Articles

Special Section – Regulatory Competition in the EU: Foundations, Tools and Implications

edited by Francesco Costamagna

Introduction

This *Special Section* investigates, from a multidisciplinary perspective, foundations, tools and implications of regulatory competition in the EU legal order. The term *regulatory competition* refers to a process enabling economic actors to select and deselect the law regulating their formation or activity, putting jurisdictions in competition with one another for the attraction of scarce resources. Some of the *Articles* of the *Special Section* will use a slightly different terminology – speaking about policy competition or jurisdictional competition – to refer, however, to situations that still fall within the scope of application of the above-mentioned definition.

Earlier theoretical models posited that, under conditions of perfect competition, the creation of a market for the rules, whereby laws are made to match the preferences of economic actors, contributes to maximising allocative efficiency. This vision proved to be over-optimistic, failing to take into due consideration the negative spill-over effects that regulatory competition could have in many fields, such as labour law, tax and environmental law, by inducing a *race to the bottom*. Indeed, one of the ways in which States can succeed in the race to attract the much-needed resources is by lowering regulatory standards. This notwithstanding, the promotion of regulatory competition has been eagerly retained as one of the main objectives of the neoliberal agenda. According to it, putting law-makers and regulators in competition with one another is a way to undermine *excessive* regulation, freeing up more space for market forces.

With regard to the EU, regulatory competition has been often regarded as an inevitable consequence of its multi-tiered structure. The *Special Section* challenges this view, holding that regulatory competition is not just an accident, but, as duly emphasised by Menéndez in the opening *Article*, a process that was not "brought about by the decentralised force of private actors, but designed by political fiat". To put it differently, promoting or curbing regulatory competition are political choices made to pursue specific policy objectives.

Moving from this premise, the first part of the *Special Section* offers an in-depth examination of the complex relationship between the European integration process and

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regulatory competition, exploring its historical and conceptual foundations, as well as critically engaging with its implications on the EU constitutional architecture.

The *Article* by Menéndez provides a cross-temporal analysis of the rise (and partial fall) of regulatory competition as a tool to advance market integration in the EU. According to Menéndez, a key moment in this evolution was the push toward the completion of the internal market, which occurred in the second half of the '70s. In that context, the promotion of regulatory competition contributed to the decoupling of the economic from the political, so to subordinate the latter to the former. A similar logic prevails also in the context of the Economic and Monetary Union, where the promotion of regulatory competition pursues a narrow set of objectives, such as financial stability, at the expense of other competing ones. The post-crisis reforms consolidated the role of this tool, by strengthening the capacity of supranational institutions to advance internal devaluation as a strategy to increase Member States' capacity to compete for the attraction of capital. The *Article* closes by looking at the implications of this evolution of the role and the nature of law in the European integration process. In particular, it casts a critical eye on the commodification of the law, which is no longer the product of a democratic deliberative process, but a commodity. Relying on Polanyi, Menéndez sees this evolution as one of the main flaws of the current phase of the European integration process.

Polanyi represents a key reference point also in the analytical framework worked out by Joerges in the second *Article* of the *Special Section*. Relying on the idea that the economic is inextricably linked with politics and the State, Joerges criticizes the attempt to eliminate the political from the integration process. More specifically, he challenges the assumption according to which markets have a unique capacity to efficiently allocate resources and co-ordinate knowledge. This fallacious premise is at the basis of the choice of promoting regulatory competition as a way to put external pressure on democratic will-formation processes, so to overcome the opposition of political or societal forces. The *Article* criticizes EU institutions' recourse to regulatory competition as a tool to promote uniformity. Looking at the debate between Streeck, advancing the *back to the nation State* option, and Habermas, defending the *more Europe* argument, Joerges proposes a third way, based on his *Unity in Diversity* vision. In this perspective, the EU, rather than using competition to constrain national autonomy, should revert to an institutional setting having the respect for diversity as its defining trait. This proposal builds on the author's well-known work on conflict-law constitutionalism, which he considers as a "counter vision to regulatory competition".

The first part of the *Special Section* is completed by Ferrera's contribution, offering a political science's perspective on regulatory competition. The analysis recognizes the merits of the regulatory competition theory, but, at the same time, it highlights its main shortcomings. According to Ferrera, this theory focuses on the exit dynamics – and, in particular, on the capacity of economic operators to vote with their feet and, by so doing, contribute to counter rent-seeking protectionism –, but it is too dismissive of the

voice side of politics and of the role of loyalty. Regulatory competition acts as an irritant within the EU and it erodes loyalty that Ferrera considers as "the glue that keeps the polity together". This process has given rise to, once again in Polanyian terms, countermovements that threaten the stability of the whole edifice. The *Article* sees the rise of *souverainiste* forces as a defensive reaction to the dispersion of nation States' authority due, at least in part, to a conception of politics just as "a rational selection of public policies in response to regime shopping".

The second part of the *Special Section* builds on these analytical findings and, in particular, on the idea that regulatory competition is the by-product of political choices made by supranational institutions. These choices, and the institutional dynamics underneath, vary from sector to sector. The *Articles* composing this second part look both at fields where EU law acted as a facilitator of regulatory competition and at fields where it functioned as a buttress against it or, at least, some of its most heinous effects.

My *Article* deals with a scenario falling in the first category, focusing on free movement of companies within the internal market. Here, the Court of Justice has progressively broadened the scope of application of Treaty rules on freedom of establishment with regard to cross-border transfer of companies. According to the Court, these provisions entrust corporation with the right to transfer their statutory seat in another Member State even when their sole objective is to change their legal clothes so to pay less taxes or lower salaries to their workforce. The Court operated in a legislative *vacuum*, filling it with a distinctively pro-market solution. The Commission is now following suit, having tabled a proposal for a Directive that, if adopted, would make law shopping a corporate right in the EU legal order.

Conversely, there are other cases where EU institutions have taken action against regulatory competition, perceiving it as a threat for the stability of the whole edifice. Munari takes into consideration one of the most fitting examples in this regard: environmental policy. The *Article* recalls that avoiding that the differences between national environmental legislations could trigger regulatory competition was the main – if not the only – rationale for granting legislative powers to the then European Economic Community in this field. The ensuing harmonization process was intense and pervasive, progressively levelling up environmental standards and, as clearly put by Munari, excluding that environmental protection could become a competitive factor between different national regimes. Interestingly, the *Article* shows that, in this case, the Court of Justice joined forces with the legislator, adopting an anti-regulatory competition approach when interpreting relevant Treaty provisions that seemingly left some space to Member States to lower their environmental standards. The same happened when it came to the relationship between international standards and EU ones. The Court intervened to ward off any possibility of regulatory competition from the outside, imposing to non-EU companies wishing to carry out their business in Europe to abide by EU environmental standards.

The *Article* by Van Cleynenbreugel focuses on taxation, which represents another case where EU institutions have decided to confront regulatory competition. The analysis shows that tax competition has long been considered as an inevitable consequence of the choice to create an internal market at supranational level, while leaving taxation into Member States' exclusive legislative competence. After the crisis, the Commission changed its attitude, at least with regard to the most aggressive forms of tax competition. First, it proposed to harmonize the corporate tax base for multinational businesses. Second, it began to make a more intense use of its enforcement powers in the realm of State aid to sanction special tax arrangements that, being selective, distort competition. Third, it started to target aggressive tax planning strategies in the context of the European Semester, recommending some Member States to amend certain aspect of the tax legislation. Van Cleynenebreugel argues that the Commission's strategy still falls short of providing a comprehensive and effective response to the problem. According to the author, the failure is not to be attributed to a lack of efforts by the Commission, but to the fact that it is forced to deal with structural imbalances on a case-by-case basis.

The multidisciplinary character of the *Special Section* allows for a more comprehensive understanding of regulatory competition and of its deepest implications on the constitutional architecture of the EU, as well as on the long-term prospects of the European integration process. The *Articles* composing the *Special Section* critically engage with the idea that regulatory competition is just an innocuous consequence of the removal of obstacles to the free circulation of goods and services at supranational level. Moving from different analytical angles, they shed more light on the dangers that the choice to promote regulatory competition as a tool to advance specific policy objectives poses for the constitutional identity of the EU.

Francesco Costamagna[*]

[*] Associate Professor of EU Law, University of Turin, Affiliate at the Collegio Carlo Alberto, francesco.costamagna@unito.it. The *Special Section* has been conceived and composed in the context of the REScEU project (Reconciling Economic and Social Europe, www.resceu.eu), funded by the European Research Council (grant no. 340534).