

Market Making: The History of the Internal Market as a Technicalization of Politics and a Politicization of the Technical

By Christian Frankel

1 Introduction

‘There is no such thing as a healthy person,’ my father used to say. ‘A healthy person is simply a person who as yet has not been examined sufficiently.’ He was, perhaps needless to say, employed in the pharmaceutical industry, and he was expressing the philosophical, if somewhat cynical, basis of what we may call the pharmaceutical gaze: there are always new illnesses to be found and always more cures to sell. The pharmaceutical industry is well aware that it will never be completely innocent when it offers new cures; it has an interest in unmasking ‘the illusion of health’ again and again, and to do so as a means to market new products. Ultimately, after all, the pharmaceutical industry is not about health but about illness. Health, as it were, is only the name of a condition not yet sufficiently exposed to the pharmaceutical gaze.

Likewise, there may be no such thing as a free market. What we take to be a free market is a market that has as yet to be examined more carefully for barriers to trade. This reinterpretation makes us aware of a certain liberal gaze: there are always more barriers to identify and hence also new political decisions to be made to remove these barriers. Ultimately, market integration is not about markets but about barriers and politics. A free market, as it were, is only the name of a condition not yet sufficiently exposed to the liberal gaze. And the political establishment may be well aware that it will never be completely innocent when it pushes for market integration; it has an interest in unmasking ‘the illusion of free movement of goods’ again and again as a means to make politics. In this article I argue that there are surprising similarities between the underlying philosophy of market making in the history of the European Union and the statement that ‘there is no such thing as a healthy person’. This similarity comes to the fore when we study removal

of barriers to trade in a historical perspective. Over time, the more barriers are revealed by the liberal gaze, the more technical politics becomes. At the same time the technical is politicized. This of course raises the question: What sort of political establishment could this be in favour of.

When accounting for this story, my interest is not all the small incremental changes that make the notion of barriers more rigorous. Rather, my aim is to show the bigger changes through which new *kinds* of barriers are brought to light, each time with the effect that the politics of removing barriers becomes quite different. In what follows I provide a condensed story of barriers to the free movement of goods in the making of the common markets of the European Union.¹ I present this story in three steps and conclude with a discussion of what political establishment is likely to have pushed this development.

2 *Removing barriers by plan*

Our history begins in 1958, when the so-called Treaty of Rome came into effect. The Treaty set the creation of a common market as a clear goal for the Community, and to this end the free movement of goods was crucial. To achieve it, barriers were to be removed, and in the first years these barriers were thought of as external to the member states (Commission 1958; Commission 1959). This essentially reduces to issues related to customs and quotas (Council 1960). Both are barriers established at the external boundary

¹ The dataset used for this historical analysis comprises written documents from the formally political EU institutions, written in the period starting from 1958 and until the early 2000s. The written documents differ in types: some are annual reports, others are white papers or green paper, some are legal acts, some are decisions, debates in the European Parliament and so on. All the materials selected explicitly discuss barriers to the free movement of goods. Often the material has been found by ‘snowballing’, i.e., by tracing references in one document to a next document, and so forth.

of the member state. Customs, for example, are levied when goods pass the external boundary of one member state and are imported into another.

In this conception, it is characteristic that the common market can be established by removing such external barriers. The member states could very well remove their external boundaries unilaterally and sustain their sovereignty – the important issue was that these external boundaries did not work as barriers for the free movement. In other words: there was no direct link between the nature of the boundary and the nature of the member state.

This conception of barriers is based on a conception according to which the common market – although absent – was already present as a potentiality. All that was needed for this potential market to become present was that there be no external barriers. If there were no barriers, then the common market would be there. This understanding of the naturally given market is institutionalised in a certain division of tasks between the Community and the member states. The Community has the task to map and survey barriers for the common market, and ensure that these barriers are removed according to a specified plan. This plan covers 12 years, and is an essential part of the original treaty of Rome (1958) (Commission 1962). The task of the member states is to remove the barriers in question. They could do so unilaterally. The Community was proposed mainly because surveillance and control was considered necessary to ensure that the member states actually take the steps required.

What we have here is not too far from a notion of markets often found with economics: “in the beginning there were markets” (Williamson 1975: 132). Barriers, then, suppress this initial condition, and make it appear as a lost past and as a situation to re-establish by removing the barriers.

Here we may be led to believe that ‘market’ can be achieved if the identified barriers are simply removed; just as health might be achieved once illnesses are cured. But on closer examination, of course, more barriers are identified.

3 Removing barriers by harmonization

Up to this point in time, barriers were thought of as discrimination. Customs discriminate by imposing a levy upon imported goods but not on home-produced goods. A question that arose already during the first decade after the founding of the community was: can barriers be non-discriminating (Commission 1967)? This was quite a question to struggle with: How can a member state set up barriers to trade without discriminating between home-made goods and imported goods?

The solution came by suggesting that a measure of a member state could be a barrier by being different to measures of other member states. *Technical barriers to trade* are described as barriers that are not barriers as such. Technical barriers are measures by a member state which works like a barrier because the measure *differs* from corresponding measures in other member states (Commission 1968). In other words: The measure is not a barrier, but the difference is a barrier. An example could be measures regulating packaging of beer. This is a purely internal measure of the single member state. The measure does not discriminate, as it affects domestic products and imported products alike. In spite of this, the measure does impose barriers on the free movement of products, due to the difference between such measures.

Today such barriers are known as *technical barriers to trade*. Although this today is a well-known category of barriers, it is not mentioned in the Treaty of Rome. It was, it seems, an outcome of a closer examination of free trade. The liberal gaze proved to be effective.

The shift from measures that are barriers as such to measures that are barriers due to differences between nations constitutes a fundamental change in the conception of the market. One effect is that the amount of barriers is multiplied, which makes the creation of a common market a much more encompassing project (Commission 1967). More importantly, however, the market project changes character, which again requires changes in how political cooperation in the Community should be organised.

Focus is moved to the internal affairs of each member state, and in this new focus, each member state is observed as a difference between state and market. The market loses its naturalness; the market only exists because it is constituted politically by the measures of the state. This is also to say that the market now becomes concrete and specific; the market is only a market in virtue of the specific member state, which constitutes the (national) market through specific regulation. The member state specific regulation implies that the markets of the member states can be different in ways that make them incompatible.

”Barriers resulting from differences between regulation in the member states” (Council of Ministers 1969) are barriers resulting from differences in how markets are constituted politically in each member state. The solution appointed to this problem is a concept that is familiar today, but in the 1960s was a word borrowed from music: Harmonisation (Dembour 1996). Harmonisation came to name the Community’s effort to remove differences that functioned as barriers. Harmonisation is, in other words, the effort to regulate or govern how member states govern in order to remove barriers stemming from differences in how member states govern.

The task of the Community was in other words not simply to open the floodgates for the common market, but rather step by step to ensure that the common market is constituted politically. As mentioned, this is a task much more encompassing than had been expected at the outset. In fact, it was such a vast task that the institutions of the Community were not geared for it. So when the 12-year plan for the realisation of the common market was not successful it was not because the plan was not realised, but rather because the new conception of market raised a whole load of harmonisation tasks that had not been included in the plan.

This conception of the market developed over many years, and is in many ways still dominant. The focus on customs and tariffs implied a view of the market as a natural and, we might say, healthy condition. If only it is not suppressed by barriers it will emerge in its full vitality. The shift towards technical barriers brings with it a much more fragile notion of market, one in which the market depends on regulation and one where the vitality of the market is seriously impeded by differences in regulation. What differences do here impede

the market? What differences can be considered inferior and what differences impede? There is no final answer to such questions, and there is no final stopping point as to what differences should be removed because they impede the market.

This way of approaching barriers and the implied notion of markets, i.e., as a reality to be constructed by rules, is not too far from a sociological understanding of markets. Fligstein's theory of market making may here serve as an example:

The first problem for a sociology of markets is to propose theoretically what kinds of rules and understandings are necessary to make structured exchange (i.e., markets as fields) possible in the first place. There are four types of rules relevant to producing social structures in markets –what can be called property rights, governance structures, rules of exchange, and conceptions of control. (Fligstein 2001: 32-33)

The assumption that drives this approach is, it seems, that we have markets, and now we need to understand how they have come about. While economic sociology often directs our attention the making of markets, it tends to focus on what is achieved. While economists often assume that “in the beginning there were markets”, sociologists often assume that markets are actually achieved as social constructs. While the sociological perspective is different, the dominant tenor is similar to that of economics in the respect that markets are taken *de facto* to be a reality. But again, would we not assume the liberal gaze to disrupt this reality?

4 *Removing barriers by transnational negotiation*

Until this point in the historical recapitulation, all barriers we have met were formal political decisions: They were either legal acts or administrative acts. This aspect of the conception of the market changes during the 1980s. It is taken as a political problem that also other decisions than decisions made by public authorities constitute barriers to trade (Commission 1980). More specifically it is concluded that also private, technical standards may be technical barriers to trade, and can hence also be understood as political decisions constituting markets (Council 1983). Accordingly, constituting a common market is partly

outside the competence of the member states. The Treaties appoint the member states as responsible for realising the common market. However, to fulfil its responsibility, the member states have to cooperate with private parties, which constitute the market private-politically (Commission 1990).

Hereby the new conception of the market also implies a fundamental change in what it is to be member state. In order to establish the common market it is no longer sufficient that the member states are represented as states. It has become necessary also to represent the member state as a technical standardiser, i.e. as private political actor. This form of representation has, however, to be developed in the Community (Commission 1995).

Internally in the member states, the new conception of the market raises the question of how – and whether – the state has precedence in relation to private political actors. Seen together the internal and the external problem opens the question of whether ‘state’ and ‘member state’ remain appropriate descriptions of the political order which emerges in the construction of the market.

The basic question is whether ‘the private’ remains ‘national’ when it is no longer subordinated to the state. The emerging difference between state and private politics opens up the possibility that private politics is organised according to principles other than the national, namely, according to a functional representation of political interests. The political order is not only differentiated in inside/outside (Walker 1993), but also differentiated functionally; regulating a market is not ordered territorially, but is a function that can be fulfilled by more institutions. Establishing the common market becomes a transnational endeavour in the sense that territorial orders of politics are coupled with functional orders of politics (Frankel and Højbjerg 2007). Politics changes character. As long as the market was created by formally political decisions, the political decisions were also characterised by conferring rights and obligations. In each member state the market was created by conferring rights and obligations, and each citizen was a citizen as a result of the rights and obligations conferred. However, private politics makes this description of politics insufficient. Private politics is politics in another sense: It does not confer rights and obligations, but creates affected and interested parties (Commission 1998). And who is

affected by private political decisions and who is interested party is a matter of ongoing negotiation. This is also to say that it cannot be taken for granted whether and in what way the state plays a role.

These problems and questions are developed alongside the resolution of the private political problem. In brief this solution may be characterised as the promotion of a European private politics. A considerable step in this direction is taken with the adoption of the so-called “new approach to technical harmonisation and standards” (Commission 1985; Council of Ministers 1985), which sets up a sort of division of labour between European standardisation organisations, the Community, member states and national standardisation organisations. This division of labour, however, is highly ambiguous. On one hand it maintains that the formal political institutions set up an indisputable frame for the private political actors (Commission of the European Communities 2000). On the other hand, the very same frame is named as a topic of negotiation between the involved parties (Commission 1998). All in all we get a situation in which none of the actors have the upper hand, but are all depending on each others’ competencies in order to fulfil their responsibilities (Commission 2001; Frankel and Højbjerg 2007).

5 *Concluding discussion*

The removal of barriers to trade in products is a cornerstone of the making of the internal market of the EU, and since 1958 barriers have been removed as a means to achieve the free movement of goods. Step by step, however, the notion of barriers has become more fine-grained and more encompassing.

The perspective of this chapter suggests that removing a barrier never results in a ‘free’ market but, rather, in a finer awareness of new, ever more subtle, barriers to trade. Although it may look as if it is a project concerned with establishing a market, then, it is in reality a project that is obsessed with barriers, and we may expect new barriers to be brought up again and again.

Markets, as it were, are never finally free, but are always riddled with undiscovered barriers to trade. It is those barriers that are interesting, not the ‘freedom’ that their removal implies.

How might this affect the way we study markets and how they are ‘made’? First, it should get us to notice the important relation between barriers to trade and the way political decisions are made. Just as the ‘introduction’ of new illnesses and their subsequent cures (or new cures and their subsequent illnesses, if you prefer) will presumably shape developments within the industry, so too must the diagnosing of new barriers be presumed to occasion political developments, and new classes of barriers do, indeed, establish wholly new forms of politics.

To spell this out, we can focus on the relation between market and state. It has been argued that markets require states to be made (Fligstein 2001), and this view is in fact widely held in the sociological literature (Block and Evans 2005). But the increasingly close examination of barriers to trade reveals a situation where member states become dependent on private actors and technical standards. This is what we may term a technicalization of politics, and it simultaneously implies a politicization of the technical. To remove barriers, the work of technical standardization is centralized in few European technical standardization organizations, and in this way European standards absolve national standards.

To the liberal gaze, we here have a solution to a problem: closer examination reveals that private standards work as technical barriers to trade, and hence they are to be harmonized by common European standardization organizations. Ironically, the making of market here implies the making of a monopoly on technical standardization. A situation where many (national) technical standards competed is replaced with a situation where European technical standards are given a virtual monopoly. This virtual monopoly is in many ways a special European thing; e.g., in the ‘internal market’ of the United States of America there is a situation of competition amongst technical standardization organizations (Schepel 2005). Not surprisingly a monopoly implies market and political power. In short it implies

that firms become directly involved in the making of the market (Frankel and Højbjerg 2009).

In the first years, private companies do not play any formal role in regards to the removal of barriers. They may pressure governments to remove or keep barriers, but they are not held responsible for the barriers. The notion of the market as naturally given also implies that private companies are black boxes that act and transact on the market. One could also say that a ‘private company’ is a given entity, and is to be viewed as completely autonomous in regards to its internal operations. These are beyond the political interest. The aim of establishing a common market does not affect this internal autonomy, but only the context in which it is to be unfolded.

Once technical barriers to trade come into focus during the 1960s, the political task of making a market changes, but this does not involve private companies. Private companies are to be delivered a market – a ‘level playing field’ – on which they can compete. Again, we may of course expect numerous firms to be active in the background, advocating and lobbying for specific solutions to harmonization of member state legislation. However, as a result of the political constitution of markets, companies become subject to political manipulation. By constituting markets in specific ways, it is hoped indirectly to change companies by changing their market conditions: harmonization becomes industrial policy, environmental policy etc. The conception of the market implies a clear division of work: private companies are given the apolitical task of deciding how to act on the politically constituted market, whereas (formal) political institutions, i.e., the member states and the Community, are appointed the task of constituting the market.

Starting in 1980, private firms have become directly involved in the political construction of markets. The Commission also stresses this point when it writes: “The public authorities have ceded a part of their traditional prerogatives” (Nicolas and Repussard 1995: 184). At the same time private firms – and ‘economic actors’ more generally – have become responsible for their own destiny:

Standardisation is for the common good, and the public authorities have, by making use of it to such a high degree, made the economic actors responsible for their own destiny. Now it is up to these actors to demonstrate, that they do have the necessary maturity to take upon themselves this responsibility, and this they can do by taking advantage of the standardisation instrument and strengthen is, not only to accommodate own wishes and wants, but also realising the important role of standardisation as an important element in our whole social order. (Nicolas and Repussard 1995: 184)

The quote shows a conception of the market in which the Community does not provide the market to firms; rather, the economic actors are required to take part in the construction of the market. Without discussing the consequences for ‘our whole social order’ if the economic actors do not have the ‘necessary maturity’, the quote underscores that the construction of the common market is not a finished but an ongoing dynamic project.

Taken severally, the findings in this chapter are not novel. E.g., technical standardization has been studied extensively (Tassey 1992; Nedergaard 1994; Genschel 1995; Lundvall 1995; Tassey 1995; Werle 1995; Falke 1996; Voelzkow 1996; Krislov 1997; Ladeur 1999), and so has the *new approach* (Pelkmans 1987; Schreiber 1991; Previdi 1997; Vos 1997; Joerges and Vos 1999; Joerges, Vos et al. 1999; Vos 1999). But the focus on what is missing, on the fact that markets are always incomplete, brings the political implications of the European market-making project into focus in a new way. Political power is not only sustained at national level, nor only increasingly transferred to the European level, but also displaced to private actors. In this way the analysis points to a serious challenge, namely, the centrality of private companies in the political creation of markets.

When hit by an illness, we are happy that there is a cure. Although cynical, the statement that ‘there is no such thing as a healthy person,’ is in most cases to be preferred to the situation where no cure is sought. Though we may prefer a cure to no cure, however, we are never-the-less in the business of illness. In any case, it is of interest to see what illnesses get attention (while others do not) and with what societal consequences.

6 Bibliography

- Block, F. and P. Evans (2005). The State and the Economy. The Handbook of Economic Sociology: Second Edition. N. J. Smelser and R. Swedberg. Princeton, Princeton University Press: 183-204.
- Commission (1958). Erster Gesamtbericht über die Tätigkeit der Gemeinschaft. Bruxelles.
- Commission (1959). Zweiter Gesamtbericht über die Tätigkeit der Gemeinschaft. Bruxelles.
- Commission (1962). KOM(62) 300: Memorandum der Kommission zum Aktionsprogramm der Gemeinschaft für die zweite Stufe. Bruxelles, den 24.10.1962.
- Commission (1967). "Ergänzende Antwort der Kommission der Europäischen Wirtschaftsgemeinschaft auf die schriftliche Anfrage Nr. 118 von Herrn Deringer (14. März 1967)." OJ 901/67, 29.3.1967.
- Commission (1967). Zehnter Gesamtbericht über die Tätigkeit der Gemeinschaft. Bruxelles.
- Commission (1968). "KOM(68) 138 endg.: Allgemeines Programm zur Beseitigung der technischen Hemmnisse im innergemeinschaftlichen Warenverkehr, die sich aus der Unterschiedlichkeit der einzelstaatlichen Rechtsvorschriften ergeben." Drucksachen des Deutschen Bundestages Drucksache V/2743.
- Commission (1980). "COM(80)400. Vorschlag für eine Entscheidung des Raets über ein Informationsverfahren auf dem Gebiet der Normen und technischen Vorschriften." OJ C 253: 2-6.
- Commission (1985). COM (85) 19 final. Technical Harmonization and Standards: A New Approach, Communication from the Commission to the Council and to the European Parliament. 31 January 1985.
- Commission (1990). "COM(90) 456 final: Commission communication on the development of European standardization. Action for faster technological integration in Europe." OJ C 20/1-35, 28.1.1991.
- Commission (1995). COM(95) 412 Communication from the Commission to the Council and Parliament on the Broader Use of Standardization in Community Policy. Bruxelles, EU-Commission.
- Commission (1998). SEC(98) 291: Efficiency and Accountability in European Standardisation under the New Approach. Report from the Commission to the Council and the European Parliament.
- Commission (2001). COM(2001) 428 final: European Governance - A White Paper. Luxembourg, Office for Official Publications of the European Communities.
- Commission of the European Communities (2000). Guide to the implementation of directives based on the New Approach and the Global Approach. Luxembourg, Office for Official Publications of the European Communities
- Council (1960). "Beschluß der im Rat vereinigten Vertreter der Regierungen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft über die beschleunigte Verwirklichung der Vertragsziele, Brüssel 12. Mai 1960." Official Journal 1217/60(12.9.1960).
- Council (1983). "Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations." OJ L 109, 26.4.1983.

- Council of Ministers (1969). "Allgemeines Programm vom 28. Mai 1969 zur Beseitigung der technischen Hemmnisse im Warenverkehr, die sich aus Unterschieden in den Rechts- und Verwaltungsvorschriften der Mitgliedstaaten ergeben." EF-Tidende C 76/1, 17.6.1968.
- Council of Ministers (1985). Resolution of 7th May 1985 on a new approach to technical harmonization and standards" (85/C 136/01). Bruxelles.
- Dembour, M.-B. (1996). Harmonization and the Construction of Europe - Variations away from a Musical Theme. Florence, European University Institute, EUI working paper LAW 96/4.
- Falke, J. (1996). Standardization by professional organisations. Sources and categories of European Union law : a comparative and reform perspective. G. Winter. Baden-Baden, Nomos. **22:** 629-644.
- Fligstein, N. (2001). The Architecture of Markets. An Economic Sociology of Twenty-First-Century Capitalist Societies. Princeton, Princeton University Press.
- Frankel, C. and E. Højbjerg (2007). "The Constitution of a Transnational Policy Field – Negotiating the EU Internal Market for Products." Journal of European Public Policy **14**(1): 96-114.
- Frankel, C. and E. Højbjerg (2009). "The Political Standardizer." Business and Society: doi:10.1177/0007650309332311.
- Genschel, P. (1995). Dynamische Verflechtung in der internationalen Standardisierung. Gesellschaftliche Selbstregelung und politische Steuerung. R. Mayntz and F. W. Scharpf. Frankfurt New York, Campus Verlag: 233-265.
- Joerges, C. and E. Vos (1999). EU Committees: Social Regulation, Law and Politics. Oxford, Hart Publishing.
- Joerges, C., E. Vos, et al. (1999). The law's problems with the involvement of non-governmental actors in Europe's legislative processes : the case of standardisation under the 'New approach'. Badia Fiesolana, San Domenico (FI), European University Institute Department of Law.
- Krislov, S. (1997). How Nations Choose Product Standards and Standards Change Nations. Pittsburgh, University of Pittsburgh Press.
- Ladeur, K.-H. (1999). Towards a Legal Concept of the Network in European Standard-Setting. EU Committees: Social Regulation, Law and Politics. C. Joerges and E. Vos. Oxford, Hart Publishing: 151-170.
- Lundvall, B.-Å. (1995). Standards in an innovative world. Standards, Innovation and Competitiveness : The Politics and Economics of Standards in Natural and Technical Environments. R. Hawkins, R. Mansell and J. Skea. Aldershot, Edward Elgar: 7-12.
- Nedergaard, P. (1994). Internationale standarder — og deres betydning for virksomheden og samfundet. København, Handelshøjskolens Forlag.
- Nicolas, F. and J. Repussard (1995). Fælles standarder for erhvervslivet. Bruxelles, Europa-Kommissionen.
- Pelkmans, J. (1987). "The New Approach to Technical Harmonization and Standardization." Journal of Common Market Studies **25:** 249-69.
- Previdi, E. (1997). The Organization of Public and Private Responsibilities in European Risk Regulation: An Institutional Gap Between Them? Integrating Scientific Expertise into Regulatory Decision-Making. C. Joerges and e. al. Baden-Baden, Nomos.

- Schepel, H. (2005). The Constitution of Private Governance - Product Standards in the Regulation of Integrating Markets. Oxford, Hart Publishing.
- Schreiber, K. (1991). The New Approach to Technical Harmonisation and Standards. The State of the European Community : Policies, Institutions & Debates in the Transition Years. L. Hurwitz and C. Lequesne. Harlow, Longman.
- Tassey, G. (1992). Technology infrastructure and competitive position. Norwell, MA, Kluwer Academic.
- Tassey, G. (1995). The roles of standards as technology infrastructure. Standards, Innovation and Competitiveness. The Politics and Economics of Standards in Natural and Technical Environments. R. Hawkins, R. Mansell and J. Skea. Aldershot, Edward Elgar: 161-171.
- Voelzkow, H. (1996). Private Regierungen in der Techniksteuerung. Eine sozialwissenschaftliche Analyse der technischen Normung. Frankfurt a.M., Campus.
- Vos, E. (1997). "The Rise of Committees." European Law Journal 3(3): 210-229.
- Vos, E. (1999). Institutional frameworks of Community health and safety legislation : committees, agencies and private bodies. Oxford, Hart Publishing.
- Walker, R. B. J. (1993). Inside/outside: International Relations as Political Theory. Cambridge, Cambridge University Press.
- Werle, R. (1995). Staat und Standards. Gesellschaftliche Selbstregelung und politische Steuerung. R. Mayntz and F. W. Scharpf. Frankfurt New York, Campus Verlag: 266-298.
- Williamson, O. E. (1975). Markets and Hierarchies. Analysis and Antitrust Implications. New York, The Free Press.