Jnl Publ. Pol., **24**, 1, 75–98
DOI: 10.1017/S0143814X04000042

Taking Legal Rules into Consideration: EU Asylum Policy and Regulatory Competition

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ABSTRACT

This article applies regulatory competition theory to an unexplored case of competition among legal norms: asylum. The asylum case study allows for a discussion of two main assumptions of regulatory competition theory: the spontaneous emergence of competition among rules and the mechanical response of regulators to market forces. The article explains to what extent the current legal framework impacts on the emergence and development of the competitive process. This framework determines the existence of a market of legal norms, it impacts on the arbiters' mobility and on States' decision to compete. The article then addresses the mechanical vision of competition. It shows that law frames the response given by regulators to market forces. It discusses the hypothesis that competing legal rules evolve in a linear way and converge. Finally, the asylum case shows the limits of competition theory's ability to explain the evolution of law.

Introduction

Regulatory competition can be defined as the process in which regulators deliberately set out to provide a more favourable regulatory environment, in order either to promote the competitiveness of domestic industries or to attract more business activity from abroad (Woolcock 1996; see also Radaelli, this issue). It is a dynamic of alteration of national regulation in response to the actual or expected impact of internationally mobile goods, services, or factors on national economic activity (Sun and Pelkman 1995). Based on Tiebout's theory (Tiebout 1956), regulatory competition as analytic model was first used to explain the American experience with corporate chartering (Romano 1985; Cary 1974; Charny 1991). The model rapidly flourished because it provides an explanation of how regulators respond to the demands of mobile factors, as well as shedding light on the evolution of legal norms and policies in a global environment.

Regulatory competition was 'imported' into European legal literature in order, *inter alia*, to complement the comparative analysis of law and, with the

aid of economic analysis, to explain both the interactions between national legal orders, and the convergent evolution of legal norms (Ogus 1999). Further, regulatory competition provides the economic underpinning of subsidiarity in a multi-layer structure of government. Finally, it contributes to the identification of the scope for harmonization and competition among rules (Reich 1992; Van den Bergh 1998; Woolcock 1996).

Another line of argument considers that competition, in contrast with harmonization, is an efficient law making process in a multi-level system of governance. Indeed competition between legislators would generate the benefits of a learning process based on the trial and error principle and would trigger a natural approximation of different legal rules through the selection of the most efficient norms (Van den Bergh 1998; Ogus 1999).

Whether it is discussed by economists, political scientists or lawyers, regulatory competition is hard to grasp because arguments based on empirical analysis and normative claims are frequently entangled. However the scope of this article is not so ambitious as to deal, even implicitly, with normative questions. Rather, in this article I set out to discuss, from a legal perspective, two main assumptions of the conventional approach to regulatory competition. Firstly, scholars tend indeed to neglect the fact that, although Hayek has linked competition and spontaneous order, competition between legal rules is not a spontaneous process. Hence the interest of identifying which factors impede or spur the emergence of competition among rules. Secondly, I wish to question the assumption that regulators respond mechanically and automatically to market forces in order to compete with other regulators. This neglects the importance of the legal-institutional framework that shapes the response of the regulators.

To this end, I will look at an unexplored case of competition among legal norms in the EU: asylum. There has been a shift from relatively generous asylum policy to a race of restriction and deflection. After the Second World War, EU Member States had welcoming and protective asylum legislation. Once a person was given the status of refugee, he/she was granted the right to work, or subsidies, and social rights. These measures contributed to the integration of the refugees into the host society. True, legislation was different throughout Europe: Member States had different interpretations of the 1951 Geneva Convention on refugees, and the recognition rates of the refugee status varied significantly. Yet, there was an 'old' asylum regime in Europe, described by Joly as an 'integrative policy of access and full status recognition paired with full social rights' (Joly 1999).

By the mid-1980s, however, the growth of asylum seekers in Europe increased the economic and political costs of each national asylum policy. The number of asylum applications increased six-fold from the early 1980s to the early 1990s, i.e. from 73,700 applications in 1983 to 692,380 in 1992 (see Table 1 for details). The costs of integration have increased because

https://doi.org/10.1017/S0143814X04000042 Published online by Cambridge University Press

TABLE 1: *Asylum applications in EU Member States 1980–2001 (UNHCR 2002)*

	Austria	Belgium	Denmark	Finland	France	Germany	Greece	Ireland	Italy	Luxembourg	Netherlands	Portugal	Spain	Sweden	United Kingdom
1980	9,260	2,730	70	n.a.	19,910	107,820	1,790	n.a.	2,130	n.a.	1,350	1,640	n.a.	n.a.	2,350
1981	34,560	2,290	120	20	19,860	49,390	2,240	n.a.	3,640	n.a.	1,590	600	330	12,650	2,430
1982	6,310	2,910	300	10	22,510	37,420	1,190	n.a.	3,140	n.a.	1,210	1,120	2,460	10,230	4,220
1983	5,900	2,910	800	20	22,350	19,740	450	n.a.	3,040	n.a.	2,020	610	1,420	7,050	4,300
1984	7,210	3,650	4,310	30	21,710	35,280	760	n.a.	4,560	n.a.	2,600	380	1,180	12,000	2,910
1985	6,720	5,300	8,700	20	28,930	73,830	1,400	n.a.	5,420	n.a.	5,640	70	2,360	14,500	4,390
1986	8,640	7,640	9,300	20	26,290	99,650	4,230	n.a.	6,480	n.a.	5,870	280	2,280	14,600	4,270
1987	11,410	5,980	7,590	50	27,670	57,380	6,930	n.a.	11,030	n.a.	13,460	440	2,480	18,110	4,260
1988	15,790	5,080	11,310	60	34,350	103,080	8,420	n.a.	1,240	n.a.	74,902	330	4,520	19,600	4,000
1989	21,880	8,110	5,280	180	61,420	121,320	3,000	n.a.	2,120	n.a.	13,900	160	4,080	30,340	11,640
1990	22,790	12,960	18,990	2,740	54,810	193,060	6,170	n.a.	4,830	n.a.	21,210	80	8,650	29,420	26,210
1991	27,310	15,170	12,910	2,130	47,380	256,110	2,670	30	26,470	n.a.	21,620	260	8,140	27,350	44,840
1992	16,240	17,650	20,070	3,630	28,870	438,190	1,850	40	6,040	n.a.	20,350	690	11,710	84,020	24,610
1993	4,750	26,880	16,480	2,020	27,560	322,610	810	90	1,650	n.a.	35,400	2,090	12,620	37,580	22,370
1994	5,080	14,350	7,990	840	25,960	127,210	1,300	360	1,790	n.a	52,570	770	11,990	18,640	32,830
1995	5,920	11,420	10,050	850	20,170	127,940	1,310	420	1,730	390	29,260	450	5,680	9,050	43,970
1996	6,990	12,430	7,390	710	17,410	116,370	1,640	1,180	680	260	22,170	270	4,730	5,750	29,640
1997	6,720	11,790	5,570	970	21,400	104,350	4,380	3,880	1,860	430	34,440	300	4,980	9,660	32,500
1998	13,810	21,970	6,080	1,270	22,380	98,640	2,950	4,630	11,120	1,710	45,220	370	6,650	12,840	46,020
1999	20,100	35,780	6,950	3,110	30,910	95,110	1,530	1,1090	33,360	2,910	39,300	310	6,410	11,230	71,150
2000	18,280	42,690	10,350	3,170	38,590	117,650	3,080	14,800	14,000	630	43,900	200	7,930	16,300	75,680
2001	30,135	24,549	12,403	1,651	47,263	88,363	4,650	10,324	9,620	689	32,579	192	9,219	23,513	70,995

asylum seekers, who were traditionally European and skilled migrants, have been replaced by less skilled asylum seekers coming from other regions of the world and of different ethnic origin. Add to this the benefits that governments expected when they granted protection to asylum seekers and refugees have decreased. In particular, after the fall of the Iron Curtain, political benefits arising out of protection granted to individuals fleeing persecution from communist countries have obviously diminished. The consequence of this change in costs and benefits was a change in behaviour. Governments (and in particular those receiving a significant percentage of asylum seekers such as Germany and France) started to compete to prevent asylum seekers from asking for protection in their national territory. Other Member States, fearing that they may become the receptacle of the redirected protection seekers, rapidly followed suit.

The competitive process generated by the early restrictive amendments has led to the adoption of more and more restrictive provisions. States have enacted a number of measures aimed at repelling asylum seekers: the erection of barriers to access the host country (stringent visa policies; non access to the territory for those that have transited through a safe third country), impeded access to (or short) procedure of examination of the protection claim, restrictive interpretation of the notion of refugee under the Geneva Convention, limited rights during the examination procedure, limited rights granted to refugees (temporary stay, no social rights on par with nationals), no programme and facilities promoting integration, and the emphasis put on the return of the persons to the country of origin (for details of the legal evolution, see Joly 1999; Noll 2000; Crépeau 1997; Schuster 2000). This mirrors a process of regulatory competition.

Asylum is a very original case of competition. It is not a process whereby different locations compete to attract the mobile factors of production. Nor is it a case where indigenous companies lobby their national regulators in an effort to improve the national policy mix offered. Competition among asylum rules would better correspond to a third form, where States have not competed to attract economic actors but to repel them. Asylum is specific because it is not connected with companies' competitiveness. While competition among social, environmental, or company laws derives from competition between companies, competition in the field of asylum does not depend, to emerge, on the development of so-called industrial competition. These characteristics explain, to a certain extent, the form of the competitive process and its result.

The organization of the article is simple. Section 1 is an overview of the competition between the EU Member States' asylum legislation since the mid-1980s. Section 2 includes discussion of the 'spontaneous' competition assumption. It tries to explain to what extent the legal framework has an impact on the emergence of the competitive process. More particularly, it

focuses on the relation between legal rules and regulatory arbitrage. Section 3 examines the regulators' responses. It shows that the response is not automatic: it depends on different variables, one of which is the existing legal framework. Thus, while competition stimulates the evolution of law and can explain some convergence, the asylum case encourages discussion of the assumption of a spontaneous approximation around one or several efficient regulatory regimes.

The evolution of EU member states' asylum legislation: an example of regulatory competition

The evolution of asylum and refugee legislation in Europe from the mid-80s onwards is characterized by a substantial decrease in the legal protection granted to asylum seekers and refugees (Joly 1999; Crépeau 1997; UNHCR 1997; Jeannin et al. 1999; Noll 2000). Scholars speak of the emergence of a 'new' asylum regime that reflects a change in paradigms: whereas before the regime implemented an integrative policy of access and full status recognition, it now maximises exclusion, undermines status and rights and emphasises short-term stay for refugees (Joly 1999). Indeed, during the 1980s and 1990s, numerous legislative amendments were introduced in a rapid trend culminating in the creation of the so-called 'Fortress Europe'. With the Schengen and Dublin Conventions, EU Member States have set out co-operative schemes in order to put an end to this restrictive spiral, but the trend remains one of restrictive legal protection. These phenomena can be, to a certain extent, explained by regulatory competition.[2] As such, regulatory competition complements sociological, political and economic analyses of asylum legislation (See for details, Barbou des Places 2003).

The origin of competition: the threat of regulatory arbitrage

Competition among rules originates from the economic actors' responsiveness to differences in regulation, called regulatory arbitrage (see Radaelli, this issue). In the field of asylum, competition developed because States were convinced that asylum seekers were rational actors, acting as law consumers i.e. selecting as a destination the State offering the highest level of protection (i.e., the opportunity to be granted refugee status, rights of residence, to work, subsidies, social security etc.).

The evolution of the number of asylum applications in Europe gives some indication of the existence of asylum shopping. Data provided by the United Nations High Commissioner for Refugees (UNHCR 1999) point to the

conclusion that, during the 1980s and the 1990s, asylum seekers modified their choices as a consequence of restrictive amendments to asylum law in certain European countries. For several States, one can discern a clear correlation between restrictive legislation amendment year t and the significant decrease of asylum applications year $t+1$. From 1983 to 1992, the number of asylum applications lodged in Germany increased every year, from 19,740 in 1983 to 438,190 in 1992. It is exactly at this moment that the German Constitution and law were modified restrictively. The following year, the total number of asylum applications dropped from 438,190 to 127,210. After that date, the number of applications went on decreasing. In Spain, a major restrictive amendment was introduced in 1994. Before Spain abandoned its liberal legislation, the number of asylum applications was on the increase every year, from a very small number in the 1980's (one or two thousands) to 12,620 in 1993 and 11,990 in 1994. But in 1995, the number of asylum applications dropped to 5,680 and then oscillated between 4,730 (1996) and 6,650 (1998). The same evidence can be given for France (legislative amendment in 1991, decrease in the number of applications in 1992), Sweden (years 1992–1993) and the Netherlands (years 1994–1995). On the basis of these data, it is possible to argue that asylum seekers are informed of legislative amendment and re-orientate their choice after a restrictive change. Rotte et al. (1996) who have analysed the cases of France and Germany show that changes in law significantly influence asylum migration.

Information must be provided, or at least accessible, to the potential arbiters. It is the same condition as Tiebout's 'full knowledge of each jurisdiction's revenue and expenditure patterns'. To suggest as much seems rather provocative in view of the circumstances in which asylum is requested: it seems doubtful that people fleeing persecution would have access to the rules, compare them and select the country or destination on the basis of a better treatment to be expected in one country as opposed to another. But the UNHCR concludes that asylum seekers are usually skilled people, guided by 'readily available information about other places and available opportunities, cheaper and accessible transportation facilities and available services of professional migration agents assisting with travel arrangements and documentation' (UNHCR 2000: p. 3). In addition, sociological studies show that many asylum seekers have access to information, in particular when they travel by a transit State before entering onto the European States' territories. They also stress the capacity of smuggling networks to review legal rules and inform asylum seekers (see Chatelard 2002).

Nevertheless there is not widespread agreement on the existence of asylum shopping. The major counter-argument to the existence of asylum shopping is that where protection seekers 'end up depends mostly on how quickly they fled and by which means (. . .) most have little previous knowledge of

regulations about work or welfare support.' (Bocker and Havinga 1997). A second criticism of the asylum shopping hypothesis is that legal norms and the rights they grant are not the unique levers of the choice of a destination State. Many push and pull factors influence the choice of a destination: presence of family members, national communities, language spoken, financial networks etc. Expected legal rights are only one among many criteria that trigger the decision (See Rotte et al. 1996). Therefore, when a State restrictively amends its asylum legislation, only some asylum seekers modify their choice. The reality of regulatory arbitrage can be questioned: it might be a weaker factor than expected.

On balance, one can argue that there are different 'populations' of asylum seekers targeting the same country. As the data suggest, there is a sort of rational arbitrage population in most EU countries. Be that as it may, public opinion analysis shows that citizens fear an 'invasion' of refugees. Even in countries, which have, comparatively speaking, strict laws, governments may consider that controls are too lax and that their country is carrying all the burden of refugees in Europe. Governments now publicly voice their concern that favourable conditions in one country might be a decisive pull factor (Bouteiller-Paquet 2001).

This situation recalls the political debate on social dumping. Barnard (2000) argues that social dumping is more a term of political discourse than a description of economic reality. The same happens in asylum policy. Asylum shopping probably explains some migration flows, but is unable to fully explain States' decisions to enact new regulations. Rather, it is the perceived threat of huge flows of migrants entering their territories that has given Member States an incentive to adapt their legislation, following the example of their direct competitors.

Regulators' response: a race in deflection

Since the number of asylum applications had increased exponentially from the mid 1980s onwards (Table 1), and as every application for asylum implies financial, administrative and social costs, the opportunity cost for host countries became very high. This increase in the costs of asylum legislation has generated a change in behaviour, and the main European states have unilaterally implemented a number of deterrent measures. Competition rapidly took the form of a spiral of restriction in legal protection.

Regulators' responsiveness to factor movements: a spiral of restriction

Correlation between the increase of asylum applications year t and law amendment year $t+1$ (See UNHCR statistical data 1999) suggests that States have reacted to asylum seekers' migration. One can evidence a

link between net growth of applicants and drastic amendments to the laws. This is particularly significant in the cases of Spain, Germany and Portugal. Not only have these countries modified their legislation but also their Constitution.

Of course adaptation to consumers' preferences took on a specific form. Whereas in the Delaware model governments veer towards attractive regulation for companies, in the field of asylum the goal is just the opposite, i.e. to take in as few asylum seekers as possible (Barbou des Places and Deffains 2003).

Firstly, most countries have introduced a wide range of measures related to the arrival and admission of persons wishing to claim refugee status in their territory. They implemented measures, rightly called '*non entrée*' measures, impeding or making extremely difficult the entry onto national territory. Here are some examples: reinforcement of border controls, visa requirements (for entry and transit), the fining of airlines or shipping companies transporting undocumented people, the posting of liaison officers in countries of origin or transit, etc. In addition, all Member States have included in national law the 'safe third country' and 'manifestly unfounded application' techniques, complemented by readmission agreements with third countries. A person coming from a safe third country will not have access to the status of refugee and will generally be refused the right of entry to the national territory. The concept of manifestly unfounded application justifies the curtailing of the examination procedure, limits procedural rights and guarantees and can lead to the total refusal to grant refugee status. These deflecting measures are intended to contain asylum seekers outside Europe, mainly in States surrounding the persecuting State (UNHCR 2000; Lavenex 1999; Joly 1999).

Secondly, there has been a restriction of the rights granted to people enjoying refugee status (right to work, social subsidies etc.) or to people whose asylum applications are under examination (right to housing or to work, access to training and education for children etc.). Governments have also favoured measures of temporary stay (housing in reception centres, no access to work), and developed measures favouring return (signature of readmission agreement with transit countries) and done away with all measures favouring integration in the host society (language courses, cultural rights) (Joly 1999). These various measures implemented over the course of only a few years, in particular the arsenal of techniques aimed at reducing welfare, were a signal to asylum seekers: the latter were nudged towards reorienting their choice of one State to another.

Thirdly, access to refugee protection has been limited. Observers have noted a growing tendency to interpret the criteria for refugee status in an increasingly restrictive manner. Higher standards of proof of persecution are being imposed, the only recognised agent of persecution is the State and

applications of asylum seekers coming from countries where so-called internal flight alternatives exist may be rejected. Countries in which there is generally no serious risk of persecution are added to national lists of so-called safe countries, and nationals of these States often confront the presumption that their claim is unfounded when they apply for asylum (Joly 1999; Schuster 2000).

It follows that Member States have been highly reactive to asylum seekers' preferences. Limiting legal protection was a reaction to the increase in the number of asylum applications and it was intended to prevent and/or dissuade asylum seekers from entering national territory. At the same time, the measures were adapted with reference to the other competitors' rules. Indeed, each piece of legislation can be seen as partaking in a strategy of de-regulation necessitated by a competitive environment.

A race to externalise

Because Member States are part of a Union and share common borders, they are interdependant, their legislation interacts, and therefore each legislative amendment had an effect on the neighbours. Rotte et al. (1996) show that French law reform in 1991 resulted in the re-routing and subsequent increase in the number of asylum seekers going to Germany. In the same vein, France saw a rise in the number of asylum applications due to toughened German regulation. Accordingly, when Germany amended its Constitution in 1993, the Netherlands and the UK became the recipients of the asylum seekers previously going to Germany. Unsurprizingly, the following year it was Great Britain's turn to enact restrictive legislation.

Certainly, competition among rules was not perfect, as it did not involve all participants at the same time. The redirection of asylum seekers to the UK and The Netherlands in 1994 clearly indicates that not all Member States became recipients of protection seekers previously hosted in Germany. This can be accounted for by the fact that asylum shopping is not simply based on legislative differences. Other pull factors influence the choice of a potential destination. As mentioned earlier, the language spoken, national communities, family ties etc. may limit the size of the market. In addition, geographical proximity, and legal agreements facilitating border crossing may influence significantly the transfer from choice A to choice B when State A modifies its legislation. Cluster competition is therefore much more likely to exist than perfect competition.

Be that as it may, competition has taken the form of deliberate use of national regulations as a strategic weapon in international competition and in which one country's gains become the others' costs (See Gatsios and Seabright 1989). Indeed, because new national legislation was aimed at further reducing asylum migration, the competition became a general race

among «diversion policies» designed to shift to other States the responsibility of taking in asylum applicants (UNHCR 2000; Landgren 1999).

Result of competition

Whatever the criterion used to evaluate the result of competition – the effect of competition on the game participants' welfare, the quality of the law enacted etc. – there is evidence that competition in the field of asylum has turned out to be negative.

A race to the bottom

Firstly, the shift from generous asylum laws to restrictive measures has thus been detrimental to asylum seekers' situation (See for details, Barbou des Places 2003). The *non entrée* measures adopted by all Member States have jeopardized the security of potential and actual asylum seekers (UNHCR 1997). In many cases, States do not grant the status of refugee. But because they are bound by international obligations such as the *non-refoulement* principle[3] set out in the Geneva Convention, they cannot resort to expatriation. As a result many asylum seekers can neither be granted refugee status nor can they be returned to a third country. They therefore live in a 'a-legal situation', with no protection and no possibility to integrate fully into the host society. The situation is not so different for those who are 'fortunate' enough to be granted the Geneva status. The procedure for the examination of asylum applications is extremely long and a cause of problems. Before their asylum application is fully examined and a status granted or refused, asylum seekers live without subsidies. Finally, as many States have reduced the number of rights conferred upon asylum seekers, like the right to work and social protection, or the right to an education, a marginalized group in a semi-legal situation is created.

Secondly, competition has turned out to be a costly game for governments too (Barbou des Places and Deffains 2003). The competitive process has imposed frequent legislative changes, and occasionally constitutional amendment. In addition, the costs of deflection have been extremely important and probably excessive. By putting the emphasis on migration control and border protection, regulators have used a very high level of human resources (customs, police, and civil servants in charge of asylum application examination). The volume of administrative procedures regulating access to national territory and organizing border controls has constantly increased. Competition has also generated practices that have become costly for States' international reputation. The development of restrictive measures has damaged their reputation of human rights protectors (UNHCR 1997).

At a collective level, the result of competition is also sub-optimal. The pursuit of unilateral actions and indifference towards the plight of other

Member States has started to jeopardise other EU objectives and policies (Barbou des Places 2002). A non-burdensharing strategy is likely to impact on other fields of European integration, such as the general achievement of the internal market, the progressive establishment of a migration policy, including the Dublin and Schengen systems. In the absence of equitable allocation of refugees, overburdened States may come to reconsider border control collaboration or delay the adoption of regulations in other fields (economic and social cohesion for example). In addition, unevenness in the reception of refugees raises the question of solidarity among States belonging to an ever-closer union (Thieleman 2002). In sum, the result of the competitive game is an 'all losers' one.

Sub-optimal rules

In addition, competition among asylum laws was not conducive to the emergence of efficient and good rules: the new restrictive rules raise questions of legality and legitimacy. And they are inefficient. Let us consider the principles of good law first. Indeed, as governments were mainly concerned with the efficiency of their deflection policy, they implemented rules, whose legitimacy or whose compliance with international norms is arguable (Crépeau 1997). For instance, the compliance of the carriers' liability system with Article 31 of the Geneva Convention has been questioned.[4] The use of safe country and manifestly unfounded applications mechanisms is also problematic, and it reveals a minimalist interpretation of the Geneva Convention. The pursuit of efficiency in deflection also led States to enact measures that raise questions of national legality. Scholars (See Jeannin et al.) document the increasing powers given to authorities which come under the Executive branch and whose actions, in practice, are not challenged before courts. The UNHCR (1997) also denounces the expeditious examination of asylum applications, in violation of national law. Soft law, such as interpretative rules, significantly influences the behaviour of authorities but escapes judicial monitoring. In addition, legal problems arise when migration controls – which have a direct impact on asylum seekers' situation – are exercised by incompetent authorities. The carriers' contribution towards border controls is an arguable privatization of States' competence (Crepeau 1997; Jeannin 1999). Efficiency in deflection has turned out to be the unique criterion used to evaluate what is 'good law'. Compliance with international norms, the legitimacy or the coherence of national legal orders were cast off as useful criteria in the assessment of the validity of competing measures.

And paradoxically, while States were preoccupied with efficiency, i.e. the competitiveness of their restrictive legislation, the rules implemented during the 1980s and 1990s did not achieve their objective. The instruments used (the enactment of restrictive procedures) proved to be inefficient in attaining

the States' goal (to get as few refugees as possible). First of all, while the array of restrictive measures may have slowed the inflow of asylum seekers, it failed to stop it and did not adequately regulate migration flows. Second of all, the rules enacted produced side effects. The UNHCR stresses the growth of human trafficking that results from restrictive procedures. It indicates that the restrictive asylum practices introduced 'have converted what was a relatively visible and quantifiable flow of asylum seekers into a covert movement of clandestine migrants that is even more difficult for States to count and control' (UNHCR 1997: p. 199). Sociological studies also show that irregular movements are increasingly arranged and carried out by professional traffickers (Salt and Hogarth 2000; Ghosh 1998). Because the restrictive measures have driven migration underground, States are obliged to permanently reinforce procedures and draw on more and more human resources to fight against smuggling networks and abuse of the asylum system, which in turn constitutes significant indirect costs of bureaucracy. A second illustration of a costly side effect concerns the right to work. In order to dissuade asylum seekers from coming, States have decided to withdraw the right to work previously granted. The consequence is that many asylum seekers remain a considerable burden, as States are obliged to provide subsidies in order to compensate for the subsequent loss of earnings (Joly 1999).

One can finally conclude that, because States unilaterally implemented deterrent measures and initiated a competitive game, their deflecting measures rapidly became inefficient. They constantly had to readapt their legislation in order to remain competitive. To this aim, they were obliged to enhance further and further the deflection effect of their policy in order to outdo their rivals.

Failed co-operation in the shadow of regulatory competition

Since the mid-1980s, EU Member States started negotiating international agreements dealing with asylum. They pursued two main strategies, which were assumed to eliminate competition among asylum laws. The first move towards a collective limitation of the competitive process was the signature of the Schengen Convention and the Dublin Convention determining the State responsible for examining an application lodged in one Member State of the EC[5]; it entered into force in 1997. Here it is proposed to analyse the Dublin Convention as a collective action that aims at impeding asylum shoppers' mobility and thus the opportunity to exercise regulatory arbitrage. Indeed the Dublin convention's purpose is to set up mechanisms ensuring that each asylum application lodged in the EU will be processed by one Member State (and only one). As it prevents regulatory arbitrage, the Dublin Convention was supposed to hinder the development of regulatory

competition. Exactly at the same period, Member States started negotiating burden sharing schemes. It is a different strategy insofar as it intends to replace the previous unilateral and competitive actions that deflect asylum seekers in sharing out the costs and resources of refugee protection. After the treaty of Maastricht and within the framework of third pillar mechanisms, Member States adopted various measures trying to establish burden sharing plans: a Resolution on the allocation of responsibility among Member States[6], a Decision laying down an alert and emergency procedure on burden sharing with regard to the admission and residence of displaced persons on a temporary basis[7] (See Noll 2000).

But the results of these different instruments of co-operation are, however, negligible. The co-operation of the 1990s has failed to stop regulatory competition. The result of this spontaneous co-operation is unsatisfactory. The Dublin convention has not eliminated asylum shopping. Rather it has incited asylum seekers to develop a strategy of clandestine entry and residence in order to avoid the Dublin mechanisms. Informed of the Dublin criteria, some protection seekers managed to avoid the official procedure of acquiring a visa or residence permits and to enter illegally into the territory of their destination States. The burden sharing projects have not produced better results. In the early 1990s, States considered the possibility of organizing people-sharing mechanisms, i.e. mandatory allocation systems of asylum seekers among Member States. But this project was abandoned because it is a mandatory system that denied asylum seekers the freedom to choose the protecting State. As a result, a very light system has been set out.

In sum, despite important efforts to co-operate, there was no shift from costly and unilateral asylum policies towards fairer and more efficient collective action (Barbou des Places 2002). States promoting co-operation schemes have been permanently constrained by the risk of being undercut by competing States. While the majority of Member States had an interest and incentive to co-operate, the potential benefit of pursuing competition by individual action was still promising. This is a classic prisoner's dilemma (Noll 1997). States have tried to save themselves through unilateral action rather than accepting the costs, which accompany the benefits of co-operation (See also Suhrke 1998). Co-operation could not emerge from the shadow of regulatory competition: logically the 1990s were characterized by the evident predominance of competition (See Barbou des Places and Deffains 2003).

To conclude, both the evolution of the EU Member States' asylum legislation from the mid-80s, and the failure at establishing efficient co-operation instruments able to tackle the asylum dilemma can be explained by regulatory competition theory. Competition did not work well, but it was sufficient to trigger legislative amendments. It is precisely to legal rules that the article now turns.

Challenging the 'spontaneous' competition vision, legal norms and regulatory arbitrage

The conventional explanation of regulatory competition is that, given an effective threat of exit, spontaneous forces would discipline States against enacting laws which set an inappropriately high or low level of regulation (Barnard and Deakin 2002). This, however, accounts neither for the factors that facilitate regulatory arbitrage, nor for the mechanics that trigger States' decision to compete. The response of economic actors is indeed crucial for the operation of competition among rules, because they are the media through which competition takes place (Woolcock 1996). In other words, in the absence of regulatory arbitrage (i.e. selection of a rule by the economic actors) legal rules can co-exist and never enter into competition.

A market of legal norms

By way of introduction, it might be of interest here to recall that regulatory arbitrage requires, in order to exist, the existence of a 'market of legal norms': law shoppers must have the opportunity to choose among alternative legal products. The condition of existing substitutable products is not easy to meet insofar as, to be alternative products, the competing legal norms must fulfil certain functions, i.e. respond to some distinguishable consumers' preferences, while, at the same time, constitute real alternatives, i.e. present a certain degree of originality and difference. It seems that in many areas, the double characteristic of equivalence and difference is not met and some harmonization can be required to ensure that the regulatory regimes in different countries are, from the point of view of the arbiter, broadly equivalent.

Here the argument is proposed that, in the mid-1980s, there was a market of asylum legal norms. When competition started, all Member States had indeed a law regulating the conditions for being granted the status of refugee, asylum procedure and the rights conferred upon refugees (right of work, residence, social subsidies, right to family reunification etc.). Moreover, as all Member States have ratified the Geneva Convention and the Additional Protocol of New York, 1967 and are bound by the European Convention of Human rights as interpreted by the European Court of Human rights, their legislation fulfils a similar function. They grant protection to those fearing persecution, they implement the *non-refoulement* principle, and they organise, to a certain extent, the family reunification of refugees. True, many differences exist, relating either to the rights granted to asylum seekers or refugees, the definition of a refugee, and these differences are important enough to trigger asylum seekers' decision to select one or another State as a destination. But it is precisely because a balance existed between similarities and differences in national asylum legislation that regulatory arbitrage was possible.

Legal norms, guarantees of mobility

The existence of a market of legal norms is not a sufficient condition to trigger regulatory arbitrage. There must be the material possibility to arbitrate: law merchants can be arbiters only if they have the legal capacity to move and change jurisdiction according to their preferences. Hence the importance of legal rules because they can hinder or facilitate mobility.

Think of the situation in company law. The possibility of a market for incorporations has been blocked, in part, by the operation of national-level rules of conflict of laws, which limit the degree to which companies can choose its applicable law – (i.e.) the so-called *siège réel* doctrine. The EU's institutional environment is ill-suited to a market for incorporations (Deakin 2000). Contrast this with asylum policy, where the legal framework in place grants the asylum seekers' capacity to move. The achievement of the internal market indeed permits their migration in the EU. Once an asylum seeker has reached the territory of a Member State, secondary migration is greatly facilitated by the removal of the European internal borders. Certainly a State can impede access to refugee protection, and in practice, EU Member States have erected barriers to prevent asylum seekers from accessing their protection by impeding entrance onto national territory. With the Dublin Convention, States have also tried to block the asylum seekers' strategy to choose their destination. Moreover, the 'third safe country' notion, introduced in every national legal order, contradicts the idea that asylum seekers are free to move and choose their destination State. But despite these many States' efforts to control migration and prevent asylum seekers, either from moving or from choosing their destination, in practice asylum seekers manage to reach the State where they want to ask for protection. Asylum seekers frequently escape the application of the Dublin Convention criteria and eventually lodge an application in the State of their choice. Therefore, the erection of new controls and borders has failed to stop migration, and instead, it has transformed legal entries into clandestine arrivals and migration. But at this stage the norms of international law play a fundamental role.

Under international refugee law, clandestine entry does not impede the lodging of an asylum application. According to the Geneva Convention, an asylum seeker can not be condemned for having entered a Member State without legal documents. In addition, once an asylum seeker has lodged an application on a State's territory – whatever the means – and, therefore, freely accessed a system of protection, the Geneva Convention (Article 33) forbids States to resort to expulsion or repatriation according to the principle of *non refoulement* that it sets out. Thus, as international law assigns full responsibility for protection to whatever State asylum seekers are able to reach (Hathaway 1997), people who meet the criteria defined under the

Geneva Convention can avoid the processes designed to impede entrance and manage to be granted asylum simply by finding a way, however illegal, to arrive on the territory of a Member State. In other words, legal norms have enabled asylum seekers to act as arbiters, in so far as they are given, *de jure* or *de facto*, the possibility to choose among several jurisdictions.

To be sure, even when legal rules guarantee mobility, the decision to move depends on the expected gains. While European companies' immobility stems, for a non negligible part, from the costs of re-incorporations, the argument that mobility is too costly is not pertinent in the case of asylum seekers simply because they are forced to move. Asylum seekers may have no choice but to 'vote with their feet' (UNHCR 2000: p. 5) and high costs of mobility are meaningless. Therefore, regulatory arbitrage depends on many variables before it can really exist. The legal framework in place is only one of them, hence the validity of the argument that harmonization, or a certain degree of co-operation as demonstrated by the impact of international law, can be of some help for the emergence of competition. But the asylum case study also shows that the threat of asylum shopping has given States incentives to compete by degrading their legal protection. Thus the legal rules' impact is twofold. Legal rules first matter when they guarantee freedom of movement. Second they influence the emergence of competition because their very existence maximises the disciplinary effect of threat of exit (entrance in the case of asylum). It may indeed be sufficient for a few marginal consumers to make (or be prepared to make) the move in order for a few disciplinary effects to arise (Barnard and Deakin 2002). Thus the simple fact that legal norms in place grant asylum seekers the possibility – even by illegal means – to lodge an asylum application in the State of preference fuels a fear of asylum shopping based on the most favourable environment.

The upshot of this discussion is clear: legal rules play a complex role in the process. They are part of the competitive process because they influence the development of competition by guaranteeing regulatory arbitrage; they are the medium through which States compete (by redesigning them); they also influence the process in so far as they frame the response given by regulators to the consumers of law and other competitors. It is to this last point that we now turn.

Challenging the 'mechanical' vision of competition. Law and regulators' response

The conventional Delaware model of competition tells us that, when regulators realise that companies or investors are changing jurisdiction in reaction to a legislative change in other jurisdictions, they decide to change their law. They respond by enacting legislation that matches law users' preferences and that is modelled by comparison on the other States' norms.

This approach is based on several implicit assumptions, that regulators would respond mechanically to market forces and that the response would take certain predictable forms. Let us look at these assumptions.

Regulators' capacity and opportunity to respond

Do regulators respond to the threat of exit by turning to efficient and competitive rules? The regulators' response is not mechanical. It is shaped by many factors that range from political and legal culture to the perception of appropriate solutions. In particular, national and international legal orders shape the response to the market.

Recall that the development of competition depends on the expected payoffs of a competitive action i.e. a legislative change. Here comes a difference between company law and asylum. States are informed that companies will reincorporate only if they are offered an attractive regulatory burden. As companies' regulatory burden is the sum of regulation imposed upon business (by company law, but also by labour law provisions, tax obligations, insolvency procedures etc.) States know that a change in one single legal area (company law, or environmental law, for instance) is very unlikely to trigger a decision to relocate. Therefore unless it has the intention to remodel drastically its law with the explicit aim to be a company-friendly jurisdiction, a government has few incentives to respond to a first mover legislative change. By contrast, by one single legislative amendment, a government can significantly modify the 'regulatory benefits' of asylum seekers and thus influence the destination choice. Let us think for instance of a legislative amendment that would narrow the definition of who is a refugee. Thus, there is an incentive to respond to competitors. Unsurprisingly, States first adopted measures that had a very strong impact on asylum seekers' situation, either because they limited the access to the territory or because they restricted access to the refugee protection and the subsequent rights. One may therefore consider that the legal framework not only conditions the States' capacity to respond, but it also matters in their decision to respond, and thus to compete.

Secondly, the legal framework plays a role insofar as it forbids certain responses. Indeed Member States had exclusive competence to regulate asylum, but they did not have discretionary power: States' responsiveness to asylum seekers migration was thus constrained by the norms in existence. Sure, the obstacles to the reshaping of asylum law were not considerable. As mentioned above, all EU Member States have managed to redesign restrictively their asylum legislation, and in five cases they have even modified their Constitution (Germany, France, Spain, Portugal and Italy). These constitutional amendments have required time, implied costs and they have probably delayed the response to the market, but the elimination of the

constitutional right of asylum turned out to be the first step in a general move towards a decrease in legal protection (See Jeannin et al. 1999).

On the contrary, international norms have significantly influenced the development – and the outcome – of the game. Certainly, States have frequently interpreted certain provisions of the Geneva Convention in an increasingly restrictive manner (the only recognised agent of persecution is the State, for instance) and many examples point to the conclusion that the existence of binding international legal norms was not an obstacle to the race towards restriction in legal protection. Yet interestingly, no Member State has adopted legislation that violates the letter of the Geneva Convention. A very good example of this limitation is that States have implemented new forms of protection, called humanitarian, territorial or *de facto* status. These statuses confer legal rights upon persons who fall outside the scope of the Geneva Convention and are thus unable to enjoy refugee status (*Duldung* in Germany, F status in Denmark, Exceptional leave to remain in the UK, etc.). Interestingly, States have adopted these mechanism with little reticence, although at first glance they increase the number of persons likely to enjoy protection under their jurisdiction. But this apparent generosity must not conceal the real aims. The *de facto* status are less protective than the status of refugee (the rights conferred are limited, the protection generally temporary) and thus less costly. And most of all, States have complete autonomy with regard to granting or refusing these statuses. Therefore, States have accepted new forms of protection in order to get round the constraints of protection, and to avoid Geneva Convention obligations.

To sum up then, international obligations have influenced the trajectory of the competitive process because, as they forbid certain responses, they frame to a certain extent States' capacity to compete. Insofar as international law is a binding rule collectively agreed upon, it could delimit the playing field by indicating what constitutes fair competition. Above all, the influence of international provisions points to the conclusion that regulators can not automatically respond to market forces.

The form of the response. Discussing the 'mechanical evolution of law' hypothesis

The prediction of conventional regulatory competition theory is that governments will repeal inefficient regulations and introduce new measures that match law consumers' preferences. A spontaneous approximation around efficient norms (Mattei 1994) is also predicted because States would import efficient legal norms. Market-driven convergence – as opposed to convergence through harmonization – is said to occur around one of few regulatory models.

This model pre-supposes a mechanical evolution. As such, it can not fully account for the evolution of law. Asylum provides plenty of examples that confirm the prediction of competition. Yet they do not confirm the 'mechanistic' assumption.

Competition as the dynamic that generates the evolution of law

It is common ground that competition between the suppliers of legal rules will significantly affect the evolution of law (See Ogus 1999). And indeed the competitive process has first influenced the content of EU Member States' asylum legislation. Many examples have been given of amendments that have considerably restricted the protection granted to asylum seekers and refugees, either by limiting the rights, or by preventing access to the rights. The most striking figure of the substantial erosion of laws relating to protection is the fact that the five EU Member States which traditionally granted a right to asylum in their constitution (France, Germany, Spain, Portugal, Italy) (See Jeannin et al. 1999) restrictively modified their constitutional provisions in 1993 and 1994. These five countries all suppressed or limited the so-called constitutional right to asylum – i.e. what was before a right has become a favour granted by sovereign States.[8] The constitutional amendments illustrate the extent to which competition can impact upon the evolution of law.

But competition also generates changes in the national law-making processes. When competition starts, national laws do not evolve in complete isolation. Rather, laws are a reaction to the other States' legislation, as is demonstrated by the asylum case-study. There is first a striking simultaneity in the enactment of law amendments: all Member States modified their refugee and asylum law by the mid-1980s, with a second trend of legislative amendment in the beginning of the 1990s. A second example of interactions among asylum legislation is the evidence of chain amendments. There are three interesting examples where, when one State introduced a restrictive modification, its competitors quickly followed suit and modified their law by 'copying and pasting' the innovative legal techniques invented by the first mover. The first example took the form of sanctions imposed on carriers transporting improperly documented passengers. Initially conceived of by Danish law in 1983, the measure was then imported by Germany, the UK and Belgium in 1987 and later all other Member States have copied the technique that consists of decentralizing and privatizing border controls (Cruz 1995). The second example concerns the creation of international or transit zones in airports and ports. The goal is to avoid the official entry onto national territory that triggers a State's responsibility *vis-à-vis* asylum seekers. France introduced the system in 1992 and then Italy a few months later, followed by Germany in 1993, and, in 1994, Spain copied the technique, rapidly followed by the majority of the Member States of the EU. A third

convergent evolution in Member States' legislation was the incorporation of two complementary concepts: 'safe third country' and 'manifestly unfounded application'. Germany introduced these notions into its legal order in 1993 and subsequently all Member States enacted provisions enhancing them.

These three examples not only seem to validate the spontaneous approximation thesis, but they also tend to confirm, in conformity with competition models, that competition has triggered innovation. One may indeed argue that Germany's invention of 'safe third country' and 'manifestly unfounded applications' concepts, as a means of preventing asylum seekers from accessing protection, was the innovative response to the carriers' liability mechanism as invented by Denmark. A process seems to have occurred such as: State A invents x, State B imports x and tries to gain advantage in the competitive process by inventing y, etc. Therefore, as long as one researches tendencies, movement, evolution and interactions, the regulatory competition model is of particular interest for comparative lawyers.

How to grasp the evolution of law? Legal norms are not just products

However, this abstract sketch is very incomplete. The few copying and pasting examples remain limited. Asylum laws remain extremely different, as shown by the current difficulty in harmonizing them. Whatever the criterion used (convergence in enacting efficient measures, convergence from the point of view of consumers' utility etc), competition has not led to a generalized phenomenon of approximation. To be sure, one can put forward the hypothesis that only limited convergence was expected in the case of asylum. As competition is not perfect indeed, there was no convergence. One can also argue with Ogus that convergence is unlikely in the case of heterogeneous products. He defines the heterogeneous products as interventionist products that protect defined interests and/or supersede voluntary transactions. Because such interventionist law creates winners (the beneficiaries of protection) and losers, there is no reason to expect convergence because national preferences regarding the level of protection are likely to differ (Ogus 1999).

But other crucial variables should be taken into consideration. Asylum policy points us in one specific direction: institutions, and in particular, law. Legal rules should not just be compared to industrial products, created by industries and susceptible to be copied, improved, produced at better costs. Accordingly, the copying and pasting phenomenon is not to be expected in all circumstances in so far as, for institutional and cultural reasons, the costs of imitating foreign legal principles may be too high. Scholars like Legrand (1997) and Teubner (2000) argue that law is embedded in a system, and in a culture. They have shown that the transplant of one legal concept or

technique from one legal order to another is often impossible, if not undesirable because the transplant may produce unwanted consequences.

While these scholars focus on legal culture as an impediment to convergence and transplants, there are some more directly observable obstacles to the phenomenon of legal rules import. The asylum case gives indeed some interesting examples of problematic transplants. While the French legislator incorporated in French law the safe third country notion, the French Conseil d'Etat refused to consider as manifestly unfounded an asylum application on the simple ground that, before entering French national territory, the asylum seeker had transited through a State signatory of the Geneva Convention.[9] The French legislator was obliged to take this case into consideration and by the Law 98-348 of 11 May 1998, the Parliament has repealed the 'safe third country' notion from the French legal order. In the same vein, the French Conseil constitutionnel in its Decision of 25 February 1992, limited the possibility to set up transit zones. These examples show that some transplants are unlikely to survive and reveal that the import-export logic is unlikely to account exhaustively for the forces at stake in the evolution of law. There are also examples of impossible transplants. States like Germany and France had a 'competitive' advantage because they had a very narrow definition of who is a refugee, (definition that does not include persons fearing persecution from non-state actors). According to all logic, one may have expected the other States to copy the technique. But in the majority of the other Member States, it was impossible to import this technique, either for political reasons or because the legal framework would not permit the legislator to enhance such restrictive interpretation of the Geneva Convention.

Thus it seems that competition among legal rules can not successfully be modelled on industrial competition. True, States respond to the market forces through the designing of norms, hence the term 'legal products', but the response can take many unpredictable forms that a mechanical vision is unlikely to grasp.

Conclusion

Competition *à la Tiebout* helps to explain the evolution of the EU Member States' asylum legislation from the mid-1980s onwards. It explains the national regulators' interdependence, the interactions between national legislators and arbiters (here so-called 'asylum shoppers'), the rapid trend of convergent legislative amendments, and the phenomenon of the import of legal concepts from one legal order to another. It also explains the general race towards restriction and deflection that is the result of the competitive game. Finally it is the 'shadow of competition' that has dissuaded States from cooperating efficiently – hence the failed result of the cooperative schemes set out in the 1990s.

Asylum policy stimulates a discussion of two main assumptions: the spontaneous emergence of competition among rules and the mechanical response of regulators to market forces. This article does not assume that competition among legal rules emerges spontaneously. Rather, it explains to what extent the legal framework in place impacts on the emergence and development of the competition. The framework first determines the existence of a market of legal norms, which is a pre-condition for competition. Second the legal framework impacts on the arbiters' mobility and, more particularly, on their capacity to choose among several legal rules. Finally it shows that the present legal rules play a role insofar as they maximise the disciplinary effect of the threat or the exit of so-called 'law consumers', and thus incite States to compete.

The evidence discussed in this article exposes the limitations of the mechanical vision of competition. It shows that law frames (by enabling or constraining) the response given by regulators to those subject to law and to others affected. The form of the response cannot be captured by a mechanical vision of legal evolution. In particular, one should discuss critically the hypothesis that States compete through the redesigning of their rules by deleting inefficient norms and importing into their national legal order new measures that match preferences of those subject to laws, hence triggering spontaneous approximation around efficient norms. The asylum case study does not validate this assumption and shows the limits of competition theory's ability to explain the legal evolution.

Finally, the focus on law proposed here reveals the limits of comparing industrial competition with competition among legal rules. While the application of competition theory to the formation of legal rules sheds light on the dynamic process that fuels legislative change, interactions between legal orders and incentives to innovate in legislative techniques, it is unlikely to fully account for what happens 'inside' i.e. in the national legal orders. Another limit of the model is that it frequently neglects the fact that competition among rules is always mediated through States' institutions. Future research should depart from the mechanical and systematic vision of regulatory competition, and should question the validity of considering law as a legal 'product' at all.

NOTES

1. This paper was written whilst a Marie Curie Fellow, European University Institute of Florence, Law Department.
2. In this article, 'regulatory competition', 'competition among rules', 'competition among legislation', 'locational competition' and 'interjurisdictional competition' are different phrases describing the same reality.
3. The so-called non refoulement principle means that no asylum seeker can be sent back to a State where he/she risks persecution.
4. This provision states that the Contracting States shall not impose penalties, 'on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened, enter or are present in their territory without authorization.'

5. Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention, OJ C 254, 19.08. 1997, p. 1.
6. OJ 1995, C262/1/3, 7.10.1995.
7. OJ L63/10, 13.03.1996.
8. In Germany for instance, asylum remains a subjective right but it is no longer absolute: the German legislator has been constitutionally empowered to draw up lists determining which countries of origin or transit are to be considered as 'safe'. In Portugal, the law of 29 September 1993 has given the State power to grant or refuse asylum. In France, the Constitution was changed in 1993, and what was an obligation to grant asylum has become a simple choice for the State to give protection. In Spain, a 1994 reform abolished the difference between constitutional and conventional asylum.
9. CE, Ass. 18 December 1996 Ministre de l'Intérieur c/ M. Rogers, n 180856, conclusions Delarue.

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