to the dispute. Thus, the tribunal gave all the competence to the judicial courts. The theory gives all the competence to only one order to avoid the risk of incoherence in the legal system, the same court which will give the answer to the problem. The problem is not to know if the solution is right or wrong, but to obtain only one answers and not two answers which can sometimes be different. Why the judicial courts? Because after the decision to apply the theory of block of competence, the second step is to chose between the order of the administrative court and judicial courts. The tribunal of conflict chose the judicial courts because the tribunal said that this is a question of economic matter and not a question of State organization. So the block of competence is more natural for judicial courts than for administrative courts. Now, for a same decision, a company or a consumer wants to obtain not only the annulment of the decision but also the liability of the State or the regulator if it has legal personality, they can obtain that through a judicial trial, for both and at the same time. It will be the same court who will answer to both question of annulment and liability. This way, it is more coherent (for the moment, the regulator is never liable, because the condition of the liability of the regulator is hard to fulfil).
So for the moment the question of the liability, even the problem of liability of the State is in the hands of judicial courts. And this is very stranger for continental law system. It's usual in the US, in the UK, but it's very strange in the civil law system. This is why civil law systems are often against regulatory law because simple, ordinary courts are thus competent to punish the State. And in the French mind, in the French tradition, only an administrative court could have the power to punish the State. And remember, the judge who composed the administrative courts, especially the council of state, the judge comes from the national school of high administration (EAN). So it's not a problem because it's a sort of natural jurisdiction composed by the administration which has the legitimacy to punish the State; But now in the regulatory system and in the competition law, it is simple courts which have the power to punish the State (like in the US or UK). These courts are composed of ordinary people, who only went through the simple school of judges and not the school of administration (ENA).

Through this theory of block of competence invented by the tribunal of conflict, we have thus a decision taken by the regulator and image at the same time, we can have an annulment of this decision and also a liability. And it is a judicial court which will examine the question of annulment and the question of liability.

[illegible] But which judicial court? The decision of the regulator is a sort of jurisdictional decision after a sort of trial, through the due process principle, and after that you may attack to decision before a tribunal of appeal. The question of this liability wasn't examined by a judicial at the first step. So the question is: can the court of appeal examine the question of liability of the State or of the regulator, directly after the decision, or should the company or the consumer is thus obliged to put the case before a first judicial tribunal? Because in this procedural system, we have 2 level of

examination of the case: first level and second level. The first level is the decision taken by the regulator through this mini trial and second step is the court of appeal.
So logically the question of annulment must be examined by a court of appeal, but the liability should be examine by a tribunal of first level. But if you say that, you recreate a risk of incoherence. Because they are both judicial courts but the tribunal of appeal can say that the decision of the regulator is right, while the first tribunal can say that the State is liable because the decision is wrong.
This is why 1998, the case law response was that the tribunal of appeal has the power to examine directly the question of legality of the decision but also the question of liability, without first going through a first level tribunal. This is thus very complex because in a procedural way this is a judicial court, because we apply the theory of block of competence, but at the same time it's also an administrative substantial rule of liability. And in administrative rule the liability of an administrative body can only be engage in case of grave fault.
So if you want to engage the liability of the State, and we did it for example in France through the case "OURY", because for ex the regulator has committed a fault, you must do it before a judicial court. But is it possible just to prove a simple fault? Because in private law it is sufficient to prove a simple to engage the liability. Or do you oblige to prove a grave fault, because in the public, administrative law, you are oblige to prove a grave fault to engage the state? And the solution given by the Cour de Cassation is : in the procedural perspective the competence is given to the judicial court, but because it is an administrative decision, this judicial court must prove a grave fault, Such as it is demanded the public an administrative law. This is a perfect example of the mix of private and public law because an administrative legal rule is applied by a judicial court through the liability of the regulator. So the liability of the regulator is applied by the judicial court but in application of the administrative rules.

This question of liability of the regulator is very important because after the crisis, the question of the liability of the regulator will be pose before the courts through class action (about financial market, protection of the consumer, protection of investor) because the regulator didn't take right decision to prevent the question. So the question of whether it will engage his liability or not, this question will be posed in the US through class action (trials have already begun we don't know the answer which will be given by the judges).

Question: The conseil d'Etat say that judicial should not have the power to supervise these administrative decisions taken by administrative body to exercise this sort of police of market. The council of state asked the parliament to give him back the power to examine the power to examine the decision taken by the regulator. In 1986, the French minister decided to adopt the principle of free market. And the free market is self regulated, so we only have contracts, price of propriety or goods. We don't need state and if there is a dispute we only need courts, but we don't need economic police and we don't need state because we are in a free competition. Before 1996, the competence was given to the administrative courts in France because we believed after the second war that the market wasn't able to create his own balance. And we thought because we don't have enough rules we need a state and rules of police to create a right repartition of goods between every one. This is why it's an administrative and political question because this was just after the war. So between 1945, without market and without enough rules, and 1986, the question was only administrative question so only administrative competence. But in 1986 the Prime minister decided that the market is good enough, we have many offering parties, many consumers, a good repartition of goods, we can thus let the market function by itself. Thus we only need contracts and rights on propriety or good. And thus became a question of private law. In 1996, the power was thus taken by the tribunal of conflicts to administrative courts and gave it to the tribunal of appeal, because it thought that the economic problem is a problem of private matter (problem of contract, of private propriety) but not a problem of state organization. This is why we have bodies which can be administrative bodies, the control must be made by a judicial tribunal. Professors of administrative law and the Council of State are against this system. They say that this question is a question of administrative police of the economy, because it is a way for the State to step into the market. And for the moment, the council of State asked to the Parliament to oblige the tribunal of appeal to stop controlling the decision taken by regulatory bodies, and the Council of State ask to have again the power to control the regulatory bodies. SO in France we have a strong battle between 2 order of jurisdiction: the judicial order and the administrative order.
(The tribunal of conflicts was created by the French revolution. We said that we have a question of state and of general interest; only an administrative court can examine these type of question. We also have simple ordinary court for people with their particular private and simple internet. And for them we accept simple court. For French revolution, it's impossible for simple courts to examine the action of the administration. This is a constitutional rule. It's impossible for single judicial judge to punish the administration, because administration is more important cause it tries to satisfy the general interest and thus is more important than simple judicial courts. So it's completely strange for the common law

system. But for continental law, especially for France which had the French revolution, it's necessary to preserve the separation between the 2 orders: administrative courts on the one hand and judicial courts on the other hand cause it's not the same interests at stake. For administrative courts, the interest is the general interest which the administrative court thus understand, while simple judicial court deal with private, little interests and a simple judicial judge can settle these disputes. But it's politically impossible to let to ordinary court the power to examine the decision taken by the administration and of course to punish the state itself. This is why the separation of the two orders are important. This is why France created this tribunal of conflict to put cases in the hands of the order of administration courts or in the hands of judicial court. But it's don't work for our problem because on the market there are both private and public internet and so it's impossible to put the cases in the hands in one of the two orders. This is why it's easier in common law system; it's always the simple judicial courts which have the powers to examine the exercise of powers by every one (state, private person, firms etc.). Because they don't have this distinction of private and public.)

2) <u>Accountability</u>

We have to understand that it is not possible to let the regulator having so many powers without being accountable. When you are accountable, it is the fact to response of the use of your fault. It's not liability, cause it's not a legal punishment, but it's the fact to response of the use that you make of your power. This is why it's hard to be at the same time independent and liable. This is why for the courts and for the regulators it's hard to be at the same time to be liable and independent, but it's possible to be at the same time independent and accountable. This is why we have so many theories and proposition on the accountability of the regulator. It is difficult to organize the accountability of the regulator because it is not made simply through legal rules.

- ***The first way is the transparency:*** the legal system will oblige the regulator to function transparently. The sector, as we saw, is in auto observation, so every one watches everyone, and every one watches the regulator. And the regulator is obliged to be transparent. This is why the first in regulatory law is the obligation of transparency. This is not the case in another type of law. The obligation of transparency is put on companies and is also put on the regulator. Of example, the dominant company must have a transparent accounting, the financial companies on the financial markets must be transparent, and the financial market regulator must be transparent. And every one is an expert, every one wants to preserve its particular interest, and if they observe a wrong behavior of the regulator, it is immediate denounced (on television, phone calls, though international meetings, during diners etc.). It's a sort of accountability. If you don't organize this rule of transparency, for example for hedge funds in financial markets, or for toxic assets, we have a big problem of regulation;

- ***The second rule of accountability is of course the judicial review***. This principle is a common law principle. It is the principle that the decision could be also adapted before a court. For ex in the US the principle of judicial review is the most important constitution principle. This is a sort of accountability, and it is not against the independence of the regulator because the courts are also independent. So it's not a problem. And the government cannot give orders to courts, as he cannot give order to regulator. So you can put a control on the regulator made by courts because courts are also independent from the government. And in every regulatory system, courts are very powerful; If courts have regulatory powers such as in the US, or through the judicial review, it is a good system of accountability.

- ***The 3rd way to organize accountability:*** the rationality of the system and the obligation for the regulator to give the economic motivation of its decision. When a government or a Parliament adopts a regulation, they are not oblige to give an economic explanation. The only say that they are elected, and thus have a legitimate power to adopt this regulation and it is sufficient to say for a regulator who is not elected that he is obliged to give an economic explanation (in both to justify the individual decision or creation of regulation). Because of this motivation, every one can control if the decision itself is rational or not, because every one can dispose of the rational motivation. If the motivation is that the President of the firm of the sector is the brother of the regulator, it's hard to give a rational motivation, because then the privilege gave to that firm will be hardly justified in the eyes of other firms in the sector. So the necessity of rational motivation is very important to create accountability.

- ***The 4th system is to oblige the regulator to be accountable before the Parliament through annual reports.*** Through annual reports the regulator publishes a book, and every one will read the book in which the regulator explains what he did during the year: the decision, the goals, the difficulties etc. After that, the Parliament can ask to the regulator to

come before a special commission (special administrators, deputies , etc.) and ask the regulator explanation for some decisions to check if the decision were rational are not.

Last but not least, remember that the rule is less important that the goal. The first part of the goal is the power. The power were given to the regulator to obtain satisfaction of the goals. For example, the creation of a real free competition, or for example the prevention of systemic risks, or for ex the preservation of the fresh air etc. So the regulator uses the powers and uses them largely, to obtain the satisfaction of these goals, because he has a mission. The mission is not only to apply the law, but to obtain the goal. This is why, and it's not the case for the courts or for companies, this is why states organize now an evaluation of the action of regulators. And the State tries to evaluate if the regulator used its powers to obtain the satisfaction of the goals, and if in reality this goal is effectively obtained. It's an economic evaluation made by professors of economics. This evaluation is made by the State because the more normative rule is in the goal, (the legal such as the power is just the tool) and the system is the assessment system. The assessment is the fact to evaluate the satisfaction by the regulator to obtain the satisfaction of the goal: for ex the capacity of the regulator to open the market for real, or prevent the systemic risk effectively, or to organize for real the education for all , etc. And if the regulator didn't obtain the purpose, for example he didn't manage to really open the market or didn't prevent the systemic risk, then he is accountable before the Parliament, before the State.
In this conception, we have a very good articulation between the independence of the regulator from the government, and the control by the State of the correct use of the power of the regulator through the principle of accountability.

C) The appointment of the regulator

It's important because at the same time he has great power and he is independent from the government and at the same time from the sector.

1) The appointment of the regulator based on his structure

At the beginning and in the UK, the regulator was a person. For ex prof Littlechild for the electricity sector. They prefer to appoint a person because they needed a person who was very respected by the sector. (about the supreme court even though it's not a regulator: This is why they chose a person for example who wrote many books and who was a professor of university. The supreme court depends a lot on the personality of its member and Obama said he wanted to appoint a person a who doesn't not only knows the law.) If you appoint just a person as a regulator you will chose a person who has much credit, given by both the government and the sector.

- But now we have a more bureaucratic conception of the regulatory law. This is why we prefer to appoint an agency and an independent administrative agency. In this independent administrative agency there is a President and members. The appointment of members is made by for example by politics for ex President of the republic and president of national assembly or Congress. It depends on the country. Moreover, if this sort of body exist, the President appoints a social and economic council. We can imagine in this sort of organization that it is sufficient to see who has the power to appoint, everyone can be appointed (you only need for ex to have the right nationality).
There is also an expert system inside the AAI, and not a bureaucratic one. The person who is appointed then must have some qualities, for example some diploma or some experience in the field for many years. It is a system based on qualified persons. And in this case, the legitimacy comes from the qualification and don't come from the person who has made the appointment.
So, in many countries, the agencies are composed at the same time by members coming from the first system (bureaucratic system) and members coming from the second system based on qualification. For example, at the same time, we have professors, qualified persons, and anyone chosen by the President of the Republic. It's like a mix between both system, inside the independent administrative agency. In France, it's the president of the republic who appoint these qualified person. This is just the structure of the IAA. It's important to notice that it's of course independent, it's not just a simple decentralized agency of the state, even though it's administrative.
- private regulators; But we don't restrict the regulatory bodies to administrative agencies because there are many private regulators. So we don't have to make a strong difference between private regulators and administrative regulators. It could dangerous if we say that the regulator is only the administrative body, because it will say that the private regulator exist de facto, and de facto strong power and isn't accountable by the law nor liable by the law. So we prefer to recognize the existence of private regulators and by this way organize their accountability and legal liability.

We will see two examples:

- Internet: At first, economists said that internet is not a problem because internet is self regulated. Internet is such as a market, so as a market it is self regulated because the offer can find the demand. But, it's not really true because for example we can imagine people disagreeing and we could imagine a dispute between an offerer and a demand made on internet. This is why we have now an international private associate, called ICANN, spontaneously created and which has the power to resolve disputes, and which gives the domain names, which is of course a very strong power. And if you would like to have the benefice of the power of ICANN, you must pay ICANN. Since it's not a public regulator but a private association you must pay. But ICANN is approved by every one because it's a global regulator and the problem of regulatory system is the level of regulatory and for many things we need a global level. And thus for internet we need this global level of regulation because internet is every where.

- The second area is the sport. The sport doesn't have any administrative regulator They only have a system of federation, sport by sport. For example, the international federation for football, FIFA. The FIFA has much money, has its seat in Geneva Switzerland, and has many powers and for example the power to punish. So if someone doesn't respect the norms because the fifa also has that power to adopt the norms, if someone don't respect norms this private regulator would punish this person, or this national club. And could also punish through final punishment but also the interdiction to play for some month, so a sort of retaliation. So the FIFA is an absolutely private regulator. Some people say that this sort of private regulator are too powerful and too much money. The budget of the FIFA is enormous.

So these private regulators have too much money because they oblige people in Internet, people in the field of football, to give them a lot of money because the sector is captured by the regulator. It's not possible for people who would like to build a club, or would like to solve a dispute on internet, not to pay this private regulators. So the first problem is capture.
Other problem, is that these sort of private regulator don't have any legitimacy.
[illegible] Finally, some people say that these private regulators don't fight against problem general interest, for ex pornography on internet is not the problem of ICANN. And for the FIFA, Which adopted a code of best practices don't try to fight the doping problem.
[illegible] So the solutions could be the creation of a sort of independent administrative authority for sports, especially for football because we have so much money, and for internet. But like for financial market it's quite impossible cause it's a global area. IT's was not like that before but the problem retransmission on TV made the FIFA very powerful. The problem occurred when football started to be very lucrative because of retransmission on TV.

Recap: So this is the appointment of the regulator though its structure: administrative agencies, or private regulator. And if you are inside the independent agency, we have charismatic regulator through one person appointed, or a more expert appointment, or a bureaucratic appointment.

2) The appointment of the regulator based on its functions

The regulatory law is made through the goals, through the logic of teleology. This is why the appointment of the regulator is also based on the goal, on the function. The substantial definition of regulatory: the regulatory law is in the goal, the legal rule and obligation is only a tool. This is the same for the appointment of the regulator: the regulator must be appointed through the goal. It's there a sort of reflection between the substantial definition of regulatory and the system of appointment of the regulator. You must appoint a person who can obtain the satisfaction of the goal of regulatory law. This is why it is so important to appoint a person who can obtain the satisfaction of the goal. Not only an implementation of the legal rule, not only a good lawyer, but especially a more strategic person who has experience and who can obtain for the sector and from the government the satisfaction of the goal. This is why we spoke of the nomination of the next SC member, because when Obama said he doesn't want to chose someone who doesn't only knows the law in books but know it for reality, it is the same rationale to appoint a regulator. This is quite natural because prof obama was before a professor of constitutional law, and the constitution is a sort of regulation for country. But, when you have build the regulator based on the goal, it's hard to constitute a network between regulators, because regulators must work with classical administration and the administration just has to obey the government. SO the regulator is a sort of « administration of mission ». What is most important is that the regulator understand what is his

mission. And it could be difficult because the law can or cannot give what mission is precisely the one of the regulator. For ex the opening of competition, or give the right to access to some goods to every one, and the law could give many goals to the regulator (open competition, protect weak person, organize sustainable development). And the state must appoint the regulator which can satisfy this mission which could be in contradiction between its own terms. Because it's different to open competition which is a short term mission and to organize a sustainable development which is a long term mission. And it's difficult to protect weak person and not only consumer, because consumer are protected by the market itself. But if the mission is to protect weak person for ex children, then the market doesn't protect weak person but protects only consumers.

D) What is a good regulator?

Everyone tries to define who could be a good regulator. The good regulator is independent in fact (de facto), from the government and from the sector. The state must give him this possibility to be independent, through real and strong powers against the sector and against the government, and against himself because the regulator doesn't have the possibility to anticipate his own carrier. Remember, the carrier inside the sector and inside the classical administration. The regulator must be built by a theological method. Finally the regulator must be respected and must have influence on the market, and also belongs to social channels which are very important in every country. In every country, we have social channels. And first, social channels built through education and through universities. For example in the US through Harvard and Yale, in the UK through Oxford and Cambridge, and in France through the ENA.
At last, the good regulator is placed and the right level: national or European and if we can at a global level (if possible). If the object to regulate is also global, such as internet or sport through the televisions, or financial markets of Course, and if possible through a network of regulators.

Section 2: The Status of general regulatory law in regard with the other fields of law

I) The relation between general regulatory law and public law

A) Inserting general regulatory law in the general theory of the State

1) The state as a unified source of law

Classically, for classical French people, the State is the source of the law. So it's quite simple: the State equals the law which comes from texts taken by Parliament and government. State=law=text taken by Parliament and government. This is a tradition in continental systems, which adopt this conception because the State has person which only have the legitimacy to adopt or exercise the power of people, because people gave the power to the State. It's like a circle: State can thus oblige people to obey. This system is created through the law and the law is only texts adopted by Parliament and government because parliament and government represent the State. This is why we can see the state as a unified source of law. In this system judge cannot have any power. Because they don't have any legitimacy to exercise a power to create law, to create legal rules. In this sense, the judge is only a sort of agent of application of general rules taken by the Parliament. It's a neutral agent, to apply general rules to particular situations. It's the French conception for ex. in this sense, if we imagine the problem of political power and legal power to create law, then judge don't exist in a political way. They don't have any legal nor political power to create general rules. They are just neutral agents who apply a general rule created by parliaments to particular situation, without creating new or other general rules. This is a political decision.

- ***In France or other continental systems***, if you try to imagine the political system, we have a « social contract » (la theory du contract social). Imagine a social contract, by this social contract people gave the power to the State, and the State represents people. In a political system, we have only parliament and government. These political bodies can decide, because they are a sort of emanation of State which is legitimate through the social contract. But judges are not inside the political system, and individuals are neither in the political system. People just obey to the law adopted by government or Parliament, and judges just apply the law to particular situations. THIS IS THE CONTINENTAL LEGAL SYSTEM. In this conception, the sovereignty belongs to the State. And the State is a unique source of law.

- ***It is not at all the same in COMMON LAW.*** Because they don't have the same tradition. It began in the UK and after has been exported in the US. There was the King (then it became the Prime minister in the UK and the White house in the US). The monarch was thus the supreme administrative body. After that, there was the Parliament (the congress in the US) which is inside the political system. And finally they was the judicial courts and the Supreme court. So you don't have two bodies but 3. In continental state only parliament and government, and in the common law system: administrative, parliament and the courts (and supreme court). In continental system the judge is outside the political system, the legal power is neutral, they just have the power to apply the general rule to particular situation and individual only have the power to apply the law. But in the common law it's not at all the same system. Because, as we saw three days ago, the president of the US has a great power to appoint the judges of the Supreme court. But this judge of the Supreme court must be approved by the Parliament. Another example is the budget: it's always a very important political power. The budget is only adopted by the parliament, but the president has a right of veto and could thus say that he don't accept this law, and for ex Clinton said few years ago that he don't accept the budget. The system is the system of check of balance. It means to organize not at all a hierarchy between political bodies and courts outside the political system, but on the contrary, in a political system where courts is inside the system, a distribution of political power which organizes a check and balance where every one can have power on every one. We will see that the regulatory body is conformed to this COMMON LAW system and not to the continental system. This is why the UK was the first to adopt the system of regulator, for ex because the regulator who are administrative bodies are at the same time controlled by judicial courts. This is adopted in the UK. It's easy to organize administrative bodies in the US too cause it's conformed to their tradition of check and balance. But it's harder to understand and organize the regulatory system in a continental legal system, because it is built on not only the restriction of political bodies through the parliament and government without courts, but also because the relationship is not a check and balance system but a system of hierarchy between state and parliament on the one hand, and between judges and individual on the other hand. So if we build regulatory body every where it means that at the end we will adopt the COMMON LAW. So in our legal tradition continental legal system, the law has the state as unique and legitimate source.

- ***But now, we accept a more pluralist conception of the law and of the state***. Because remember, the state gives order to individual and individuals must obey state. But in a pluralist conception, individual also have the power to use the legal system, and the relation is not only from top to bottom but also from bottom to top. Not only the image of the first social contract, but in the real functioning of the society, individuals can contract with the State. This is a new conception named governing by contracts. This could be the right way cause in the first conception individuals try not to obey the State and in the new conception of contract, by definition individual accept the relationship, accept obligations and duties, and the society functions more easily but this functioning. This is why in a pluralist conception of the State, for example not only law, regulation, judicial decisions, administrative decisions but also contracts are the base for the law, thus the law is more efficient. This is why we find planning contracts in public law which are the tool of regulatory law. A regulatory system not by regulation, not by unilateral texts, but by contract. SO it's not just a plan but a planning contract. For example with enterprises. And for example, the council of State said that the planning contract are real contracts and not only plans. Because it was difficult to say of a planning contract is a simple contract with a signature of the enterprise, of a real contract, organised by the law of contract. In this pluralist conception the contract would be the most efficient tool of the regulatory law and public law.

2) The state, synonym of sovereignty

First, regulation can be a choice made to respect the competition policy.

If the state is presented like a sovereignty, then regulatory could be a choice made to respect the competition policies made by the others and first of all made by Europe. Every year the EU commission adopts a book named European competition policy in which this body exposes the way to build a unique market in Europe, a unique competitive market in Europe. In a strict, restricted conception, the member state uses its own sovereignty to help the realisation of this competition policy. But the competition policy is not exactly the same thing than the competition law.

- **What is the different between competition policy and competition law?**

So the competition law is quite simple because it is rules which punish anticompetitive behaviour, abuse of dominance position and conspiracy which create damages to a free market. It is not the problem of the government, because it is sufficient to have a law which forbids this behaviour, and after it's sufficient to have special bodies such as administrative bodies or courts which punish this behaviour.
The policy is something else. The policy is a decision and a choice between different ways, to for example prevent anticompetitive behaviours (competition law only punishes and not prevent anticompetitive behaviour). Thus a policy is: the abuse of dominant position is a very dangerous behaviour and must be prevented. A competition policy is to open the competition in a sector: it's a decision, it's a policy. For example the judge can only apply the law but not a policy. Policy is a choice between several ways in general balance. This policy could be only made by States, because the State is a synonym of sovereignty. And you must be a sovereign to make a choice. This is why many member state criticize the European commission, cause when it adopts every year a book about competition policy, the European commission acts like a state, acts like a sovereign. And the European commission is only an administrative body. In Europe there is the European parliament. A better organization would be that the Parliament would adopt that book on competition policy and not a European commission. But it's the commission cause it's stronger, and so it adopts every year the book on competition policy.

The regulation can also be a choice based on economic policy. You don't need sovereignty to exercise the power based on competition law, but you must have sovereignty to adopt general rules of competition policy, so it's a problem for the legitimacy of EU Commission. And you must have even more sovereignty to adopt an economic policy, in competition to a simple competition policy. An economic policy is more than the simple conception of the organisation of market, it's only a choice about innovation, about social organization, about industries etc.
For example, the industrial choice. The industrial choice belongs to the economic policy and doesn't belong to the competition policy. And for example, the industrial choice depends in a legal way on patents. Because if you would like to promote innovation, you must give patents in a mature economy such as in Europe, and it's a choice of industrial policy. This is industrial choice is made only by states because only states has the sovereignty to do it. The European commission and any European body has not the legitimate power to adopt an economic policy. So in Europe we have a huge problem because we don't have an economic policy, because we don't have a European State. So it's like if we had weapon but not the other: we have an efficient competition law, and efficient competition policy, but we don't have an economic policy at the European level. This industrial choice thus belong to the public law at the national level in every member state. So many academicism and politics ask for an economic European governance and not only a competition system because the economy is not only the organization, the functioning and the building of the market, but also a choice of politics and economics.

Question: Regulatory law is a balance btw the principle of competition and another principle which is not only a technical principle (so not only the access of the network, but for example the access to education which is a political decision). So economic policy is very present in regulatory law. For ex the problem of relation between competition and patents belongs to regulatory law and to economic policy. For example if we consider the relation btw competition law and patent belongs to regulatory law, then the EU Commission could decide what and how the relation could be built. In the conception of the EU commission the favour will be given to competition law against patent law. But if you think that patent law belongs to the economic policies cause it's a problem of long term decision btw industrial and social choice (cause it concerns for innovation) it belongs to economic policy and thus can only come from the State and not Eu commission.

AUTRE QUESTION: If you are only in the area of law and not policy, for example competition law. Normally when you apply the general rule you only have one solution for example a victim of an abuse of dominant position went before a court, asked for punishment and this courts punished the author of that bad behaviour. It's one solution in a quite mechanic system. But if it's a competition policy, the policy is a decision between several decisions that you can adopt in consideration between several conditions, such as the area you want to build as a free market, or the suspicion of many anticompetitive behaviour in sort of firms etc. So you will adopt a decision between the many decisions you can adopt, and second you will adopt not only one decision on one case, but you will adopt and this is why it's a book, a global and coherent conception for competition. And if you read the book of competition policy of the year, you can see that the EU commission says that it's more important to struggle against the abuse of dominant position that to punish conspiracy. It's increasingly difficult to punish the international cartels and this is why we must adopt a network between competition bodies. And it is very important to struggle between international cartels, and since it's a global problem, we don't have a global competition body so it's why we must try to adopt without state decision procedural

method to obtain information. A good solution could be a clemency program: a proposal of clemency program is a competition policy. And some states and some academics said that the EU commission don't have the legitimacy to have a competition policy because the EU commission isn't a state and is only a state which can have a policy. And an administrative body such as a the EU commission can only apply the law and for ex punish a firm which organized a cartel. One solution on one case, but without noting that we need to organize new procedural rules cause it's important to punish these behaviour.
DEF ECONOMIC LAW: Some people say that economic law is just a methodology to create rules to organize the market and the relation between market and an other rules. In a liberal conception it's the law of the market. The economic policy is different, and it's more radically different from competition policy and law, because the person who will adopt an economic policy has a choice between, several decision, not only inside the rules of the market (I prefer to punish international cartel), this person could prefer for ex the social protection than the development of the free market. And that person could prefer the protection of people who work than the competition between them. So the scope of an economic policy is greater that the economic law because the economic law is only the law of the market, and the relation with another field of law through a certain methodology. And we can say almost in the same term what we said about competition: an economic policy can only be made by a sovereign, cause it's a fundamental policy for a long term in the general interest of the people. But it's a problem because in Europe we have only a competition law but also a competition policy made spontaneously by the EU commission and we don't have any economic policy in Europe.

B) <u>The link between general regulatory law and public utilities.</u>

<u>1) The public utility entity and the public utility mission</u>

The public utility is the same that public services. In china they are many public services such as in France, and it's usual to make the distinction btw kingly public services and social and economic public services. They take care of education, health, justice, energy and access to culture. In a classical way we describe public services through its form cause it's a classical administrative bodies and not independent administrative agencies, or public enterprises or even private with a delegation of public services which are in charge to satisfy the public utilities. For ex to transport people, or give them electricity or educate children , etc. If you want to know if you are in the area of public services, and by this way in public law, it's sufficient to watch if you see an administration or a public enterprise or a public administrative delegation of powers to a private enterprise. For ex, the distribution of water is often made by private enterprise but it belongs to a public utility car this enterprise mix it with an administration delegation given by municipalities;
This is the definition in public law of public utilities by the form: administrative body, public enterprise, administrative delegation to a private firm. .By this way all the regulatory decisions and rule belongs to the public law. But this very formal conception is now criticized be cause the regulatory system is based on teleology. We prefer the definition of public utilities by the goals.

DONC DEF: So public utilities defined by the goals are public utilities if the goal is the satisfaction of the public. Then it is a public utility, even if it's only made by a private enterprise without administration, without public enterprise, without administrative delegation. For example, for sport, football, the professional federation of sport has the power to organize the this public utility. This is why this private association are controlled by the administrative courts, because this is a public utility. It's thus very coherent cause it's always judge on the mission, on the goal. For ex the decision taken by order of lawyers,, a sanction for ex, are controlled not by judicial courts but by the administrative courts cause the organization of the law firm is a public utility.
This is why some activities belongs to public utilities even if they are only exercised by private enterprises because the goal is the satisfaction of the mission of public services.

<u>2) The renewal of the principle of equality, continuity and adaptability.</u>

So if we are in a public services area: financial market, banking market, telecom, energy etc. belongs to public law and rules of public services. So if we are in this big area of public services, we have 3 fundamental rules: equality, continuity and adaptability. This rules are found in the constitution. In France it's written in the declaration of the human rights: every one must have an equal access to the public service.

- For the principle of equality, The administrative court, constitutional state and traditional courts adopted a nuance because we only have an equitable access to public service and this equitable access is: every person in the same situation must have the same access. So it's not every one must have the same access it's every on the same situation must have the same access. So it's not against the principle of equality to oblige rich people to pay more money for a service because they are not in the same situation than poor people.

- The principle of the continuity of public service is the necessity to let open the public service all the time, and to obtain the functioning of this public service every day. Now we make a balance btw the fundamental and constitutional right of continuity for public service, and the right to protest through a strike. For ex in France now we try to organize a minimum public service for transportation. The methodology is through the principle of proportionality.
DEF: The proportionality is a new principle which began at the European level through the relationship between the law and enterprises because the European body have the power to use them as far as it is necessary but no more. SO it's a very new conception, for the use of power. If you have a power, you can use it as far as you need but no more. This is how Europe try to protect the freedom of people: we must obeyed the law as far as it is necessary but no more. It's a new conception. And for example, people have a constitutional right to stop work as far as the right for people who use public services are not smashed down. It's a principle of proportionality btw 2 principles: the principle to stop work and the principle to use public service, and in Europe the principle to use power for administrative body and the principle to use freedom for firm and people.

- The principle of adaptability: it's only the power of administration to change the contract, by a unilateral way and to transform its own obligation without the acceptation by the other parties, but only by giving a financial compensation. So it's not a duty but a power of the administration. For example it's an exception to contract law cause you can't change the contract without the acceptation of the other party, but if you are in charge of a public service you can adapt the contract through your own decision with a financial compensation.

This public services, and especially the principle of equality were adopted in EU law when the public services entered the market. This is why the public services entered the regulatory law.
Imagine a market with an economic natural monopoly, for ex for transportation. In the classical presentation, these three principles are quite formal. For example we have a formal equality before the court, and we have a formal equality before education and health. For example in Europe you must wait for 5 years to obtain a judgement. This is bad for ex if you're a victim of an accident and you will be dead before the judgement. Some people said that it's against their right of access because they need to obtain a judgement before I die. The council of state only said that it’s not his problem, we only have a right to an equal access. It's sufficient that every one needs to wait for 5 years to satisfy the constitution. SO it's a very formal conception.

But in a regulated sector, the conception is not made like we have seen, not made by lawyers but by prof of economics and in reality they say that the problem is not equality if you don't have a real access. The negative equality is not the satisfaction of the public services. So if you have a public services for ex which product energy, and the public service wants to sell energy to other producers of energy, then the first enterprise needs to have a real access. And it's not sufficient to say that it's impossible to have an access and you must wait 3 months, but it's OK because your competitor are treated the same. So don't complain you have an equal treatment. But this reasoning is against the EU rules. So the equality of access which was a simple and formal rule of a member states became at the EU level a real right to access. And it's not at all the same; in Europe it's not the same to say that you have a real right to obtain a judgement in only 2 years. So at the European level, for the regulated sector because of the influence of the economics, they say there is not only a right to equal treatment to access but a right to a real access. This is what we named a universal services. It's a transition in European terms of the public services in the members state. But at the same time it's not only a translation but also a transformation of the formal equality before services (even if no one can access it wasn't a problem for the legal system and courts) to an effective right to access. And if the right to access isn't satisfied, the owner of the network will be punished, and will be constrain to open the network. So not only punished to give money but punished by opening the market.

The EU law translated the notion of public services into universal services. This gave to each operator an effective right to use the network and open the network to other competitor. By this way the first operator for example which would like to sell some energy could effectively do it to the benefit the competitor.

The problem is: at what price? Because the network is inside the market, for ex the energy market, but is not itself a market. Because as we have seen the network of transportation is an economic network monopoly. So there is only one owner. So we could have a price fixed by the government, it's a first solution. But this solution could be dangerous if one competitor is also a state owned company because the government could be tempted to use this power to regulate by fixing the price to access the network in favour of his own state owned company. For example, if the company which owns the network is also a state own company, the temptation for the government could be to fix a very high price for the access. This is why the regulatory law doesn't accept the addition of the power to compete, the power to exercise an economic activity and the power to regulate, but prefers to let this power to fix the price of access to the regulator, or perhaps, to the company and competitor and the owner of the network, by a contract. This contract would be controlled by the regulator cause if the company which wants to use the network thinks that the price is too high, it creates a dispute between the owner of the network and the competitor, and the regulator has the power to resolve the dispute. The regulator has the power to fix by emitting a regulation, or through dispute resolution, the power to fix an equitable price of the access. This equitable price is calculated by the regulator itself. And this equitable price is not the same thing that a fair price, because the fair price is spontaneously created by the market. But this network for example the network to transport the electricity is not a market. SO it's impossible to use a market to constitute or to take a faire price, and we don't have to let the monopoly to impose a price cause it could thus be very high, and since it's dangerous to let the government to fix the price it would use this power to regulate to use in favour of its own company, so the bets way is to let the regulator find an equitable price for this access. It will exercise this power through the law or through dispute resolution. And there is many dispute on the price. Indeed, it's not so simple: the owner of network can say that the competitor will need to build the technical construction between him and the pre-installed network of the network owner, and that price can be very high. Thus the competitor will not have the power to negotiate because he doesn't have any other proposal because there is only one owner of the network. So it's a dispute and the regulator will give a solution. For example, the regulator can say that the owner has the right to impose the construction and the price of the network to make the connexion with the pre-existing network and the new one, but the regulator will fix the equitable price for that.

II) The opposition between public and competition law

Competition law and regulatory law are in opposition because in the classical conception the regulatory law belongs to the public law which is the expression of the sovereignty of state. So we have a State, which decides what is good for people. Thus the state takes a decision for his people, and on the other hand, we have the market which functions without the State and of course without decision taken by the administration of by the State. It is true that, at the beginning, in the years 1960 there was a strong battle between member state and competition law because member states wanted to take decisions, for example through an economic policy, because they have the sovereignty, and the EU body didn't accept this decision taken members states because the only reference for European bodies is the functioning of markets. So the state cannot impose decision on the market, for example I the State prefer to resolve my social problem and avoid bankruptcy and thus give money to that firm which is a State aid, this is forbidden by EU law. The Rome convention says that the nature of the shares of the company on the market is not relevant. An enterprise has the same obligation and the same freedom whether it's a private enterprise or a state own enterprise.
So it's impossible for a state to say that it's its company, and want it to use it to create a public service, but it's not possible because for the EU commission, it's only a simple enterprise. There was thus a conflict between public law which express sovereignty, and competition law, which expresses the market. But after that, the competition law finally integrated some theories which are close to the regulatory law and the public law. So things became less complicated.
The first theory was the theory of the essential facilities.

A) The technical differences between regulatory law and competition law.

We have a market. We have a network. This network gives a dominant position. The regulator is inside the regulation law. Imagine a company asks to enter inside the network because the company is in the middle of the network, for ex industry of production of energy, and a competitor, company A would like to sell the energy to a company B which is very far in the market. For ex company is in the market of production and company is in the market of distribution. It's impossible for the company A to access in the production part of the market without going through the first network.

1) **The theory of market before and market after**:

Imagine a market of stones. And also a market of houses. There is an offer made by people who build house and demand from people who wants to buy a house. But to build a house, the offers on the market of houses (the builder) need stones, and so they are also demanders on the first market, the market of stones. And the offerers of the first market are companies who have stone, cause without stone you can't build a house. This question is developed in the paper of Nelly Kroes. If this companies has a monopoly in the market of stones, then he had a dominant position on the market of house. And if he refuses to sell stones to the company of building houses, they this houses company can't offer houses on the second market. So it's a great power because it's easy, if the competition is not really free in the first market, to impose a very high price to the demand of the first market, because if the demand cannot obtain stones, the demand cannot offer house on the second market (the demand cannot be an offer on the second market). In this case, it could be an abuse of dominant position on the second market with the use of market power on the first market. And there is a lot the decisions about tile and stones for house cause a company can abuse of its dominant position on a first market on a second market.

In the case of regulated sector, the owner of the network will abuse of its dominant position if he refuses to open the network or if he imposes an excessive high price. And for the court, American court and EU court, it's sufficient to take the general position of abuse of dominant position to obtain the obligation to open the network, as to repair the abuse. The sanction could be a punishment, such as being impose to pay, but we could also have cases in which are asked remedies, and the remedy is the fact that the behaviour is sanctioned not only money but the obligation to adopt a new behaviour. So the notion of remedies is to depart from the mere money remedy. Now, competition court say we not only take sanction, we also oblige enterprises adopt remedy to stop their anticompetitive behaviour. For ex if the anticompetitive behaviour is to not open the sector, the sanction is thus to open the network. This is at the same time a sanction and a remedy. So inside the evolution of the competition law, we have the same result that in the regulatory law. It's possible in the evolution of competition law to obtain the same organization. So now we have almost forgotten the conflict between public, competition and regulatory law. Now the competition law evolves towards the regulatory law, for ex through the theory of essential facility.

The problem is to say what is an essential facility, and what is not an essential facility. For example, we can have a first market which includes producer of vegetables, and demand which is a company who wants to buy from the producer because they want to sell this product to consumer on another market. In this condition, the sellers is the demanders of the first market, and the offerer on the second market. Imagine the offer is a mass distributor. So for a producer, 90% of his production must be solved to this demander who is a mass distributor because if he wants his production to arrive to the final consumer on the second market, then in reality its production must be sold to the demander of the first market because its product must end up in big stores. He the producer didn't obtain to sell his product to the mass distributor which is the demander of the first market, he will go to bankruptcy. So the question is: is the mass distributor an essential facility? It's a question because for the moment, little producers (not coca cola) are so weak against demanders (mass distributed) that the mass distributor can impose the price exactly as they want, and thus exactly as an owner of network. Because the mass distributor is a sort of network. Because mass distributor pretty much have much market power.
So the competition law tries to regulate through competition law the power of mass distributor to refuse to contract to little producer without condition. It's a very political issue in Europe it's difficult to impose to someone to contract. Because every one in general terms has the liberty to contract but also the freedom to refuse to contract. As we have seen, in the simple case of a regulated sector we impose the duty to contract, but its against the principle of the law because there should be no duty to contract. So in a mass distribution, can we impose to mass distributors to impose him to contract with the producer? If the competition law accepts to impose a duty to contract, at what price will the mass distributor buy this product? At the end, competition law accepted this type of State intervention on the market because on the market every one must have the freedom to contract or not to contract. This is why now at the EU level, commission doesn't accept to apply the theory of essential facility in this case. The EU commission only started accepting this theory since 1993 to apply essential facility theory to the regulated sector (this theory was created in the US in 1911 by the SC). In France the theory of essential facility was admitted in 1998 for the regulated sector, and the law organized a very special and very complicated system, trying to regulate the relationship btw producer and mass distribution, but not through competition law.
This is the same system of the regulatory process, but not exactly because the competition law is made by ex post decision.

DIFFERENCE BETWEEN EX ANTE AND EX POST:

The ex post individual decision: at first we have a situation, and after that there is a reaction by competition authorities, and a solution (for ex punishment or a remedy etc.). In the regulatory law, the regulatory law is an ex ante solution. An ex ante solution is a solution taken before the situation occurs. For example, the government gives the price of the energy, or the price of the gaz , etc. It's an ex ante solution.
The competition law is always an ex post solution. This distinction seems simple but in real terms it's not as simple because every one can anticipate the future and so the distinction of ex post and ex ante is hard to use in legal cases but easy to understand in economics.

2) <u>The control of mergers</u>

[¥] In the new competition law of china there is a control of mergers. What is a control of merger? A merger is when at least two enterprise becomes one enterprise or create a new enterprise. In a classical way, why must we control mergers? The first question in a teleology thinking is why. Why is the goal of the control of merger and why is it so important today? In a classical conception, For a traditional competition law, the problem is the anticompetitive behaviour, and such an anticompetitive behaviour can occur because firms have a market power. This is why the first condition is market power. This is why in competition law we need to find the relevant market and after that market power, not only for the abuse of dominant position but also about conspiracy.

In a first moment, let's say that we have companies which respectively have 15 and 10% of market power. In a second moment, there is a creation by the addition of A and B of a new company C which will then have 25% of power on the market. So in the first moment, no company had the power to oblige every company to obeyed them, they didn't have the power to fix the price, to impose a geographic repartition in the country , etc. At the second time, the new company C will have the power to fix the price. Price fixing is the best power because it completely against the law and the free market rules to fix a price. The company can make the price and not let any space left to the fair price of the market. Thus, this is called an anticompetitive behaviour. This anti competitive behaviour was not possible in the first situation but only in the second moment, after the merger.
This is why the merger must be controlled. And the control of merger is just an anticipation of the behaviour of this enterprise in the future. Because the powers on the market will be changed.
For ex,
[¥] the economic theory of contestable market: if the merger gives seventy percent of power in the market, you can be sure the authority will refuse the merger. But if it's easy for potential competition to still enter the market and offer low prices, then the merger could be authorized because the high price fixed by the new very powerful company, which triggers off the entrance in the market of potential competitor, because the market is contestable. This contestable market theory is made by prof of economics.

[¥] There are 2 conceptions. In this conception, the control of merger is only the application of prohibition of anti competitive behaviour in the future. So we have at present the sanction of anti competitive behaviour, which is an ex post reaction. And if we can calculate the possibility of anti competitive behaviour in the future, you must on the same base prohibit the merger. This is the classical conception of control of merger.
But if the conception of control of merger is just the same application of the same whether ex ante or ex post, then the control of merger only belongs to competition law and competition authority, and not to state. But for example in France, since this year, the control of merger is made by the competition authority. This is why the control of merger belongs to the competition law.

But you can imagine another conception: because when two firms make a merger, this changes not only their market power but also the structure of the market. So it's not only the problem of the protection at the time of the behaviour of the firms, but also a problem of the modification of the structure of the market. And for example, in a less liberal conception, if at the first moment the market is equally separated btw all market powers, but in a second moment the merger gives a very important shares to only one firm, then the structure of the market affects innovation, industries effect , etc. Then the merger is a public issue and it thus become an issue to be handled by the State. This is why until this year in France it was the minister of the economy who had the power to control the merger and not the competition authority which only had the power to sanction the anticompetitive behavior. Then, the fist moment is submitted to competition cause it's an ex post reaction to anti competitive behaviour and the sanction is made by the competition

authority, but the second moment which concerns the structure of the market and the industrial effect of the merger, it becomes an ex ante reaction and thus the power is given to the State which can then refuse the merger because for ex the merger could create social problem. In this conception, the merger and the control of merger belongs to the regulatory law. This is very important because if we give the control of merger only to the competition authorities, the competition authority will only thing about the possibility in the future of anti competitive behaviour, but if we think about the problem of structure of market and say that it's a problem for the State, then the State will consider other questions such as social questions. It could become even more complex if we mix sectors. For ex mergers between banks which involve many administrative bodies: regulatory bodies, competition bodies , etc.

B) The evolution of regulatory law through competition law.

1) The distinction Between ex ante and ex post

We have always said that the regulation is an ex ante system and competition law is an ex post system. Because regulatory law, and it's why regulation are so important, is an organization of some sectors, while competition law is just an ex post reaction in every sector for every market if an anticompetitive behaviour is offered.

But this distinction is not so sharp because if a competition body takes an individual decision, because the competition law is observed by every one, every one can thus anticipate the future. For ex in case law the relation between the principle of free competition and monopoly given by a patent. Because in this case a pharmaceutical company had taken a patent, and because the company has this patent, the company don't want to give the power to other firm to develop other medicine. This is a case between company A and B. A say that the freedom to act, and the free competition gives him the permission to refuse to B to use the medicine. SO A and B will end up before a competition court and the court will give an ex post decision but for the past, because company A will have already had a behaviour and B also. But in reality, because every one after the case reads the solution of this case, it's easy to go beyond this individual decision and to transform this solution in a general solution and conclude that every company could or couldn't use the medicine against the patent taken by a second company. And this for every patents under certain conditions or certain illness. This is why through individual decisions taken ex post we have in reality general rule for the future. This is why we have an ex ante decision. Because we thought that what the court had decided in the first case, it will repeat the same solution and reasoning in the future because the court, the competition body is rational. So if both cases are analogue, the solution will thus be the same.

☒ This is true in Europe and it is true the common law system because we have the rule of the stare decision. And if you want any decision taken by the EU court of justice or commission, you will see at every page that it refers to a previous decision taken by that body. SO this ex post decision becomes an ex ante decision for the future. And for every ex post decision there is an inclusion for the future. This is why in the EU case law there is always the visa of precedent decision. This is why it is like a regulatory law but made by the courts.

☒ It's the same thing by influence of the common law system, but it's also the case in the system of continental law, but only by rationality. Because if the court has decided this way in the past, and if the court has no reason to decide in another way, it must thus decide in the same way even for a new case: it's rational. And because the economic law tries to be very rational, when a decision is adopted in one case, it's a tip for the other analogue cases in the future. This is why for example, also in the common law and for ex in the supreme court, they use precedents, not only in their own legal system, but for example the supreme court uses decisions from others system. It's rational to use solution adopted by other courts even if they are foreign courts. In the supreme court in the US, who is a specialist in Antitrust, Stephen BREYER obtained from the SC to use precedents from Europe, because it's rational to adopt the same solution. In this very rational conception you find the US decision the reference of the solution taken by the EU courts and used by the American to settle the case. For the moment, you don't find this reasoning in Europe and other members of the SC don't think like BREYER who is very open to other cultures.

The important is to understand that the difference btw ex ante and post cause the ex post of today is the ex ante of tomorrow if you consider the precedent,. This is easy in common law system, which is adopted by the EU level and now also adopted at the national level.

2) The temporary regulation then the come back to general competition law (after liberalization of the GRAND FATHER)

Another connexion btw competition and regulatory law: the use of regulatory law to obtain a free competition. So the regulatory law is a tool for free competition when the sector concerned was built before on State owned monopoly. In this case the liberalization of the sector is not sufficient, the declaration by the law to the free competition is not sufficient, the outside of the sector, investor, and potential competitor would not enter the sector if they didn't have guarantees against the former monopolistic state owned enterprises. In this case the regulator must organize and permit a free competition, and must use its power against the former monopoly.
This is why the regulator must be independent from the government cause by definition, it works against the government And we have a movement between liberalization, privatization and free competition, privileged by the regulator. The regulator, in this formation becomes an asymmetric regulation, because this is a regulation against the former state owned public enterprise.
This former state owned public enterprise has the privilege of grand father because they were in the sector before, they have information, they have techniques, consumer knows them very well and so they have a privilege of grand father. The regulator must fight against this grand father through asymmetric regulation, for ex the transparency of accounting of this former enterprise. In this sense, and it's why regulatory law and competition law are very near, regulatory law is a tool for competition and competition can only be useful in sectors which are regulated.

3) <u>The correct organization of regulatory network (interregulation)</u>

But, and it's the difficulty; the difficulty is to build an institutional framework to let these institutional independent bodies, or private bodies, to function at the same time for different goals, different sectors and different levels.
This is the problem of INTERREGULATION. What we must avoid is the incoherence of the system. And we have seen through the financial crisis is the incoherence of the system because in the US, they don't build link between national level and federal level, they don't build link between banking regulator and financial regulator , etc. They didn't build an efficient inter regulation. And if you don't build this inter regulation, each regulator could adopt very efficient rules or administrative individual decision for its own sector, on its own level , etc. But if you have a gap between this level, and this sector and this decision it creates a crisis.
So it's very important to reorganize inter regulation. Some politics say that it's easy: before we had a natural interregulator which was the State! In the state, it's very easy: there are minister, prime minister and the president and we organize weekly meeting and we adopt the rule for every one and we have the law adopted by the parliament. So if we have a state, which is a unified source of law, there is no problem of inter regulation. This is why we gave up state, because we thought state are not legitimate or efficient, or are in conflict of interest, of because we don't have a global state nor a EU State, thus you adopt a regulatory system for every sector and for every level. But now we have a very big problem to build an inter regulation, which is the inter-institutional problem of regulatory law.

For the moment, it is possible that at the national level the state will go back and exercise the powers which were given to regulator. In this way, we will thus come back to a classical conception, and after that national state will organize international meeting through the G20, to find global solution through the power to engage themselves, and the most important branch of law will be again the international public law. It is one of the possibility indeed.

But if the situation is not adopted because the world cannot be reduced to only 20 countries, and we need to find global solution for the others, we will keep the system of regulatory law with regulator, but we will need to organize an international network to avoid the contradiction and gaps between solution.
This network, and remember what we said for the Lamfallusy process which is only European, we can open it to a global area; it will give something like that: we organize a network between regulatory bodies. This is why the competition law made in 1993, through a very important regulation « the regulation of the modernization of the competition law », and this regulation was for the first time a new frame work for institutions of competition law. We thus organized a network of every competition bodies of each member state. Furthermore, we take each member states, and organize the network. The network, and because we have old member like UK and France, but also new member states, Poland, Malte, Slovenia, and in these countries the administration don't know very well the competition law cause it's technical and difficult. So the competition bodies in this countries need to have more education and technical councils. This is why the network has many function and for example every competition body helps the other to understand and apply competition law. For ex if a national competition body think that a question or issue is very important, and thinks that the solution it has taken is very important, it thus immediately gives the solution to others. In this way we can hope to have unification in Europe without a creation by the State. And at the centre of the network; we

have the EU commission. So the EU commission, and it's the same for regulatory law (cause for regulatory law we have the same system of network) we have the EU commission. The EU commission is very powerful, it help competition national bodies to find solution and find the law. And the EU commission help national bodies to adapt its resolutions. The national bodies don't have to adopt the resolution but since it's the EU commission which help national bodies to understand legal rules and solutions, it's easy for the Eu commission to persuaded national bodies to accept these legal solution. These national bodies accept this organization. It's the way to have a European coherent law.

The EU Commission always accepts to do the work, because the work gives the power. So the EU commission always say yes, always agree to organize the meeting, give money for the meeting, give books and give education to regulator cause it's hard to become the regulator of financial market, of energy market , etc. The EU Commission organizes the learning and thus without a legal power, it has still the power. For ex last year the EU commission organized the meeting in Florence in which there is the university of Europe. After the meeting, with all the regulatory president and other academics and person which have a great personal personality we thus have a European commission. Thus, without legal framework, the EU commission is in reality the inter regulator. And the other accept this framework, cause this framework allows regulator to be independent from national government. And you can imagine for the future that the EU commission will become increasingly powerful cause we don't obtain a global state, we don't obtain a real EU State, but we obtain a network with at the centre the EU commission cause it's the EUO commission which does the work. This is why we could adopt this conception, or try to go back to the state cause the problem of the EU commission in this system is the problem of legitimacy. The EU commission is only legitimate cause it works and has much knowledge and gives solutions, but it's only a bureaucratic legitimacy but not a legal legitimacy. This is why some people say we must destroy Europe and come back to national state. Or maybe go back to an Europe with only strong country and close it to nations which very new and weak legal system.

III) The regulatory law and the contract law

We have spoke about contract, but not special contract. But potentially, contract could be the right solution to build a global regulatory system.

A) The potential capacity to organize a framework for regulatory system for global market: putting into contract regulatory law

1) Contacts and self regulation:

The self regulatory system could be built on codes of best practices. But the codes of best practices, which can be adopted by companies, don't engage these companies. So it's just a sort of moral engagement, but not a legal engagement. This is why for example the competition law put the prohibition to transform the code of practices as a legal engagement.

- But if you adopt a real contract between a regulator and every operator, it could be a self regulation. For example, remember that every financial market is organized by a company which is a private enterprise. For example in Europe it's EURONEXT Which is a private company and which was the result of a merger between French company, Dutch and another one, and now we have a simple European financial market organized by Euronext. A project exist to organize a merger btw the US organizer of financial market and the European euro next. If this merger is adopted, we could have a global organization of financial market. But it's hard because if we have this sort of global private regulator, this merger will give so much powers, that this private regulator would use this power against operators. So nobody know; it's just a perspective that we could have a merger with the North American organizer of financial market to obtain a global regulator of financial market. But it could be dangerous.

- Euronext adopted a text and nobody knows the legal nature of this text. It's very insecure because this text gives all the conditions for companies to put their share on the financial market; And this text also gives to euronext a lot of powers such as the possibility of radiation of the chair of these companies if the companies don't respect the rules organized by the text. So is this text an administrative decision because the regulation of financial market is a public repair given by delegation to a private company, which has the power to adopt an administrative decisions. At the same

time the FMA adopts global regulations to organize the behaviour of company on the market. At the same time euronext adopts an administrative general decision to organize the quotation, admission of shares.
Or is it a contract btw euronext which is a private company, and the other companies, for ex LVMH which would like to put its share on the financial market and contract with euronext?
Nobody knows: academics say it's an administrative decision and other say no it's a simple contract.

[illegible] What is the difference between the administration decision and the simple contract?
If it's a simple contract, you could organize your contract as you wish. If it's a general administrative decision, it's not possible to adapt it for every company. SO if you have a liberal conception of regulatory law, you will say that the financial market authority which is an administrative body adopts this general regulation which is an administrative act, and companies just obey the act. Or on the contrary, the body which organize the functioning of the financial market, Euronext, which is a private company, makes contracts with company which want to put share on the financial market and this contract could thus be negotiated. This could be a solution for global problem cause it's quite easy to organise the same contract around the world. And if LVMH and it's the case, puts its share on many financial markets, in China, NY, Paris , etc...., though the multi-quotations, it would certainly like to have the same contract negotiated with every private regulatory body such as Euronext. In this conception we will have 2 regulatory bodies and it could be a very efficient and right system.

Idée de MAFR D'organisation. At first, and it worked well in financial market and in network, we have a public and first regulator, for ex the AMF, which organizes the first rules by administrative torts, and after that we have second private, or at least non necessarily administrative, regulatory bodies, such as Euronext for the financial market, which organizes the financial market.
In this system if you have a regulator of 1st degree and a regulator of second degree. The company must obey to regulator of first degree (AMF) and contract with the regulator of the second degree (euronext). We could have the same for network. For ex you have the energy regulatory administrative regulator. It's the regulator of first degree, and every one must obey to its regulation, but then the second regulator, the regulator of second degree will be the owner of the network.
The company will need to obey to the regulation decided by the administrative regulator of first degree but will only need to contract with the second degree regulator. And for example we can imagine that the regulator of first degree must be outside the sector, in order to be more independent from the sector, but of course the regulator of sector degree, because he is the owner of the network, or he is the organizator of the market, must be inside the market or the sector.

Through the contract the second degree regulator can impose a lot of technical impositions and impose prices. And there is a sort of judicial review to control the regulator. So it's only a regulator of second degree and thus must obey to the regulator of first degree. In the financial market for ex, the NYSE (New York) was not very well regulated cause it was only regulated by a board which was composed by the banks which are on the financial markets. And after that we have problem cause in reality the regulatory bodies is in conflict of interest. So we need regulatory body which is outside, which is not in conflict of interest, and it could be an administrative and public bodies, and the owner of the network could be a regulator of second degree. This is why the owner of the network has more right than a simple operator but also more duties cause it's also a regulator. And this is under the regulator of the first degree. This is why it has the duty to open and the duty to contract. And again since it's not possible to oblige someone to contract, it's a very important duty to contract and you won't find someone else who is oblige to contract but for the owner of the network. This owner also have power that other companies don't have such as imposing technical condition, or impose investment to other party, cause it has a duty to guarantee the good preservation of energy like a regulator and not like a simple party, a simple contractor (*l'idée est donc de lui donner des responsabilités qui irait avec sa tache de regulateur sans etre pour autant une entité publique administrative et donc pouvant contracter*).

((The regulatory law is: the balance between the principle of competition with another principle, this other principle could be a technical principle and in this way it's not difficult to organize this balance. But this other principle could be a political principle through a public services and by this way it's more difficult to organize the balance because we have a control between two ideology.)))

*back to contract: some markets are global. The contract, public or private, could give solutions for example for prices. And for example, in the US, you find a sort of contract btw government and banks. Government say I give you much money but you must give me power. And firm can refuse and give back the money to keep the power.

2) Ordinary contracts and extraordinary contracts in regulated industries

[illegible] The contract of access to a regulated sector. Usually, for a simple market, the entrance is free and you don't have to contract with someone else to enter the market. But for some sector, and for example financial market, you must at first obtain an authorization from an administrative operator, for ex the AMF which gives an administration the authorization to enter the market, but you must also contract with the private company which organizes the sector. And nobody knows if the relation with for ex EURONEXT is simply an adhesion to an administrative decision made by Euronext, you thus simply accept to administrative decision to enter the market, to put you share on the financial market, or if it is a contract. But we can think that it is more a contract btw euronext and you company. If you are in the network industry, it's sure that the relationship btw the company and the owner of the network is a contract. For ex railway, and you are train company and you want to put your trains on this network, thus you need to have a contract to access the network. Often the law precise that this contract is private (OR PUBLIC?). It's a decision taken by the law, accepted by the Parliament. But in many country the law decides that these sort of contracts are private contracts.

[illegible] Why is it important to precise if this contracts are private? Is it a good idea to precise this qualification? (Euronext is private but most owner of network are public.) What is possible to do in a private contract and not in an administrative contract?
If the contract is administrative it's insecure because the state is allowed to change it. But in a technical sector where you need big investment in the long term you need a secured contract. So a private contract is more secure than an administrative contract because it's impossible to change the terms without the acceptation of the other party.
The other reason is: the status of the public order (the public policy) in private and administrative contract? And more precisely the status of the international public order? The public order is a matter which is so important for the society that it's not possible to change them. For ex all the criminal law is of course a public order and if you are in the international public order, it's the core of the public order cause it's so important that not only do you not accept the change of the rules inside your system but you don't accept any effect to not respect the rules of other system. For ex the organization of the financial market belongs to the public order: because it's so important, in the economic system, that it's impossible for ex to say that now I renounce to attack you before a court for you anticompetitive behavior, these contract are illegal because it goes again public policy, the public policy to punish anti competitive behavior.

[illegible] 2 types of public order: the public order of direction (diriger), for example the organization of markets, and more, of regulated market, and secondly a public order of protection, for example the protection of consumers. Usually, we say that an administrative matter is a question of public order/policy because the state organizes the society. And usually we say that the private law is not a problem of public policy because the private law only organizes relationship btw individuals. This is why, classically, when a person disposes of its own rights, he can also give them up (for example adopt another regulation for them in a contract because the contract is the expression of his own will and not of the will of the State).
So if you are in a private contract it's easier to organize as you want the economic relationship between both parties. But it's more complex cause the global organization of the market belongs to the public order, but remember that on the market we find private relationship between offer and demand. So we find on the ordinary market private relationships. So in this special contract of access, it is difficult to say directly that it's not a contract of public order because the object of this contract is to organize the access to the network and the access to the network is the expression of the universal services, the right to access served by the contract is the same thing that the universal service which is the EU expression for public services. In this sense, inside the private contract, we find a public order for a real access. The contract might be private but can include a public order if the object of the contract is the access to the network and the access to the network is the universal service which is the EU legal notion of domestic public services. But we can have private contract with public order. But in this sense, in this private contract, it's only what concern the access and the efficiency of the access which is considered as public policy matter. So you can't say that you want need to wait for 3 months to access the market, this will be against public order, and thus be modified by a court. But because we are in private law you can put other dispositions in you contract, for ex details on exploitation (for example to change the competence of jurisdiction, or the term of the contract).
[illegible] You can for ex change the details on jurisdictional competence: If you have a dispute btw the parties you can say that the resolution of these dispute will be made by the regulator; this is what the law says. But because we are only in a private contact you can change that jurisdiction competence and some contracts parties can decide to give the competence of dispute settlement to an ordinary court, for ex the court of Paris cause they want to leave the regulator

outside their relationship. Frison Roche is not sure whether this position is legal because possibility the power of the regulator might be a public policy matter, especially since tribunal of commerce don't know anything about regulation and it's preferable to let the dispute to the regulator. Another ex is that because it's only a private contract, you can organize an arbitration clause. And if the situation is international, then this arbitration will also be international. So it could be a very efficient solution for international market without international State, without international regulator, without international court, both parties could organize an international arbitration. This is a case for the international sector, cause without an international regulator parties will organize an international arbitration. It's legal because it's not a problem if the matter belongs to public order cause it's sufficient that the arbitrator applies the disposition of public order. For ex competition law can be dealt by arbitration if the arbitrator applies the disposition of competition law, and it's the same for regulatory law if the arbitrator applies the public order dispositions of the law (¥ arbitrability).
By this way, there is a mix between a flexibility of the private contract, and the respect of the public order. The public order for the access of the network, or the access of the financial market, and the respect of the rule of organization of this sector, but also to opportunity of legal rules or tools such as arbitration, a change of jurisdictional competence , etc.

¥ The advantage to recourse to the regulator to settle dispute: The regulator resolve the dispute through asymmetry and will probably settle in favor of the company against the network owner. He's more competent that an ordinary which will not apply this asymmetric conception, and it's an advantage for the owner of the network to an ordinary tribunal than the regulator. Because cases are so complex it's thus an advantage to go before an ordinary tribunal and it's easy to persuade the tribunal of the owner's rights, who also have many lawyers. But for arbitration each party choses their arbitrator and so its easy to chose an arbitrator which will be in your favor. But this sort of dispute resolution is very expensive is thus a problem cause the owner of the network is very rich in comparison to the firm because the owner of the network has a monopoly and so he's very rich, and can go to arbitration which is expense and perhaps the little company won't have the money to do it. But for the moment, it's not illegal to put arbitration in a private contract.

So for the moment we use private contract because it's not only sectors which are regulated but also market, and on market we have private contract and also for the access to the network, we have private contract, and a freedom to organize the relationship, without consideration for the asymmetry of power btw the both parties, if the both parties respect the public policy to the access to the network, because the access to the network is not a contractual disposition but a legal right given by the law. And it's not the case for an ordinary contract. Why? Because in a simple situation we have only the freedom to contract or refuse the contract, but in a regulated sector, you have the legal right to access and the owner of the network or the company which organizes the financial market for ex Euronext, have the legal duty, the legal obligation to open by contract the network or the sector. This is why the contract is only the expression of the legal right. And the legal obligation. But of course, after that, and if the public policy is respected, the parties can adopt their particular relationship with another disposition inside the contract.

¥ But for more complex sector we have more complex contract, called CONTRACT OF BALANCE. For example, in a more complex sector, which is the electricity sector, we find companies which product electricity and as we know, electricity cannot be stocked, but it is possible to conserve gas. So in the gas sector it's quite easy to stock cause you find a sort of building with gas inside. And the right to access to the reserve of gas. But it's not the same for electric energy cause you can't build a stock of electricity and there is thus no access to the reserve. So we have a contract to access the network, a technical mechanism of dispatching (the owner of the network dispatch electricity to every company who accept to product or stop the production of energy when the network needs or doesn't need energy for transportation). It's important for global production of electricity that the network has exactly the right dimension of transportation because without electricity you have a blackout, if we don't have enough electricity in the network. This power to organize the right dispatching of electricity is organized by contract, and this contract is called contract of balance. Through these contract, every companies which product energy takes the obligation to product electricity if and when the owner of the network demands it, and to give electricity to the network. And without that we have a blackout, which is not only a problem of production but a problem of network. This is why we have a group of contracts: a contract in favor of the company which would like to sell its production and want access to the network (it's a contract of access) and also in the same group, the contract of balance, and by this contract, the company which products the electricity takes the obligation to produce this energy and to give it to the network owner, if the network owner needs to have electricity. And every minute in the center of dispatching, which is a secret center cause we find many information, for ex we have the center of dispatching in France (we need to go through the president of the company to have information, it's a sort of secret defence) we find on every computer a cartography of demand of

energy of people and company, and minute after minute it's easy to see when people go to lunch or watches football. In this case the network needs to transports much electricity and immediately they ask company to give electricity to the network and the network can then sell energy to people. This is constructed by contract of balance: it's a balance btw offer and demand, give the responsibility of the right balance to the company. So in the first contract, the responsibility is on the owner of the network, because it has the duty to open the network, but in the second private contract, and it's a great problem of public policy because we have the risk, the systemic risk of a blackout, it's a contract of balance and the responsibility is on the company which produces the energy.

In this sort of organization we have a quite good organization, only governed by private contract for an essential good which cannot be conserved, and we have a system against this sort of systemic risk which is a blackout. By this way we have a sort of absorption by the contract of the imperative principle of regulation. For the moment, because it's quite new and we have a vertical integration of a monopolistic enterprise, all this organization in made in one enterprise. It's easy for one enterprise to organize the production, transportation and distribution because of vertical integration (for ex within EDF). But with the liberalization and the disintegration imposed by Europe, we have a sort of implosion of the system and we have several parties on the sector and because we don't have one enterprise but many enterprises with several different functions, we thus need and have contracts. And we don't dispose of many academic studies of the function of contract in the regulatory law.
Because in the competition, it's quite easy and we can read many studies about the kind of simple contract organization of the market (only consumer, demand and offerer). But in regulatory law, it's not simple contract, and there is a systemic risk especially when the market and global. In this case the contract could be a good legal tool to regulate global market without state. But after it's hard to distinguish which part of the contract go against public policy and is thus illegal, and which disposition parties can discuss. In this sense contract can give to parties flexibility.

B) Specific control of access (the regulator imposes the fair price of the contract of access through a decision after a dispute settlement by forcing the owner to make its costs transparent)

The control of the contract is made by the regulator or by the court. For the moment, the regulators when they exercise their power to resolve the dispute, the regulators adopts the tendency to find a solution in favor of the company against the network owner. So it's an asymmetric solution. For example, in the classic contract law, during the negotiation before the signature of the contract, there is no duty to be transparent but only a duty to be fair. But, if it's a contract of access then the regulator says that the network owner must be transparent, because only it is the network owner. So in the mind of the regulator the settlement of the dispute is another way to regulate. It's not a specific power different from the power to regulate (in the power to regulate the regulator impose the duty to be transparent to the monopolistic company) through the power to settle the dispute he impose to the company to be transparent. It imposes the duty for the network owner, without legal text, to give to the company the cost of the construction of the small network between the company and the big network (pour faire le lien), while in the usual contract law it's not an obligation to give this kind of information, you don't need to give to the buyer of the good what does the good costs to you. If you give this information it's very useful to the other during the negotiation. Then the firm can say that if the production was only 10 he will only 12 as he believes it's a fair return of investment, as in simple contract it's only the negotiation which will give the price and not based on an information which should stay secret.
So on an economic perspective, in contract law, the price is built by negotiation. And because the interest because both parties are contrary, until the contrary of both interests are not satisfy, one party will refuse the deal. For ex I propose 10 euros and the other party proposes that only 10 euros is sufficient for this goal, or I will find another buyer. And there we don't give any information about the goods. On the market, there is a massification of offer and demand and the meeting between the offer and the demand can produce a fair price.
But in a regulated sector, and in the contract of access, because the regulator says thinks we don't have a real negotiation and it's first of all an affair of regulation and he must regulate this contract, he will oblige the network owner to give its own costs, for example the cost of the construction of the little network needed to make the correspondence btw the network and the firm, and then it's easy for the company who is not obliged to give to the regulator any costs, it can say that based on the price obligatorily provided by the network owner, the firm will only give a price close to the cost of production for the network owner, thinking that it's sufficient. And because the firm not only has the freedom to contract but also the right to access and thus the right to contract, he can oblige the network owner to contact and the price the firm will decide (as long as it's superior to the cost for the network owner). So the decision of the regulator to solve the dispute is not to resolve a dispute on how to regulate, but only to obtain a price by imposing the owner to give

the costs of the production, and then give the info to the firm who wants to access the network of how much the fair price must be. So it's very far from contract law, and a regulator court could probably not understand that.

IV) Regulatory law and tort law

A) The responsibility of the one to whom the rule applies

1) The drifting towards criminal law

There is a difference btw civil responsibility and criminal responsibility. Civil responsibility or liability obliges someone who causes a damage to another one to repair this damage. It's a civil obligation. This is why this person could take in advance an insurance and by this way a damage could be repaired cause the company of insurance will pay and the person who caused the damage don't have to pay much money because he paid before less money to the company. And the company of insurance calculates the mass and the perspective of damages and the mass of money the person must pay to the company. So always think about civil liability linked with insurance. In this system, the damages are very well repaired cause the company of insurance will always pay. But the problem is that the civil liability has also for function to punish the person who caused the damage. And if this person has taken an insurance, this person will thus not be punished. So in this sense the insurance is an incentive to cause damages. So it's a very good system for the victims but a bad one cause it creates a incitation for people to create damages. This is why if you want to create an incentive for people to not act against the law, or to respect the law, or to not act against other people, because for example we could create a systemic risk, you must create an incentive for people who can create damages. And the civil liability isn't a good system, because you have the system of insurance. And it's not a problem for people because people are rational and it's not a problem for him to create damages it's just a moral problem, so rationally he can create damages cause he won't have to pay.

This is why every regulated system which system risk goes to criminal law. This very liberal economic system such as the US is built on criminal law. And people don't respect the rules of competition go directly to jail. Because it's not possible to obtain an insurance for behavior against a rule of criminal law.
It's not possible because criminal law, classically, is composed by 3 elements: the firsts element is the legal element, the second one is the intention of the author of the behavior, and the third element is the personal identity. These 3 elements have been the classical ones on criminal law since the XIXth century. It wasn't the case in the middle ages but now with the regulated system we come back to the middle ages.

Classically, BECCARIA, what is the criminal law? It's an expression in legal term of a moral sanction.
So in a philosophical conception, at first we have a fault, and an important one which explains why it involves a criminal liability and not only civil, this fault is expressed by a behavior against another individual or against a good. This is why we have a sanction of *ex post of this faults,* and this fault is expressed by the behavior of course a person. Because it's only a person who can complete a fault because you need to distinguish what is right and what is wrong to commit a fault and to diverse a sanction. This is a Beccaria system, a philosophical system. This is why in a modern criminal law we need an intention of the author of the behavior and this behavior needs a capacity to make the distinction between right and wrong. And there is a very strong link between the moral and the law. The legal element is just that you must also know what the law has forbidden. Because your behavior is not only bad but also against the law, so you need a legal element cause the principle is the freedom and the exception is the prohibition. In classical term all criminal law is based on prohibition of behavior and this prohibition must be built by the law before the behavior cause if the legal element don't exist before the behavior the principle is then the freedom. This is why the system is a liberal system.
The last element is the personal identity because it's the person who has committed the fault, who is the author of the behavior, who must punished, but of course not anyone else! So it's a very practical system, but it's not efficient.

Indeed, it's not efficient because at first, it's very difficult to prove the reality of the fault, to prove the intention. And for example, it's not possible to punish a child because a child is not able to have a clear distinction between what is right and what is wrong, and it's impossible to punish insane people, and also it's not possible to punish by criminal law companies, because the firm is only a legal person, not a real person, and a firm doesn't have the capacity, the moral capacity to distinguish between right and wrong. So it's impossible to apply criminal law to companies. But if you

would like to have an efficient system, in for example markets, on financial market, it's very efficient to punish companies. This is why, until 1990, and for example with the new criminal code in France in 1993, we adopted the principle of the ability for companies to be punished by criminal law, without moral capacity to distinguish between good and bad behavior cause it's not a problem. The problem is not to punish ex post a bad moral behavior, but to create a good incentive and efficient incentive on companies to adopt a behavior complying to the law. In this sense, The proof of intention is not required by the criminal economic law. Because it's not imposed to prove the intention of a company. So in criminal economic law it's insufficient to prof the illegal behavior, and by this way and only through the contradiction of the behavior towards the law, to engage the criminal liability of the company.

[illegible]After that, it could be very efficient to organize the criminal responsibility for the other companies. Because if you have a real person, it's not possible to escape the criminal law, only by suicide for ex. So it's a very high price. And if you are dead, the legal is immediately stopped because we don't people dead people in the classical theory. Suicide is a sort of self punishment. But if you are a company, it's very easy: you stop you legal existence and you create another company. So it's easy to escape criminal law. So in competition law, in regulatory law, we will say that we have a continuing responsibility, because the real subject of criminal law is the economic enterprise and law knows the legal subject of law, and for ex if you have a group of companies, with the mother company at the top, and many daughters with many sisters companies, you can engage the criminal responsibility of the mother company for the behavior for example of its little daughters. But this way, this incentive is put in the mother company to strictly control its daughter and the sisters , etc...., in order to not be found liable. If you don't do it, it would be easy for the mother company to say that it's not its fault but the fault of the daughter, but usually the daughter will be poor and the mother company very rich. So in classical law wasn't efficient. In a systemic criminal law, we return to a possibility to charge the liability of the mother company because it has the control of all other companies, and most of the time this mother company is very rich. In this sense we use increasingly criminal law, and this for 2 reasons: 1) it's very efficient, and 2) it's impossible to take insurance, and it's a rule for the punishment for managers. For example, in the Enron case and in the Madoff, the manager then goes directly to jail. So it's not possibility to put the consequence of your behavior on insurance, and it's efficient cause it's very easy to prove; But the only problem is that it's a return to the middle ages, during which we accepted to organize criminal trial against dead people, children, against people who didn't know the difference btw right from wrong, when we applied a new law and not old law, and when we trailed people for the fault of others; The MA system was a system based on efficiency. At first thus, prof of criminal law was against this system because before being a system of criminal law its before all a system of economic law, and to obtain the satisfaction of the purpose of the system. This is why the system is very violent.

[illegible]This is also why because it's not a proper question of fault, it's not a question of ex post, it's possible to organize a contractualization of the criminal law, while it is not possible in classical criminal law. For ex you committed a murder, you can confess or denounce your accomplice, but it's not a reason to renounce to punish you. But because we are in a n economic area the legal system and the courts can organize the contractualization of criminal law. In this sense, if people or companies confess their own behavior, their own criminal behavior, and more if this company will denounce the criminal behavior of the other company they will obtain the absence of punishment. It's a sort of new system of insurance. Many opinion people say that it's a system of denunciation or delation. And the system for people who have committed a criminal behavior to obtain the absence of punishment through the denunciation of the others is an immoral behavior cause It's a gift, a gift given to a criminal this only exist for the economic area cause it's a very efficient solution, but it's not accept for classical criminal law such as murder; this could be strange that we could say that it's important to punish people who have committed murder and it's more important in those cases to obtain information and thus give the gift of innocence by a system of denunciation, but we refuse cause in the classical criminal law we stay in the classical system. But in the economic criminal law, the criminal law is only a tool but not an autonomous system. In a classical legal system, criminal law is autonomous. But for economic matters, and more if we have a problem` of asymmetry of information, criminal law is like every sort of rule, just a tool and a tool to obtain information and to obtain the behavior we want to obtain, and thus to get the right incentive.
[illegible]This is why the EU commission says that the criminal law is only a tool box. The criminal law is governed by the 3 principles which are autonomous from other branch of law. But for the EU Commission, since it's only a pragmatic conception of law, the law is just a tool box, in which we put many rules such as criminal law or civil law. That's why we don't need to make a real distinction btw criminal liability or civil liability cause the law applied are only tools inside the same box. So now, in economics matters, you can forget BECCARIA and its three principles, because the court now only uses criminal law to obtain the satisfaction of the goal and not to punish the behavior which are

criticized though moral considerations. This is why for ex we don't need the proof of intention. And this is why we need a criminal responsibility of companies because on the market, we have many companies.

And also, how to calculate the criminal punishment?
In a classical system, we said that the punishment is in relation with the gravity of the behavior. If the behavior is very grave, the punishment will be very strong. For example, you have committed a murder, so you will go to jail btw 1 years to 30 years. If for another behavior we are only punish btw 1 year and 3 year plus a money punishment btw 1 euro and 10 000 euros. If it's the very little contradiction with the law cause you don't put you car in the right place, you only risk a punishment btw 1 euro and 10 euros. And because we are in a classical conception it's impossible for the court to punish you for more money that what is provided by the law, cause it's against the first principle of the legal element. The legal element tells to every one that if one commits the behavior, he risks the punishment btw one euro and 10 000 euros but no more. Or if I say 10 euros or 10 000 euros every one understands that he risk a punishment btw two 2 number, but no less and no more. So criminal law is easy to anticipate for every one because the punishment for criminal law is an exception to freedom.

But if we are in an economic law, for example in Financial market, then you must obtain the right behavior and we need to obtain a real sanction by creating the right incentive. So the parliaments have adopted new rules and have posed that the punishment is not just a sum between 10 euros and 10 000 euros, but a multiplication of financial benefits obtained by the person who committed the prohibited behavior. For example, if one person uses a privilege information on the financial market, which is an abuse of market, and this is prohibited, and by the use of the privileged information, he obtains a financial benefit of 10 000 euros. If you put the classical system, you create an incentive to commit the bad behavior, because this person obtain the financial benefits, not only if it's not finish but even if it's finish. This is why the law says that this person will be punished with a multiplication of its financial benefits by 10. In this sense, for this person, the risk is one billion euro, but only for that actor. But for another actor, with the use of privileged information will give him only financial benefit of 1000 euros, the court can only punish him for 10 000 euros. So the possibility to punish changes for every one, but for every case it's a good incentive, because in every case the person doesn't have the interest to adopt a behavior against the law.
And in the US, cause prof of economics are powerful, the calculation is also based on the risk of information of this behavior. If it's very hard to know this behavior, for ex it's an international cartel and it's hard to obtain the information of this behavior, they calculate that the risk of revelation is very poor so the sanction must be very high. But if the risk of regulation is very high, the number possible for the sanction must be less high, because they organize a relationship btw the possibility of information and the capacity of punishment. This is an economic conception of the punishment, without consideration for the behavior itself.
Recap: So in economic law, competition law and regulatory, criminal law will grow because it's a very powerful incentive to obtain right behavior, and also because economic law is only a tool box: criminal law is now not at all a classical and autonomous conception of legal system, but only a tool to obtain the efficiency of economic law and regulatory law. This is why after the financial crisis, actors will end up before criminal courts.

B) The liability of the one who issues the rule (precautionary principle)

We have already studied the liability of the State: the State can be liable for the behavior of the regulators, even if the regulator is independent from the State. It's the same system than the system adopted for the courts, because courts are independent from the courts, but the State can still be liable for the courts. For example in Europe, if courts or the trials are too slow the liability of the State can be engage not only by national courts but also by the EU court of human rights. At the same time the State has the duty to prevent the systemic risk. This is why we can talk about precautionary principle which obliges the State to organize the prevention of global and systemic risk. It's a very complex question, because nobody knows exactly what are the condition for this sort of responsibility, and whether it is an objective responsibility or a responsibly for a fault. For example, and we will know that in 2 years, nobody knows if the responsibility of the regulators for the crisis can be engaged cause they didn't adopt the right rules to prevent financial crisis, or if it's only the employees of banks who are responsible for the financial crisis. So we have 2 sorts of system and we can imagine a sort of convergence btw the behavior of both the regulator and the people in banks, and thus maybe create a responsibility between all of them.

V) Regulatory law and rights - The relationship between regulatory law and the statutory legal system.

Let's take a company who wants to access the network: it can ask to enter not only because he has the right to contract and offer the contract of the network owner but also because he has a legal right to access the network. This is why the contract is now the legal way to transform in real terms his potential legal right to access. And this company has the legal right to access because the other companies are for example consumers have also legal right to for example energy. You might say that this sort of legal right is a sort of new economic and social human right, because every one needs energy, or for example everyone needs transportation , etc. This is why and because it's a legal right, the network owner thus doesn't have the right to refuse the contract. This is why it's a legal right that the price isn't fixed by only the contractual negotiation and only the mechanism of markets, because he could only give prices which could be high, for example fair price for the market could be high, and this is why the price would be equal to 0. If a very person, even very poor, because every one has a legal right to obtain the good, and it could be a political decision, the price is calculated not in consideration of the contractual negotiation, not in consideration of the meeting of the offer and demand, but on the capacity for every one to be able to pay the good. And if it's not possible for someone to pay the price, cause every one has a legal right to that special good, then the price will be 0. And this is admitted by the EU commission. Of course this is a political decision because the gratuity if a political decision. The decision to calculate the price in consideration of the capacity of the consumer to pay the price is a political decision.
So if you try to understand the system: at first we have in political terms some rules which are so essential for people that people have legal right to obtain this good. If people are not able to obtain this good because this good is too expensive for them, the price must be 0 are very low for them. For example, in France, it's the solution for universities, but in many other countries such as China or the US it's not the same solution for universities, where universities is not a common good and thus no legal right to access the universities, without contract. And if there is a contract it's only the technical expression of this legal right. This is why it's important to understand that when a good is designed as a common good, by political consideration, the access to this good is the expression to legal rights. But in this case, it is a political ideology. And because it's a political ideology, it's the State which has the legitimacy to say it. If it's only a technical problem, it's not a political ideology and in this case it could be an administrative body, a regulator or a EU body which can decide the price.
Ex: if has a consumer you have the right to obtain electricity, but you don't pay your bill thus don't respect your contractual obligation. After that, the other party will stop to satisfy its own obligation and could stop supplying electricity to the consumer. It's the logical reaction. But in the energy sector, in many countries, there is a legal right to electricity. So the EDF must continue to supply electricity to people who don't pay their bill, because people have the right access electricity. It's a problem for EDF cause it's a cost for that enterprise. But it's more sophisticated than that because they calculate which sum of energy people need for one day. Cause if you have a legal right to access to energy without paying your bill while having the right for every day to have much electricity, you can at the same time heat your pool while not paying your bill. So EDF and the government calculated that you must continue to have access to electricity and energy for the fridge, but also to lights and also one computer. This is human sort of human right. And this all equals for ex for 100 watt per day and if you don't pay your bill you continue to receive electricity but only up to 100 watt per day. At the same time, for telecommunication, if you don't pay your telecommunication bill, they can stop supplying the service but not for emergency numbers, and the firm can't have the power to stop the supply for the emergency number. It's the same for the banking sector. If you don't have enough money on your account the bank may stop to give you a credit card but you still keep the right to a bank account. And you have the legal right to your bank and to take some money from your account, even though you don't have instrument of credit and payment. So in every sector there is a right to access to the good without paying, but only for very basic service. So it's the access to basic and essential services. In banking area, account, in electricity area 1000 watt per day, and telecommunication access to emergency numbers.

A) the regulatory system constructed as a judicial mechanism

In a first presentation we have the State with an independent administrative agency of independent administrative body, which takes administrative decision. After that, the company, or everyone who is concerned by the decision can contest the decision before a court, through the principle of judicial review. The principle of judicial review is a constitutional principle in every European country, and it's also the case in the US. In this conception, the building of these independent regulatory bodies is just a sort of modernization of the State, and after which we organize a judicial review which exists before the institution of this bodies. But in public and administrative law, every one who is concerned by an administrative decision can contest it before a court through the judicial review.

--》 But we could adopt another reasoning through the article 6 of the EU convention of human rights, because this article 6 said that everyone has the right to right to have access to an impartial tribunal. So it's the right, the human right to access to an impartial tribunal, and this first affirmation precised that this right exist in civil and criminal matter. It's the most important article of the EU convention of human rights cause if you don't have an access to an impartial tribunal, it's equivalent to not have rights. This is why the EU court of human rights gives much importance to this article 6. But members states said that we are not concerned by this article 6 if the body is not a tribunal. And the regulatory bodies are not formally tribunals.
Moreover, the member states said that we are in an administrative area, it's thus a problem of administrative law, and article 6 concerns only civil and criminal area, and not administrative area. The EU court of human rights refused to adopt this reasoning proposed by members states including France, because at the European level, the court adopted another definition of what is civil and criminal matter, and not law. If you just say that the criminal matters is the same thing that the criminal law, and that the criminal law is just texts in the criminal code then it's easy for country, for states, to organize punishment outside the criminal court through administrative procedures and after that say they are not concerned with article 6 because we are only in administrative area and not in criminal law. So, and the EU court of human court said that if the State would like to improve the repression, the best way is to stop to use the criminal law and to prefer the administrative way, because the administrative way would not be concerned by article 6. To avoid this behavior of state, the EU court said that the criteria is not the formal nature of the law, criminal or administrative law, in administrative law or criminal law, but rather the MATTER. The matter which is criminal, and perhaps through an administrative law, or matter which is a civil matter and perhaps through an administrative law.
For example, the regulatory body have the power to punish. And the power to punish for ex to oblige companies for ex to give money or deprive them to have an economic activity in the sector, is a power of punishment, so it's a criminal power. SO we have a criminal matter. This is important because for example in France, the council of state took 15 years to adopt the EU reasoning, because the council of state before preferred this definition of what is criminal, or civil or administrative law, by formal definition (pas le critère de la forme). Of course if you adopt a formal definition you give a large margin to the state cause it's easier to the state to put the power in the administrative law and by this way this power would not be concerned by art 6. This is why the creation of these administrative regulatory bodies is an improvement or an increase of the criminalization of the law. For example, the administrative body doesn't have to be impartial, because there are no texts which say that the administration has a duty to be impartial. The administration just has the duty to obey the government. And the notion of impartiality of the administration doesn't exist. It's only court which must be impartial

After that, at the EU level, since 1978 and since the French case of 1996 by the cour de cassation, and after that with a case adopted by the council of state itself, in 1998, the French courts accepted the submission of the regulatory administrative bodies to the article 6. And in this sense, the regulatory body are such as tribunals. When the regulatory administrative body exercise the power to punish, because it's a criminal matter, or when the administrative body resolve a dispute because the settlement of the dispute belongs to the civil matter. So we are always in a civil matter or in a criminal matter. So when the regulatory bodies use their power, it does it always under the article 6 (because art 6 concerns both civil and criminal matters).
This consideration changed the behavior of the regulator because for example, it's quite difficult for a regulator to be really impartial when he exercise an asymmetric power through the resolution of disputes.

--》 Moreover, they are 2 definitions of impartiality: an objective and a subjective one.

The subjective definition of impartiality is not a real problem because subjective impartiality concerns a body, a court, or a regulatory body, to adopt a decision or a judgment without personal consideration, without interference with personal knowledge of the case. So if a judge or if the regulator knows very well one of the party or has a personal interest in the case, then it's a problem of subjective partiality. And through the judicial review the decision will be modified. But in many countries, the corruption is not a big problem so in the regulatory law, the problem is more the objective definition of impartiality.
Because the English tradition said that the court has the obligation not only to be impartial in reality, but also to let every one see their impartiality. So their impartiality must be apparent and let every one see their impartiality. This is why the principle of transparency, which is a grand principle in regulatory law, is applied to regulatory body, which must be also transparent, because every one must see their impartiality. Its easily accepted in the common law system but it's against the tradition of continental law, especially in French tradition, cause for the state council it's sufficient to be sure that the administrative judge has the sense of public services, are not corrupted and thus don't have to prove their impartiality.

But the EU system, in this way, the tribunal and the regulatory bodies which are like tribunal, must prove their impartiality, just like in a common law system. And they must prove it objectively. This is why this objective impartiality must be proved permanently and this is why the regulatory bodies must be reorganized. Because, the regulatory body is like a box, like an independent administrative agency, and we have many functions,

--》 The procedure: For example if a case enters the box (for ex problem of behavior of a company on financial market) the first step is to try to find some facts. This is the step of the instruction, very important especially administrative trail. It's not like in civil trial cause we don't have many parties: there is the company and the regulatory body itself which began to have suspicion on the company. So the regulatory body decides to open the case. This is the exercise of the right of action. It's strange because the body opens the case before itself, and it's not very conform to the principle of impartiality because if you open the case before yourself, you have some suspicion that the company did indeed act badly (because if you didn't think that you would not have open the case). It's the RIGHT OF SELF ACTION.
This problem was brought to the council of state, which protected the power of administration like usual, and gave an answer to the case Habib bank 2000 that the power to open the case before itself is not against the principle of impartiality of the tribunal if the first presentation of the facts is neutral. It's a very strict conception of impartiality. But in France the council of state always protects the power of administration, even against the rights of people, because for many sociological reasons the council of state like instruction. Thus the power to open a case before oneself is against article 6 because it's not a proof of impartiality, but the council of state didn't reason like that and no one brought the case before the EU court. But if another bank asked the same question to the EU court of human right, the answer would probably not be the same (the possibility to open a case before itself is against article 6 even if the presentation of facts is neutral, and it is an anticipation of the punishment. It's not because a presentation made by the administration is neutral that it's not against article 6. They would not believe that the neutral presentation of facts exists to prove impartiality, it is an anticipation of the punishment).
In France we prefer the state and have a lot of faith in the administration and we don't like art 6 very much. .If the administration is composed by exceptional people with a strong sense of public services and act only in the interest of others or in the general interest then it's not a problem for article 6. and if we trust administration in a classical way we don't need to say that the administration is like a tribunal, we don't need to put the exigency of impartiality and we don't need to have a suspicion against the administration. So this is why article 6 as put on the regulatory bodies is a big struggle, a struggle between 2 ideologies. In France, by tradition we trust the State and the administration and so the council didn't understand the application of article 6 on the regulatory bodies. And of course the council of state admitted without difficulties the possibility to open a case before itself, because the council of state believe it tries to serve the general internet, and it believes that it is neutral. It's strange for ordinary people but we must believe the council of state who is more educated that the people because they went through the ENA where the leaned the sense of general internet. But this is against the EU reasoning made by the EU court of Human rights. Because the EU court of human rights prefer people against the State. It's a very strong principle of the EU convention. The EU convention is a weapon for people against the state.
This is why it's hard for tribunal cause for the court the tribunal are made to defend the people against the state, and in the conception of the council of state the administrative court is more made for the defence of the State against the people, without corruption of course, but it's a question of sociology and tradition.

THIS WAS THE RIGHT OF SELF ACTION, cause it's an action exercised before the tribunal itself. So it's a power of self action, and MAFR thinks that it's against article 6, but it's not a problem for every one.

--》 After that, we have an instruction and this instruction is made to find the facts, the facts against the company, or perhaps in favor of the company. But in reality, every one knows that the person in charge of the instruction tries to find the facts against the company. This is a great power because the law gives to person who has the power to make the instruction of the case, such as the power of search just like in criminal law. For ex the competition body also has great power to execute search, not only in offices but also in the houses of the managers. In theory, they must ask to the president of the tribunal, but in reality he just put its signature because it's too complex for a simple tribunal.

Second step: a deeper instruction. If the person who made the first step of instruction thinks that it would be possible that the person of the company did break the law through its behavior, he could decide to go a deeper instruction.
After the instruction in two steps, there is an audience with every one, all member of regulatory body for ex, and after that, before the decision, and for article 6 the decision is absolutely like a judgment, we have a deliberation. The deliberation is secret, so firms and their lawyers cannot participate to the deliberation, which is only within the member

of the regulatory body. And before 1996, during this deliberation we found not only the member of the President and of the board of the administrative body but also the person who made the instruction. Why did we use to organize the trial like that? Because it's more efficient, because who understand and know the case the most? It's the person who have made the instruction. Thus, if you have a problem to understand and seize very complex cases, it's easier to keep the person who made the instruction within the tribunal, because he will help the other judges and member of the administration during the deliberation. It's a good explication.
But, if you adopt the reasoning of article 6, there is a problem. First, there is a problem of the impartiality, because since the beginning the body has a conception of the case, and thinks since the beginning that the company and the person adopted a behavior against the law. And more specially, the person who has the person of instruction, and who decided to go to the next step, necessarily have an opinion on the case. Because if he didn't have an opinion, he would have stop the case, and necessarily thinks the behavior is against the law. So he necessarily already have a preconception of the case, and thus is PARTIAL. Thus, after that, during the deliberation, it's dangerous cause he knows the case better than the other members of the body. These members will listen very carefully this person and will follow his opinion. So the opinion built by this person just after the first step of instruction, will be transformed into the judgment, the decision of deliberation itself.
So this system is against the principle of objective partiality, even if there is no corruption, even if the instructor was right, it's still a problem of partiality because his opinion adopted at the first step of the trail will become the final judgment of the trial. Sometimes judgment are just a copy, a total reproduction of what the instructor had concluded at the first step.

Moreover by the time the regulatory body notifies the firm that they have open an instruction, then it's too late to defend itself. Because during the first period the firm cannot defend itself or have a lawyer of have access to the paper of the made by administration. So we have a problem cause the administration has too many power, it's partial even if it's not corrupted and might be right in the end, there is not due process.

--》 Thus, by the OURY and DIDIER decision, the supreme court in France, the judicial court and administrative court decided that the objective organization inside the regulatory body is contrary to article 6.
This is why now we have inside every regulatory body or competition body, an autonomous commission for dispute settlement and punishment, and in another part we have the court of the regulatory body which can take for ex individual administrative decision to observe the quotation of shares for ex, and there is the general secretary who is very important because he is the one who will have the power of action. If will thus ask to the commission of dispute settlement which has the power to punish to open a case against a company. And these two bodies inside the general body are absolutely autonomous from each other. And of course, the board has the power to regulate, in the sense of adopting general norms and individual administrative decisions. If it's not a problem of settlement of dispute, it's not a problem of punishment, because if it was the case, we would be in the matter of civil or criminal matter and end up in the part of the body which is submitted to the article 6. But the adoption of a regulation is not submitted by article 6 cause it's not like a trial.

The regulatory body is thus such as a tribunal, and every one has the power to contest its decisions, through the principle of judicial review. So even the power to adopt general regulation you can contest it before a court, same for individual administrative decision or individual punishment.

--》 The difficulty is the nature of this sort of contestation (the nature of the judicial review). So we have a regulatory body or an independent administrative body, has taken a decision and you want to contest this decision before a court. Before, because of the influence of the EU conception at the national, we believe now that in many cases the regulatory body acts like a jurisdiction, that act was like an appeal(it was not like a first instance but rather a second instance). Like in many country to know if the competence is for the administrative or judicial courts, it's complicated. What is important is the power of the courts. The courts are not special courts. It's the case in the UK for example. They built a special court, a tribunal of appeal which is a special jurisdiction. In other country, such as in France with the court of Paris (and sometimes the council of state), the courts are just usual court. They are ordinary court. The regulatory bodies can adopt decision with a sort of political opportunity, because the regulatory bodies by definition has to regulate a sector. And for example, it has not only the power but also and at first a duty to prevent for ex a systemic risk, and to prevent the bankruptcy of banks. Should the court of Paris have the same exceptional powers because by the sort of translation, the court of Paris will examine the decision taken by the regulatory body in order to prevent the systemic risk? Because an ordinary judge don't have the duty and don't have the power to prevent the system risk in banking

sector and financial markets. SO it's very difficult cause it's only an ordinary court which can by ordinary way settle a dispute and verify the legality of a decision taken by the regulatory body, but it's hard to say that the court of Paris or the council of state can regulate because they come after the regulatory body.
We asked the question to the council of state about the control of mergers. Because the control of mergers is a sort of regulatory matters and some academics and the council of state itself said it has the power to make a substantial analysis of the case and to adopt the solution which is the most opportune to the sector or to the market or to the structure of the market.

Nobody knows if more generally the court which ratifies the decision taken by the regulatory body can become by the way regulators themselves. For ex in banking area the court of Paris could or must prevent the systemic risk through the control of the regulatory body. Nobody knows, the question is left open.
What we can say is this: if we accept this great power for the ordinary court, we must have well educated judges in economy. For example, the tribunal of appeal in the UK had a president, president Bellamy who's very well educated, not only in law but also economics. Same in the US cause ordinary and competition tribunal are composed by high educated judges. It could be dangerous to give to much power to a court if it's only composed by lawyers. This is why the tendency is for a specialization of the judges. If we accept that the ordinary courts can become regulators of the market through the control of the decision taken by the regulatory bodies, we must then organize the specialization of the judge.

Rappel on regulatory law: It's the methodology to obtain the right balance btw a competition principle and another principle such as technical or political. It goes beyond the distinction between the market and state. That's why it concerns some more specific sectors which need to be regulated so the sectors are at the same time organized by some rules taken by the competition, but also need rules organized by the state or administrative bodies. For the future there are several issues:

The liability: it will be decided after the financial crisis. Liability of State, liability of financial actors.
The issue of the rules of contract inside the regulated sectors, and no one know quite well and the power of contracts in regulated sectors.
And after all and perhaps at first, we don't have a global regulator to fight global problem in global sectors. We don't know if it's possible, legitimate and efficient to build international and global regulators, of if it's possible to obtain an agreement, so a sort of contract, between all states concerned by this global issues.

The regulatory law is not a problem for the past and for legal system, but more a way to find new solutions for a world globalized and with a globalization of national economies. This is why the regulatory law needs a new conception of political sciences, of economic matters and of course of legal rules.

What is a planning contract: It's a classical way to organize the sector: a contract made btw the state and the state owned enterprise. For ex contract btw the state and public postal enterprise which talks about the budget given by the State to the enterprise and the obligation taken by the firm in compensation, such as the transportation of letters. The council of state said that the planning contract is not an administrative decision but a real contract with a negotiation btw the state and the firm, and thus a contractualisation of the action the state. That was the first moment, now there is a general movement of contracutalisation of the actions of the state cause we think that if someone accept the obligation through a contract it's more efficient.

Is the law sufficient to restore the trust? Or is it only the States who can restore the trust? And trust in important to rebuild the trust in financial and banking sectors, and it's not the case for networks. So we need an approach sectors by sectors but there are common issues to each sectors such as the regulator, procedure, contract , etc.

We should function more on the teleology system.

Governing by contract: the judge can judge through a sort of contract with the parties. The principle is the more efficient for the state is not to impose a rule and to impose a rule, because people have the power to disobey the rule because the State don't have information and because can go to other countries. Because people now have freedom to go to other countries, it's hard for State to make them obey. There is a sort of competition between legal system, so if people don't like the national legal system, because for ex people need to give much money , etc...., these people go abroad. SO the states now don't have really the power to impose the legal rule. So the state prefer to govern by a sort of contract with people and by this way people have the satisfaction of their own interest, give info to the state and accept to obey the rules cause they participated in the elaboration of the rules. It's the theory of the contractualisation of the public action. It's the same for the court: the judge imposes the judgment, but in family matters the best way would be to organize a contract for children and thus court get better result because now parents will obey the judgment cause they participate to the elaboration of the judgment. So judgment by negotiation with the judge and between parties. It's a more contractual society. And in tradition way, common law is traditionally a contractual society. And in a continental legal system we don't have this tradition to negotiate with the State or the court or elaborate a sort of contract.

If we don't trust the regulator and he does something wrong, can we do something besides judicial review? The court can just nullify the decision adopted by the regulator and give the case again to the regulator and oblige him to adopt a new decision. It's a possibility. But also the court can also replace the regulator and adopt by itself the right decision. For ex in take over decision the court takes the decision in the place of the regulator. On other question, the court only nullifies the decision and ask the regulator to adopt a new decision. After that the company can adopt the decision before the court.