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**EVOLUTION OF ASYLUM LEGISLATION IN THE EU:  
INSIGHTS FROM REGULATORY COMPETITION THEORY**

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## ABSTRACT

The paper proposes to use regulatory competition theory in order to better understand the evolution of the EU member States' asylum legislation. It argues that regulatory competition theory can explain the rapid trend of legislative amendments from the mid-80's onwards, the progressive yet incomplete convergence of the EU member States' legislation, and the spiral of restrictions of legal norms originally enacted to protect asylum seekers. Competition among legal norms also explains EU Member States' reticence to collaborate and share the burden.

The first argument of the paper is that a phenomenon of competition developed because Member States were convinced that generous asylum policies would be a pull factor for asylum seekers. They feared that regulatory arbitrage (i.e. asylum shopping) would lead asylum seekers to select their destination State on the basis of the level of protection offered. States have entered into a process of de-regulation and, because of their interdependence, national measures have become instruments of a general race to externalise. The result has turned out to be negative and corresponds to a « race-to-the-bottom ». This negative result can be observed at two levels : competition was detrimental to both asylum seekers and States; the rules enacted were suboptimal.

The paper then explains why the first cooperation instruments introduced at the end of the 80's and onwards have failed to meet their objective. The effects of cooperation schemes like the Dublin Convention or burden sharing projects are negligible and there was no shift from costly and unilateral asylum policies towards fairer and more efficient collective action. It is an example of cooperation in the shadow of competition.

Finally the paper evaluates the communitarisation of the competence to act in the field of asylum. It is unlikely to permit the emergence of a federal and centralised regulation able to change the nature of the game. In conclusion, the paper seeks to assess if a good combination of cooperation and competition is likely to produce « good » asylum policy in Europe and investigates the “co-opetition” model promoted by Esty and Gerardin.

*Keywords: Asylum policy, Regulatory competition, Regulation, Policy cooperation, Harmonisation.*

## INTRODUCTION

The evolution of asylum and refugee legislation in Europe from the mid-80's onwards is characterised by a substantial decrease in the legal protection granted to asylum seekers and refugees. Scholars relate the emergence of a "new" asylum regime that reflects a change in paradigms: whereas before the regime implemented a selective but integrative policy of access and full status recognition paired with full social rights, it now maximises exclusion, undermines status and rights and emphasises short-term stay for refugees (Joly). During the 80's and 90's, numerous legislative amendments were introduced in a rapid trend culminating in the creation of so-called "Fortress Europe". With the Schengen and Dublin Conventions, EU Member States have set out cooperative schemes and tried to establish burden sharing mechanisms in order to put an end to this restrictive spiral. But the trend remains one of restrictive legal protection.

The paper purports to explain these phenomena using regulatory competition theory<sup>1</sup> as an analytical framework. This theory may indeed serve as a complement to sociological, political and economic analyses that all try to explain evolution in asylum legislation. They stress the importance of political context (extreme rights movements in Europe for example) or underline the costs of asylum policy. As for lawyers, they have emphasized the inadequacy of international legal provisions currently in force to tackle efficiently the problem of refugees in an era of mass flights and civil wars (Bouteiller-Paquet, 2001). The paper builds upon these arguments and applies regulatory competition theory as a complementary perspective. The theory brings additional insights insofar as it may explain the evolution of legal norms, and sheds new light on the phenomena of interaction and interdependence among national legislation.

Regulatory competition is defined by Woolcock (1996) 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. The concept is imported from Tiebout's theory (1956) which set out a model of local governments in which different levels of service or

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<sup>1</sup> The paper will consider that "regulatory competition", "competition among rules", "competition among legislation", "locational competition" and "interjurisdictional competition" are different terms describing the same reality.

taxation coexisted with residents changing location to choose the pattern they individually preferred. The model was based on the principle that consumers would ‘vote with their feet’ by moving to another locality if they did not like the combination of public services and taxes offered. As a result, local governments would tend to allocate resources in a pareto-efficient way. Despite the numerous criticisms levelled at Tiebout’s system, regulatory competition theory has been used to explain the American experience with corporate chartering. Setting national regulations by taking into account their impact on the flow of internationally mobile goods, services or factors and, in turn, on national economic activity is said to lead to a form of arbitrage by economic actors across the different opportunities provided by the market. Regulators are responsive to mobile factors’ demands and will modify their legal framework in order to attract larger shares of mobile factors, hence the appearance of a regulation spiral. Indeed, the American States have competed for incorporations by offering corporation friendly chartering requirements. Because the race was won by the State of Delaware, the idea that regulatory competition develops a deregulatory dynamic has been dubbed the Delaware effect (See Romano, 1985).

Regulatory competition theory does not overlook the potential shortcomings of the competitive process. First, competition cannot *per se* cope with nor avoid market failures, among which externalities: States’ activities often produce effects on other States. Second of all, the benefits of regulatory competition must be weighed against the potential undermining of welfare States should mobile factors of production (capital, companies) be competed for as opposed to less mobile factors (labour). In the same vein high transaction costs can also be mentioned insofar as frequent changes in regulation can generate important transaction costs for regulators and the regulated industry (adjustments costs supported by business). Finally, debates have focused on the result of regulatory competition. In the wake of the Delaware debate, risks of competitive deregulation and a “race to the bottom” in regulation have been underlined: if one regulator decides to introduce lower or lax corporation taxes in order to attract investments and succeeds, the other regulators will compete and reduce taxes as well. Reduced taxation decreases the ability of governments to provide public goods and the result is said to be sub-optimal. Opponents of this conclusion have tried to demonstrate that instead, in certain cases and circumstances, a race to the top might occur (California effect). Indeed, in order to attract new investors, States must be able to offer public goods of high standards, such as infrastructure, educated labour, stability etc.

The paper proposes to use regulatory competition theory in order to better understand the evolution of the EU member States’ asylum legislation. It argues that regulatory competition theory can explain the

rapid trend of legislative amendments from the mid-80's onwards, the progressive yet incomplete convergence of the EU member States' legislation, and the spiral of restrictions of legal norms originally enacted to protect asylum seekers. Competition among legal norms also explains EU Member States' reticence to collaborate and share the burden.

The first argument of the paper is that a phenomenon of competition developed because Member States were convinced that generous asylum policies would be a pull factor for asylum seekers. They feared that regulatory arbitrage (i.e. asylum shopping) would lead asylum seekers to select their destination State on the basis of the level of protection offered (Part 1). States have entered into a process of de-regulation and, because of their interdependence, national measures have become instruments of a general race to externalise (Part 2). The result has turned out to be negative and corresponds to a « race-to-the-bottom » (Part 3). The final Part explains why the first cooperation instruments introduced at the end of the 80's and onwards have failed to meet their objective. The final remarks seek to assess if a good combination of cooperation and competition is likely to produce « good » asylum policy in Europe. (Part 4).

## **PART I - WHY DID REGULATORY COMPETITION START? EVIDENCE OR THREAT OF ASYLUM SHOPPING**

In regulatory competition theory, the origin of competition among rules is economic actors' responsiveness to differences in regulation. This responsiveness, called forum shopping or regulatory arbitrage, is the action undertaken by market operators to select the best location for investments or economic activity on the basis of the local regulatory environment (Woolcock, 1996, p. 298). 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 (opportunity to be granted the refugee status, rights of residence, to work, subsidies, social security etc.). The following will show that the threat of asylum shopping<sup>2</sup> became part of political rhetoric (Section 1). This perception is not rooted in empirical evidence but is based on the specificity of asylum. Asylum seekers are by nature mobile actors, and the legal framework favours their capacity to act as forum

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<sup>2</sup> The terminology "asylum shopping" is used to describe two different realities. The first one, that tends to be dominant in political debates, refers to the fact that people lodge multiple asylum applications in several States, thus "abusing" the asylum system. The paper uses the second meaning : asylum shopping is the comparison and selection of one asylum rule among several.

shoppers. Therefore, while forum shopping is arguable in certain areas, it is highly plausible in the field of asylum (Section 2).

### **Section 1. The threat of asylum shopping**

There is a debate among scholars on the very existence of asylum shopping. Yet an analysis of statistical data describing the evolution of the number of asylum applications in Europe gives evidence of the existence of asylum shopping. Data provided by the UNHCR (UNHCR, 1999) point to the conclusion that, during the 80's and the 90's, asylum seekers modified their choices as a consequence of restrictive amendments to asylum law in a given European country. One can evidence a correlation between restrictive legislation amendment year  $t$  and the significant decrease of asylum applications year  $t+1$ <sup>3</sup>.

Spain and Germany are two significant examples. From 1983 to 1992, the number of asylum applications lodged in Germany increased every year<sup>4</sup> (with one exception: 1987) and reached the level of 438 190 applications in 1993. 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 127 211. After that date, the number of asylum applications went on decreasing: 116 370 in 1996, 98 640 in 1998 etc. 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 80's (one or two thousand) to 12 620 in 1993 and 11 990 in 1994. But in 1995, the number of asylum applications dropped to 5680 and then oscillated between 4730 (1996) and 8410 (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 reorient their choice after a restrictive change. Rotte et al. (Rotte, 1996) who have analysed the cases of Germany and France conclude that changes in law significantly influence asylum migration.

But there is not widespread agreement on the existence of asylum shopping. The major counter-argument to the existence of asylum shopping is that asylum seekers are not "normal" migrants. A report in 1997 (Backer

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<sup>3</sup> Certainly, asylum seekers do not only react to changes in legislation. An increase in the number of asylum applications can be explained by the outbreak of a war, sudden political repression in a country etc. Therefore, the increase is considered to be significant in one country only in comparison with neighbouring countries.

<sup>4</sup> From 19 740 in 1983, to 438 190 in 1992.



and Havinga, 1997) stresses the fact 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.” A second criticism of the asylum shopping hypothesis is as follows: legal norms and the rights they grant are not the unique levers of the choice of a destination State. Many pull and push 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.). 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.

Yet analyses of public opinion have evidenced that in many States, populations fear an “invasion” of refugees if national legislation is too welcoming. Even in countries which have, comparatively speaking, strict laws, governments may esteem that controls are too lax and that the State is carrying all the burden of refugees in Europe. States now publicly voice their concern that favourable conditions in one country might create an « in draught » (Bouteiller-Paquet, p. 176). Very recently, British Home Office Minister Bob Answorth indicated that the adoption of common minimum standards under debate in the EU “will help to deter asylum shopping”<sup>5</sup>. The asylum shopping argument is now predominant in political debates, as illustrated in the Sangatte case. In the same vein, current efforts to harmonise refugee law provisions in the EU are generally justified by the desire to eliminate the differences in levels of protection among legislation that feed asylum shopping<sup>6</sup>.

This situation recalls the political debate on social dumping. Barnard (2000) shows that regulatory arbitrage among European social legislation is unlikely because businesses are not relocating on a large scale. Social dumping has proven to be more of a term of political abuse than a description of economic reality. It became part of political rhetoric, convenient for the left and the right. It can be argued that a comparable phenomenon has occurred in the field of asylum. Asylum shopping probably explains some migration 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 gave member States an incentive to adapt their legislation following the example of their direct

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<sup>5</sup> Quoted in 10 Downing Street Newsroom, <http://www.number-10.gov.uk>

<sup>6</sup> The Working Paper “Revisiting Dublin” concludes that the Common European Asylum system will reduce the differences between member States which may influence the distribution pattern of asylum applications within the EU. It admits that, as substantive asylum laws have not yet been approximated, “it is no surprise that people in need of international protection find one member State a more attractive destination than another” SEC (2000)522 final of March 21<sup>st</sup>, 2000.

competitors, just as in the Delaware competition the prospect of reincorporation made host countries lax their standards.

## **Section 2. Explanation of the threat: “Asylum shopping” is plausible**

Asylum shopping is plausible for two reasons.

The first condition of regulatory arbitrage is the existence of a “market of legal norms”: legal products in competition must be “alternative products” for law shoppers. This condition is met in the case of asylum. All Member States have legislation 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). The fifteen asylum legislation are alternative products insofar as they are both different and equivalent in their function (granting protection to people fearing persecution, implementation of the non-refoulement principle<sup>7</sup>). The latter characteristic must be emphasized: it indicates that, for regulatory arbitrage to exist, a good balance must exist between similarities and differences in national legislation.

But, in actual fact, even the existence of different legal products is not sufficient to trigger asylum shopping. Forum shopping also requires that information 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).

Asylum shopping is plausible for a second reason as suggested by the comparison with regulatory arbitrage in company law or social law. In

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<sup>7</sup> All member States have ratified the Geneva Convention and the Additional Protocol of New York, 1967. They are all bound by the European Convention on Human rights as interpreted by the European Court on Human rights. Thus, a minimum common denominator exists.

these fields, scholars have raised doubts (See Deakins for company law, Barnard for social law) as to the existence of regulatory competition among EU member States. Their main explanation lies in the absence of 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. The competition among American States for incorporations was indeed partly driven by the United States' conflict of laws principle that sets out that incorporators are free to choose the State of incorporation and thereby to choose the law applicable to the corporation's internal affairs (Trachtman, p. 60). Following Tiebout's theory, there must be full mobility of people and resources at little or no cost, a condition that is unfulfilled as far as European companies are concerned (See Mac Gowan and Seabright, 1995). Indeed, companies hesitate to relocate because of reincorporating costs, and many legal conditions hinder their mobility. Deakin shows (2000) the absence of an effective European market for incorporations. 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 mechanisms of corporate and exit which, in the US context, brought the corporate law systems of the States directly into competition with each other, simply do not exist within the EU. Trachtman (1993, p. 60) concludes that the principle according to which economic actors are free to choose the law applicable does not exist under most civil law jurisdictions.

For asylum, the context is different. 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” (the UNHCR 2000, p. 5) and high costs of mobility are meaningless. The achievement of the internal market facilitates their mobility 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: in practice, States have erected barriers to prevent asylum seekers from accessing their protection by impeding entrance onto national territory. But despite States' efforts, in fact asylum seekers frequently manage to reach the State where they want to ask protection. The erection of new controls and borders has failed to stop migration. Instead, it has transformed legal entries into clandestine arrivals. Nor can an asylum seeker be condemned for having entered a member State without legal documents according to the Geneva Convention. Last but not least, once an asylum seeker has lodged an application on a State's territory, and, therefore, freely accessed a system of

protection, the Geneva Convention forbids States to resort to expulsion or repatriation according to the principle of non refoulement that it sets out<sup>8</sup>.

Therefore, insofar as regulatory arbitrage is concerned - i.e. selection of a destination State on the basis of the legal treatment to be expected - the hypothesis according to which the asylum field is specific is highly plausible. Mobility is the essence of any type of migration and is facilitated by the international legal norms on refugee and asylum seekers.

## **PART II- EXPLANATION OF RESTRICTIVE LEGISLATION AMENDMENTS: STRATEGIC DE-REGULATION AND THE RACE TO EXTERNALISE**

The process of competition among legislation is a three-step game. It is triggered by regulatory arbitrage. The Delaware example shows that the response of companies and investors is crucial for the operation of competition because they are the media through which this very competition takes place (Woolcock, p. 305). Then, when regulators (States) realise that companies or investors are changing jurisdiction, they will decide to change their laws. Competition starts when States are responsive to law merchants' preferences. The third step takes place when States enter into competition with each other and begin to implement strategic measures i.e. measures aimed at being competitive in comparison to the other member States' rules.

The paper now purports to evidence the development of competition among member States' asylum legislation. It shows that States have been responsive to asylum seekers' preferences (Section 1) and have enacted strategic regulation (Section 2). These laws have produced externalities and a process that can be described as a race to externalise (Section 3).

### **Section 1. Regulators' responsiveness to factor movements**

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. Germany modified its law (including its Constitution) in 1993, just some months after what was to become the peak of its asylum application growth curve (more than 438 109 applications in 1992). The same correlation between net growth of applicants and drastic amendment appears in Spain in 1993 and in Portugal in 1994. These examples are especially relevant because the three States in question not only modified their legislation but also their Constitutions. It is

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<sup>8</sup> Article 33 of the Geneva Convention.

the whole national legal system of protection that was restrictively modified in order to reduce the costs implied by a generous asylum policy.

Of course States' adaptation to law consumers' preferences took on here a specific form. Whereas in the Delaware model States enacted attractive regulation for companies, in the field of asylum it will be shown that the goal was just the opposite, i.e. to take in as few refugees as possible. It follows then that States reacted to consumers' demands by enacting legislation aiming at repelling them or preventing them from accessing refugee protection.

Firstly, States introduced a wide range of measures related to the arrival and admission of people wishing to claim refugee status onto their territory. They implemented measures impeding or making extremely difficult the entry onto national territory: reinforcement of border controls, visa requirements (for entry and transit), creation of international zones in ports or airports, the fining of airlines or shipping companies transporting undocumented people, the posting of liaison officers in countries of origin or transit, etc. These measures are rightly called "non entrée measures". In addition, all member States introduced into 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 onto 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 purported to contain asylum seekers outside Europe, mainly in States surrounding the persecuting State. Traditional transit countries, States such as Turkey, Iran, Jordan, and the CEECs, have become final destination countries as a result of restrictive EU member States' policies and indeed have been encouraged to come together to form a buffer-zone for the EU via political, diplomatic and economic incentives (see the UNHCR, Lavenex, Chatelard).

Secondly, one can canvass examples of many legislative amendments that have restricted 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.) States have also favoured measures of temporary stay, and therefore introduced a qualitatively different approach, which negates the premise of the Geneva Convention (See Joly). States have also developed measures favouring return and done away with all measures favouring integration in the host society. These various measures implemented over the course of only a few years were a

signal to asylum seekers: the latter were nudged towards reorienting their choice of one State to another.

Thirdly, States have limited the access to refugee protection. 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. Instead of a universal definition of people fearing persecution, negative, and more exceptionally, positive group determination is frequently adopted. 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, p. 344)

States have also implemented new forms of protection, called humanitarian, territorial or de facto status and frequently promoted by the UNHCR. These statuses confer legal rights upon persons who fall outside the scope of the Geneva Convention and are thus unable to enjoy the refugee status. This complementary protection grants protection to persons fleeing civil war (Duldung in Germany, F status in Denmark, Exceptional leave to remain in the UK), who are victims of persecution by non-State actors (territorial asylum in France), who are victims of persecution founded on their sexual orientation (Sweden). Interestingly, States have adopted this mechanism with little reticence, although at first glance they increase the number of people 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). In reality, de facto statuses are part of a strategy to reduce protection costs when a person can not be repatriated. In addition, States have complete autonomy with regards to granting or refusing these statuses. Therefore, States have accepted new forms of protection in order to internalise the constraints of protection, and to avoid Geneva Convention obligations<sup>9</sup>. It ensues from all of the above that Member States have been extremely reactive to asylum seekers' preferences. Limiting legal protection was a reaction to the increase in the number of asylum applications and was purported to prevent and/or dissuade asylum seekers from entering onto national soil. 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.

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<sup>9</sup> Germany, for example, when modifying its constitution in 1993, created at the same time a specific status for civil war refugees. This legal status, entirely organised by the legislator, forbids its beneficiaries to apply for the status of refugee (See Ablard and Novak, 1995).

## Section 2. Strategic deregulation

Analysing the determining factors of asylum seeker inflows in Germany and France during the period 1985-1994, Rotte et al (1996) conclude that between the asylum policies of both countries a clearly relevant degree of interdependence exists. They show that French law reform in 1991 resulted in the rerouting 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. Other examples can be provided. When Germany amended its Constitution, the Netherlands and the UK became the recipients of the asylum seekers previously going to Germany. The Netherlands received 35 400 asylum applications in 1993 and 52 570 in 1994. In the UK, the number of applications also increased from 1994 to 1996. Unsurprisingly in 1996, it was Great Britain's turn to enact restrictive legislation (introduction of the notion of safe third country into national immigration law).

The argument is that, because Member States are part of a Union and share common borders, they are interdependent and their legislation interact. A comparative analysis of asylum law amendments reveals very interesting interactions among legislation.

First, there is a striking simultaneity in the enactment of law amendments. All member States modified their refugee and asylum law by the mid-80's. Moreover, it is significant that the five EU member States which traditionally granted a right to asylum in their constitution<sup>10</sup> (France, Germany, Spain, Portugal, Italy) (See Jeannin et al.) restrictively modified their constitutional provisions in 1993 and 1994. They all transformed the previous right to asylum into a right to ask for asylum, in other words what was before a right has become a favour granted by sovereign States. In Germany, 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<sup>11</sup>, the law of September 29<sup>th</sup>, 1993 has given the State power to grant or refuse asylum<sup>12</sup>. In France, the Constitution<sup>13</sup> was changed in

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<sup>10</sup> This so-called 'constitutional asylum' is a right conferred upon specific categories of people (usually people fearing persecution for their political activity in their country of origin) and directly granted by national constitutional norms. It is different from the right granted in application of the Geneva Convention.

<sup>11</sup> Before the 1982 amendment, asylum was granted to foreigners and Stateless people persecuted or fearing persecution for their action in favour of democracy, social or national liberation, peace among peoples, freedom and human rights.

<sup>12</sup> Article 4-2 States that asylum can be refused on the grounds of external or domestic security, which include the socio-economic situation of the country.

<sup>13</sup> Following the preamble of the Constitution of 1946, people fearing persecution for their action in favour of freedom have a right to asylum on the territories of the Republic.

1993<sup>14</sup>, and what was an obligation to grant asylum has become a simple faculty for the State to give protection (See Picard, 1994, p. 166). In Spain<sup>15</sup>, a 1994 reform abolished the difference between constitutional and conventional asylum. The elimination of the constitutional right to asylum was the first step in a general move to decrease protection (See Jeannin et al). Officially, France and Spain changed their constitutional provisions in order to comply with the Schengen Convention. But this argument is not convincing because the Schengen Convention did not impose on member States the abolition or the amendment of constitutional rights to asylum. In reality, regulatory competition is a better explanation. The existence of a favorable constitutional status alone was a pull factor for protection shoppers who did not fulfil the conditions required by the Geneva Convention.

A second clue pointing to interactions among asylum legislation is the evidence of chain amendments: if one State introduced a restrictive modification, his competitors would quickly follow suit and modify their law by “copying and pasting” the innovative legal techniques invented by the first mover. Three sets of techniques, invented in one country and then copied by the others, are particularly significant. The first 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 introduced into their legal orders only to then be incorporated into the Schengen Convention in 1990. Logically then all other member States have copied the technique that consists of decentralising and privatising 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 soil that triggers a State’s responsibility *vis-à-vis* asylum seekers. France introduced the system in 1992, and then Italy a few months later, then Germany, in 1993, and Spain, in 1994, 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 then all member States enacted provisions enhancing them.

These three examples tend to confirm that, in keeping with regulatory competition theory, the competitive process has favoured a natural, albeit very incomplete, approximation of national asylum laws. It also reveals that States’ legislation were in permanent interaction.

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<sup>14</sup> Article 53-1 al. 2 : when France is not held responsible for asylum application (in application of the Schengen criteria), the French authorities can grant asylum to any foreigner persecuted for his/her action in favour of the freedom.

<sup>15</sup> The right to asylum was recognised by article 13-4.



### **Section 3. A race to externalise**

The interdependence among national legislation can be explained in two ways. One may consider that States' laws have generated non internalised regulatory externalities imposed upon their competitors. According to this view when national regulators enacted laws they failed to take into account the resulting international consequences. The uncontrolled creation of non internalised negative externalities is, in competition theory, a sign of market failure and inefficient competition.

A second and more convincing hypothesis is that, in the field of asylum, 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). The new legislation contained a potential for "devaluation races" in asylum law among Western countries. Rotte et al suggest that States have used beggar-thy-neighbour effects in this field (Rotte et al, 1996).

To be true, one may argue that the policy of externalisation towards non member States is not related to regulatory competition among member States. Yet the first States to have adopted diversion measures could then claim a first mover advantage. It is striking that all the externalisation legal techniques (the safe third country notion and readmission agreements, the 'manifestly unfounded application' concept, the posting of liaison officers in ports and airports of transit countries, the financial incentives for transit countries to reinforce their border controls etc), once invented and created in one member State, were then copied by the others in a rapid trend.

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 legislation differences. Other pull factors influence the choice of a potential destination: the language spoken, national communities, family ties etc. may limit the size of the market. In addition, geographical proximity, 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. This indicates that competition among national asylum laws, although it was not a perfect game, was a process, a dynamic that States had to come to terms with and indeed chose to reinforce by their strategic actions.

### **PART III- EVALUATION OF THE SPIRAL OF RESTRICTIONS IN LEGAL PROTECTION: A “RACE TO THE BOTTOM”**

There is a debate with regards to the result of regulatory competition. For scholars like Romano (1985) or Charny (1991), competition among rules produces optimal and innovative legislation: it creates a “race to the top” because it ensures the production of laws distinguishable by their capacity to enhance shareholder welfare (See also Trachtman, 1993; Winter, 1997). But many scholars disagree with this conclusion. Competition can be deleterious when States are penalising the less mobile factors, such as workers, by reducing, for instance, employment protection legislation in order to remain attractive to the more mobile factors such as capital. For Cary (1974), one of the main critics of the Delaware model, competition is not efficient because managers will choose to incorporate in the State where the corporation laws are efficient but only from their point of view: they disregard shareholders’ interests. Therefore a “race to the bottom” is said to occur when businesses move in response to negative deregulation designed to attract capital by lowering social protection. The competition creates a spiral of restrictions from which, in the long run, no State can emerge victorious.

In regulatory competition literature, two criteria serve to determine the result of competition. First of all, the effect of competition on the game participants’ welfare. Second of all, the capacity of regulatory competition to produce optimal rules. With regards to both criteria, I propose to conclude that, in the field of asylum, regulatory competition has produced a negative result<sup>16</sup>: competition has generated a spiral of restrictions in legal protection which is problematic both for asylum seekers and for States (Section 1). In addition the rules enacted are sub-optimal (Section 2).

#### **Section 1. The restriction in legal protection is detrimental to both asylum seekers and States**

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<sup>16</sup> The terminology has also entered political discourse. For instance, Belgium’s Minister, Antoine Dusquene, has mentioned the necessity to “put an end to negative competition between member States”, See Agence Europe, 17/09/1999.

Using a law and economics perspective, the supporters of the Delaware model of the competition for incorporation consider that the market for shareholder investment will discipline managers in their choice of jurisdiction, so that the jurisdiction that provides the most efficient law contract between management and shareholders will be selected. The argument is that shareholders are able to identify the costs being allocated to them by virtue of applicable State corporation law and to coalesce into effective action to avoid these costs. Shareholders may lobby State legislatures against « lax » corporate laws, or they may seek to influence corporations directly, encouraging them not to incorporate or reincorporate in States with lax corporate laws. To put it differently, the race to the top argument is rooted in the conviction that shareholders are a countervailing force against management's interests in laxity. Critics of the Delaware model espouse the view that the balance of power tips in favour of the managers rather than the shareholders as the former can make independent choices regarding the jurisdiction of incorporation and that the market for shares is inadequately effective as far as disciplining managers goes.

The focus on shareholders' and managers' situation, which serves to evaluate the result of competition, is mainly based on a costs and benefits analysis. I propose to use this costs and benefits analysis and apply it to each participant of the game and have come to the conclusion that competition is negative because it has undermined both asylum seekers' (§1) and States' (§2) welfare.

#### §1. The degradation of the asylum seekers' situation

The shift from generous asylum laws to restrictive measures has been presented in the previous part. It is important now to evaluate its consequences.

First, States have implemented “non arrival” measures, aimed at containing asylum seekers outside of Europe and/or to redirecting them towards other member States. The UNHCR considers that these *non entrée* measures have jeopardised the security of potential and actual asylum seekers (UNHCR, 1997). These procedures impede access to a territory and have obstructed the flight of people whose fear of persecution in their country of origin is genuinely founded and who are unable or unlikely to obtain refuge in a neighbouring State. The UNHCR shows that through the implementation of safe third country and manifestly unfounded application measures, asylum seekers are bounced from country to country until one finally decides to host them. This chain deportation phenomenon adds to the psychological and physical wear and burdens of an already fragile population.

As seen above, States have also limited the access to refugee status. To that end, some States have chosen a very narrow interpretation of the

Geneva definition of “refugee”. The most significant example is the refusal to grant the status of refugee to people who are victims of persecution by non State actors or who are fleeing civil wars. But because they are bound by international obligations such as the *non-refoulement* principle set out in the Geneva Convention and Article 3 of the ECHR, States frequently cannot resort to expatriation. As a result many people can neither be granted refugee status nor can they be returned to a third country. They therefore live in a legal limbo, with no protection and no possibility to fully integrate into the host society. In some cases, people will be able to manage to access a de facto status, but the latter provides limited rights, and grants only temporary stay in poor conditions. The situation is not so different for people who are ‘fortunate’ enough to be granted the Geneva status. NGOs and the UNHCR observe that the procedure for the examination of asylum applications is extremely long. They indicate that such lengthy procedures are problematic because, before their asylum application is fully examined and a status granted or refused, asylum seekers live without subsidies.

Finally, many States have reduced the number of rights conferred upon asylum seekers who are already caught up in the asylum procedure, like the right to work and social protection. One can point to practices such as the withdrawal of social welfare and legal aid entitlements, or the restriction of the right to an education. Joly (1999) rightly concludes that asylum seekers suffer from a negative presumption. They are considered guilty until they prove themselves innocent (of having committed a fraud). A program of non-integration implicitly underpins the measures applied: if, in the end, they are granted protection, it is almost despite identity or travel documents. As a result, a marginalised group in a semi-legal situation is created.

## §2. The costs of competition for States

From the States’ point of view, competition was also a costly game and competitiveness has required permanent and far too laborious efforts. First of all, the competitive process imposed frequent legislative changes, and constitutional amendment. In some cases, States amended their legislation every year, which represents important costs in relation to the legislative procedure, time spent by members of parliament, the involvement of government and civil, as well as the costs of implementation of the new law.

Second of all, the deflection costs have been extremely important and probably excessive. By putting the accent on migration control and border protection, regulators have used a very high level of human resources (custom, police, and civil servants in charge of asylum

application examination). The volume of administrative procedures regulating access to national territory and organising border controls has constantly increased. As the UNHCR States, (UNHCR 1997, p. 196) “in attempting to limit the number of asylum seekers arriving and remaining on their territory, these States have actually damaged their own interests”. Moreover, the systems developed to reduce the costs have created new costs. The chain deportation system generated by the implementation of safe third country techniques has required new technical means and resources, precisely the opposite result of the countries’ goal (see ECRE 1995).

To tell the truth, the deflection costs were not uniquely caused by competition. The shift from generous to restrictive asylum policy is attributable to the eruption of important conflicts that led to mass refugee movement and the subsequent massive increase in the number of asylum seekers in Europe. Yet 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 further and further enhance the deflection effect of their policy in order to outdo their rivals.

Thirdly, competition generated practices that became costly for States’ international reputation. Part of their international image and the benefits gained from hosting refugees is to be able to tout themselves as human rights protectors. The development of restrictive measures unsurprisingly damaged their reputation and States now face problems of legitimacy in certain arenas. Moreover, the UNHCR (UNHCR, 1997, p.69) notes that, when the very countries responsible for establishing the international refugee regime begin to challenge its legal and ethical foundations, “then it is hardly surprising that other States, especially those with far more economic problems and much larger refugee populations, have decided to follow suit. (...) Increasingly, when low-income countries close their borders to refugees, they tend to justify their actions by referring to the precedents which have already been set by the more affluent States”. Moreover, the degradation of refugee protection in third world countries impacts on member States’ asylum policies. When transit countries refuse to sign or ratify the Geneva Convention or grant only limited protection to refugees, European countries cannot consider them to be “safe” and therefore cannot make use of the safe third country technique. Indeed the efficiency of their deflecting measures is challenged by their very own policies.

At a collective level, the result of competition is also sub-optimal. Numerous studies (Noll, 2000; UNHCR, 1999) highlight sharp differences in the allocation of asylum seekers and refugees. Whether the study is

carried out by examining the number of refugees per country, the ratio GNP/number of refugees, or the ratio population/number of refugees, whatever the period considered, some member States carry a heavier burden than others (Betts, 2002; Vink, 2002). In itself, the difference is not necessarily problematic. Betts (2002) shows that States can receive private benefits in hosting refugees. Generosity in the reception of refugees might be justified by internal motivations: history, perception of a duty to protect human rights, labour market needs etc may explain differences in national reception policies.

Yet, from the mid-80's onwards, the perception that a generous asylum policy was beneficial decreased as the number of asylum seekers dramatically increased in Europe. As a consequence, States started comparing their policies, and the main reception countries began to point to the imbalance and insist upon the need for burden sharing schemes. The pursuit of unilateral actions and indifference towards the plight of other member States started to jeopardise other EU objectives and policies (Barbou des Places, 2002). A non-burden sharing 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). The solidarity principle roots collective action in the EU and its disrespect might have serious consequences on the achievement of EU objectives. In sum, the result of the competitive game is an "all losers" one.

## **Section 2. Suboptimal rules**

Regulatory competition theorists use a second criterion to evaluate the result of competition: the quality of the rules enacted. Charny (1991) for example makes the point that managers will choose to incorporate in the State where the corporation laws are more efficient. In his view, if Delaware was able to surpass its competitors in attracting incorporations it was because the state adopted optimal - not lax - rules. Romano (1985) agrees that the market for incorporation creates an incentive for each State to enact the most efficient laws, i.e. Delaware won the race because it offered comprehensive statutes and case law, as well as an experienced judiciary specialised in corporate matters. It was also highly responsive to the need for legal innovation insofar as it quickly reacted to legal controversies, by adopting new precedent, new rules. Finally it granted stability and serviceability in the system.

In contrast to the incorporation regulatory competition, the competition among asylum laws was not conducive to the emergence of efficient and good rules. The rules enacted raise questions of legality and legitimacy (§1) and have proven to be inefficient (§2).

#### §1. The ‘efficiency versus legality’ dilemma

Describing the evolution of the international asylum regime, Crepeau (1997, p, 264) argues that member States had to face a liberal critique but at the same time constantly prove their efficiency in the implementation of their legislation. As States were mainly concerned by the efficiency of their deflection policy during the competitive process, they implemented rules, whose legitimacy or whose compliance with international norms is arguable. For instance, important criticisms have been aimed at the questionable compatibility of carriers’ liability mechanisms with international norms. The legislative provisions organizing carrier sanctions have been justified with reference to the obligations set out by article 13 of the 1944 Chicago Convention on International Aviation, which requires that airline passengers comply with the entry formalities of the country of destination. But the Chicago Convention does not impose a legal duty on the airlines (operator) to enforce such compliance by passengers. Compliance with Article 31 of the Geneva Convention has also been questioned. 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.” As the Council of Europe has frequently pointed out<sup>17</sup>, the national laws implementing the carriers’ liability rule fail to conform to the spirit of the Convention.

The use of safe country and manifestly unfounded applications mechanisms is also problematic<sup>18</sup>. Their implementation corresponds to a minimalist interpretation of the Convention. It contradicts a general principle of interpretation of human rights norms which requires an open, liberal and teleological interpretation that affords the greatest protection of the dignity of victims (See Crepeau 1997, p. 265). The UNHCR adds that the so-called unfounded applications are hastily examined by police forces at the border, without any form of legal guarantees or judicial control<sup>19</sup>. A third question arises out of the establishment of transit or international zones. Whether it be officially or simply in practice, some States have considered that these zones are not part of their national territory thereby justifying the non-

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<sup>17</sup> See Parliamentary Assembly Recommendation, No. 1163(1991)

<sup>18</sup> The UNHCR frequently calls attention to the fact that the examination of so-called manifestly unfounded applications is expeditious, processed by police forces at the borderline or immediately after entry without real guarantees offered to the person.

<sup>19</sup> Executive Committee, conclusion No. 30/XXXIV on refugees status and abusive or manifestly unfounded applications, UNHCR, Geneva

application of their legal norms in these areas. But the UNHCR (1997) denounces the use of these zones, which serve to mask the turning back of numerous potential refugees as a breach of article 33 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 p. 239) document the increasing powers given to authorities who 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 which violates 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 privatisation of States' competence (See Crepeau, 1997; Jeannin, 1999).

This general evolution suggests that efficiency in deflection has turned out to be the unique criterion used – although there are many others - 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. Yet, legitimacy was a much discussed issue in States like Germany where the right to asylum was incorporated into the Constitution in the aim of limiting the executive power after the experience of the totalitarian nazi State. Therefore, unsurprisingly, when efficiency-oriented measures have been challenged before national courts<sup>20</sup>, they have become politically costly for governments, who have had to face both international and national critiques.

## §2. Inefficient rules

Although States were preoccupied with efficiency, i.e. the competitiveness of their restrictive legislation, the rules implemented during the 80's and 90's 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).

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<sup>20</sup> In December 1996, the French Conseil d'Etat in its decision *Ministre de l'Intérieur c/ Rogers*, refused to consider as manifestly unfounded Mr Rogers' asylum application on the simple ground that, before entering the French national territory, he had transited by a State signatory of the Geneva Convention. (CE, Ass., 18 décembre 1996, *Ministre de l'intérieur c/ M. Rogers*, n 180856, conclusions M. Delarue). The French Conseil constitutionnel in its February 25<sup>th</sup>, 1992 decision limited the possibility to use the transit zones.



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 irregular 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. Chatelard (2002) shows that keeping asylum seekers out has had the side effect of allowing for the development of networks of migrant smugglers (See also Salt and Hogarth, 2000 and Ghosh, 1998). Accordingly, to avoid being returned to the safe third countries by which they have transited, many asylum seekers destroy their identity documents and passports or lie when they describe their migration route. The restrictive measures have thus driven migration underground. As a result, States are obliged to forever 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. The limited protection conferred upon asylum seekers tends to disempower them and hamper their contribution to host societies, thus exacerbating hostile perceptions of them by the latter (Joly, p. 347).

The conclusion is that regulatory competition has turned out to be negative. It has been costly, inefficient with no limit to the spiral of restrictions and to the increase in costs. Constitutions have not been able to serve as bulwarks, setting down the rules of the game insofar as they have been amended. Yet, arguably potential rules of the game already exist and can be found in international law. States have tried to get around the Geneva provisions or have interpreted them restrictively. But they have avoided direct infringement of the Convention. Therefore, one may wonder whether, in the frame of this regulatory competition process, international law is not the ultimate limit. Insofar as international law is a binding rule collectively agreed upon, it could delimit the playing field by indicating what constitutes fair competition. This suggests that international cooperation is susceptible to regulate competition and avoid the race to the bottom.

## **PART IV- ARE THERE ALTERNATIVES TO NEGATIVE REGULATORY COMPETITION?**

What kind of response is needed to avoid market failure and eliminate the negative effects of competition? Revesz (2002), who analyses competition among environmental rules in Europe, suggests two possible responses to negative regulatory competition among member States. First of all, the member States can agree to a bilateral, legally enforceable treaty which will produce the optimal result. In such a treaty, States can adopt optimal, stringent standards thereby maximising social welfare. Then, if a State is seen to cut its social standards, the other Member States will impose sanctions on it. The second response is the adoption of a comprehensive federal legislation in order to eliminate the undesirable effects of the race. Centralised action is promoted because, if federal legislation adopts optimal standards acceptable for all States, the States would be precluded from competing for industries or incorporations by introducing lax regulations. The expected result is the maximisation of collective welfare.

The first strategy of cooperation was followed during the 80's and 90's but it was inefficient (Section 1). Is centralised action (i.e. action at the federal level) the solution? I will show that despite the transfer of competence to the EU, "centralised action" in the field of asylum is unlikely at the present time to transform competitive and unilateral behaviour into collective action leading to an optimal regulation. I therefore propose to explore Esty and Gerardin's idea of « co-opetition » (Section 2).

### **Section 1. Limited spontaneous cooperation among member States: cooperation in the shadow of regulatory competition**

EU member States have established legal norms aimed at collectively tackling the asylum dilemma (§1). But despite important efforts, the result of this spontaneous cooperation is unsatisfactory. This failure can be explained by the idea that cooperation took place in the shadow of competition (§2).

#### **§1. Initiated cooperation**

Since the mid-80's, 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 application lodged in one member State of the EC<sup>21</sup> (entered into force in 1997). I propose 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). The Convention has laid down six hierarchically ordered criteria that serve to determine which member State is to be held responsible for processing the application: family-bond criterion; the issue of a residence permit; the possession of a valid visa; illegal entry; the permission to enter without a visa; first application for asylum. The mechanism prevents asylum shopping for two reasons. First, asylum seekers can no longer initiate parallel or successive applications in several member States. Only one State is competent to process their examination. Second of all, the Dublin system transforms the asylum seekers' opportunity to choose his/her destination country into a legal State-oriented determination. For instance, an asylum seeker wishing to claim asylum in the U.K. but entering illegally the EU via the French territory will not be allowed to reach the U.K.: the French authorities will be deemed competent for the examination of the claim. As a result of the Dublin Convention the "freedom" to exercise asylum shopping is absorbed by an institutionalised and interventionist mechanism of distribution of asylum seekers among member States. 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 purports to replace the previous unilateral and competitive actions that deflect asylum seekers in sharing out the costs and resources of refugee protection. In 1992, a Common position was adopted that referred to burden sharing in order to ensure a just and lasting solution for people fleeing the Yugoslav war. After the treaty of Maastricht and within the framework of third pillar mechanisms, Member States adopted various measures trying to establish burden sharing plans. In September 1995, the Council adopted a resolution on the allocation of responsibility among member States<sup>22</sup>. In 1996, a Decision was enacted laying down an alert and emergency procedure on burden sharing with regard to the admission and residence of displaced

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<sup>21</sup> 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.

<sup>22</sup> OJ 1995, C262/1/3, 7/10/1995

persons on a temporary basis<sup>23</sup>. Main refugee receivers, in particular Germany and Sweden supported these norms. From the early 90's onwards, these two countries have systematically proposed and promoted burden sharing plans (Swedish proposal on burden sharing in November 1993; German draft Council Resolution on burden sharing with regard to the admission and residence of refugees of July 1994). This action in favour of burden-sharing must not be misunderstood as a strategy designed by overburdened States to rid themselves of an excessively large number of protection seekers. It should be viewed, instead, as a means to maintain and restore States' admission capacities in the long term (Hailbronner, 2000). As a matter of fact, burden sharing plans in the field of asylum reveal a political will to foster solidarity and equitable distribution among States belonging to an ever closer Union. As burden sharing projects help States to increase or maintain the protection granted to asylum seekers and ensure greater justice to asylum seekers, they represent an attempt to move away from the logic of regulatory competition.

## §2. Failed cooperation

The results of these different instruments of cooperation are however negligible. Some scholars argue that their main interest is in that member States have benefited from acting collectively to achieve migration-related objectives without having had to cede their authority to the Community (Thouez, p. 1). Other scholars argue that States have used common norms to legitimise at the national level the shift towards restrictive asylum legislation. For instance, the Dublin Convention and the 1992 London resolution<sup>24</sup> allow States to return an asylum seeker to a third country even when the criteria point to one of the States' responsibility for processing the case<sup>25</sup>. Vink concludes that governments have pursued restrictive policies that are perhaps not all that different from those that they would have pursued in the absence of European cooperation, but they could get away with it more easily by strategically profiting from the European playing field. This is especially true of frontrunner countries such as the Netherlands or Germany, who could then try to shift the blame to Europe for being too harsh. (Vink, 2001; Guiraudon, 2000).

Be that as it may, the 90's' cooperation has failed to stop regulatory competition. The Dublin convention has not eliminated asylum shopping and is criticised for having created significant side effects such as lengthy procedures, unclear criteria, the fact that few asylum seekers are ultimately

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<sup>23</sup> Council Decision of March 4<sup>th</sup>, 1996, OJ L63/10, March 13<sup>th</sup>, 1996

<sup>24</sup> Resolution on a harmonised approach to questions concerning host countries, unpublished.

<sup>25</sup> The London resolution advocates considering the possibility of returning an applicant to a third country outside the European Union first before examining whether a member State is to be held responsible on the basis of the Dublin Convention

transferred from one country to another, longer periods of uncertainty (See Liebaut, 2002). More important is the view that the Dublin Convention has incited asylum seekers to destroy identity and travel documents, and has generated a strategy of clandestine entry and residence in order to avoid the transfer from one member State to another. Some asylum seekers have also decided to withdraw their asylum application in order to avoid the application of the Dublin Convention, preferring access to a more limited form of protection. Last and mainly, asylum seekers have developed new strategies in order to continue to be able to choose their destination State. Informed of the Dublin criteria (especially the fourth, i.e. illegal entry), some protection seekers have avoided the official procedure of acquiring a visa or residence permits and choose to enter illegally onto the territory of their destination State. Despite States' efforts and coordination, asylum seekers have pursued their strategy of asylum shopping.

The burden sharing projects have not produced better results. The 1995 resolution and the 1996 decision have not created any common rule concerning admission, return, rights granted to displaced persons etc. As a consequence, the content of national legislation has not been approximated and differences among laws fuel regulatory arbitrage. In the early 90's, States considered the possibility to organise people-sharing mechanisms, i.e. mandatory allocation systems of asylum seekers among member States. The 1994 German draft proposed to assign protection seekers with a distributive key based on member States' percentage of the total Union population, percentage of the Union's territory and percentage of the Gross domestic product of the Union. Moreover, this mandatory system denied asylum seekers the freedom to choose the protecting State. But strong reservations from France and the UK watered down the project. As a result, a very light system has been set out: the 1995 decision on alert and emergency procedure abandoned the system of allocation of people.

Logically, the imbalance of burden among member States was not reduced during the 90's. All data confirm the unevenness in the distribution of protection seekers in Europe, both for refugees and for temporary protection seekers during the Yugoslav crisis (the UNHCR, 1999). Moreover the Dublin mechanism has produced concentration effects (Lavenex, Noll). By application of the entry criterion, States in geographical proximity to crisis regions are deemed primarily responsible and risk being overburdened. By application of the family criterion, the Dublin convention increases the burden of States already hosting large communities of migrants. Hailbronner (p. 401) concludes rightly that the Schengen and Dublin conventions have established a special type of burden shifting rather than burden sharing.

In sum, despite important efforts to cooperate, there was no shift from costly and unilateral asylum policies towards fairer and more efficient

collective action. States promoting cooperation 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 cooperate (Barbou des Places; 2002), the potential benefit of pursuing competition by individual action was still promising. Noll explains this situation by the prisoner's dilemma metaphor that describes the impossibility to cooperate in public goods theory (Noll, 1997). He notices that the spiral of restriction recalls the prisoner's dilemma in which two parties try to save themselves through unilateral action rather than accepting the costs which accompany the benefits of cooperation. Suhrke underlines the fact that States still had enough manoeuvring room to insulate themselves from asylum seekers flows (Suhrke, 1998) insofar as unilaterally, each State retained the legal capacity to bar entries. Therefore, States conferring on asylum seekers a more limited legal protection could still expect to win the competitive process by pursuing restrictive policies. Only high refugee receivers had an interest to promote cooperation and burden sharing. But given that decisions were either based on voluntarism (international conventions) or on the unanimity rule, cooperation was unlikely. Cooperation could not emerge from the shadow of regulatory competition: logically the 90's were characterised by the evident predominance of competition.

## **Section 2. Conditions for an efficient federal regulation?**

Federal action is traditionally presented as the alternative to negative competition when spontaneous cooperation does not emerge or does not produce efficient regulation. The first benefit of a centralised action are the economies of scale which may be created by establishing a single, uniform set of rules that govern various types of transactions. The need for multiple governments to produce the same legislation is reduced. A second benefit comes from the fact that central government can provide more of the relevant public good at less cost because it reduces the costs that stem from regulatory arbitrage : evasion, forum shopping, externalisation. Thirdly, centralised action is also justifiable from the perspective of distributive – as opposed to allocative - efficiency.

The issue that must be raised now is whether the communautarisation of the competence to act in the field of asylum will permit the emergence of a federal and centralised regulation able to change the nature of the game (from competition to cooperation) and its outcome?

### **§1. Competition in the loopholes of federal regulation**

As it gives competence to the EC to regulate migration and asylum issues, the Treaty of Amsterdam could theoretically allow for the adoption of a

comprehensive and efficient asylum legislation. Article 63(1) EC has given competence to the Council EC to adopt minimum standards for the reception of asylum seekers in Member States, minimum standards with respect to the qualification of third country Nationals as refugees, and minimum standards for the procedures in Member States for granting or withdrawing refugee status.

The end of the intergovernmental approach is a major change, together with the Council's obligation to act within a five year time limit. Following an optimistic scenario, the harmonisation process, by suppressing differences in legislation, should limit regulatory arbitrage and therefore could avoid the race in protection restriction. Harmonisation is likely to ensure fair protection to asylum seekers and eliminate costs related to constant legislation amendments. Moreover, the action undertaken by European institutions could eliminate the externalities problems and would limit transactions costs for law consumers and regulatees. In accordance with the Treaty of Amsterdam, States have accepted to complement the harmonisation process by the establishment of burden sharing mechanisms (Art. 63(2)b). Therefore it is possible that, if burdened States can expect assistance from their partners in the form of people-sharing or fiscal sharing mechanisms, they will maintain or increase their acceptance of protection seekers. Likewise, they could be incited to accept protective harmonised norms. Therefore, the treaty of Amsterdam opens up the way for a first scenario: the replacement of competition by harmonisation driven by a central authority and the revitalisation of States' commitment to the Geneva Convention through Community measures.

But centralisation, i.e. comprehensive State regulation in the EU, poses also many problems. Centralisation needs to be made compatible with the subsidiarity principle. The subsidiarity principle imposes the respect of national diversity in asylum policy, insofar as the level of protection to be granted is to be decided at the national level only. Therefore, the difficulty is the following: because central government is supposed to produce legislation which applies to a large number of States, chances are that legislation produced at the central level will represent only the lowest common denominator upon which all States can agree, especially if unanimous voting is the rule. The problem is that a minimal common rule cannot eliminate differences in regulation thus the floor remains open to regulatory arbitrage and competition because of the loopholes in federal regulation. Unless the harmonisation norm is comprehensive, competition remains the most plausible scenario.

Indeed the current debates on the future European asylum policy reveal that many States still rely on a competitive strategy in order to avoid new costs and are not promoting a comprehensive and protective European

asylum policy. Only a very limited harmonisation, offering a low level of protection to asylum seekers, is, for the moment, to be expected and this despite the Commission's efforts to promote decent protection of refugees. Moreover, in the absence of norms guaranteeing real burden sharing insurance (Article 63 EC exempts burden sharing measures from the five year time limit), it can be assumed that "a rational State will opt for a minimum level of protection" (Noll). States will not promote mandatory high (and costly) standards of protection without receiving any guarantee that the others will share the reception efforts. The decision creating the European Refugee Fund<sup>26</sup>, which symbolises a political will to ensure financial compensation for overburdened States, will not suffice to offer real insurance and predictability for main receiving countries. Its budget is too limited to cover care and maintenance costs induced by refugee protection. Because norm sharing (i.e. harmonisation) and fiscal and people sharing can not be separated, it ensues from all of the above that minimum harmonisation is highly probable (Barbou des Places, 2002) and that cooperation, even promoted at the central level, is unlikely to replace regulatory competition.

It seems therefore that the 'competition versus centralisation' debate is too simplistic for the EU. In Europe, central or federal regulation is EC law, i.e. norms enacted under the Member States' control. The enactment of an EC rule must take into account the variety of national interests, benefits and strategies. The adoption of a European norm can not be analysed as an alternative to competition insofar as the creation of a European norm itself results from both cooperation and political competition among member States.

## §2. Co-opetition

The correct approach must not rely on the replacement of competition by centralisation. States' incentives to compete or free ride by lowering standards of protection will not disappear simply because States also negotiate common rules at the EU level. Rather, the situation points to a solution that combines « tamed » competition and cooperation. Esty and Gerardin (2002) offer an interesting analysis. They argue that regulatory theory should reflect and parallel the world's diversity and complexity. As regulatory competition corresponds to horizontally arrayed jurisdictions, it represents only one of the forms of pressure that disciplines State actors and drive governmental efficiency. In their view, optimal governance requires a flexible mix of a variety of different types of competition. Only multidimensional competition (States versus federation; States versus States, government decision makers versus non-governmental organisations), combined with cooperation, is likely to enhance regulatory

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<sup>26</sup> Council Decision of September 28<sup>th</sup>, 2000 establishing a European Refugee Fund, 2000/596 OJ L 252/12, 6.10.2000.



effectiveness and efficiency. They call this regulatory approach: « co-opetition ».

Their model suggests going beyond the regulatory competition versus cooperation debate and points in the direction of the path taken by current works on European good governance. The Commission has recently enacted a communication that promotes the use of the ‘open method of coordination’ (OMC) in the field of migration and asylum<sup>27</sup>. The OMC is aimed at complementing the top-bottom enactment of legislative measures and favours open and public discussions among States, the Commission, and other actors such as the European parliament and NGOs. The OMC purports to enhance public discussion in an institutionalised political arena, and promotes the discovery and transfer of “best practice” among member States.

Two elements must be stressed that might bring about a change. First of all, because the OMC on principle obliges States to politically and publicly justify their actions, one can legitimately expect that States which adopt unilateral, selfish and externalising measures will be politically and publicly blamed. In the field of asylum, the enactment of restrictive legislation shifting the burden to other competitors would be politically costly for States. As a consequence, States desirous of avoiding public ‘shame’ and wishing to protect their good reputation could be incited, when they enact a new law, to take into consideration the possible effects of their legislation on their partners-competitors. Hence the OMC could tame the horizontal competition among States.

Second of all, the OMC could represent a move away from the previous inter-State game insofar as it promotes the consultation of civil society, and includes NGOs in the debate. Its interest lies in that it multiplies the number of actors involved. The presence of numerous actors is indeed essential in the field of asylum as the first concerned, i.e. asylum seekers, cannot influence the content of the laws enacted. They can select a destination State but they cannot oppose the adoption or enforcement of restrictive national laws. This is one of the main differences with the Delaware model in which shareholders can resist incorporation decisions advocated by managers. Because shareholders can decide to impede a relocation that does not match their preferences, one can expect companies to relocate in states offering an optimal combination of norms enhancing shareholders’ and managers’ welfare. It is the competition between these two kinds of actors that generates a compromise on the decision to relocate a decision that influences the evolution of the States’ legislation. In the

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<sup>27</sup> Communication from the Commission to the Council and the European Parliament on an Open Method of Coordination for the Community immigration policy, COM (2001) 0387 final.

field of asylum, there is no such competition between countervailing forces. Hence the importance of involving institutions such as the UNHCR or NGOs in the debate, to ensure a more comprehensive debate. Because NGOs might exert pressure on regulators, this situation resembles the « extra-governmental regulatory co-opetition » praised by Esty and Gerardin. They use this term in referring to the dynamics of competition and cooperation taking place between governmental and non-governmental actors. This form of co-opetition promises to heighten governmental performance by unleashing NGOs who then become intellectual competitors in the policy-making domain. Indeed the authors consider that in many cases, NGOs are better positioned to compete with regulators than are other government officials. As NGOs are swift to pick up new issues and operate in a fiercely competitive market place for media and public attention, their pressure can create a strong incentive to come up with creative solutions.

Can we seriously expect that the OMC, if effectively put into practice, could put an end to the restrictive spiral in refugee protection? The answer is probably negative. Yet, it is certainly the combination of institutionalised and framed competition and cooperation that could permit the elaboration of a non regressive European asylum policy. It is only on this condition that Reich's analysis (1992) can be borne out. He argues that the enactment of minimum harmonisation measures, which complies with the subsidiarity principle, can generate a competition for "better rules". His idea is that EC law would form the starting point for a competition between legal orders, by establishing a common parameter, that could then allow for different choices by people living in different jurisdictions. By placing limits on competition, harmonisation can aim to preserve the autonomy and diversity of national legal systems, while at the same time seek to 'steer' the channel of the process of evolutionary adaptation of rules at the State level. Therefore one can expect that the directives which set out minimum standards will create a floor of rights from which member States cannot depart, but upon which they can build by setting superior standards.

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