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Mobility and Competition Among Jurisdictions within the European Union and at the international level

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*The Duke cannot deny the course of law;
For the commodity that strangers have
With us in Venice, if it be denied,
Will much impeach the justice of the state,
Since that the trade and profit of the city
Consisteth of all nations.*
(SHAKESPEARE, *The Merchant of Venice*, Act
III, Sc. III)

Abstract

The paper analyses the relationship between individual mobility and competition among jurisdictions in the perspective of Constitutional Economics, with an application to the European Union. According to this approach, competition is conceived as a knowledge-discovery procedure taking place under rules. Within the European Union, free mobility is de facto hampered through legal and administrative barriers. Migration from third countries is still in national competence, but harmonisation measures are planned. The subsidiarity principle has been introduced as a guiding criterion for the distribution of competences: the recourse to harmonisation has to respect this higher-level principle. In the field of economically driven mobility, central rules should be limited to setting a procedural framework for lower mobility costs and better premises for a desirable development of competition. Caution in the process of harmonisation of economic migration politics is recommended.

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1. Introduction

During the last decades, technical progress, higher integration and interconnectedness in the economic and social realms of life – the phenomenon of globalisation – have caused two different effects on the factors influencing the mobility choice of individuals among jurisdictions. On the one hand, mobility has become less expensive and is in fact becoming stronger; on the other hand, a comparison between states or local entities is easier and more directly possible. The characteristics of the rule frameworks of jurisdictions, such as the competition rules, social or tax systems, labour standards, can be more easily observed and compared. The information costs have sunk as well. The possibility of cheaper mobility puts the governments under pressure ‘from within’, because citizens can more easily leave; linkages and interconnection with other jurisdictions make the comparison of systems possible and reveal new alternatives; this causes an ‘external’ adaptation pressure on national rules. Migration theory and policy focus traditionally on the first aspect of this two-sided effect. The second is most known under the keyword ‘system competition’ or ‘competition among jurisdictions’ and has been analysed in economic theory from different perspectives, prevalently in search of winners and losers and foreseeing races ‘to the bottom’ or ‘to the top’ in the future.

It is a matter of logic that the object of analysis in the theory of competition among jurisdictions would not exist without the possibility for individuals, at least potentially, to move between local authorities. Competition among systems and jurisdictions can only emerge if a minimum freedom of factor movement is guaranteed. Migration theory, in turn, investigates how migratory movements can be influenced through the design of a rule framework and how they are conditioned by system competition. Its focus lies on the movement of people in general, for economic or political reasons. The overlapping interest of the two approaches, then, is the role of free movement of people as a factor: Labour. In this context, all the forthcoming arguments concerning mobility imply the specification that they relate to economic mobility for the supply of labour.

If mobility freedom is granted in a polity, its effects influence the institutional design and the conditions for system competition according to the particular outline of the rules on mobility. At the same time, the chain of causation can be reversed: the openness of national systems to competition affects potential and real migration flows. More exactly: mobility causes system competition, and system competition causes mobility. Similarly, it is possible to say that mo-

bility is a necessary condition for system competition, but not strictly vice versa; nevertheless, even if mobility can take place for a number of other reasons, the differences among systems are an acknowledged precondition for mobility. The result of empirical observation, though, shows that “[I]labour is globalisation’s missing link. The flow of workers across borders is heavily impeded, leaving the global market for labour far more distorted than those for capital and commodities.”¹

The advantages of system competition will be analysed in this paper in the context of the European Union. After the illustration of the concept of system competition from a constitutional evolutionary perspective in section 2, section 3 will look in more detail at the two directions of influence between mobility and competition. Here, the interdependence of exit and voice will be discussed, as well as the different effects of harmonisation (as a political instrument) and subsidiarity (as a guiding principle) on competition. The relevance of a higher-level rule framework for international competition is described in section 4. Individual mobility within the Union will be the issue in section 5.2: according to the principle of free movement of workers as one of the four fundamental freedoms, political measures in this field aim at reducing still existing migration barriers. Economic migration from third countries into the European Union will be analysed in section 5.3: a tendency to harmonisation policies can be observed, but caution has to be advised. Subsidiarity is an acknowledged principle for political action in the EU and it has to be considered. Conclusive remarks close in section 6.

2. „Constrained competition“ and „system competition“ from an evolutionary perspective

2.1 Constrained competition

The concept of competition describes generally a process in which two or more parties compete for something that not all competitors can possess, buy, or reach. This process can be carried out in different ways depending on the rules under which it takes place. The situation of complete absence of rules that guide market competition, for example, is similar to a state of anarchy, where there are no constraints of means and strategies, and ‘anything goes’. In unconstrained competition it is not possible to make predictions regarding the behaviour of individuals on the market, quite apart of the possibility to generate expectations about the outcomes of the process. This situation can be overcome through the introduction of rules that constrain the range of possible behavioural and strategic choices. The exclusion of undesired

¹ THE ECONOMIST, October 8th 2005, p.84.

ways to carry out competition enables the parties to develop expectations about the behaviour of the competitors and to make predictions about the patterns of results that can be expected. In this way, a social order emerges, in which the ‘anything goes’ competition is replaced by constrained competition.

The same applies beyond the market arena in other realms of social life. Coexistence in society and political competition, for example, can be expected to work better if constrained: undesirable strategies can be excluded, complexity reduced. From the point of view of Constitutional Economics, rules are suitable if they respect the common interests of the individuals concerned by them. Rules are desirable if they are accepted by the parties involved, and they submit to rules because they expect advantages from mutually accepting those restrictions. In the market, sellers and buyers voluntarily accept rules of conduct because they expect better long term pay offs from this limitation of their freedom. In the same way, the members of society submit to common rules if they expect a social improvement from the constriction. They agree to play within restrictions. Such a competition is not inhibited or ‘not free’, but it is rather channelled in a desirable path.

Different polities decide individually on the rule framework for competition among their members. They differ from one another in many aspects, one of which is the market order, but also the institutional framework and the rules of political action contribute to the development of individual characteristics in a polity. Constitutional constraints in the political arena can be observed in all democratic societies. The relevance of this evident statement lies in its implication for the competition among systems.

2.2 System competition

The typical form of competition between systems was the conflict between democratic free market economies and socialist economic systems.² After the breakdown of the latter and the intensification of the economic relationships among the former, the competition among different free market forms became dominant. As described above, each polity creates its own complex framework of rules to guide social interaction and political life. Depending on which particular system is considered, competition can be further qualified as fiscal, institutional, locational, jurisdictional and so on. These forms of competition can take place locally, among

² See SINN, HANS-WERNER (2003), p. 1.

states of a federal authority, or among nation states, and concern the relationship between institutions or the location decisions of firms and enterprises. The dimension of the phenomenon depends on the possibility to act across the borders of the different systems and on the intensity of the activity that really takes place, i.e. whether and how much individuals invest economic resources, offer their labour, move to another system, etc.

As stated above, competition exists in the economic, political and social realm. While political competition within a polity concerns *collective* choices and decisions, particularly the choice among rules, competition among systems takes place through the *individual* choice among different – existing – rule frameworks. The more freedom individuals have in choosing among systems, the more the political actors have to consider this restriction to their activities in the political arena. System competition limits the power of the state towards the citizens. Politicians can take decisions changing the characteristics of the jurisdiction in which they act in many fields, supporting or inhibiting competition (e.g. through migration policy). Rationally, they have no incentives to implement measures that limit their power or put their election at risk; at the same time, they must consider the consequences of their action on the attractiveness of their jurisdiction for international mobile resources in their territory and abroad. This could cause a conflict with the assumed self interest of politicians in holding or augmenting their power.

A last central specification regards all forms of institutional competition: not the institutions themselves compete with each other, tax systems or the most attractive industrial locations are not the actors in this process, but rather instruments through which individuals, or groups of individuals, act. Institutional design influences the individual strategies and thus the success possibilities of the competitors. “‘Competition among rules’ is the competition between individuals and groups that is carried out by means of rules and institutions.”³ From this perspective, it is evident that only the existence of different institutional designs creates the competition potential among the actors. At the same time, it can be deduced that the contrary process – harmonisation – eliminates competition potential. Harmonisation measures level the differences between institutional frameworks of the jurisdictions involved, and cause thereby the diminution or elimination of competition. This point will be further developed in paragraph 3.2.2.

³ VANBERG, VIKTOR AND WOLFGANG KERBER (1994), p. 196.

2.3 Competition as a discovery procedure: the evolutionary approach

The concept of competition is conceived in this paper from an evolutionary perspective, because the focus lies on the reciprocal influence on each other of mobility and competition among jurisdictions. The changes in the rules and the development of new solutions to problems emerging from the interaction of the two phenomena are of interest here. HAYEK describes competition as an „Entdeckungsverfahren“⁴, a discovery and knowledge-creating process in which experiments can take place through variation and selection of strategies, rules and behaviour patterns. With respect to competition among jurisdictions, HAYEK writes: “Competition between local authorities or between larger units within an area where there is freedom of movement provides in a large measure that opportunity for experimentation with alternative methods which will secure most of the advantages of free growth.”⁵

Discovery of knowledge and evolution take place in competition through experiments and thanks to a feed-back mechanism that informs on success or failure of the experiments. These consist of a process of variation and selection. Through variation new alternatives emerge that can be tested against existing options; selection guarantees the survival of the successful ones, while the less successful are sorted out. This is typically the case in market competition for products or among production technologies, but it applies also for the evolution of social rules. Just like “different production technologies can be more or less effective in generating valued output, different institutions can be more or less effective in allowing groups that adopt them to generate social surplus”⁶, and they function as social technologies.

3. The relationship between mobility and system competition

As mentioned above, an interdependence seems to exist between the two phenomena of mobility and competition among jurisdictions. Mobility of factors, in this context labour, is a necessary though not sufficient condition for competition among local authorities. On the one side, mobility can put pressure on the competition rule framework of a polity, forcing its adaptation to new situations. Higher mobility in or out of a jurisdiction strengthens the competitive pressure on it. More mobility → more competition. In order to face this development, new organisational devices may be introduced. On the other side, then, this reaction increases the differences between this jurisdiction and others, thus creating further incentives for mobility: more competition → more alternatives. The further direction of this dynamics, though, is

⁴ See HAYEK, FRIEDRICH A. VON (1969).

⁵ HAYEK, FRIEDRICH A. VON (1960), p. 263.

⁶ VANBERG, VIKTOR AND WOLFGANG KERBER (1994), p. 196.

not clear. The increased number of alternatives can give strong incentives to mobility, as individuals have new options that can possibly better fulfil their preferences: more alternatives → more mobility (which would then imply → more competition). But it can also reduce the potential for mobility, because migration costs rise due to the higher differentiation, i.e. higher information costs and insecurity. More alternatives → less mobility. These complex causalities have to be analysed in detail.

3.1 Mobility as a condition for system competition

Potential freedom of movement makes competition among jurisdictions possible. The real or potential exercise of the exit-option changes the conditions under which political action can take place. At present, since we find ourselves in the middle of an interdependent process, it is not easy to identify the first step of the chain reaction. Is there one factor that necessarily has to give the initial start-up, so that others can react and set the feed-back in motion?

As far as the European Union is concerned, it is possible to observe the origin of the relationship between mobility and jurisdictional competition from a historical perspective. The measures introduced in order to enforce the four basic freedoms led to the cutback of mobility barriers among the Member States. The realisation of a common market set incentives for the mobility of people, firms, goods and factors of production, which strongly intensified the competition among locations within the Union. In this sense, the competition among local authorities has to be seen as a logical consequence of the reduction of mobility barriers.⁷ If movement is free, such as in the case of the European Union, the characteristics of different regions or systems determine their attractiveness for the mobile factors. These characteristics, in turn, are not only represented by geographic position or natural factors, but rather determined increasingly by the political form and particular design of the institutions in the jurisdiction. As KERBER puts it, each political measure that affects the attractiveness of the jurisdiction for locational decisions becomes a possible competition parameter.⁸

In the context of the European Union, no active and positive design of rules for system competition took place. The effect of having system competition is not due to a project and was not a direct target of the European legislators. The outspoken aim of the European Union was

⁷ See KERBER, WOLFGANG (2003), p. 44. Similar in: KERBER, WOLFGANG (1998), p. 199. More general in: VANBERG, VIKTOR (2001), p. 15.

⁸ See KERBER, WOLFGANG (2003), p. 45. The fact that economic policy can be intentionally used as a means to increase the attractiveness and competitiveness of a jurisdiction is the starting point for the „race to the bottom“-argument that, though, will not be analysed in this context.

always to improve the conditions for a workable and ‘fair’ competition among economic actors, capital owners etc. through integration. System competition was not considered as an integration strategy. Rules for this aim are, then, unsurprisingly absent from European laws or regulations. The functioning or failure, workability or distortion of the observable competition, at the moment, can be considered as casual.⁹ BUCHANAN states that within the EU there is still “no attention to, and consequently no understanding of, competitive federalism as an organizational ideal for the structure of Europe that might be brought into reality.”¹⁰ If jurisdictional competition is constrained at all, then, this is not due to appropriately defined rules; from a Constitutional Economics perspective, there is no framework of such rules at the European level.

If competition is considered as a discovery procedure, mobility is necessary because it makes selection possible. If individuals are systematically allowed to leave undesirable locations or systems, these systems will not be able to survive in the long term and they will be sorted out. In the case of jurisdictions, differently from biological evolution, a real ‘extinction’ of the less successful is not necessary, although the collapse of the socialist systems pretty much resembles it. Social evolution relies on the reaction to signals sent by the population regarding the desirability of system characteristics. For this reason, typically, dictatorships and socialist systems limit or entirely forbid the emigration of their citizens. Selection is possible if at least one alternative exists. Variation of existing options, offers, or alternatives is necessary for the process of evolution. Competition is relevant, in this respect, because it enhances the variation process, as will be described in the next section.

3.2 Competition as an (enhancing) condition for mobility

It has been argued that mobility can be considered a necessary condition for competition to take place, while the contrary is not the case, as there are many other different reasons for individuals to move. Besides this logical premise, however, the foregoing shows that mobility can receive incentives from competition, and that a weakening of competition brings about a decrease of incentives to mobility. Rivalry encourages the development of alternatives that are necessary for evolutionary variation in a knowledge-crating process. In reverse, measures that tend to reduce variation have a lowering effect on competition. The higher homogeneity has ambiguous effects on migration costs. The possibility to leave the jurisdiction, though, is cen-

⁹ See KERBER, WOLFGANG (2003), p. 55.

¹⁰ BUCHANAN, JAMES M. (2004), p. 26.

tral, because otherwise there would be low incentives for the political actors to be responsive to the citizens' preferences. This aspect will be specified in the following section.

3.2.1 Voice and exit

ALBERT O. HIRSCHMAN's analysis of the role of ,voice' and ,exit' can be useful to show the influence of competition among local authorities on mobility.¹¹ HIRSCHMAN observes that, for a number of reasons, an organisation can fail to meet the expectations of its members, just like a producer can fail to satisfy the consumers' preferences. Individuals can express their dissatisfaction through exit: they stop buying the product, or voice: protest and voting behaviour. The exit option is typical in market situations, while voice is more frequent in politics, but the two concepts are interconnected and therefore relevant in both realms. In the field of politics, voice is defined as the possibility for the members of a jurisdiction to influence collective decisions within their jurisdiction, while exit consists in the movement of a person who is not willing to accept the results of collective action or institutional design out of the territory where these apply. The person does not necessarily have to leave physically the jurisdiction, if a relocation of capital, resources, labour supply suffices for the aim. According to the object being withdrawn from the territory, different forms of exit and, consequently, of system competition can be observed.

Exit and voice are not mutually exclusive options. They are complementary for an individual as they are both expressions of his/her will or preferences; and they are interdependent, because their effectiveness is not absolute but depends on the realisation of the other.¹² The effects of voice, for example, are very limited if exit is not possible or extremely expensive. Exit possibility is typically granted in democratic systems, where voice is exercised in terms of participation and representation. Migration pressures out of democratic polities are nevertheless less relevant as they are in dictatorial systems, not least because of the effectiveness of the voice mechanism. "Democratic states based on multiparty systems and sustained by welfare provisions provide avenues for voice. These might therefore be assumed to be least prone to unleash a wave of migration."¹³ In repressive regimes without the possibility to exercise voice, exit is typically also extremely expensive, but often the only choice left.

¹¹ See HIRSCHMAN, ALBERT O. (1970).

¹² See KIRSCH, GUY (2004), p. 60. Similar, though in another context, is WEEDE's argument that "das Wahlrecht in der Demokratie zwar einen Beitrag zur Missbrauchskontrolle politischer Macht darstellt, aber in keiner Weise hinreichend ist. Die Möglichkeit des Widerspruchs bei Wahlen muss ergänzt werden durch die Abwanderungsmöglichkeit der Bürger." in WEEDE, ERICH (2005) p. 20.

¹³ AHMED, ISHTIAQ (1997), p. 175.

The role of voice is not so much in the focus of economic analyses on mobility as the exit-option, that is more directly related to the issue. Neoclassical models postulate the exit possibility as given, in order to look at the effects of in and out-flows on the immobile population, etc.; political science and sociological approaches acknowledge the importance of voice for the national population and for the immigrants, underlining the role of participation rights for the problem of integration, for example, but they do not undertake an economic analysis. The political economy of voice and exit has been further developed and important aspects of the relationship between the two have been pointed out, but they have not been systematically applied to the analysis of the relationship between jurisdictional competition and migration.

Within a jurisdiction, a successful exercise of the voice option is more important for individuals if exit is not possible or very expensive, like in closed – typically dictatorial – systems. At the same time, political actors cannot ignore voice signals from the citizens when the emigration alternative becomes more and more feasible. This opening process strengthens the influence of voice and the exposure to potential system competition. The members of a jurisdiction will react with more or less exit or voice depending on the costs and expected benefits of the two alternatives. They depend on the existing choice options outside the jurisdictions for the exit alternative, and on the chances of success for the individual commitment in the case of voice. Given the fact that mobility costs consist of much more than monetary factors,¹⁴ it is possible to say that the lower the costs of exercising the voice option and the higher its prospects of success, the more it will be preferred to the exit-option. Moreover, the object of voice exercise can refer to a particular aspect of political and social life, as it is the case in a referendum, while the alternative of exit is more complex: some parts of the individual endowments can be in fact separately moved abroad, but in general the relocation concerns a bundle of factors or requires the physical mobility of individuals. This is much less the case for the economic exit on markets. However, some conditions can make exit particularly attractive, as in the case of federations, and in general when the local authorities are small and near to each other. In particular, the right to exercise exit within a federal system is more valuable, the wider the competences of the local authorities. If regions and communes have little competences and autonomy, and most of the power relies on the central level, the local authorities have little scope for a differentiated design of decisive factors like tax burdens or public services. WEEDE argues that competitive federalism is advantageous for the citizens if the com-

¹⁴ The role of ‚loyalty‘ will not be discussed in this context.

petences of the central state are limited to the tasks of securing defence, the openness of the inner borders and the common market.¹⁵

If it is true that competition among jurisdictions strengthens the responsiveness of the political actors to the interests of the jurisdiction members, then voice will become less expensive and more successful when the openness to competition increases. This would lead to the logical deduction that less emigration is to be expected. Precisely the intensity of mobility, though, is the condition for that desirable effect of competition consisting in the higher response to the preferences of the citizens. Mobility causes competition among local authorities, this strengthens the effect of voice in relation to exit. If the possibility of exit is given, but it is less exercised, because jurisdictions under competitive pressure tend to be more responsive to the citizens' interests, competition is bound to decrease. Does this reduce the necessity of politicians to consider the needs of the population? This decrease of intensity concerns the one form of competition carried out through the physical movement of individuals, but this does not mean that political actors are not disciplined in other ways. To conclude from a weaker real exit exercise that they could be less responsive to the common interests of the citizens and misuse their power would be fatal, as long the potential exit option has not changed.

3.2.2 *Ex ante* Harmonisation

Territorial competition will be stronger if the jurisdictions involved have different characteristics, and this is more probable, the more discretionary power is situated at the local level. This process brings about variation. Per contra, processes that enhance homogeneity weaken those differences that can function as competition parameters among jurisdictions. The *ex ante* harmonisation of political realms observed within the EU reduces the possibility of designing different alternatives, and variation decreases. The significance of selection procedures is endangered. On the one hand, general uniform rules reduce the costs of mobility caused by administrative and legislative obstacles, or uncertainty about the rule framework to be expected in the new jurisdiction; on the other hand, however, there are bigger homogeneous areas to overcome in order to find a significant alternative. This is not only to be understood in the physical sense of geographic distances, but also in the sense of bigger and more complex bundles of factors that have to be left behind. Exit can be easier in less heterogeneous conditions, but the realisation chances of individual freedom becomes more difficult.

¹⁵ See WEEDE, ERICH (2005), p. 21. In the case of Germany, for example, the author points out that equal taxes and the precept of equal living standards in all *Länder* minder the value of federalism.

The common market and the free movement guarantee in the European Union can be considered as an example. They pursue the aim of enabling individuals to exercise freely their individual rights, but the effects of harmonisation and centralisation tendencies¹⁶ on competition make this exercise *de facto* more difficult. The principles of mutual acknowledgement and country of origin are of different nature: they represent a universal rule at the European constitutional level, and leave scope for individual action on the subconstitutional stage. National political action to enhance competitiveness is still possible, misuse for protectionist reasons more difficult. This is not the case for *ex ante* harmonisation measures: they can be misused for the aim of reducing undesired competition pressure. Thanks to the fundamental freedoms, among other factors, the EU Member States can not effectively elude system competition through individual action anymore, but they can do it jointly,¹⁷ through the instrument of *ex ante* harmonisation. This is basically what SCHÜLLER means with the catchphrase of the ‘europeanisation of the welfare state’, thanks to which the endangered national social achievements can be protected from international competition.¹⁸

3.2.3 Subsidiarity

The critique of the trend towards larger scale harmonisation is related to the argument in support of the supremacy of the subsidiarity principle. According to what was stated above, mobility costs are lower if the jurisdictions between which mobility takes place are smaller, closer to each other, and more homogeneous. Regions, communes and in general local authorities within a federal system mainly share these characteristics. If political competences are situated at the local level, the local authorities have the scope to design their rules autonomously. If the members of a jurisdiction are assumed to prefer a situation with more rather than fewer alternatives, they may agree to have more competences placed at lower levels. In multilevel systems, this can be achieved through subsidiarity. This principle consists essentially in the rule that political competence should always rest on the lowest possible level. Competences are transferred to higher level institutions only if its exercise at a lower level is not possible or not desired. Besides the traditional arguments in favour of subsidiarity, according to which political action takes place ‘closer’ to the citizens and is more responsive to their preferences (voice), this principle would allow for a wider range of alternative political options within a shorter distance and among geographically and culturally homogeneous

¹⁶ See KIRSCH, GUY (2004), p. 61.

¹⁷ See SCHÜLLER, ALFRED (1997), p. 97.

¹⁸ *Idem*, p. 98.

regions (exit)¹⁹. The costs of mobility decrease and the probability to find more desirable options increases. „Subsidiarity, by shifting political authority to lower-level – and hence smaller – jurisdictions, will decrease the costs of inter-jurisdictional mobility, making it easier for persons to escape from unwanted policies.”²⁰ Precisely this factor strengthens individual liberty and increases the competition among jurisdictions. These effects are opposite to those caused by harmonisation.

Even if it is true that any kind of differentiation can virtually increase the costs of mobility, the option of reducing the competences of local authorities through centralisation or harmonisation measures is not necessarily to be preferred. The costs of this alternative consist in the loss of individual liberty and knowledge-creation advantages. Moreover, the scope for abuse is not completely eliminated, because exceptions based on public security and health exist, which can in turn be misused. From the point of view of competition as a knowledge-discovery procedure, subsidiarity and harmonisation differ in the substantial fact that the former is compatible with a competitive process in which experiments, variation and selection can take place. For this reason, however, it is central that the subsidiarity principle is constrained through rules excluding undesired strategies: in this case the possibility to use the discretionary autonomy implied in a subsidiary system for protectionist reasons.

4. National and international rules for competition among jurisdictions

The differences in – economic and political – competition rules characterising jurisdictions are relevant because the individuals living under the framework of rules can shape their competition strategies differently, according to what is allowed or not. Societies differ in their social, economic and political orders, and these differences can influence the way they work.²¹ There will be more and less successful jurisdictions, in Constitutional Economics terms, in the pursuit of a rule design enabling the members of the jurisdiction to pursue their common goals. The idea is similar to the situation on economic markets, where the economic performance of different systems can be more directly observed. In the political arena, although less measurable in quantitative terms, the quality of the rule framework is just as decisive.

¹⁹ The first interpretation is called by VANBERG „communitarian subsidiarity“ and is described as an instrument to strengthen the voice-option of individuals. The second line of argument is defined “liberal subsidiarity” and focuses on the exit-option. See VANBERG, VIKTOR (1997), p. 254 and 256. The tensions between the two concepts are not central in this context.

²⁰ VANBERG, VIKTOR (1997), p. 254.

²¹ See VANBERG, VIKTOR (1994), p. 13.

Systems are more or less competitive depending on their natural and political characteristics, their flexibility, etc. Within a national state, a federation, or a political union, individuals can act under a common framework of rules; beyond these borders, though, there are only few – enforceable – rules for global competition. In multilayered systems, competition among the local authorities at lower levels can be constrained by a higher order of rules. This is not the case at the international level. On the level of actions, individuals aim at ‘playing the given game better’ under the given rules, improving their strategies and discovering new possibilities. Up to a certain degree,²² there is the scope for improvement on the subconstitutional level, but beyond that degree, improvements can only be obtained through rule change. The introduction of rules to ‘play a better game’ on a higher level would be the constitutional challenge. This is the case, for example, when international – enforceable – agreements are made, bilaterally or among more states. The first alternative, however, is still strongly dominant today. Binding agreements at the international level concern typically trade problems or military coalitions.

In the context of institutional competition, the distinction between improvements of strategies in the game as opposed to improvements in the rules of the game, has been formulated by MANFRED STREIT²³ with his differentiation between institutional arbitrage and institutional change. Institutional competition, in his view, consists of two interplaying processes: the decisions of private agents that relocate their mobile resources according to their perception of differences between territorial systems and institutions (institutional arbitrage), and the activity of public agents to change their institutional supply to make their jurisdiction more attractive in the arbitrage process (institutional change). In Constitutional Economics terms, these two stages correspond respectively to the subconstitutional and constitutional level. The functional characteristics of institutional competition are twofold: as a controlling device regarding political power, and as a discovery procedure regarding institutions. The first function refers to the voice aspect, the second to that of exit.

The European Union is structured as a multilevel system of competences, their actual location depending on the effects of two opposite forces, the forces of centralisation on the one side, aiming at the extreme to regularise and harmonise the national systems into an integrated

²² This degree would correspond to the anarchistic equilibrium in Buchanan words. BUCHANAN, JAMES M. (1975), p.57f.

²³ See STREIT, MANFRED (1998).

European design and, on the other side, “forces reflecting residual nationalisms.”²⁴ These aim at maintaining competences and thus full sovereignty at the level of the Member States, submitting only to EU-wide regulatory norms. Both extremes are unlikely to be realised in reality, but the opposite forces have influenced the design of the European structure and will continue to do so. As JAMES M. BUCHANAN points out, the EU will necessarily be ‘federal in nature’ because of the division of political authority between the central level and the Member States. Competition on the vertical and horizontal dimension will not be completely switched off but, in his view, the structure of institutions emerging from the opposite forces will always show the effects of political actions at the two levels: the central authority will try to extend harmonisation measures and the nation states will impose discriminatory policies as a reaction to interest group pressures. Precisely in this setting, competition is indispensable: an overcentralisation of authority will lead to reductions in rates of growth, and the retention of authority in Member States will have negative effects on the fundamental principle of market integration. From a Constitutional Economics perspective, it is not possible to determine the appropriate level for the allocation of competences without considering the criterion of citizen sovereignty, recurring to the common constitutional interests of the individuals concerned. In this perspective, the competition between local and central level is not to be conceived as a question of retaining competences or extending harmonisation measures, but as a question of finding the appropriate level of competence to satisfy the preference of the citizens involved.

At present, there are three dimensions in which European competition takes place. First, within the Union, Member States compete with each other to attract European citizens. In this field, the rules of the game are harmonised to a high degree under the fundamental principle of free movement. Secondly, every single Member State competes with non-EU countries for immigrant workers; the rules for immigration from third countries are not yet harmonised, and each EU country can develop an individual immigration policy. Thirdly, as a system, the European Union legislation competes with third countries. In the following, I will concentrate on the first two points.

5. Mobility in the European Union

5.1 Migration policy in Europe

The analysis of migration policy is one of the relatively new fields of economic policy. Most of the nation states did not have a framework of rules and general criteria to approach the

²⁴ BUCHANAN, JAMES M. (2004), p. 28.

phenomenon until in recent times, excluding the typical immigration countries like USA²⁵ and Canada. In Europe, the political action in this field has been dominated by asylum and refugee issues since the end of World War II, leaving the realm of economic driven migration to selective case-by-case reactions to local problems or workforce shortages. As DANIEL KUBAT puts it, migration policies were run as “a matter of waiting to see what will happen next while issuing *ad hoc* regulations.”²⁶

The development of migration policy in the European Union is a good example for this passive attitude, both at national and Community level. The Member States have concentrated their efforts in the consolidation of measures concerning the conditions for granting asylum, i.e. to individuals displaced as a consequence of war, in the 50ies and 60ies, and to immigrants from post-communist countries in the more recent past. The subsequent development of a common European migration policy regarding third country immigrants was dictated by political pressures in the field of asylum and refugee politics. The Member States typically fear the disadvantages of a unequal distribution of this humanitarian burden, while they are reluctant to renounce sovereignty in the design of rules for the economic migration policy. In this field, it is central for the Member States to preserve the independence and flexibility to introduce national measures to face peculiar needs of the country. This position is reflected in KUBAT's quotation. From a Constitutional Economics perspective, the advantages of flexibility are acknowledged, not because of the possibility of short term *ad hoc* regulations, but rather because of the potential benefits of competition.

The Commission itself acknowledges the advantages of a competitive system although only indirectly: in its directives and regulations it is often specified that action is taken on the basis of concepts which have already been successfully applied in Member States, or after the analysis of the current rules adopted at a national level. The observation that there are more successful concepts or rule sets within Europe, however, is perceived as a mandate for the European legislators to take action and provide for the extension of the successful rules to all Member States. This conclusion goes at the expense of the decentralised competences that have caused the effects observed and erodes *de facto* the subsidiarity principle.

²⁵ The USA imposed the first migration quotas in 1920 (HATTON, TIMOTHY J. and JEFFREY G. WILLIAMSON (1994)). Though, strictly, it was not a policy in the sense of a closed and consequent framework of measures in a particular field of society.

²⁶ KUBAT, DANIEL (1993), p. xxiv.

Since the EU enlargement, moreover, the ‘old’ members share the fear to see their labour markets overflowed by migrant workers from the east. As far as European citizens are concerned, the main aim of coordination at the European level has become the purpose to guarantee the *status quo* in their own countries, which is achieved though the temporary suspension of the European fundamental principle of free movement for workforce from the new Member States. Together with the danger of wage shrinkage in the west, the main argument in support of this huge exception to a central principle of the Union is the effect of immigration of European citizens on the social security systems, i.e. the exploitation of the welfare state. These are under pressure because of the demographic development in Europe and basically because of their non competitive and non sustainable design, independently from migration pressures. The pretext has proved to be very useful for the ‘old’ Member States to resist the trend to economic openness. At the same time, immigration is a welcome short term device in order to stabilise the social security systems in countries with an aging population. In the following, mobility of EU-citizens and immigration from third countries will be analysed separately.

5.2 Mobility of EU-citizens within the Union

In the European Union, both harmonisation and subsidiarity exist, at the latest since the subsidiarity principle has been introduced as a general rule with the Maastricht Treaty.²⁷ This principle has gained symbolic significance both for the supporters of the need to strengthen the forces of self-government and democratic control, i.e. the political freedom within the local authorities, and for the proponents of individual rights that allow individuals to “protect themselves against policies that adversely affect their interests.”²⁸ As shown above, an unconstrained application of the subsidiarity principle, in both cases, is not desirable, because the local political actors could use their power for protectionist purposes. The realisation of the principle of subsidiarity has to take place under rules that avoid misuse in order to introduce what SCHÜLLER calls ‘institutionalised competition brakes’²⁹ that inhibit competition.

Rules for a desirable development of competition are needed, desirable in the sense that it should not lead to a scenario of economic nationalism and conflict but, on the contrary, enhance efficiency. These rules partly exist since the founding treaties, like the four fundamental freedoms, partly they have been introduced recently, such as the general application of the subsidiarity principle. They naturally cause competition. Exceptions from these basic princi-

²⁷ Art. 3b

²⁸ VANBERG, VIKTOR (1997), p. 254.

²⁹ See SCHÜLLER, ALFRED (1997), p. 99.

ples are strong interventions against the European project. For this reason, limitations of mobility of citizens from Member States have to be criticised as an outcome of interest group pressure within nation states³⁰ for particular privileges contrary to the common interests of the citizens of the Union. In particular, it has to be noted that these protectionist measures limit the positive knowledge-creating effect of competition in the new as well as in the old Member States.

In general, migration policy concerning EU-citizens aims at removing still existing mobility barriers that limit the realisation of the freedom of movement, just like trade barriers have to be eliminated if the realisation of the common market is aimed at. Competition emerges as a consequence of lower barriers. Its effects for old and new Member States result from experiments, variation and selection, and imitation. In the field of migration, for example, countries like Great Britain that have fully opened their doors to workers from the new members already experience economically driven migration from the east. These experiments contribute to knowledge creation. Migration sends signals to both the sending and receiving countries involved; as briefly mentioned above, the old Member States are typically observing that their labour markets and social security systems get under pressure. In a market context, the signals could stimulate the supply of those skills that are more demanded, generating incentives for the education and training sector. Barriers to mobility exist particularly in the field of education, because qualifications are not mutually acknowledged. Barriers to mobility concern also return migration, a field where bureaucratic obstacles have to be removed and coordination rules are needed, if integration is intended. A less one-way mobility, from east to west in the case of the EU, and a more two-ways, if not circular, dynamics would be the result of a freer movement.

5.3 Third country nationals: harmonisation or subsidiarity?

The Member States of the European Union have agreed to develop a common immigration policy at EU level in the 1999 Treaty of Amsterdam, followed by the European Council in Tampere in the same year. Within a period of five years, it was envisaged to establish a common legal framework for the conditions of admission of third country nationals and to introduce an open method of coordination for the gradual convergence of national policies. In January 2005, the Commission released a Green Paper “On an EU Approach to managing

³⁰ For the concept of intra-national rent-seeking see VANBERG, VIKTOR (2001b).

Economic Migration”³¹ and an Action Plan is planned before the end of the year. In June 2005, the EU ministers underlined the importance to respect the *subsidiarity* principle when defining the role of the Union in the Action Plan and not to usurp the Member States’ competence to determine their migratory flows.³² In substance, the realisation of subsidiarity consists in the competence for Member States to regulate the volume of admissions; in the Green Paper, the benefits of a coordinated set of procedures and criteria for admission are pointed out. The open method of coordination, at the same time, aims at the convergence of the national economic migration policies.

Is subsidiarity a desirable strategy in the field of economic migration and, if so, is it to be limited to the freedom to set immigration quotas? The benefits of subsidiarity as explained above (par. 3.2.3) apply also to the issue of the European migration policy. The variation of political alternatives following from the exercise of local level competences allows for evolution and discovery of better problem solutions. The competitive pressure existing among the Member States makes them responsive to signals concerning the attractiveness of their jurisdiction. One particular aspect affecting the attractiveness of a jurisdiction is the framework of immigration rules. This does not mean that competition is good *per se* and the central level has to avoid intervention in this policy field. On the contrary, the multilevel system within the EU is a particularly favourable case. The idea is that, if one considers the concept of subsidiarity within rules, the EU-level legislation can play an important role in setting the rule framework for the exercise of subsidiarity in the Member States.

Starting from the concept of subsidiarity within rules, the mere residual freedom of the Member States to determine the number of immigrants is too limited, and the role of the European Union should be different. Its aim is not to find the most successful immigration concept and impose it with an harmonisation procedure to all Member States. Harmonisation laws, as already mentioned, always allow for national-level limitations according to reasons of public policy, public security and public health. These exception can be misused to introduce protectionist measures. As seen above, rules of application of the subsidiarity principle are needed to avoid the same problem. In the case of migration policy, subsidiarity would allow the Member States to pursue individual aims in the recruitment of international labour, thus strengthening their competitive position in relation to other European states and maintaining

³¹ COM(2004) 811.

³² CONSEIL DE L’UNION EUROPÉENNE 8980/05, p. 15.

the individuality and flexibility needed to respond to the changing situation on the labour market. In order to avoid misuse and to introduce coordination procedures regarding the further movement of third country migrants within the Union, the Member States can profit from the existence of higher-level institutions. Since there is competition in Europe because of the realisation of the common market and the fundamental principles, national migration policies would be exposed to this pressure. They would not directly change the rule framework under which it takes place, and they would influence the conditions of the competitive process. Moreover, the single Member States find themselves in direct competition for labour with other countries, for example for skilled labour; at the moment, they have political authority in their territory: if this competence is centralised and harmonised, they lose the possibility to dispose of one competition parameter.

In the Green Paper, the complexity of the issue of access of third country nationals to the labour market is acknowledged. As a result, it is proposed to introduce EU legislation progressively, the first step being directed to “lay down certain common definitions, criteria and procedures, while at the same time leaving the Member States to respond to the specific needs of their labour markets.”³³ Provided that procedures are conceived as general rules, under which the subsidiarity principle can be applied in a desirable way, no further steps are needed. On the contrary, the further object of analysis should be to revise the existing measures at Community level, in order to proof if they represent an adequate application of the subsidiarity principle.

6. Conclusion

The concept of competition as a discovery procedure is not only central in the market arena, but also in the field of inter-jurisdictional competition, where the knowledge-creating mechanism can help developing better rules for a more desirable outline of the framework under which the citizens of a jurisdiction live and interact. The disciplining function of competition is also relevant when looking for procedures to assure a desirable development of these rules. Starting from the specification that competition is conceived as a procedure taking place under appropriate higher-level rules, the relevance of the European constitutional level for the Member States becomes evident. The distribution of competences on the two levels depends on the way the principle of subsidiarity and the instrument of harmonisation are applied. If subsidiarity is considered a guiding principle, the instrument has to be used accordingly.

³³ COM(2004) 811, p. 5.

Within the European Union, EU-migration policy has to support the removal of mobility barriers caused by differences in sectors like the social and education systems. This is a coordination task that can be exercised at the European level, together with the setting of procedural rules to guarantee an appropriate application of the subsidiarity principle; this means that the misuse of the principle due to centralisation pressures, on the one side, and protectionist interests, on the other, national side, has to be avoided.

In the case of European migration policy regarding entry from third countries, there is a scope for the EU-level coordination of procedures for the solution of cross-border problems. However, the danger of an erosion of Member States competences has to be pointed out, if subsidiarity is reduced to a degree where the exercise of this principle is limited to setting quantitative parameters and no competition can be expected anymore. The degree of harmonisation to be pursued through a common European migration policy has to be discussed in this light.

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