

Pre-empting Technical Barriers in the Single Market Anabela Correia de Brito and Jacques Pelkmans

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Abstract

Effective enforcement and compliance with EU law is not just a legal necessity, it is also of economic interest since the potential of the Single Market will be fully exploited. Enforcement barriers generate unjustified costs and hindrances or uncertainty for cross-border business and might deprive consumers from receiving the full benefit of greater choice and/or cheaper offers.

The EU has developed several types of enforcement efforts (preventive initiatives, pre-infringement initiatives and formal infringement procedures). More recently, the emphasis is on effective prevention.

This CEPS Policy Brief analyses the functioning of one preventive mechanism (the 98/34 Directive) and assesses its potential to detect and prevent technical or other barriers in the course of the last 25 years. Based on an empirical approach, it shows that this amazing mechanism has successfully prevented thousands of new technical barriers from arising in the internal goods market.

Introduction

Besides problems lingering in the EU internal market, there is also good news. This CEPS Policy Brief highlights one of the silent, yet amazing successes in the internal goods market, namely, the pre-emption of new technical barriers from arising. Although the focus in EU policy circles is, perhaps understandably, on the removal of *existing* technical barriers via case-law, mutual recognition, harmonisation and European standardization, it is far too little realized that member states still legislate many technical laws that may potentially erect *new* technical barriers in the internal goods market. The EU mechanism pre-empting such incipient barriers from arising and from (re-)fragmenting the single goods market is amazing in a number of ways: it is institutionally powerful, bureaucratically 'light', fairly transparent and, above all, highly successful. The appreciation of this success deepens once one realizes how many barriers are pre-empted annually and how profoundly the single goods market would have been re-

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fragmented, had the mechanism never existed. Section 1 describes the mechanism, known as the 98/34 procedure, followed (in section 2) by an analysis of its impressive record ever since the late 1980s. Section 3 zooms in, by country and by sector, on the most recent empirical evidence (2010 and 2011). In section 4 we develop and employ some indicators to better track how many technical barriers have actually been prevented, insofar as data allows. In section 5 we conclude.

1. The 98/34 mechanism: How national technical regulation is disciplined

Under Directive 98/34/EC¹ (twice revised and formerly known as 83/189), the European Commission receives compulsory notifications from the member states of all national draft laws containing technical regulations (on goods and, a minor part, on information society services). The notified national draft laws are verified so as to enable the Commission as well as the member states to detect potential (new) technical barriers or other (new) regulatory barriers to intra-EU cross-border trade. Subsequently, the Commission requests the relevant member states to amend the draft so as to *prevent* such (potential) barriers.

This unique and most remarkable instrument has protected the internal goods market from becoming a mockery over time. The 98/34/EC mechanism is remarkable for at least two reasons. First, member states temporarily renounce their sovereign right and freedom to legislate as and when they want. A notification automatically postpones the conclusion of domestic pre-legislative procedures for three months, i.e. the draft cannot be adopted before the end of this standstill period. However, such standstill period may be prolonged to four or six months. In case of a blockage (i.e. when the Commission announces that the proposal concerns a matter that is covered by a proposal for an EU directive, regulation or decision), it may reach twelve months. If the Council adopts a common position, the national legislative procedure is blocked for 18 months.

¹ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations. The Directive was amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, which extended the system to include Information Society Services.

This is an effective way to prevent new technical barriers from arising. Second, notification is not only compulsory but the Court of Justice of the European Union (CJEU) has explicitly ruled (in *CIA Security International*, 1996²) that non-notification renders the national law, adopted subsequently, inapplicable and, consequently, 'unenforceable' against individuals. Again, such a ruling provides strong incentives to notify, thereby raising the credibility of 98/34 even more.

What is typically notified? Basically, all national technical regulations together with an explanation of the necessity to make such regulations, if this is not clear in the draft, unless the regulations are a simple transposition of international requirements or European directives. It is hard to 'guesstimate' what the economic significance of this domain is, but a rough proxy would be nearly 20% of intra-EU trade in goods. However, one has to appreciate the precise meaning of this. The regular Commission reports on Directive 98/34/EC³ speak of goods in the non-harmonized field as well as in the harmonized field. The latter refer to secondary national legislation that elaborates principles and specifications in EU directives. Depending on the situation, member states may exercise considerable discretion in this area, and 98/34 procedure verifies whether that discretion is being used in ways that create unnecessary divergences or incompatibilities with the relevant directive(s). In other words, it disciplines at EU level the national regulatory autonomy first allowed in the directive, such that no new barriers to the internal goods market emerge.

National notifications, sent to the Commission, are automatically transferred to the national representatives in the 98/34 Committee (which is chaired by the Commission). It is expected that both the Commission and the member states carefully screen the notifications and, if they see a reason, make observations of two kinds:

- 'Comments' are advisory in nature and/or ask for clarification so as to ensure that no new barrier might arise from the draft law at stake and should be taken into account by the notifying EU country 'as far as possible'.

² Case C-194/94 '*CIA Security*' (1996) ECR I-2201.

³ Such as the latest ones: COM(2009) 690 of 21 Dec. 2009 (on 2006 – 2008) and COM (2011) 853 of 7 Dec. 2011 (on 2009 and 2010), for example.

- ‘Detailed opinions’ argue why the draft law risks erecting one or more new technical barriers, which is the basis for automatically suspending national legislative procedures for another 3 months, and the notifying member state must report to the Commission the action it intends to take to remedy the problem.

In actual practice, the borderline between the two types of observations may be a little fuzzy. The transparency of the process has much improved over time. A Commission website called TRIS⁴ reports all notifications in summary form (usually in English), with links to the full text. In principle, therefore, business and all interested associations and individuals have the possibility to track the process and identify cases of interest to them.

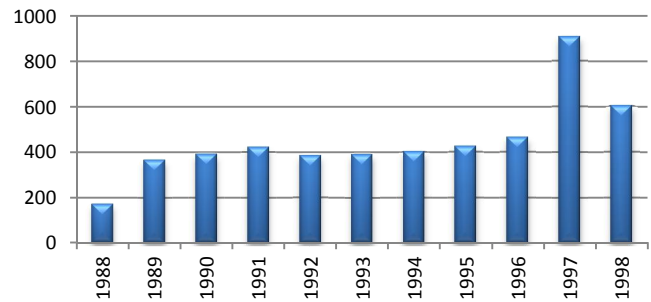
2. The amazing track record of 98/34: Empirical trend

How critical the 98/34 mechanism has been for the protection of the internal goods market can be seen from Figures 1 and 2, which show the number of the notifications over the period 1988–2010. The regulatory activity of member states in this narrow field of goods legislation is considerable. In the period of the EU-12 (1988–94), annual notifications hovered between 300 and 400 and many of these prompted observations from the Commission and/or member states, suspecting potential barriers. During the period of the EU-15 (1995–2003), notifications start to rise to (sometimes far) beyond 500 a year.⁵ A further structural increase can be observed after the first and second Eastern enlargement (2004–10), approaching an annual average of around 700 a year.

⁴ TRIS stands for a Technical Regulations Information System and is a database which facilitates the notification system under Directive 98/34/EC. On the publicly available website, one can find all the relevant information on the procedure, including notified draft laws and subscription to a regular alert system on the latest notifications. (see <http://ec.europa.eu/enterprise/tris/default.htm?CFID=8295454&CFTOKEN=e9e11cc0c490dce-FBEB12B6-036B-4761-A48052BC73431FA0>).

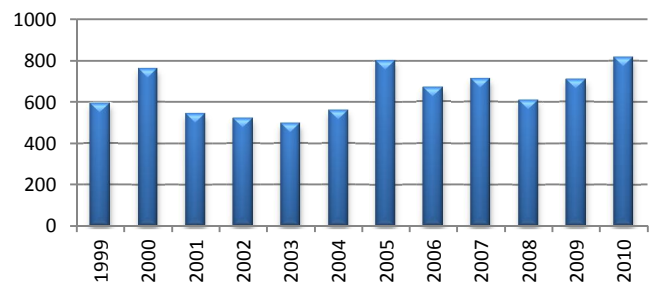
⁵ The extreme peak in 1997 is due to the Netherlands, suddenly realizing the consequences of the CIA Security case. It was catching up in 1997 with 400 extra notifications which it first felt were unnecessary. For details of this ‘regulatory-crisis’, see Box 1 in Pelkmans et al. (2000, pp. 270-271).

Figure 1. Trends in notifications of national draft laws under 98/34, 1988-98



Source: Pelkmans et al. (2000, p. 274), based on Commission reports.

Figure 2. Trends in notifications of national draft laws under 98/34, 1999-2010



Notes: 2004: enlargement from EU-15 to EU-25; 2007: enlargement from EU-25 to EU-27.

Sources: Pelkmans (2007); SEC(2009) 1704 of 21 Dec 2009 and SEC(2011) 1509 of 7 Dec 2011.

In short, for already one and a half decades, the notifications number more than 500 a year, with a recent trend of 700. This amounts to unique empirical evidence on the high, if not secularly increasing, regulatory activity of member states. In Europe the shift to more and more EU regulation, at the expense of national regulation (at least in goods), is frequently discussed. This trend is widely accepted as inevitable, given the ambition of creating and maintaining a deep and smoothly functioning internal (here: mainly goods) market. One of the repercussions is that member states (as well as business and even citizens) have (rightly) become quite sensitive to the need for EU regulation to be carefully justified, least-cost and well-designed based on strict EU regulatory impact assessment.

What is rarely considered, however, is what member states *themselves* do in the areas remaining under national regulatory autonomy, for the simple reason that there is no easy way to ‘observe’ such trends. The 98/34 mechanism gives

analysts unique (though partial, for goods only) empirical evidence about how member states use their autonomy in goods markets. The inference is clear: member states remain very eager regulators. Yet, this eagerness creates serious risks of newly emerging technical or other regulatory barriers, which might be difficult, slow and costly to remove again. Hence, the justification of the intrusive 98/34 mechanism which does not reduce national regulatory autonomy but disciplines it for the sake of the internal goods market. It is important that the member states jointly have assumed ‘ownership’ in the 98/34 Committee since they all can (and do) make observations on the draft laws of other member states, whilst being disciplined themselves as well.

The effectiveness of 98/34 in protecting the internal goods market can be appreciated once one zooms in on the actual working of the procedure. No less than some 12,500 notifications have been dealt with since 1988 (until 2010 inclusive). One might assume that, once the mechanism is well-known inside the national administration (between ministries – which requires coordination carried out in practice by national enquiry points), the mere existence of the mechanism should already exercise some disciplinary effect. Thus, one should expect the potential barriers detected in 98/34 procedures to be a good deal less (in terms of draft laws)⁶ than 12,500. Even so, thousands of potential barriers have been prevented in these 23 years, as graphically substantiated in Figures 1 and 2. The 98/34 procedure allows greater precision with respect to the number of prevented barriers. As noted, member states and the European Commission can make two types of observations on notified draft laws: “*comments*” and “*detailed opinions*”.⁷

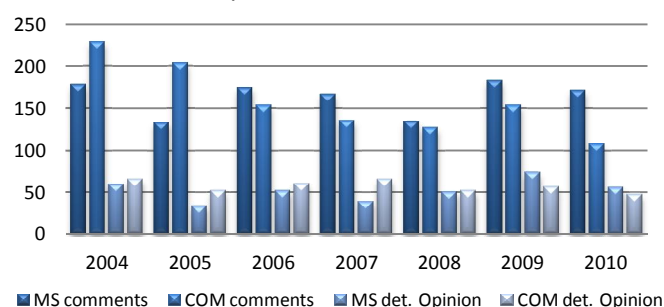
Figure 3 provides empirical evidence for the period 2004–10 inclusive. The comments over these 7 years amount to 1,142 for the member states and 1,113 for the Commission. Even if one

⁶ Of course, a single draft law may well contain more than one or indeed many (potential) technical barriers. Here, we simplify by assuming that one law can be tantamount to one (potential) barrier.

⁷ The Commission can also block a draft law in case relevant harmonization work is already under way or due to be undertaken. This leads to a suspension of 12 months, giving time for the preparation of a draft directive.

(rather generously) assumes that none of these instances would have given rise to later barriers, the procedure undoubtedly increases legal certainty for business, which is a much appreciated gain (lowering information costs). Were one to assume that some of the draft laws having been ‘commented’ on would have given rise to barriers, the beneficial impact of 98/34 would be so much bigger. It seems reasonable to presume that the latter assumption is probably correct. The ‘detailed opinions’ identify potential future barriers. The member states identified over the seven years no less than 366 such instances, and the Commission 402. One cannot add these totals because many detailed opinions of member states may well be on the same draft laws and are likely to overlap with detailed opinions from the Commission; usually, the Commission list is larger than the number of draft laws identified as problematic by member states.

Figure 3. Detection of potential regulatory barriers under 98/34, 2004-10



Sources: SEC(2007)350 of 21 March 2007, SEC(2009)1704 of 21 Dec. 2009 and SEC(2011)1509 of 7 Dec 2011.

On this basis, one can conclude that no less than 400 national draft laws were temporarily stopped by ‘detailed opinions’, indicating a serious risk of emerging technical barriers in the internal goods market. Moreover, the experience shows that a significant chunk of identified potential problems can be solved in a dialogue between the notifying member state and the Commission or another member state that issued a comment or a detailed opinion. This amazing record shows how crucial 98/34 is for keeping the internal market from deteriorating by preventing a groundswell of new technical barriers. With even more detailed data below, we shall construct and calculate an “*effective prevention indicator*” showing the proven performance of 98/34 in pre-empting what otherwise would have become ‘new’ barriers in the single goods market. This prevention comes in

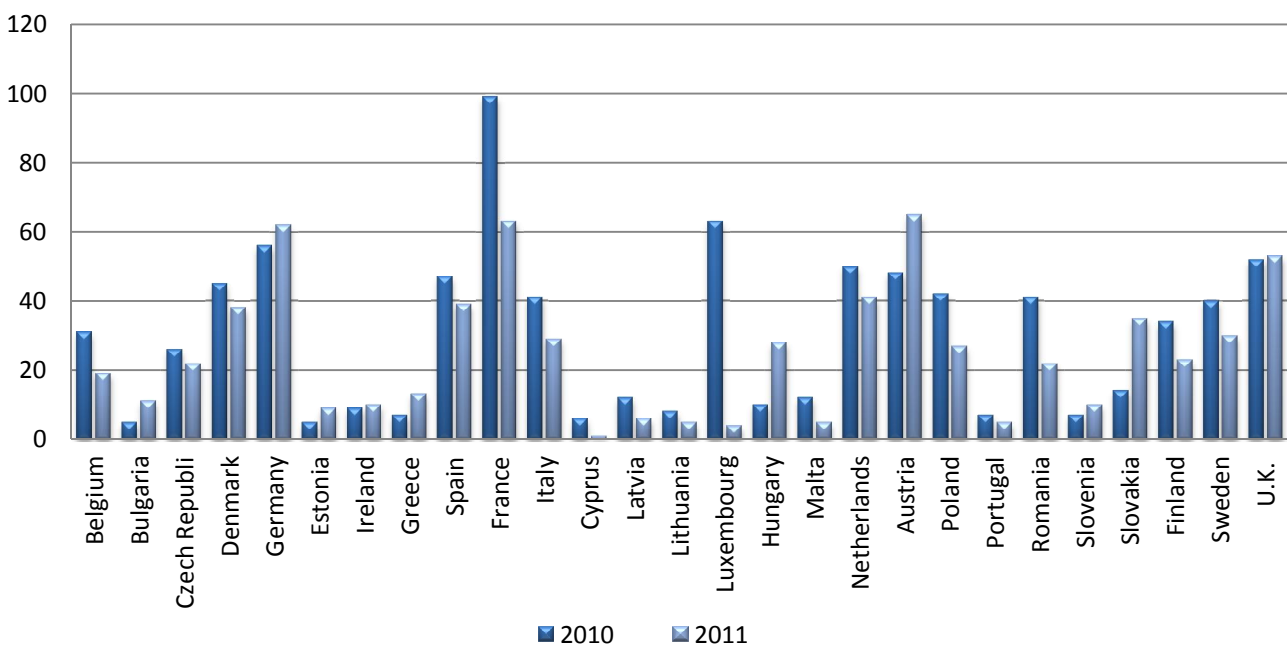
addition to the probably growing awareness and increased discipline inside ministries as well as the deterrence effect of notification and analysis by other member states and the Commission.

3. Recent empirical evidence: EU countries and sectors

We provide empirical evidence for 2010 and 2011. The data shown in the present subsection are taken from the TRIS database as it stood mid-March 2012. We first exhibit notification trends by EU member states, followed by an identification

of the sectors attracting the most notifications over the years. The number of notifications in 2011 declined to 675, from 817 in 2010. The 2011 total is roughly at the average level since 2005, showing a stable trend line. Figure 4 demonstrates that EU member states exhibit considerable differences in their propensity to notify in the years 2010-2011, that is, to regulate either in the non-harmonized, or harmonized field or in both. Whereas 10 EU countries notified 20 draft laws or less over the two years together, four member states reach beyond 100, with a peak of 162 notifications by France.

Figure 4. Total number of notifications by EU member state, 2010-11



No less than 11 member states recorded more than 5% of total notifications in 2010. In 2011 this group shrank to seven EU countries, signalling a more even pattern of notifications. In the reactions to notifications, there is a possibly interesting contrast between the Commission and the member states. Whereas the Commission seems to have become more vigilant and/or projects notified were regarded as more problematic (comments going up from 108 in 2010 to 112 in 2011, despite fewer notifications, and detailed opinions going up from 48 to 56), member states' responses decline in number, in line with the decline of the total (comments decreasing from 176 in 2010 to 147 in 2011, and detailed opinions going down as well from 49 in 2010 to 46 in 2011).

When focusing on sectors, it is telling that only relatively few sectors attract the bulk of the notifications. Apparently, the national propensity to regulate is extremely unevenly distributed between sectors. There are indications that the same sectors have been in the lead for decades. In 2010 and 2011, the first three sectors were agriculture and foodstuffs, building products and telecommunications, followed by transport, mechanics and environment and packaging.

Agricultural and foodstuff were the sectors with the highest number of notifications attracting comments and/or detailed opinions (134 notified draft regulations) over the period 2010-11. The subjects covered included, among others, labelling of foodstuffs, food supplements, origin of products, food hygiene, composition of foodstuffs

and beverages, materials intended to come into contact with foodstuffs, mineral, spring and drink waters for human consumption, equipment for treatment of water for human consumption and measures on genetically modified organisms (GMOs). The EU legislation on GMOs includes, among others, Directive 2001/18/EC⁸ on the deliberate release into the environment of genetically modified organisms, Regulation (EC) No 1829/2003⁹ on genetically modified food and feed, Regulation (EC) No 1830/2003¹⁰ on the traceability of food and feed products produced from genetically modified organisms and Commission Recommendation on co-existence measures 2010/C 200/01.¹¹

No less than 68 draft technical regulations in the field of building and construction attracted detailed opinions/comments by the Commission and the member states. A great part of these draft notified regulations are concerned with firefighting equipment, supporting structures made from concrete, dangerous substances, their properties and labelling. The building and construction sector is regulated at EU level by Directive 89/106/EEC¹² on construction products and Directive 2010/31/EU.¹³ Classification, packaging and labelling of dangerous

preparations are regulated in the Regulation (EC) No 1272/2008.¹⁴

The third sector with a higher number of notified draft regulations attracting detailed opinions and/or comments was the telecommunications sector (47 notifications), mainly radio interfaces. This is a sector in which rapid technology developments in recent years has resulted in increasingly complex national regulations, which could potentially create barriers within the internal market. The three sectors ranking 4 – 6 in this respect are transport (45), mechanics (39) and environment and packaging (30).

Going back to, say, 2002-05,¹⁵ one finds the same group of sectors attracting the most comments and/or detailed opinions: as in 2010-11, agriculture and foodstuffs is on top, telecoms is second, followed by transport, construction, energy and mechanical engineering. Of these six, only energy is different. Going back even further in the history of 98/34, over the entire period 1984 (when Directive 83/189, the predecessor of 98/34, came into force) to 1998 inclusive, the top five are once again the same sectors as found in 2010-11 (although with a different ranking) and practically the same as during 2002-05: machinery & engineering (20% of notifications), agriculture & food (16%), telecoms (16%), transport (15%) and building products and construction (12%).¹⁶

⁸ Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment genetically modified organisms and repealing Council Directive 90/220/EC.

⁹ Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed products.

¹⁰ Regulation (EC) No 1830/2003 of the European Parliament and of the Council of 22 September 2003, concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC.

¹¹ Commission Recommendation 2010/C 200/01, of 13 July 2010 on guidelines for the development of national co-existence measures to avoid the unintended presence of GMOs in conventional and organic crops.

¹² Directive 89/106/EEC Council Directive of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the member states relating to construction products.

¹³ Directive 2010/31/EU of the European Parliament and of the Council of 19 May on the energy performance of buildings.

4. Minimum actual prevention: Empirical evidence for 2010-11

The 98/34 procedure is about effective pre-emption of new technical barriers. The effectiveness of 98/34 comes about in three ways. One is through the very existence of the mechanism for more than 25 years now, which is bound to have induced some degree of discipline and efforts to ensure EU legal compatibility in ministries in all EU member states. The second way is via the working of the 98/34 notification

¹⁴ Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008, on classification, labelling and packaging of substances and mixtures (REACH), amending and repealing Directives 67/548/EEC and 1999/45/EC and amending Regulation (EC) No 1907/2006.

¹⁵ See COM(2007) 125 of 21 March 2007, The operation of Directive 98/34/EC from 2002-05, and SEC (2007) 350 of the same date.

¹⁶ See Pelkmans et al. (2000, Table 7.4, p. 279).

procedure which has gradually engendered a greater 'Europeanization' of domestic law-making by the permanent institutional machinery to comment on drafts of other EU countries, and to identify instances of potential and likely 'barriers' springing from draft laws which have no mutual recognition clauses or comprise other (too) restrictive ways to pursue health, safety or environmental objectives. These two beneficial effects of Directive 98/34 cannot be empirically verified in any meaningful way, although that does not mean that they are not real.

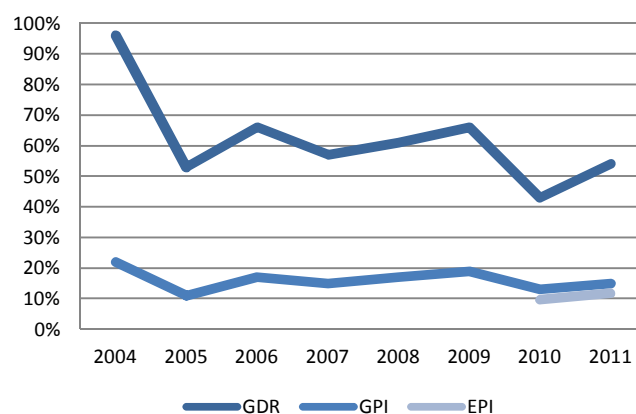
A third effect can be verified empirically with the help of three proxy measures. We refer to *barriers that were actually prevented* via the comments and especially the detailed opinions. Given that the two other ways of achieving the prevention of new technical barriers cannot be measured quantitatively, the following exercise can safely be considered as the minimum prevention accomplished; the actual prevention is almost certainly much greater but cannot be verified. In the following we assume, for the sake of simplicity, that a detailed opinion is tantamount to 'a barrier prevented' which is in actual practice very often the case. More generally, comments may also point to issues or a potential for later problems or overly complicated or heavy bureaucracy, etc., but comments may just as well provide advice or comparisons with solutions found elsewhere. By zooming in on comments and in particular, on detailed opinions, it is possible to calculate the 'proven prevention' in the annual functioning of the 98/34 procedure.

The empirical perspective can be provided with the help of three indicators. The first one is the 'gross detection rate' (GDR), showing the reported activities of the procedure in detecting issues, problems and/or likely barriers. The GDR is the ratio of the sum of the comments and detailed opinions of one year, divided by the total number of notifications. The 'gross prevention indicator' (GPI) focuses on prevention we are pretty sure about, that is, the share in percentage of all detailed opinions in all notifications in one year. However, the GPI is 'gross' because, although it is relatively easy to calculate from the TRIS website, it cannot be fully precise in identifying how many new barriers have been prevented per year (assuming that one draft law is tantamount to one barrier). The reason is that more than one member state can have a detailed opinion on the same

notified draft law and/or that a member state as well as the Commission may file a detailed opinion on the same draft law. The 'effective prevention indicator' (EPI) filters such double counting from the calculation. The GPI is the share (in %) of the notifications that have attracted one or more detailed opinions. In Figure 5 this empirical perspective has been brought together for the last few years: the GDR for 2004-11, the GPI for 2004-11 and the EPI for 2010-11.

Figure 5 shows immediately that, after many years of having Directive 98/34/EC, supported by CJEU case law, such as Unilever and CIA-Security, the trend is that still around half of the notified draft laws lead to either comments or detailed opinions or both (2004 was the first Eastern enlargement year and is an outlier). When it comes to identified (likely) barriers in national draft laws, the scores are much lower. Nonetheless, the GPI hovers around 15%, which is far from trivial. After filtering this, the EPI for 2010 and 2011 shows 9.7% and 11.7%, respectively. These are good proxies of actually prevented barriers to intra-EU goods trade. Figure 5 is a firm proof of the value of a credible and intrusive mechanism such as procedure 98/34 to pre-empt the steady erosion of the internal market for goods.

Figure 5. Detection and effective prevention of barriers in Directive 98/34



Note: GDR = gross detection rate; GPI = gross prevention indicator; EPI = effective prevention indicator.

5. Conclusions

Preventing new technical barriers from arising is, by its nature, a never-ending but inconspicuous EU activity. It would seem to excite few participants in the EU circuit in Brussels and

national capitals. To some extent, this is understandable: by definition, one cannot observe what is (successfully) prevented. European business, often complaining about lingering barriers, may not even be aware how important this preventive EU/member state cooperation has become over time and how badly re-fragmented the internal goods market would have been without it. The procedure and its reporting have assumed a low profile, and the prevention issue is regarded as administrative and low key.

This CEPS Policy Brief has shown with ample and persuasive empirical evidence that the EU disposes of an effective low-cost tool in the interface between the Commission and the member states capable of pre-empting an otherwise steady stream of new technical barriers. Over time, thousands of such barriers have been prevented. The great utility of what is, in effect, a quite intrusive instrument of EU law is beyond any doubt. Indeed, it should inspire EU policy-makers to think of it as an example that, *mutatis mutandis*, might be useful in other areas of EU enforcement as well, whether in the internal market (for services ?) or outside it.

We also wish to advance a few other conclusions that have emerged from our more detailed work done on 98/34 elsewhere.¹⁷

One striking and permanent feature of 'detailed opinions' is the finding that a national technical draft regulation pays no attention to internal market aspects or fails to incorporate a 'mutual recognition clause' or even a reference to European or other (equivalent) national technical standards. Thus, even for 2011, the analysis indicates indeed that the absence of a 'mutual recognition' clause is still a principal issue that would create a barrier to free movement in the internal market. This is even more remarkable given the mutual recognition Regulation 764/2008, in force since May 2009. This regulation shifts the burden of proof of non-equivalence to the member states and considerably protects bona-fide enterprises (which can prove with technical files the acceptance in another member state usually based on European standards) desiring market access by various strict

procedural obligations. The first report on the working of this regulation notes that it "(...) works by and large in a satisfactory way".

Knowing the history of Directive 98/34/EC (see e.g. the survey by Pelkmans et al., 2000), it is interesting to find that, much like one and/or two decades ago, it seems difficult for specialized (technical) units inside certain national ministries, to master and understand EU law, or at least the basics with respect to the free movement of goods and the 'New Approach'. Many of the same types of mistakes or 'failure to think internal market' still show up today. However, it must be noted that cooperation of national ministries, with national enquiry points set up to coordinate nationally the procedure under Directive 98/34/EC, has improved the awareness of the notification procedure. Moreover, some learning *has* taken place in the meantime: from 1995–98 (when the EU had only 15 member states, compared to 27 in 2010), the number of the Commission's detailed opinions amounted to (respectively) 75, 105, 118 and 62 – all far above the 44 prepared in 2010 for more countries.

Cases in agriculture and food, and related (phyto)sanitary issues, often tend to be regulated in an approach quite distinct from the New Approach or mutual recognition. Detailed directives nevertheless leave some discretion to member states (hence, less than full harmonization) and the inclination to use that discretion is found to be fairly strong. This might lead member states to interpret the national discretion more widely than it legally is, under such directives, which may, in turn lead to cases about the scope of a directive or about details in national (draft) laws which might conflict with the harmonized elements.

Although the cases of a missing mutual recognition clause are still present, one can observe a gradual shift over time towards problems with directives of total or partial harmonization. This shift signifies that Directive 98/34/EC has become, much more than in the past, a special monitoring device of the implementation of EU directives in the range of technical national laws and decrees (in addition to mutual recognition issues).

¹⁷ See Pelkmans & Correia de Brito (2012), to be published in September 2012 as a CEPS book. More detail is provided there on some other aspects not treated here.

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