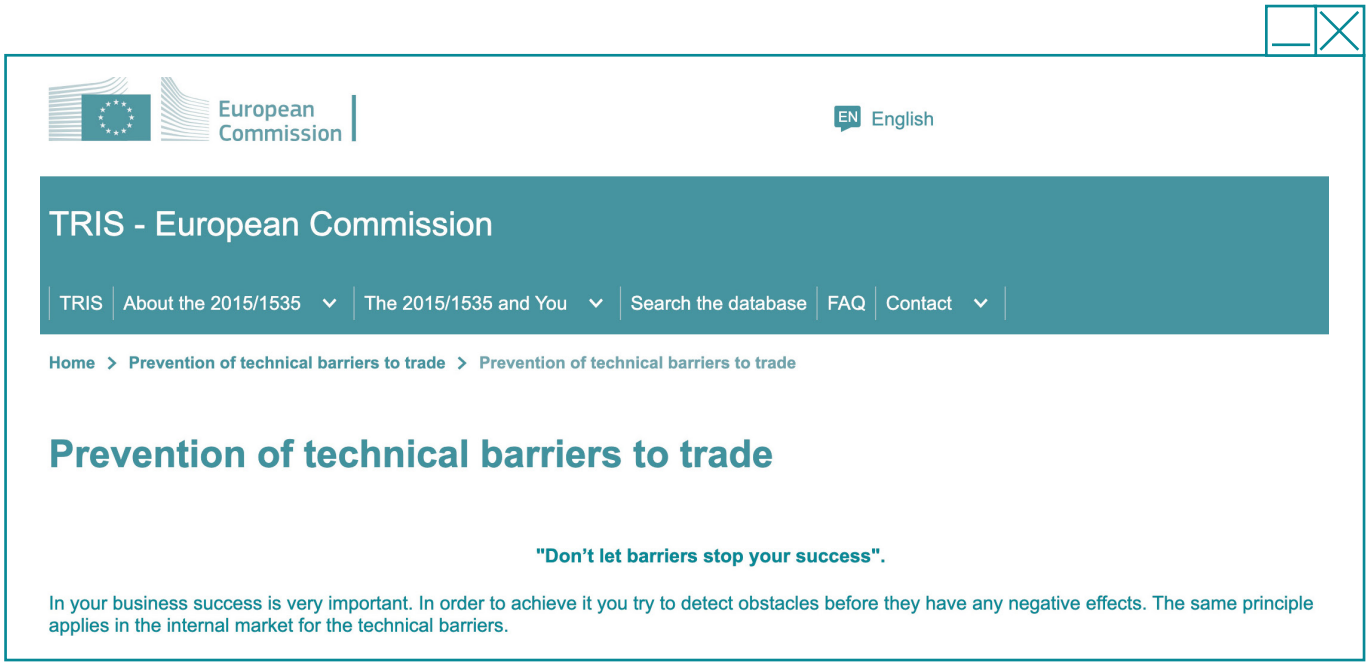
GETTING TECHNICAL: THE NOTIFICATION PROCEDURE FOR TECHNICAL REGULATIONS

Although this notification procedure was established in 1983, it took its current form in 2015 with the adoption of the Single Market Transparency Directive 2015/1535. It obliges Member States to notify the Commission of any so-called 'technical regulations'[14] for products and information society services (online services including e-commerce) before they are adopted. These regulations could for example include laws regarding online tobacco advertisement or bans on specific pesticides that could be interpreted as interfering with the Single Market's freedom to provide goods.

After a Member State has given notification, the Commission publishes any draft technical regulations in its *Technical Regulation Information System (TRIS)*, the main database used by Member States and the Commission in this procedure. The Commission and the other Member States then have three months to submit comments or detailed opinions. Companies and lobby groups are welcome to engage at this point. In fact, the Commission encourages these actors to stay on top of national regulations via the TRIS website: "In your business success is very important. In order to achieve it you try to detect obstacles before they have any negative effects. The same principle applies in the internal market for the technical barriers. [...] [TRIS] helps you to be informed about new draft technical regulations and allows you to participate in the 2015/1535 procedure."[15]



Any contributions to each case are published on the TRIS website, offering assurance to companies and lobbyists that their comments and positions on draft legislation are taken into account in Commission decisions. An examination of some of the corporate contributions to individual Member State legislation clarifies that industry often aims to push the Commission towards adopting so-called 'detailed opinions', which are a requirement for the Commission to initiate an informal dialogue or infringement investigation. Corporate objections via TRIS are a virtually unknown form of lobbying, allowing industry players to silently target Member State legislation they dislike.

To get an overall picture of the volume of legislative reviews, we took a close look at all notifications in the field of technical regulations between 2019 and 2022. Within this three-year period, the European Commission registered a total of 2532 TRIS cases. Unfortunately, the Commission does not provide a statistical overview of how often companies comment on these notifications. Nor do we know how often TRIS notifications lead to infringement cases or other actions. What we can verify is that in 413 of the more than 2500 notifications, Member State governments or the Commission itself submitted a detailed opinion. As explained above, this is the requirement for the Commission to initiate an investigation and subsequent infringement procedures.

TIGHTENING THE SCREW: NOTIFICATIONS IN THE FIELD OF SERVICES

The Services Directive requires Member States to notify the European Commission of any national laws or regulations that could create barriers to the freedom of establishment and the cross-border provision of services. These might include for example licensing requirements for certain professions. It is thus more specific than the technical regulation notification procedure. And while new technical regulations must be notified in a draft form, under the Services Directive Member States can also notify measures that have already been adopted. In 2020, the Commission set up a specific website for services notifications, similar in concept to the TRIS site.

In fact, the Commission originally had greater ambitions in terms of services sector rulemaking in countries across Europe. In 2017, backed by corporate lobby groups, it proposed a *Services Notification Procedure Directive*, arguing that the EU Services Directive needed stronger enforcement. The masterplan was that all public authorities (including cities) planning to introduce new rules for the services sector would first have to notify the Commission. After a three-month waiting period, the Commission would either give the green light or object to the new rules. However, the Commission's power grab *was foiled and it was forced to withdraw this plan in 2020*.[16] This scheme would have been far more extensive than the notification procedure for technical regulations, which so far only applies to Member States. The Commission's initiative sparked a strong campaign that involved urban activist groups, trade unions and mayors and city councillors from around Europe. They claimed that the directive would undermine the democratic space used by cities to regulate the local services economy in the public interest. These included for example rules to control Airbnb, or to safeguard affordable housing, or to guide urban planning, or to govern public services. Eventually, the Austrian and French Senates, the German Parliament and mayors of cities including Amsterdam and Barcelona objected to the directive, and it was subsequently withdrawn.[17]

CITIES OPPOSE THE SERVICES NOTIFICATION PROCEDURE DIRECTIVE

It is no coincidence that progressive cities were at the forefront of the campaign against the Services Notification Procedure Directive. The previous decades of neoliberal policies and legislation codified in the EU's legal framework meant that these cities had already faced obstacles to the implementation of many key priorities. These hurdles ranged from restrictions to the regulation of platform companies like Airbnb to austerity measures originating at EU level, and curbs via the EU's Single Market law in areas including public procurement and state aid law.

An example is Barcelona's policies to replace the privatised energy supply with publicly controlled renewable energy. The goal of these policies is to supply both municipal buildings and citizens with locally generated, affordable renewable energy. However, an EU directive limits the share of the energy that can be sold to private customers to a maximum of 20 per cent of the turnover. Based on this limit, **BarcelonaEnergia is restricted to serving 20,000 households** *in its first phase.*

Another example is the difficulties that European cities encounter when trying to use their spending power – via public tendering – to promote social justice and environmental goals. This proves far from simple in a context of neoliberal EU procurement directives that were designed to promote a single market for public procurement, where contracts would go to the bidder with the lowest price. These directives favour large multinational companies at the expense of local companies, and have also contributed to social dumping and other problems. While EU legislation has improved, numerous obstacles remain for ambitious municipalist procurement policies. In order to make way for values-based municipal procurement, the EU's Procurement Directive must eliminate its neoliberal bias. **In the meantime, cities are developing new approaches to circumvent these obstacles.**

Following this defeat, the Commission's DG GROW went ahead with their plan B: creating a website where all government notifications regarding services are published and inviting 'stakeholders' (in practice: corporate lobby groups) to comment on potential Single Market violations. In the run-up to the launch of this website, the Commission told the retail industry lobby group EuroCommerce that 'stakeholders' were *"invited to provide comments"*[18] on the laws and regulations posted on the website.

In turn, the Commission acts on comments and complaints, as it did for example when a lobby group complained about limits to mass tourism set by the Spanish island of Formentera (see Section 4.6). Since its launch in 2020, Hungary and Sweden have set the record for posting the most new rules and regulations on the services notification website, with 124 and 100 respectively, followed by Croatia (78) and France (54). The website for services notifications is certainly the least transparent complaints channel through which the business sector can influence the Commission. Contrary to the TRIS system, the Commission publishes neither the comments it receives nor its own responses to the notifications.

THE POWER OF INFORMAL DIALOGUE

Industry representatives frequently use these three powerful channels to counter unwanted legislation at the national and sub-national levels. Yet recent trends in the launching of official infringement procedures present a puzzle, as showcased by the Commission's annual reports on this topic. Although EU jurisdiction has become increasingly important at the national level in recent decades, the number of official EU infringement procedures has dropped sharply. In 2011, the Commission opened 1775 infringement procedures.[19] Ten years later, in 2021, it opened less than half as many new proceedings, with a total of 874.[20],[21]

Rather than indicating better compliance by Member States, this development is related to a change in strategy by the Commission. The Commission had already previously announced its aim to increase the use of 'dialogue' to resolve policy conflicts with Member States at the informal pre-infringement stage, and the Von der Leyen Commission recently reconfirmed this stance. And it seems that the Commission is standing by its words; while the number of infringement procedures has dropped, the opening of new so-called EU Pilot cases, which are part of the informal, pre-infringement stage, increased from 110 in 2018 to 246 in 2021.

In parallel, the number of overall complaints to the European Commission has increased from 3850 in 2018 to 4276 in 2021. As explained earlier, the Commission must assess all these complaints and evaluate if they indeed require investigations. Without fundamental legislative adaptation, it seems unreasonable to assume that the Commission would suddenly reject complaints with such greater frequency. While the pre-infringement 'dialogue' tactic might speed up administrative procedures, it makes Commission actions even more non-transparent.