

Foreword

Barbara Gabor's book provides an excellent example of interdisciplinary work on a hotly debated subject: regulatory competition (RC). The book develops her EUI PhD thesis, which was awarded the Cappelletti Prize in 2010.

Barbara primarily, but not exclusively, uses sophisticated law and economics tools to show when RC arises, which preconditions have to be met for being welfare enhancing, and how it differs across fields. She builds on different approaches from the economics of federalism to public choice, and uses insights from game theory, in a language accessible to academics in all fields as well as policy makers.

She examines regulatory competition in its broad sense, including also trade competition and yardstick competition in her analysis, focusing on what institutional and economic factors drive regulatory competition, and which factors may make it welfare enhancing or welfare reducing.

Barbara looks at the topic from a regulatory perspective, comparing company, securities, and competition law in order to evaluate the relevance of sector specificity in devising the institutional design that best promotes RC. The current literature often derives, from observations drawn from a single sector, general implications about the desirability of RC and its institutional features. She takes a different approach and compares different sectors. Her analysis integrates a comparative methodology with the tools of comparative institutional analysis, building on the social science toolkit. The comparative institutional analysis carried out by Barbara suggests that it is hard to reach homogenous conclusions because sectors matter. In particular they matter for the nature of external effects that choices of rules might generate. But they matter also in terms of regulatees' as well as regulators' incentives, as rules in various sectors have a different magnitude of impact on costs of compliance and on international trade advantages. Finally, sectors matter also for the differences within legal contexts in which their institutions are embedded.

After introducing the theoretical framework of regulatory competition, the central part of the book is dedicated to a deep analysis of the three sectors: company law; securities law; and competition law. For each one she analyses:

- the economic rationale of regulatory intervention;
- the competence allocation among legal actors at EU and MS level;
- the governance mechanisms shaping the competitive or cooperative interaction of legal actors with competence;
- the scope for legal divergence within the European legal framework, which at the same time sets the limits to legal arbitrage for regulatees;
- the channels of economic openness that may give rise to competitive interactions, and, when there is free choice of law or mobility involved, who gets to decide over such choice of legal regime;
- the occurring patterns of arbitrage, and/or competitive interactions across various legal actors, both within and across jurisdictions, and the welfare implications of these, if applicable.

The comparative chapter of the book contains conclusions on both regulatory competition theory and recent policy developments within the Internal Market. As regards normative, theoretical findings, interesting conclusions emerge, for example, concerning the responsiveness of different legal actors to different channels of competition, and the relevance of institutional design in promoting cooperation instead of competition. In terms of positive, descriptive conclusions, the book gives an account of recent trends across policy fields, such as the spread of economic theory as a regulatory paradigm and axis of competition, the spreading use of what could be called network-governance, and the narrowing of private regulators' competences.

The goals of the analysis are both positive and normative. She describes, through the lenses of RC, the evolution of the three fields, examining the concurrent roles of different institutions in shaping and steering the process. The differences in her three chosen fields concern regulatory objectives and instruments. RC is based primarily on choices among rules and to some extent among institutions. Parties are given a menu of regulatory options and correlated institutional set-ups within which they can choose. The choice-space is dictated by several factors, among which the mandatory or default nature of the rules plays a significant role. The three sectors are characterised by different degrees of contractual or organisational freedom ranging from a high level in company, to a medium that is constantly decreasing in securities, and a relatively low level in competition law.

Clearly one of the main methodological puzzles is whether the nature of rules should be the dependent or independent variable for the institutional design. The author examines both possibilities. In the

positive analysis, she assumes the nature of rule as an independent variable. Given the mandatory or default nature of the rule, different types of, or even no, RC arises. In the normative account, she changes the approach and considers both choice of rules and institutions as variables, dependent upon the selection of the desirable regulatory strategy.

The comparative analysis thence includes not only rules but also institutions. She not only considers how various European institutions have contributed in different ways to the introduction or rejection of RC, but also their interaction. She points out that regulatory competition may be triggered by institutional competition between legislatures and regulators or between regulators and courts. She emphasises how institutional incentives may contribute to stimulate – or temper – regulatory competition. At the same time, she analyses the hypothesis, frequently raised, of conflicting institutional incentives, as is the case when, for example, regulators favour regulatory cooperation while courts may promote regulatory competition.

I am extremely pleased to host her book in the Private Regulation series. It will provide both scholars and policy makers with new insights on the desirability and the limits of regulatory competition. Barbara's analysis can hopefully trigger more research and debate on the role of private regulatory competition at national, European and transnational level.

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