4 Legal Experiences of Competition among Institutions*
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1 INTRODUCTION

Thomas Hobbes would not have liked our topic. The very purpose of his Leviathan was to end chaos and bloodshed, which had been lasting in his country for decades, by the voluntary submission of everybody under a unified and strong state. The law as the primary emanation of the state must therefore be obeyed without exception. This implies a negative attitude towards institutional competition (Hobbes, 1668, ch. 26).1

Meanwhile the law has become more indulgent, or more realistic, if you prefer. Nearly every lawyer would admit that setting a rule is not tantamount to changing life in the intended direction. The lower classes do it by simple disobedience. The upper classes and in particular firms can pay for a cunning lawyer and do it legally. The lawyer will often advise them to play the game of institutional competition; lawyers would rather call it circumvention. The economic concept of institutional competition helps to a better understanding of what is going on and it is an extraordinarily useful tool for assembling and organizing legal phenomena that are usually dealt with in isolation.

While thus the positive value of the concept is strongly supported by legal empiricism, the normative prejudice of at least many of the economic analysts receives less empirical support. The law so far seems to have a more pragmatic attitude: Institutional competition is sometimes uniformly assented to, sometimes it is a means to serve very specific ends, sometimes it is reacted to as an exogenous factor and often it is combated fervently. Behind all this is obviously the traditional public interest model of regulation, to which many economists have important objections (see Posner, 1974). But even for those who share that critique, the following might prove useful since it shows how the law handles institutional competition in day-to-day business.

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To be specific, this paper is purely empirical. It is written from the perspective of real-world regulators and outlines their attitude and action vis-à-vis institutional competition. It furthermore uses on purpose a very broad concept of (institutional) competition. It may well be that economists, at the end of the day, might prefer to reserve the term for a narrower set of phenomena. But since it has not been safely established so far that the normative value judgements inherent in the concept of competition on the product markets may be extended to any form of institutional competition, it appears legitimate to use the term here in a way broad enough to encompass all instances in which individuals, organizations and officials may effectively choose among different institutions.

Other, related phenomena have to be left out. Economists have stressed that informal constraints are often more powerful institutions than formal ones (North, 1989, p. 239). Being a legal endeavour, this paper, however, will only briefly allude to the interface of formal and informal institutions (Section 2.3), while informal institutions proper are left aside.

Also omitted is the purely persuasive authority of legal institutions, although this phenomenon has high practical importance. For setting up a coherent legal system is an extremely costly and time-consuming process. Less developed and especially newly-independent states have therefore often chosen to copy a foreign legal order in full or at least to duplicate whole codes. This is true for most former colonies. Even more interesting are cases like Israel, which combines areas of Roman origin with others of common law origin. The phenomenon is obviously important for international trade. The saying: 'He who has the standard, has the market' applies to whole legal orders as well. The United States is particularly aware of such opportunities and sent a whole army of legal counsels to the newly independent East European countries. Many of these countries, however, seemingly prefer to return to the pre-World War II German roots of their private law. I nonetheless leave the question aside, since the national legislator in this type of competition is the client, while the focus of this symposium is on the rule-maker as the supplier of rules among which is competition.

Even further away from this focal point is competition of whole political systems. Obviously there is such competition. Many assert that the collapse of the Eastern Bloc was not solely the result of a credible nuclear threat, but that western information policy has a considerable share in it. Under the heading of humanitarian improvements the Conference of Security and Co-operation in Europe (CSCE) succeeded in opening the eastern markets for some western media products. The eastern population thereby began to realize how extraordinarily inefficient their economic