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What Is Meant by "Regulation": The Roles Devoted to Markets and Authorities in Times of Crisis

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*Symposium: Local to Global: Rethinking Spheres of
Authority After a World Financial Crisis*

**What Is Meant by “Regulation”: The Roles Devoted to
Markets and Authorities in Times of Crisis**

*Paul Nihoul** and *Blair D. Trigg***

TABLE OF CONTENTS

I. A TOOL FOR ACTION.....	426
A. <i>General Meaning</i>	426
B. <i>Specific Meaning</i>	427
C. <i>Other Tools</i>	430
D. <i>The Remaining Tool</i>	431
II. THAT WHICH OUGHT <u>NOT</u> BE DONE	433
A. <i>“No Regulation”</i>	433
B. <i>Remuneration</i>	434
C. <i>Lesson</i>	11
III. THAT WHICH OUGHT TO BE DONE.....	436
A. <i>“Yes Regulation”</i>	436
B. <i>Example</i>	436
C. <i>Lesson</i>	437
IV. THE CONCEPT OF CONSTRAINT	438
A. <i>“Yes-No,” “No-Yes”</i>	438
B. <i>Public Constraint v. Private Freedom</i>	438
C. <i>Constraints Resulting from Market Dominance</i>	439
D. <i>Constraints Inherent in Business Behavior</i>	440
E. <i>Constraints Imposed by Professional or Industrial Associations</i>	441
F. <i>Constraints Deriving from Market Interactions</i>	442

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V. CONCLUSION: THE NATURE OF THE DEBATE	444
A. <i>Common Feature</i>	444
B. <i>What Degree?</i>	445
C. <i>What Issue?</i>	445
D. <i>Situation, Position</i>	445

With significant international changes taking place and elections of global importance on the horizon, the need for discussing regulation as a means of confronting and ameliorating the effects of the global financial crisis of these past few years is now as pressing as ever. In this paper, we address the question of whether resolution of the current economic challenges should be resolved with increased intervention on the part of the public sector or whether the markets themselves should be entrusted with the task of spontaneously bringing solutions to existing difficulties. The question echoes a dilemma to which a significant part of the legal and economic literature about economic activities in contemporary scholarship has been dedicated, *viz.*, whether public authorities can be trusted to resolve economic difficulties and to what extent it is appropriate to curb market freedom in a context of unprecedented economic growth due to the energy deployed by market actors.

The purpose of this Article is not to provide a definitive answer to the dilemma—supposing it will ever be possible to do so. It is rather to shed some light on the respective roles of markets and regulation authorities. In formulating the question thus, we can also inquire into the consequences of those roles. Competition and consumer laws are areas of law where regulation plays a marked role in economic activity. These areas of law can be our guides as we navigate the important question posed herein.

This Article considers the meaning of regulation in its many facets and features, with consideration given not only to how regulation in general operates as a tool to induce and deter certain behaviors, but also with respect to the regulatory goals of the markets in which regulatory regimes operate. Rather, however, than getting tied down in the minutiae of this or that regulatory regime, instead this Article paints with a broad brush across topics of general interest, posing as many questions as it answers.

I. A TOOL FOR ACTION

A. *General Meaning*

In general, the term “regulation” means an action undertaken by a public authority and involving the adoption of rules.¹ For instance, governments and

1. On regulation in general, see STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982). *See generally* ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* (1971); *see also generally*

authorities around the globe have been reported, since the beginning of the present crisis, to be considering a better and possibly farther reaching regulation of financial activities to avoid the reiteration of the economic difficulties currently being experienced.² Those difficulties have affected billions of firms, families, and individuals, and are the result of practices perceived by many to be unacceptable, or at least undesirable, in the light of the consequences they have produced.

Where government regulators announce their intention to better and further regulate financial activities, they indicate, in substance, a desire to adopt normative rules, having a mandatory force, in the governance of the markets. But within each legal system, regulators must take into consideration not only the desirability (or lack thereof) of economic consequences, but also the reality of the market activity those legal systems govern. That will necessarily mean consideration of stakeholders involved and require consideration of the consumer, the seller, and the government, as each in its own way is a market actor.

In this sense, the meaning attributed to the concept of “regulation” is considerably vast. It encompasses all public activities giving rise to the adoption of rules—whatever the form of these rules and whatever the identity of the authority concerned, whether it be government, administration, independent agency, local authority, private attorneys’ general, etc.

B. Specific Meaning

Parallel to the general meaning given to “regulation,” another, more specific meaning is sometimes attributed to the concept in the context of antitrust, or competition law.³ As appears from scholarship and applicable rules, this area of

MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* (1985); *see also generally* ANTHONY OGDEN, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* (Hart Publishing 2004) (1994); *see also generally* Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); *see also generally* CORPORATE CONTROL AND ACCOUNTABILITY: CHANGING STRUCTURES AND THE DYNAMICS OF REGULATION (Joseph McCahery, Sol Picciotto, & Colin Scott eds., 1993); *see also generally* Paul Nihoul, *Norme, régulation et réforme des télécommunications*, 58 ANNALES DE DROIT DE LOUVAIN no. 4, 1998, at 390; George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); W. KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON, JR., *ECONOMICS OF REGULATION AND ANTITRUST* (3rd ed. 2000).

2. *See generally* ÉLIE COHEN, *PENSER LA CRISE* (2011); *see also generally* PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* (2009).

3. These two terms are used indifferently in this paper. The former is generally used in the United States, the latter in the European Union. On the similarities and differences between European and U.S. antitrust laws, *see generally* EUGÈNE BUTTIGIEG, *COMPETITION LAW: SAFEGUARDING THE CONSUMER INTEREST* (2009); *COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM* (Clifford A. Jones & Mitsuo Matsushita eds., 2002); EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* (2007). *See also* the books published annually by the B. Hawk and the Fordham Corporate Law Institute on specific topics considered from the perspective of E.U./U.S. antitrust rules as well as the books published in the International Competition Law Series at Kluwer, Series director: Alastair Sutton.

the law is governed by the general representation that, in normal circumstances, markets should operate freely from public interventions, with intervention reserved where necessary to avoid distortions.⁴ The public benefits in that sort of environment.⁵

As an exception to that general rule, antitrust theory provides broadly that intervention in the freely operating market becomes necessary when adverse consequences would otherwise result, the typical but far from exclusive examples being where restrictive practices or abuse of a dominant position result in market distortions.⁶ The decision that outcomes are or are not satisfactory may be based on a variety of criteria, and is generally made by a court or other public authority (e.g., trade commission). Sometimes a deal that looks good to one or more parties may not be good for the market as a whole. After all, looks can be deceiving. One reason commonly designated in antitrust theory to explain these relatively “deceiving” outcomes is the existence of excessive market power, held by one or several undertakings.⁷ In such situations, the theory states that an intervention on the part of a court or other authority may be warranted.⁸ That intervention, if any, should have as its purpose the “containment” of the powerful firm(s) to prevent the firm(s) from using its market power to foreclose competitors, thereby creating a situation where goods and services are proposed at conditions less favourable than those that can be found in competitive markets. In general, the intervention would only take place where it can be established that the “containment” would not be provided by the markets operating by themselves, without any intervention.⁹

If the intervention were to take place, it would be carried out in the name of antitrust¹⁰ legislation and should be distinguished from another type of intervention, called “regulation” on markets which, by their nature, do not

4. See generally GIORGIO MONTI, *EC COMPETITION LAW* (2007).

5. *Id.*

6. Consolidated Version of the Treaty on the Functioning of the European Union art. 101-02, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU]. TFEU Articles 101 and 102, as well as similar provisions in the Sherman Antitrust Act, provide the starting point for regulatory regimes of a complex nature developed to avoid market distortions. *Id.*; see also Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2004). See generally RICHARD A. POSNER, *NATURAL MONOPOLY AND ITS REGULATION* (1999).

7. See generally POSNER, *supra* note 6; see also William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937-38 (1981).

8. Frank H. Easterbrook, *Comparative Advantage and Antitrust Law*, 75 CAL. L. REV. 983, 983 (1987).

9. See Thomas E. Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CAL. L. REV. 893, 901 (1987).

10. On antitrust in general, see (in the United States): PHILIPP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* (4th ed. 1998). See generally ROGER D. BLAIR & DAVID L. KASERMAN, *ANTITRUST ECONOMICS* (2008); see also generally RICHARD A. POSNER, *ANTITRUST LAW* (2d ed. 2001); see also generally VISCUSI, VERNON & HARRINGTON, *supra* note 1. In the E.U., see generally MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* (2004); see also generally JOANNA GOYDER & ALBERTINA ALBORS-LLORENS, *EC COMPETITION LAW* (5th ed. 2009).

support the simultaneous activity by several firms operating in competition with one another (i.e., a “natural monopoly”).¹¹

Natural monopolies arise where the costs of providing a good or service to the consumer would be higher if several firms were operating in the same sector than would be the case if only one firm was permitted to operate there.¹² That is the case, specifically, where, for their exercise, activities require significant investment in infrastructure and, until relatively recently, telecommunications.¹³ In such markets, the presence of several undertakings would involve, for each of them, significant entry costs which would have to translate into higher prices to clients or consumers.¹⁴ Where the purpose is to achieve low prices for consumers, it may be deemed preferable to limit the number of undertakings admitted in that market to only one.

In a monopoly situation, there is a risk that it may not provide clients with conditions analogous to those existing on normal, competitive markets. A “surveillance” is then considered useful and even necessary.¹⁵ The purpose of the surveillance is to protect clients against abuses that may be committed by the undertaking in the monopoly situation.¹⁶ That “surveillance,” and the interventions on the part of courts and authorities that may derive from it, is called, in most instances, “regulation.”¹⁷

11. See STANFORD V. BERG & JOHN TSCHIRHART, NATURAL MONOPOLY REGULATION: PRINCIPLES AND PRACTICE 307-08 (1988); see also KAHN, *supra* note 1, at 1-14; see also POSNER, *supra* note 6, at 1-3; see also VISCUSI, VERNON & HARRINGTON, *supra* note 1, at 2-5.

12. See POSNER, *supra* note 6, at 1.

13. See generally E.C. COMPETITION AND TELECOMMUNICATIONS LAW (Christian Koenig, Andreas Bartosch & Jons-Daniel Braun eds., 2002).

14. See *id.*

15. CTR. FOR CO-OPERATION WITH THE ECONOMIES IN TRANSITION, PRIVATISATION OF UTILITIES AND INFRASTRUCTURE: METHODS AND CONSTRAINTS 30 (1997).

16. *Id.* Surveillance may be carried out by various actors depending on what jurisdiction is competent. In some cases, the task to monitor regulated markets is entrusted to independent agencies. That is the case, for instance, in the United States, for the electricity sector and for electronic communications markets. See *supra* note 3. The same goes for the European Union. See generally EUGENE D. CROSS, ELECTRIC UTILITY REGULATION IN THE EUROPEAN UNION: A COUNTRY BY COUNTRY GUIDE (1996); see also generally PAUL NIHOUL & PETER RODFORD, EU ELECTRONIC COMMUNICATIONS LAW: COMPETITION AND REGULATION IN THE EUROPEAN TELECOMMUNICATIONS MARKET (2004). Sector specific agencies sometimes act on the basis of their own initiatives. In other situations, the call for action may come from unsatisfied customers and/or competitors which, depending on applicable law, may have an independent right of action allowing them to bring the issue to court. In regulated sectors, a question is often whether and to what extent the general rules of competition remain applicable despite the existence of sector specific regulation.

17. See generally E.C. COMPETITION AND TELECOMMUNICATIONS LAW, *supra* note 13.

C. *Other Tools*

With these two meanings,¹⁸ regulation constitutes one tool for authorities to realize objectives.¹⁹ Other tools are available, depending on the country or continent where the regulation is envisaged. For instance, European states used to carry out, themselves, economic activities where, for some reason, they did not want these activities to be carried out by private firms. Typically, these activities would involve heavy infrastructure investment²⁰ or the establishment of solidarity among classes of the population.²¹ Depending on the situation, an administration would be entrusted with the task of carrying out the activity.²² Alternatively, the activity would be entrusted to an undertaking whose capital would be detained by an authority, i.e., a “public undertaking.” The activities would then be carried out by that undertaking under direct control of the administration or Minister in charge.²³

In these two types of situations, the tools available to authorities would not consist of formal rules. As they carried out economic activities through their own

18. Adoption of rules by authorities in general and adoption of specific rules in natural monopoly situations.

19. Classically, authorities are represented as having objectives they seek to realize. The identity of these objectives depends on a variety of factors. One of them is the procedure whereby the directors of these authorities are designated. Where that designation is based, directly or indirectly, on elections, the objectives to be realized depend upon the ideas defended by the political party(ies) winning the election. Another factor influencing objectives pursued by authorities is the margin for manoeuvre possibly left to them to determine what should be done in given circumstances. For instance, European competition law is based on treaty provisions unanimously adopted by Heads of States and Governments. *Antitrust: Overview*, EUR. COMM’N, http://ec.europa.eu/competition/antitrust/overview_en.html (last updated Mar. 16, 2012). Among these provisions, Article 101 of the Treaty on the European Union states that anticompetitive agreements may only be accepted where, among other conditions, an equitable share of the benefits accruing from these agreements would benefit to consumers. TFEU, *supra* note 6, at art. 101. That precision limits considerably the possibility for European antitrust authorities to determine, on an autonomous basis, what conditions should be satisfied for an exemption to be granted on the basis of that provision.

20. For example, telecommunications, energy distribution, water supply, or automatic transportation. Given the high investment requested, these industries are often considered to induce natural monopoly situations. *See supra* note 3. For an overview applicable to these industries in the European Union, *see generally* 2001 O.J. (C 17/04). *Report to the Laeken European Council: Services of General Interest*, COM (2001) 598 final (Oct. 17, 2001); *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions*, COM (2007) 725 final (Nov. 20, 2007).

21. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions*, *supra* note 20. *See* the three communications quoted in note 20, particularly the last one. The services encompassing the establishment of a solidarity are deemed “social services of general interest.”

22. *See Public Undertakings and Services in the European Union*, EUR. PARLIAMENT, pt. III, http://www.europarl.europa.eu/workingpapers/econ/w21/sum-2_en.htm (last visited Mar. 26, 2012).

23. *Id.* On the rules applicable to public undertakings within the European Union, *see* JOSE LUIS BUENDIA SIERRA, EXCLUSIVE RIGHTS AND STATE MONOPOLIES UNDER EC LAW: ARTICLE 86 (FORMERLY ARTICLE 90) OF THE EC TREATY 29-43 (2000); ERIKA SZYSZCAK, THE REGULATION OF THE STATE IN COMPETITIVE MARKETS IN THE EU 111-18 (2007).

administrations or through undertakings they controlled, they did not have to adopt formal rules dictating conduct to the persons in charge of implementing the objectives assigned to them. In most instances, the intent of the authority could be expressed informally through individual contacts between the Minister in charge and the directors of the public administration or undertaking.²⁴

D. The Remaining Tool

In the last decade, there has been a general movement to progressively reduce to regulation the variety of tools available to public authorities.²⁵ The idea behind the movement is that authorities and markets should do what they are there for—that is, for markets, to carry out economic activities and, for authorities, to regulate these activities where appropriate.²⁶

This movement has been observed in various countries. In Europe, some activities traditionally carried out by authorities have been submitted to competition courts. That move has been decided by the Court of Justice of the European Union (“Court”).²⁷ In landmark judgments, the Court decided that competition should extend to activities as diverse as: the management of supply and demand on the labour market;²⁸ the provision of telecommunication services, networks, and terminals;²⁹ and the provision of non-urgent transportation for

24. See *Public Undertakings and Services in the European Union Economic Series W-21*, *supra* note 22.

25. *Id.*

26. See generally TONY PROSSER, *THE LIMITS OF COMPETITION LAW: MARKETS AND PUBLIC SERVICES* 4 (2005).

27. That denomination has been introduced by the Treaty of Lisbon. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon]. Formerly, the same Court was called “Court of Justice of the European Communities.” *Id.* at art. 1(A)(8). The Court is the higher judicial instance within the European Union for all matters covered by the Treaty. A. – *Treaty on the European Union*, CURIA, http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-11/en_extrait_cour_2009-11-30_11-32-32_981.pdf (last visited Mar. 26, 2012). In substance, its intervention may occur in three sorts of circumstances. First, direct applications may be submitted to the Court by Member States and/or other European institutions where they feel that European law has been infringed by another Member State and/or European institution. *Id.* Second, an appeal can be formed against judgments issued by the General Court, which is a lower European jurisdiction where applications by firms and individuals may be brought. *Id.* Third, the Court may act upon request by a national court on European matters either to interpret European law or to decide on the validity of a European instrument. *Id.* For general information, see the Court’s website at *The Court of Justice of the European Union*, EUR. UNION, http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm (last visited Mar. 26, 2012). See generally HENRY G. SCHERMERS & DENIS F. Waelbroeck, *JUDICIAL PROTECTION IN THE EUROPEAN UNION* (6th ed. 2001); TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* (2nd ed. 2007); ALEXANDER H. TÜRK, *JUDICIAL REVIEW IN EU LAW* (2009).

28. Case C-41/90, *Höfner & Elser v. Macrotron GmbH*, 1991 E.C.R. I-1979.

29. Case 311/84, *Centre Belge d’études de Marché – Télémarketing (CBEM) SA v. Compagnie Luxembourgeoise de Télédiffusion*, 1985 E.C.R. 3261; Case C-18/88, *Régie des Télégraphes et des Téléphones (RTT) v. GB-Inno-BM SA*, 1991 E.C.R. I-5973; Case C-202/88, *France v. Comm’n*, 1991 E.C.R. I-1259; Joined Cases C-271/90, C-281/90, C-289/90, *Spain v. Comm’n*, 1992 E.C.R. I-5859.

patients.³⁰ For decades prior to those landmark judgments, all of the activities just mentioned had been submitted to derogatory regimes in the Member States where the issue originated.³¹

Pursuant to Article 102 of the TFEU, dominant firms are prohibited from abusing their strong market position.³² By definition, firms in a situation of legal monopoly are the only ones active on a given market. Under case law, that situation implies that their position on the market can be deemed “dominant.” These firms being considered dominant, the prohibition contained in the provision applies and these firms must refrain from any behaviour which, under the case law, may be considered as “abusive.” In a celebrated evolution, the Court has progressively considered in the course of time that, in essence, legal monopolies necessarily abuse their dominant position because, as shown by economic literature, monopolies are, by themselves, conducive to price increases and/or output limitations.³³

This evolution has paved the way for the European Commission, and later the European Parliament and Council, to adopt regulations opening to new entrants markets traditionally reserved by Member States for their national monopolies.³⁴ That progressive opening of national markets has been labelled “liberalisation,” as it entails the possibility for firms previously barred from carrying out a given activity to henceforth enter these markets.³⁵

Liberalisation has complicated the exercise of economic activities by administrations and/or public undertakings. As markets were opened to new entrants, these entities suddenly faced intense competition from private firms that were generally very efficient.³⁶

- For decades, public undertakings had been provided special and exclusive rights very useful for the exercise of their activities—with liberalisation,

30. Case C-475/99, *Ambulanz Glöckner v. Landkreis Südwestpfalz*, 2001 E.C.R. I-8137.

31. See generally D.G. GOYDER, *E.C. COMPETITION LAW* (4th ed. 2003).

32. TFEU, *supra* note 6, at art. 102.

33. See Case C-41/90, *Höfner & Elser v. Macrotron GmbH*, 1991 E.C.R. I-1979; see also Case C-179/90, *Merci Convenzionali Porto di Genova Spa v. Siderurgica Gabrielli SpA*, 1991 E.C.R. I-05889.

34. Restraints on predatory pricing, barred by TFEU Article 102 provide just one example. See also E.C. COMPETITION AND TELECOMMUNICATIONS LAW, *supra* note 13. Within the European Union, the European Commission has, as its task, the preparation of draft legislation for discussion and adoption by, and with, the European Parliament and the Council, whereas the two latter institutions together hold legislative power. *European Commission*, EUROPA, http://europa.eu/about-eu/institutions-bodies/european-commission/index_en.htm (last visited Mar. 26, 2012).

35. For a reference to this nomenclature see, e.g., *General Agreement on Trade in Services*, WORLD TRADE ORG., http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm (last visited Mar. 26, 2012).

36. These firms were those successful enough in their markets of origin to obtain the resources necessary for entry into liberalised markets. The economic theory of monopoly itself assumes the monopolist's position is not challenged by new entrants, either actual or potential. See ROGER J. VAN DEN BERGH & PETER D. CAMESASCA, *EUROPEAN COMPETITION LAW AND ECONOMICS: A COMPARATIVE PERSPECTIVE* 23-24 (2d ed. 2006).

these privileges could not be maintained.³⁷

- They had long been accustomed to receiving public subsidies very useful to cover their debt—liberalisation forced them to rely on their own forces to finance their activities and investment.³⁸
- Above all, they had been considered, by governments, for many years, as a convenient way to fight unemployment—as a result of liberalisation, their personnel, not always qualified, was measured against people selected by rival companies for their professional competence and their appetite for excellent economic results.³⁹

II. THAT WHICH OUGHT NOT BE DONE⁴⁰

A. “No Regulation”

At the end of the process described above, regulation remains the main—if not the only—tool available for action by authorities on markets.

Within the realm of regulation, the most common type of measure one thinks of is that where authorities prohibit a certain behavior.⁴¹ In this type of constraint, the regulating authority states “that which ought not be done.” The actors that are subject to the regulation are warned that, if they adopt the target behavior, they will be subjected to sanction of some kind.⁴² By way of anticipation, they tend to avoid the target behavior.⁴³ If they are unaware of the constraint, or if they are

37. See generally SIERRA, *supra* note 23.

38. In the European Union, Member States are prohibited, in principle, from providing subsidies to undertakings. That prohibition is based on the necessity to avoid each Member State supporting with the public budget their own undertakings against firms established in other Member States. Allowing State subsidies would have given rise to frontal competition among the Member States. Instead of that form of competition, the Founders of the Union have opted for a progressive integration of national economies. On this subject matter, see generally KELYN BACON, *EUROPEAN COMMUNITY LAW OF STATE AID* (2009); see also generally THE LAW OF STATE AID IN THE EUROPEAN UNION (Andrea Biondi et al. eds., 2004); see also generally CONOR QUIGLEY Q.C., *EUROPEAN STATE AID LAW AND POLICY* (2d ed. 2009).

39. See *Liberalisation*, EUR. COMM’N COMPETITION, http://ec.europa.eu/competition/liberalisation/overview_en.html (last updated Mar. 19, 2012).

40. On regulation in general, see sources cited *supra* note 1.

41. This can be thought of as essentially a dichotomy in terms of preventive of, and deterrent of, certain behaviors, as exemplified by regulation through agencies (preventive) and through litigation (deterrent). See generally Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, in *REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW* 11 (Daniel P. Kessler ed., 2011).

42. See *id.*

43. The underlying principle is one of a cost/benefit analysis. In the criminal context, for example, economic analysis of deterrence begins with the premise that the “potential offenders will be deterred from criminal acts if the expected costs of those acts exceed their expected benefits.” Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW AND ECONOMICS* 13, 45 (Cass R. Sunstein ed., 2000). But where the actor in question is a corporate entity, the

aware of it but do not respect it, they expose themselves to the imposition of sanction. It is supposed that the experience of the sanction should permit the actors to avoid any repetition of the sanctioned behavior.⁴⁴

B. Remuneration

Remuneration is one contentious place where regulation based on an incentive/deterrent model may be exemplified. A situation in recent memory involved the European financial institution called Fortis. The turmoil surrounding Fortis was intimately related to a strategy of expansion carried out by the CEO of that financial institution—Mr. JP Votron.⁴⁵ Mr. Votron was originally working in a leading position for a Dutch based financial institution, ABN-Amro,⁴⁶ when he was contacted by Fortis, another financial institution with a Belgian origin and a European dimension, for the purpose of offering Mr. Votron the job of CEO at Fortis.

Mr. Votron accepted the offer, with an ambitious plan for growth of Fortis.⁴⁷ As part of that strategy, the latter attempted to acquire, with the assistance of business partners, the former employer of Mr. Votron, ABN-Amro.⁴⁸ The project first encountered competition by a rival bid from Barclays, another leading financial institution. However, the Fortis bid succeeded when these directors

analysis is undoubtedly more complicated, although the fundamental starting point remains unchanged. See generally THOMAS J. MICELI, *THE ECONOMIC APPROACH TO LAW* 315 (2d ed. 2009).

44. In E.U. competition law, the amount of fines for engaging in market distortion can be doubled by taking recidivism into account. See VALENTINE KORAH, *AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE* 38 (9th ed. 2007).

45. For a chronology, see Julia Werdigier, *Fortis Shareholders Back ABN Amro Bid*, N.Y. TIMES (Aug. 7, 2007), <http://www.nytimes.com/2007/08/07/business/worldbusiness/07bank.html>; see Bloomberg News, *Consortium Wins Control of ABN Amro*, N.Y. TIMES (Oct. 9, 2007), <http://www.nytimes.com/2007/10/09/business/worldbusiness/09bank.html>; see Julia Werdigier, *In Europe, One Bank Chief Steps Down, and Another May Follow*, N.Y. TIMES, July 12, 2008, at C7, available at <http://www.nytimes.com/2008/07/12/business/worldbusiness/12fortis.html>; see Landon Thomas, Jr. & Matthew Saltmarsh, *European Regulators Move Swiftly to Rescue Two Lenders*, N.Y. TIMES, Sept. 29, 2008, at C2, available at <http://query.nytimes.com/gst/fullpage.html?res=9507E7DA133CF93AA1575AC0A96E9C8B63>; see Carter Dougherty, *Authorities Aid Banks in Europe*, N.Y. TIMES, Sept. 30, 2008, at C1 <http://www.nytimes.com/2008/09/30/business/worldbusiness/30euro.html>. For a post-debacle analysis, see *Managing Banks: It Wasn't Me*, ECONOMIST, Oct. 9, 2009, at 56, available at <http://www.economist.com/node/14587120>; *Aftermath of a Mega-Merger: Three Amigos, Only One Conquistador*, ECONOMIST, July 17, 2008, at 56, available at <http://www.economist.com/node/11751202>.

46. Harry Wilson, Philip Aldrick & Kamal Ahmed, *RBS Investigation: Chapter 2 - the ABN Amro Takeover*, TELEGRAPH (Dec. 11, 2011, 9:45 AM), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/8947530/RBS-investigation-Chapter-2-the-ABN-Amro-takeover.html>.

47. See *Lloyds 'In Talks Over Merger for SWIP'*, SCOTSMAN, Nov. 11, 2005, at 1, available at http://www.scotsman.com/business/banking/lloyds_in_talks_over_merger_for_swip_1_965748.

48. See *ABN Bid Battle 'Could go Hostile'*, BBC NEWS (Apr. 15, 2007), <http://news.bbc.co.uk/2/hi/business/6557845.stm>.

were offered an attractive financial package and the initial bid was considerably increased.⁴⁹

The deal being done, Mr. Votron received a notable increase of his salary by way of a bonus. In substance, that bonus was based on the idea that the recently made acquisitions, particularly the acquisition of ABN-Amro, had conferred to Fortis another dimension which should be reflected in Mr. Votron's salary.⁵⁰

In the increasingly declining global economic context in which the acquisition had taken place, Fortis, like many other financial institutions, became the subject of hesitant investment. The value of Fortis' shares declined,⁵¹ creating a situation where the bank needed fresh capital to finance its investments. That fresh capital was obtained through capital increases⁵² which diluted the value of the former shares,⁵³ raised discontent among the loyal shareholders, and further fueled questions about management's control of the situation.⁵⁴

Rapidly, market confidence in other Belgian financial institutions declined, leading to a situation where, for the first time in nearly a century,⁵⁵ and with the approval of the European Commission,⁵⁶ the Belgian Government had to bail out many banks operating on the national territory⁵⁷—thereby increasing Belgian national debt to a dangerous level.⁵⁸

49. *RBS Woos ABN with £49bn Bid Plan*, BBC NEWS (Apr. 25, 2007), <http://news.bbc.co.uk/2/hi/business/6590741.stm>.

50. *See Belgian Banks Reveal Big Bonuses*, FLANDERS TODAY (Apr. 7, 2009), <http://www.flanderstoday.eu/content/belgian-banks-reveal-big-bonuses>.

51. Gilbert Kreijger, *ABN Shares Fall on Fortis Financing Worries: Analysts*, REUTERS (Aug. 10, 2007, 2:41 PM), <http://www.reuters.com/article/2007/08/11/businesspro-abnamro-takeover-shares-dc-idUSAAT00705220070811>.

52. David Gow, *Shareholder Anger Could Force Out Fortis Boss*, GUARDIAN (July 10, 2008), <http://www.guardian.co.uk/business/2008/jul/11/banking>.

53. Martin van der Starre, *Fortis Ousts Chief Votron After ABN Amro Deal Depletes Capital*, BLOOMBERG (July 11, 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&refer=europe&sid=aSgzfhmCOLSU>.

54. *See Gow, supra* note 52.

55. *See Alex J. Pollock, There's Usually a Banking Crisis Somewhere!*, AMERICAN (Sept. 21, 2011) <http://www.american.com/archive/2011/september/theres-usually-a-banking-crisis-somewhere>.

56. Press Release, State Aid: Commission Temporarily Approves Rescue Aid for Dexia Bank Belgium; Opens In-Depth Investigation (Oct. 17, 2011), *available at* http://www.deljpn.ec.europa.eu/modules/media/news/2011/11101b.html?ml_lang=en.

57. Michael Birnbaum, *France, Belgium Agree to Nationalize Troubled Dexia Bank*, WASH. POST (Oct. 9, 2011), http://www.washingtonpost.com/world/europe/merkel-sarkozy-reach-agreement-on-banking-sector/2011/10/09/gIQADOV7XL_story.html; Aoife White, *European Bank Giant Fortis Partially Nationalized*, USA TODAY (Sept. 29, 2008, 8:50 PM), http://www.usatoday.com/money/industries/banking/2008-09-28-fortis-bank_N.htm.

58. Phillip Inman, *Belgium Joins Financial Markets' Hit List*, GUARDIAN (Nov. 24, 2010), <http://www.guardian.co.uk/world/2010/nov/24/belgium-financial-markets-hit-list/print>. For a historical analysis of the relations between bad debt and the existence of states, *see generally* MICHAEL TOMZ, REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES (2007).

C. *Lesson*

In the absence of compensation regulation (a form of “No regulation”), companies may adopt incentive structures which would have undesirable economic consequences for the society.⁵⁹ In the example of Fortis, it is possible that forms of regulation both internal and external to Fortis may have been able to limit the deleterious and widespread consequences of management decisions that have been linked to those consequences. Such regulatory measures might include caps on remuneration or evaluation of investment decisions with a long-term, forward-looking measurement tool, such that only those investment decisions which prove profitable over a period of, say, more than 18 months, be rewarded with increased remuneration. An external tool might include government regulation of salaries, but this may be viewed as unpopular and too intrusive to the internal operation of businesses.

III. THAT WHICH OUGHT TO BE DONE

A. *“Yes Regulation”*

In a complimentary manner, regulation can also say “that which ought to be done.” In this case, the authority intervenes through the enactment of rules where it wants a specific behavior to be adopted and in a context where, according to information available to it, the target behavior would not be adopted in the absence of such a regulation.

B. *Example*

An illustration of this sort of regulation can be taken from the strategy used by certain distance contract firms to attract clients. In most instances, clients purchase products they see in shops. The situation may be slightly different for services, which cannot be seen. However, the tendency, until recently in Europe, was to purchase services from professionals known by the client or working in a firm with which the client had already dealt.⁶⁰ Physical contact is deemed important by many consumers as it allows them to verify, before making a

59. As regards the European Union, see *Communication from the Commission Accompanying Commission Recommendation Complementing Recommendations 2004/913/EC and 2005/162/EC as Regards the Regime for the Remuneration of Directors of Listed Companies and Commission Recommendation on Remuneration Policies in the Financial Services Sector*, at 2, COM (2009) 211 final (Apr. 30, 2009); see also *Commission Recommendation on Remuneration Policies in the Financial Services Sector*, at 2, SEC (2009) 580, 581 (Apr. 30, 2009); see also 2009 O.J. (L 120) 28 para. 7.

60. Rodoula H. Tsiotsou & Jochen Wirtz, *Consumer Behavior in a Service Context*, in HANDBOOK OF NEW DEVELOPMENTS IN CONSUMER BEHAVIOR 53 (Victoria Wells & Gordon Foxall eds., forthcoming June 2012).

purchase, whether the products are those which they really want to buy, or whether the services will be delivered in an appropriate way, given the reputation of the professional, or the services already performed by him/her.

Recently, firms have sought to develop contacts with clients at a distance.⁶¹ They realized they could benefit from the fact that clients do not always want to go to a shop or an atelier to purchase products or services. In the context of these “distance contracts,” transactions were concluded. That tendency grew dramatically with the development of electronic communications techniques. To a certain extent, it has now become the standard. The physical contact has been replaced, in most cases, by information gathered on the Internet.

In some instances, “distance contracts” appeared not to satisfy all consumers completely. One of the reasons was that consumers were at times buying products that differed from those they really wanted. On the basis of pictures placed on the Internet, or available in a brochure, they purchased, say, towels which, as it appeared when they finally held them in their hands, did not exactly correspond to what they needed.⁶²

In some instances, the absence of correspondence resulted from a misunderstanding between the firm and its clients. Using the towel example, above, the firm had genuinely proposed specific towels but the message had not come across perfectly because the clients had not seen or touched the products. In other instances, the non-correspondence could hardly be deemed fortuitous. Although intent is always difficult to establish, the firm had probably sought to lure consumers with the expectation that the latter would accept the product or the service despite their relative discontent with what they in fact obtained in contrast to the relative contentment they might have felt had they gotten what they believed they were going to obtain.

C. Lesson

These difficulties have been reported to authorities, which have introduced regulation to avoid such situations. Some of these rules are based on the idea that, absent a regulation of these practices, firms seeking to conclude distance contracts may not always supply clients with the information necessary to make an informed decision. They, thus, specify the information that should be provided by such firms. They also provide a kind of sanction, by which the consumer may

61. See, e.g., *Life Insurance Purchasing Habits Changing as One in Four Consumers Now Prefer to Buy Direct*, LIFE (July 27, 2011), <http://www.lifehappens.org/life-insurance-purchasing-habits-changing-as-one-in-four-consumers-now-prefer-to-buy-direct/>.

62. Or, as far as services are concerned, they purchased a holiday trip in a fancy village but, when they arrived at the destination, the facilities were not as comfortable as they had thought based on, again, the pictures that had been presented. See, e.g., *Expedia—Vacation Packages*, CONSUMER AFF. (Jan. 31, 2012), http://www.consumeraffairs.com/travel/expedia_packages.html.

withdraw from the contract, at no cost to the consumer, in the case where the information has not been properly provided.⁶³

IV. THE CONCEPT OF CONSTRAINT

A. “Yes-No,” “No-Yes”

In the previous section, we divided regulation into categories depending on whether it compels (“yes regulation”) or prohibits (“no regulation”) a specific behavior. The reader has probably noticed that these categories overlap to a certain extent. Rather than referring to different sorts of regulations, they provide a different way to formulate, or interpret, a rule.

Take the regulation identifying information to be provided by firms engaged in distance contracts. As I have proposed above, that regulation can be associated with the second category to the extent firms are compelled, as a result of the existence of that rule, to adopt certain behavior (provide the requested information, “yes-regulation”).⁶⁴ But an analysis using the standard provided in the first category is also possible. The obligation to provide specific information can also be formulated, and/or interpreted as coming down to a prohibition to provide insufficient or erroneous information (“no regulation”).

Ultimately, the core of regulation does not really depend on how the rule is formulated, but rather on the constraint imposed upon the behavior of those to whom the regulation is addressed. Firms would have acted in a given way—but are prevented from doing so as a result of the existence of regulation. Alternatively, firms wanting to avoid a specific situation or behavior will have to adopt that behavior because the regulation so prescribes. In both cases, because they introduce constraints into an otherwise freely operating system, the regulations limit the possibilities that would otherwise be open to businesses.

B. *Public Constraint v. Private Freedom*

Is the introduction of such a constraint specific to regulation? I suspect this question plays a central role in the dilemma posed at the outset of this article, where I raised the question of whether the crisis should be solved by markets or

63. The following instruments are applicable to distance contracts within the European Union. See Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) art. 6; see also Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, 2002 O.J. (L 271) 16-24; see also Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10-19.

64. See *supra* Part III.A.

by authorities. Should markets be let free to react spontaneously to these challenges? Or should constraints be imposed on them by authorities—with the consequence that businesses will then be constrained in their reactions?

In these factual situations, constraints are associated with governmental authorities and are necessarily public in nature. By contrast, freedom is presented as being inherent to markets. An opposition is thus established between public constraints and private freedom.

That opposition induces me to formulate two subordinate questions. First, can authorities create freedom for markets? Second, can markets be, in various situations, a source of constraint? In other words, do markets at times curb the energy of businesses, their willingness and desire to engage in projects, their capacity to innovate, or their readiness to create wealth for themselves and others?

C. Constraints Resulting from Market Dominance

The discussion below concentrates on the second question. One example which readily comes to mind, particularly to the mind of a scholar with a definite interest in antitrust law, is the constraints which are carried out by dominant firms in the markets placed under their domination. Under European competition law,⁶⁵ Article 102 of the Treaty on the Functioning of the European Union (“TFEU”)⁶⁶ prohibits abuses committed by dominant firms. The application of the prohibition depends upon a showing that (a) a firm dominates a market, (b) it has made an abusive use of that domination, and (c) the behavior involved in that abuse cannot be justified by a legitimate objective.⁶⁷ The first condition, and thus the existence of domination, is deemed established where four additional criteria are met.

First, a showing of dominance requires a demonstration that the firm in question appears as a mandatory partner for clients in the market.⁶⁸ Clients have no choice but to deal with the firm. This is because, for instance, the firm controls a material necessary for the manufacture of a given product or because the firm controls a distribution network essential to channel products or services to consumers.

65. I refer, in the lines ahead, to European competition law, but the demonstration could also be made with reference to U.S. antitrust law. On the similarities and differences between them, see the references provided *supra* note 1.

66. TFEU, *supra* note 6, at art. 102 (Formerly Article 82 TEC).

67. See, e.g., Commission Decision 89/205, art. 80, 1989 O.J. (L 78) 1. Additional conditions for the application of the prohibition are that the domination must extend on a substantial part of the common market and the abuse must affect interstate commerce. Before examining whether all conditions are satisfied, courts and authorities must define the relevant market.

68. See, e.g., *id.* (for an early case articulating this principle).

Second, the plaintiff in a legal action or competition authorities acting *sua sponte* must establish that, in the context of the case, the firm has the capacity to determine the conditions under which its products and services are made available to clients.⁶⁹ In normal, competitive markets, strategies are defined by firms taking into account the possible reactions of competitors and the likely attitude of consumers. In a dominated market, that pattern ceases to exist. As a result of various factors, the firm appears as being in a position where it can determine these market conditions without even considering what consumers or competitors would do.

Third, it must be demonstrated that the firm is capable of imposing its trading conditions on other undertakings present in the same market.⁷⁰ In normal markets, each firm would decide its strategy—taking into account consumers and competitors as indicated above. In a dominated market, that relative autonomy or independence of market players has ceased to exist. For a variety of reasons, these actors must adapt themselves to the market conditions decided by the dominant firm.

Finally, plaintiffs and/or authorities must establish that, as a result of its position, the firm has the capacity to hinder, or even eliminate, competitors and competition.⁷¹ Normally, firms do not have the power to affect, by their own transactions, the structure of the market. Such an effect is possible, by contrast, in a dominated market, the dominant firm having for instance the capacity to oust a competitor from a market through predatory pricing, or the capacity to squeeze a distributor by charging the latter for supply, a price superior to the final price proposed to consumers.

Where these conditions and criteria are met, the firm is deemed dominant. As appears from the criteria above, dominance involves the imposition of constraints on consumers and competitors. By virtue of its dominance, the firm has the ability to impose market conditions on the latter and the former. It has the power to prevent entry of potential competitors and to oust actual ones—thereby constraining them in their business projects. It has the capacity to compel consumers and partners to deal with it, despite its possible shortcomings.

D. *Constraints Inherent in Business Behavior*⁷²

The existence of constraints imposed by private actors are not limited to a specific category of situations—those where a market is dominated by a firm.

69. *Id.* at art. 23.

70. *Id.* at art. 22.

71. *Id.*

72. On this subject, see Paul Nihoul, *From Unfair Trading to Free Competition—Towards a New Organisation of Markets in the European Union*, 17 EUR. BUS. L. REV. 23 (2006).

They appear to be inherent to market transactions. Constraints are created by markets and businesses in just about every situation.

One such situation is where enterprises, acting in an individual capacity, create their own rules. Such rules may concern consumers. For example, businesses make transactions with their customers subject to the latter agreeing with their general sales conditions. These general conditions may require advance payments while customers would probably prefer to retain payment until the product has been received—and to the extent they are satisfied. Businesses may compel clients to use specific products in conjunction with their own, where customers may well have chosen others.

These obligations can be analyzed as constraints with a private origin. They are not, by far, limited to customers or clients. Constraints are ubiquitous in the relationship between enterprises and their labor force. Firms typically request personnel to start their service at a certain time, to dress in a certain way, to behave with clients in a given manner.

The same can be stated about firms in relation to their suppliers. Generally, the former dictate conditions applicable to the supplies to be provided by the latter—if the latter want to continue being designated as suppliers.

E. Constraints Imposed by Professional or Industrial Associations

Constraints also come from professional or industrial associations to which firms belong.⁷³ Firms normally find an interest in participating in these associations or organizations.⁷⁴ But the counterpart for these advantages is that they must abide by the rules imposed by the same. The rules may require members adhere to certain technical specifications with respect to their products. They may prohibit members from taking a public stance on issues where the association or the organization wants to develop a common point of view, for example.⁷⁵

73. Associations exist in the majority of professional sectors. They have for their objective the organization of the profession and the promotion of its interest, often in the form of a governmental lobby, or “special interest” group. Associations may engage in decision-making which can run afoul of TFEU Article 101 when those decisions are viewed as “agreements” or “concerted practices.” See GOYDER, *supra* note 31, at 67, 68, 79-81.

74. Toni Klym McLellan, *Joining Trade Associations*, BUSINESS, www.business.com/guides/joining-trade-associations-362 (last visited Mar. 27, 2012). For instance, they receive benefits in the form of collective supply. Or they receive intelligence on market trends. Or they gain influence on the public policy carried out in the sector to which they belong.

75. Governance documents—including Articles of Incorporation, Bylaws, and Policy Manuals—play a key role in delimiting the character of the association and may therefore proscribe activities carried out by the association’s members. ASSOCIATIONS AND THE LAW 100-01 (Jerald A. Jacobs ed., 2002). The constraints imposed by trade or professional associations sometimes infringe rules of competition. On this topic, see *inter alia Trade Associations, Professions and Self-Regulating Bodies: Understanding Competition Law*, OFF. FAIR TRADING 19-20 (Dec. 2004), http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/offt408.pdf.

F. *Constraints Deriving from Market Interactions*

Beyond these specific examples, business transactions involve, in themselves, the imposition of a degree of constraints on partners and competitors. Consider “bundling” or “tying” arrangements, whereby the supply of one product is made dependent upon the acceptance of another one. For instance, iPhones have been distributed in Europe and the United States by telecom operators. In exchange for payments, these operators were granted a right to sell iPhones in exclusivity in a given territory. These payments were amortized through selling to iPhones purchasers subscriptions to mobile services provided by these operators. The situation, for clients, was rather constraining—they had to purchase a subscription with a given operator, which they possibly disliked, in order to obtain one of these famous iPhones.⁷⁶

As a result of the very existence of the constraint imposed by that practice on customers, bundling has been prohibited in some countries.⁷⁷ Through that prohibition, authorities wanted to protect consumers from purchasing products or services they did not really want.⁷⁸ Another reason could be to protect smaller businesses.⁷⁹ Bundling can more easily be carried out by firms with a significant turnover.⁸⁰ For instance, the right to distribute iPhones could only be obtained by the major telecom operators.⁸¹ The smaller ones did not have the financial capability to make the payments requested by Apple—the manufacturer of iPhones.⁸²

In that type of country, bundling would thus be prohibited in all circumstances. A violation of that prohibition would be prosecuted as an administrative matter and give rise to a sanction (imposition of a fine).⁸³ The purpose of the sanction would be to announce that sanctions will be imposed whenever the prohibition is infringed.

76. *iPhone Q&A - Revised November 20, 2011*, EVERYIPHONE (Nov. 20, 2011), www.everymac.com/systems/apple/iphone/iphone-faq/iphone-carrier-exclusivity-buying-unlocked-iphone.html; *At Midnight, The First Sale in Vilnius, the iPhone 3G (Video, Photos)*, LRYTAS.LT (Sept. 26, 2008), www.lrytas.lt/12224184741220369544-p1-it-vidurnakt-vilniuje-parduoti-pirmieji-iphone-3g-video-nuotraukos.htm; Samuel Fields, *Confirmado, el iPhone Llegará a España de la mano de Movistar*, APPLESFERA (June 4, 2008), www.applesfera.com/apple/confirmado-el-iphone-llegara-a-espana-de-la-mano-de-movistar.

77. THE UNILATERAL CONDUCT WORKING GRP., REPORT ON TYING AND BUNDLED DISCOUNTING 5, 6, 19, 23 (2009), available at www.internationalcompetitionnetwork.org/uploads/library/doc356.pdf.

78. *Id.* at 9-10, 19.

79. *Id.* at 9.

80. *Id.* at 10.

81. *iPhone Q&A - Revised November 20, 2011*, *supra* note 76 (noting that only Cingular/AT&T could get access to the iPhone).

82. *Id.*

83. See THE UNILATERAL CONDUCT WORKING GRP., *supra* note 77, at 19 (noting enforcement by groups like the Israel Antitrust Authority, the Turkish Competition Authority, The Russian Federal Antimonopoly Service, and the United Kingdom’s Office of Fair Trading).

Bundling, however, is not prohibited in all countries; it is accepted in some.⁸⁴ Where it is accepted, sellers are left unhindered in regards to their business practices—and consumers are deemed responsible enough not to purchase products they do not want. If the practice is not appreciated by consumers, sellers will have to face the consequences: lower sales, lower market share, lower profits, and lower share value.

	REGULATED MARKETS	FREE MARKETS	COMPARISON
Tying	Tying is prohibited by regulation.	Tying is not prohibited by regulation but may be disliked by business partners.	There is a difference between the two scenarios as one involves regulation and the other does not.
Penalties for tying	A fine is imposed by a court, an authority or a legislator. As a result of the fine, the profit made by the perpetrator is lower than anticipated.	No fine is imposed by a court or authority – but firms resorting to that practice face the risk that dissatisfied customers turn to other suppliers. Such firms would then lose revenues. Their profits would be lower than anticipated.	In both situations, the firm suffers a financial loss—as a result of a fine in one case (regulation) or as a result of negative reactions by dissatisfied business partners in the other (markets).

84. See *End of Bundling Ban In Sight*, FLANDERS TODAY (Apr. 28, 2009), <http://www.flanderstoday.eu/content/end-bundling-ban-sight>.

Goals	The hope of the legislator, the regulator, and/or the court is that tying will be dropped by infringing firms, as these firms undergo a sanction.	The lesson for such firms is to stop resorting to tying in similar contexts as they would otherwise be sanctioned by dissatisfied partners.	In both situations, the firm will avoid engaging again in that practice for fear of a sanction being imposed again—a fine in one case (regulation) and a business sanction in the other (markets).
Long-term policy objectives	The legislator, the regulator and/or the court anticipates that the firm will renounce ever resorting to tying in order to avoid future sanctions.	In the longer term, the lesson is that firms should anticipate possible discontent on the part of customers if they want to avoid losses in revenues.	In both situations, other firms are warned to anticipate possible sanctions and should avoid engaging in the questioned behavior.

V. CONCLUSION: THE NATURE OF THE DEBATE

A. *Common Feature*

This Article started with an interrogation as to who should be entrusted with the task of addressing the challenges attached to the current crisis—authorities or markets. In the course of the discussion, it appeared that public interventions are sometimes criticized because they involve the imposition of constraints on businesses which would otherwise be free. That critique is right to the extent that regulation indeed produces constraints.

However, as demonstrated above, public authorities are not the only ones to introduce constraints. Constraints are also produced by markets. An analysis of business practices demonstrates that constraints derive, for instance, from the power exercised by dominant firms. For the members involved, those constraints may derive from the participation in professional or industrial associations or organisations. More generally, those constraints may derive from the mere exercise of activities by firms, as the latter organize their labor force, their contacts with suppliers, and their relations with customers. Finally, such constraints may derive from the very existence of business operations as firms enter into relationships with certain partners and in opposition to competitors or from their customer base.

Markets and authorities thus have one feature in common when it comes to regulation—their actions involve the imposition of constraints on business actors.

B. What Degree?

In such a context, an opposition between markets and authorities does not really make sense. If there is any, the opposition is not between a state of private freedom and one of public constraint. If one opposition were to be mentioned, it would be between a state of freedom and one of constraint—knowing that constraints may be produced by a variety of actors.

Yet, that formulation of the dilemma immediately appears as it plainly is unrealistic. If market freedom is defined as the possibility for market actors to adopt whatever act they want or to engage in whatever project they desire without being subject to any constraint whatsoever, one would have to consider that freedom does not really exist in markets. So defined, it is an impossibility because no market action is possible without some kind of constraint.

A more realistic approach would consist of accepting that business activities entail the imposition and the acceptance of a certain degree of constraint—the question being, then, not any longer whether a pure state of freedom can be attained, but rather what degree of freedom, or conversely, what degree of constraint, is desirable.

C. What Issue?

As markets and authorities have in common the imposition of constraints on businesses, another problem is whether it is legitimate to express a systematic preference, *ex ante*, for one or the other when it comes to selecting who should address the financial crisis.

Again a reasonable attitude would be to consider that the answer is probably not the same in all contexts. Rather than asking the question of the preference for markets or authorities once and for all, we should examine, as it pertains to each issue, who is in the best position and has the best tools to address the problem. Markets should not be deemed *per se* incapable of reaching a goal of public interest. As a corollary, authorities should not be deemed *per se* incompetent to realize a given regulatory task.

D. Situation, Position

Ultimately, there are situations in which firms and/or individuals may benefit from a public intervention and there are situations in which, by contrast, they may lose out as a result of such an intervention.

In essence, the preference of individuals and entities depends on the advantages or inconveniences that may result from a situation or event. There is little doubt that customers and competitors will request public interventions where unacceptable business constraints are imposed on them by partners and/or competitors. That sort of scenario explains much of the private litigation pending

before courts. Customers sue suppliers where they deem abusive clauses imposed by the latter.⁸⁵ Competitors sue dominant firms where, as a result of the power detained and exercised by the latter, they are not in a position to develop a sustainable, ambitious business project.⁸⁶

Certainly the answer to the question posed at the outset—markets or authorities?—reflects something of a Hobson's choice. As has been shown above, where markets do not self-regulate, the public, through their governments, will often become implicated, through direct regulatory intervention or by providing a legislative framework in which individuals or companies may act as private attorneys' general to effectuate the regulatory end.

An understanding of this basic point is important to avoid becoming lost in the fog surrounding a debate of this nature. Tackling questions about the proper form of regulation requires a truly sophisticated analysis, and often the only clear answer is a relative one that takes into consideration, *inter alia*, the subject matter of the regulation, the desired outcome of the regulation, the point of view of the regulated entity, and the ability of the regulator to achieve desirable ends.

After surveying the architecture of many different types of regulation, we realize that regulation may be necessary in many instances, but also that it comes with a price. As such, any serious discussion about how to develop, critique, or modify this or that regulatory regime for the handling of this or any future crisis ought to take into consideration not only the desirability of the regulation's outcome, but also its likelihood of success in achieving the desired outcome, along with the relative strengths of the parties proposing or opposing the regulation, and the costs and benefits associated with all of the above.

Decision makers or those involved in the formulation of policy who adhere without due consideration to absolute government intervention or absolute free markets necessarily fail to take into consideration the complexities of the market place and the considerable effects that market activities have on the global economic system as a whole. Opening the debate from this standpoint will lead to meaningful discussions about regulation in the coming years, as the world exits, with new challenges and inventive regulatory tools, from the economic crisis.

85. See *Proposed Class Action Lawsuits Against Lenders for Violating Trial Modification Contracts*, MORTGAGE-MOD-MONSTER (Oct. 28, 2011), www.mortgage-mod-monster.com/proposed-class-action-lawsuits-lenders-violating-trial-modification-contracts.

86. See Josh Ong, *French Reseller Sues Apple Over Unfair Competition*, APPLE INSIDER (Dec. 30, 2011, 9:43 PM), http://www.appleinsider.com/articles/11/12/30/french_reseller_sues_apple_over_unfair_competition.html.