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Non-Tariff Measures in The European Union: Evidence from the Agri-Food Sector

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Abstract

Despite EU regulatory harmonisation and the principle of mutual recognition, Non-Tariff Measures in cross-border trade of agri-food products often violate the EU acquis on the free movement of goods. This paper assesses the pervasiveness and main features of these measures in intra-EU trade of the agri-food sector between 1961 and 2002. It also focuses on procedural and enforcement issues related to how EU member states solve the infringement proceedings opened by the EU Commission to remove agri-food NTMs. The study is based on a unique large dataset on compliance with EU law and provides a comprehensive sector-specific assessment of NTMs in intra-EU trade.

Keywords: *NTMs, agri-food, intra-EU trade, infringement proceedings, single market, EU Court*

Introduction

While in the international trading system tariff barriers are being dismantled under GATT/WTO multilateral liberalization, non-tariff measures (NTMs) have become an increasingly frequent trade restriction. In the European Union (EU) they were also used to compensate for diminishing tariffs (Marvel and Ray, 1985). The term non-tariff measure covers a large variety of trade restraints. They consist of all policies and practices that have an impact on international trade flows or are intended to impair cross-border trade (Baldwin, 1970; Bora et al., 2002). These measures include instruments such as national standards, labeling, packaging or certification requirements, as well as public and domestic governance policies which impact on cross-border trade, relating for example to intellectual property rights protection, public procurement or government export assistance (Walkenhorst, 2004).

Despite that the EU Single Market Programme actually intended to eliminate NTMs in intra-EU trade they still constitute a significant hurdle to the free movement of goods. The European Commission (1997) estimated that in 1985, by the time the White Paper for completing the internal market was published, about 87 per cent of intra-EU trade was subject to food-specific technical barriers. Recent surveys by the *European Business Test Panel* (2011) and by *Eurobarometer* (2006, 2010) show that firms continue to face difficulties in exporting across Europe as barriers to market entry continue to exist. These barriers arise from differences in national regulations and industry standards, by the absence of relevant legislation in some EU countries, by differences in interpretation of EU legislation, late transposition, or lack of enforcement.

As NTMs can harm the economy by increasing the costs for firms in doing cross-border business and by restricting market access, the elimination of remaining NTMs in

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intra-EU trade potentially benefits firms and consumers. However, unlike tariffs, NTMs are not easily removed. On the contrary, they are often hard to detect, ambiguous on their purposes (safeguarding the public interest or protecting national producers), and can be ingenious and easily changed. Despite EU regulatory harmonisation and the principle of mutual recognition, Non-Tariff Measures in cross-border trade of agri-food products often violate the EU *acquis* on the free movement of goods.

This paper looks at NTMs in intra-EU trade of agri-food products and assesses their incidence among EU countries in the period between 1961 and 2002. Their pervasiveness signals the existence of restrictive practices in intra-EU trade, adding to widespread accusations of EU protective legislation in the agri-food sector and lack of a level playing field in world trade. The findings are based on the analysis of a unique dataset on infringement proceedings opened by the EU Commission against member states that use NTMs in EU cross-border trade. This is a large original data set that allows for a detailed analysis of non-compliance cases with the basic EC Treaty articles on the free movement of goods. To our knowledge this is the first encompassing evaluation on the use NTMs in agri-food trade within the EU, as well as the first assessment of the efforts of the European Commission to address them.

Few studies on non-compliance with the free movement of goods in the EU single market have been done. Recently, Hofmann (2011) analyses whether European legal acts are infringed upon in an effort to stem import penetration and Guimarães and Egan (2011) offer a cross-industry assessment on the use of NTMs within the EU. A comprehensive, sector-specific analysis of violations of cross-border trade was not yet available. This paper fills a gap in the literature as it investigates the pervasiveness of different types of NTMs that pertain throughout agri-food intra-EU trade. What is the incidence of NTMs across member states? Which types of NTMs are more prevalent? Which instruments do governments use to implement them? How do member states justify their use? The paper then focuses on procedural and enforcement issues analyzing how EU member states solve the proceedings opened by the Commission in order to remove NTMs. Which are the member states' preferred strategies to address the Commission's pressures to remove NTMs? Do EU member states prefer their cases decided in the EU Court or solved by less coercive means? The research findings provide insights on how the EU Commission and the member states tackle the dismantling of NTMs in EU cross-border trade.

The paper proceeds as follows: the first section addresses NTMs and infringement proceedings in the EU and provides an analysis of the data set, before outlining some of the issues related to the use infringement data to measure NTMs. The second section discusses the empirical findings on the pervasiveness and main features of agri-food NTMs in the EU. The third section assesses the member states' strategies to address the removal of agri-food NTMs and assesses their preference for either legalistic or informal enforcement mechanisms. The concluding section discusses the research findings in view of the data set features.

Non-tariff measures and EU infringement proceedings

The EU tries to ensure that NTMs do not create barriers to entry and that they do not preclude equal market access for member states' firms. But despite the EU internal market and all progress in the elimination of trade impediments, trade restricting NTMs

continue to exist (Chen and Novy, 2011; Guimarães et al., 2010; Brenton et al., 2001). Varied national rules already established and new regulatory national initiatives hinder the operation of the internal market.

In response to either a complaint by a member state or an economic agent, or if the Commission detects a breach of an EU legal obligations, it has the right to open a violation proceeding against a member state if it considers it is a trade restricting NTM. Under this proceeding there is first a pre litigation administrative phase whose purpose is to enable the member state to voluntarily resume compliance with EU law. In this phase the Commission sends a letter of formal notice requesting the member state to submit its observations and views on the alleged violation. If within a given time limit the member state does no reply or if its arguments are considered unsatisfactory, the Commission issues a reasoned opinion in which it sets out its position presenting the reasons why it concluded the member state was breaking the EU law, and requesting the removal of the non-conforming measure. If the member state does not follow the reasoned opinion in order to settle the case or if no reply is received, the Commission may refer the case to the European Court of Justice, which issues a binding decision. The referral to the Court opens the litigation phase of the proceeding.

Since data on NTMs in intra-EU trade are not available, the infringement proceedings to the free movement of goods are used as a proxy of these measures. The analysis is based on a data set provided by the EU Commission on the violations of articles 28 to 30 of the European Community Treatyⁱ between 1961 and 2002. These Treaty articles establish the basic principle of free movement of goods within the EU internal marketⁱⁱ. Article 28 prohibits “quantitative restrictions on imports and all measures having equivalent effect” between member States, which includes non-tariff measures. Non-tariff measures can only be accepted under Article 30 exceptions, which consist of public policy reasons, such as public health concerns, environmental or consumer protection, among others. However, the Treaty establishes that these NTMs may not be a means of arbitrary discrimination nor a disguised restriction to intra-EU trade.

This data set on cases of non-compliance with the free movement of goods has important advantages. It relies on complaints from businesses and individuals that are directly confronted with non-tariff measures, in addition to cases detected by the Commission itself. The fact that businesses have made the effort and incurred the costs of filing a complaint with the Commission might be regarded as a sign that the complaint corresponds to a ‘serious’ impediment to trade (Walkenhorst, 2004). The complaints from consumers, in turn, contribute for an even more comprehensive account of existing barriers to intra-EU trade. This is the most complete database on non-compliance with the free movement of goods in the EU single market. It provides a very detailed description of the infringement proceedings, including the year the complaint was reported, the responsible member state, the industry in which the NTMs was used, the type of NTM, and the compliance mechanism employed to bring the case to an end.

Nevertheless data on non-compliance has to be taken with care as it is not necessarily representative of all existing violations (Mastenbroek, 2005; Hartlapp and Falkner, 2009). It may underestimate the actual incidence of non-tariff measures as it only captures NTMs identified by the Commission or reported to it through complaints.

The data set may also reflect how much complainants in different countries are familiar with the possibility of filing a complaint, and it is also impacted by the interest firms may have in reporting an NTM, particularly if it is encountered in a small national market. Yet, infringement data sets are less distorted than other Commission data on non-compliance with the free movement of goods in the single market (Treib, 2008). Finally, this compilation does not include breaches to secondary legislation which has expanded in the period – harmonization directives and regulations, hence the actual number of cases of non-compliance with the free movement of agri-food products may be higher. Indeed, the member states' breaches to this expanding legislation, which for example currently covers measures that involve the abrogation of export subsidies, is not captured by the analysis. The advantage is that the legislative basis upon which the number of infringements is counted is stable overtime.

Pervasiveness and features of NTMs in intra-EU agri-food trade

The data covers the years 1961 to 2002ⁱⁱⁱ. Given this time period, it only includes 15 EU countries^{iv}. Therefore the availability of data explains the time period of our analysis as well as the countries included in the analysis. The data set contains 2319 cases in goods markets, of which 673 cases pertain to the agri-food sector. In fact, NTMs in the agri-food sector are the most prevalent, with 31% of the violations^v to the free movement of goods in the EU (Guimarães and Egan, 2011). This finding is consistent with previous research that shows that trade in agricultural and food products is particularly prone to NTMs (OECD, 2001; Walkenhorst, 2004a). NTMs exist in all 15 EU countries in the data set. Some examples may be illustrative. In one case, German authorities obliged importers of food products originating in other EU countries to submit them to sanitary controls, though those were already done in the EU exporting country; in Greece, a trade ministry directive established that during a specific period two Greek national radio stations did not advertise food products coming from other member states; The Netherlands, in turn, did not allow fruit juices enriched with vitamins or calcium to be sold in its market based on a prohibition established in a national law, while those products were legally produced and marketed in other EU member states.

The evolution in the number of observations is presented in Figure 1. The number of NTMs in the agri-food sector reached a peak in 1985, year that the European Council approved the Commission White Paper "Completing the Internal Market". The document included a list of measures to eliminate physical frontiers and to abolish trade barriers caused by different national regulations, among other market integration objectives. Following the revitalization of the internal market, barriers in the agri-food sector started to decline. The Single market program had a significant impact on the agri-food sector, with a pronounced decrease in the number of member states' breaches of the free movement of agri-food goods (Commission, 1985).

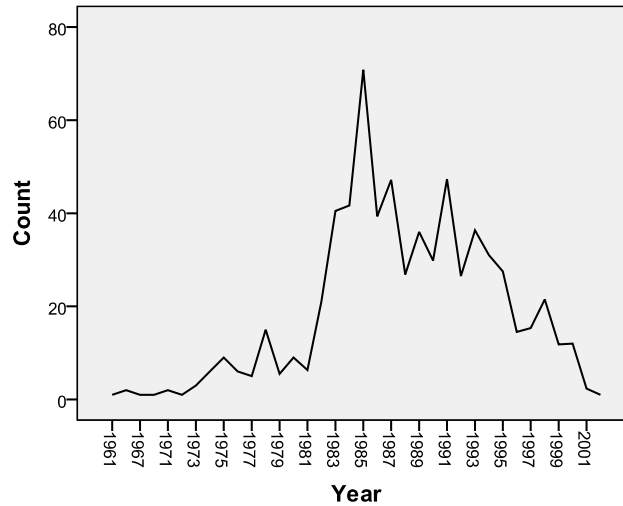


Figure 1. Evolution of agri-food NTMs in the EU

It should be noted that this decline is also partly a consequence of the expansion of secondary legislation on harmonized areas of food products, which are covered by EU directives and regulations and not by Articles 28 and 30 of the EC Treaty. With the purpose of completing the single market for food, the EU has indeed harmonized most of the food sub-sectors where technical regulations are relevant (Frahan and Vancauteran, 2006; Ugland and Veggeland 2006; Vancautern and Frahan, forthcoming). These include food safety regulations (more than 400 standards developed by CEN) intended to address concerns of consumer protection and public health, and also product quality standards (Nemec et al., 2011). In practice these regulations cover food products’ characteristics such as the use of certain ingredients, how food is processed and how it is sold, including packaging and labeling, the use of generic names and requirements on product denominations, among other specifications. This explains why the scope of articles of Article 28 and 30 has been diminishing during the last two decades and the tendency to a decrease in the number of violations that cover non-harmonized areas.

Although all member states use trade impeding NTMs their incidence varies across EU countries (Figure 2). The number of complaints by member state must be interpreted having in mind that they differ in economic size and became members of the EU in different years. However, the results show that there are three distinct groups of countries in what respects the use of NTMs in the agri-food sector. Three large economies of the EU lead in number of violations (France, Italy and Germany) adding up to about 50% of the NTMs on the agri-food sector. As Mansfield and Busch (1995, 728) argue, larger states tend to be more interested in protection and to have a greater preference for non-tariff barriers than smaller states, because they have more market power, they do not fear retaliation and may benefit from optimum protection. Greece, The Netherlands, Belgium, Spain and the United Kingdom comprise the second group, though Greece with more than the double of cases than the other four countries. This ranking of Greece between the countries that more frequently do not comply with the free movement of goods and the group that ranks in the middle, translates the diverse results found in the literature on compliance with EU law regarding Greece. Some studies conclude that the country is among the highest infringers (Börzel, 2000; Börzel

et al., 2010; Koutalakis, 2004) while others rank Greece in the middle group (Guimarães and Egan, 2011; Hartlapp and Leiber, 2010). The seven remaining EU countries contribute each with less than 2.5% to the total number of cases.

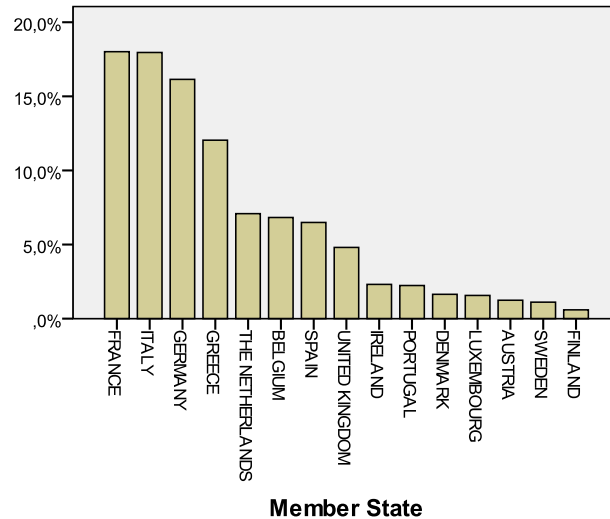


Figure 2. Country incidence of agri-food NTMs

One of the main analytical issues about NTMs is the creation of a coherent and well designed taxonomy (Bora et al., 2002)^{vi}. In this analysis we draw on the classification used by the European Commission (2010) combined with the UNCTAD (2000) classification. EU member states use a wide range of types of NTMs that impair the free flow of agri-food products within the single market (Figure 3).

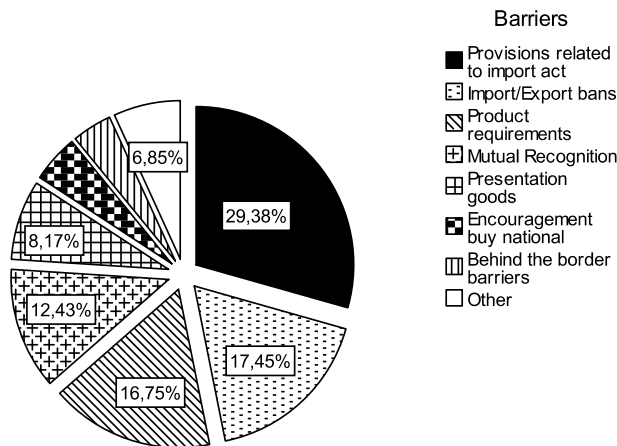


Figure 3. Types on NTMs in the agri-food sector

The most prevalent measures are the provisions related to act of import (29%), which include licenses, inspections, controls, registration and extra customs forms, and obligations to obtain national approval to market products. Outright bans on the import

and export of products and product requirements represent each about 17% of the non tariff measures in the agri-food sector. Non compliance with the principle of mutual recognition and requirements related to the presentation of goods (labeling, language or packaging requirements) amount to respectively, 12% and 8% of the measures. Policies that explicitly encourage consumers to buy national agricultural products amount to 5%. Behind the border measures issued by governments, also referred to as domestic governance policies (regulations on intellectual property rights, monopolies, or distribution requirements), represent 4% of the national measures. The results show that the EU agri-food market is highly fragmented by the use of a large variety of NTMs. This denotes high levels of domestic protection in intra-EU trade of agri-food products, adding to the widespread claims of EU agricultural protectionism towards third countries.

Governments use two main types of policy instruments to implement NTN in the agri-food sector (Figure 4): national regulations (61% of the cases) and administrative practices (33%). Interestingly, though somewhat residual, there are also regional non-tariff measures affecting trade of agri-food products among EU countries (1%).

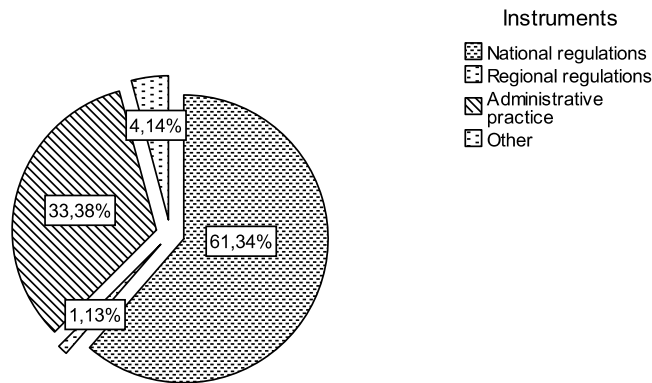


Figure 4. Implementation Instruments of NTMs

Non tariff measures are often ambiguous and non-transparent, and sometimes it is not easy to identify whether their goal is to ensure the defence of a legitimate public interest or to illegitimately protect the country’s national market. When faced with the opening of a violation proceeding by the EU Commission, the member state has the opportunity in the pre-litigation phase to justify why such measure is in place. In the agri-food sector, member states’ justifications for the use of NTMs are mainly the exceptions to the free movement of goods contained in article 30 of the EC Treaty. They account for almost 61% of the reasons given by member states to implement NTMs (Figure 5). Article 30 allows for prohibitions or restrictions to free intra-EU trade on different grounds: public morality, public policy or public security, protection of health and life of humans, animals or plants; protection of goods with artistic, historic or archeological value, and the protection of industrial and commercial property. This article is viewed as a defense right of the member state, but if the Commission deems

the member state is invoking the article unjustifiably and that the NTM is a disguised restriction to trade, it opens a violation procedure.

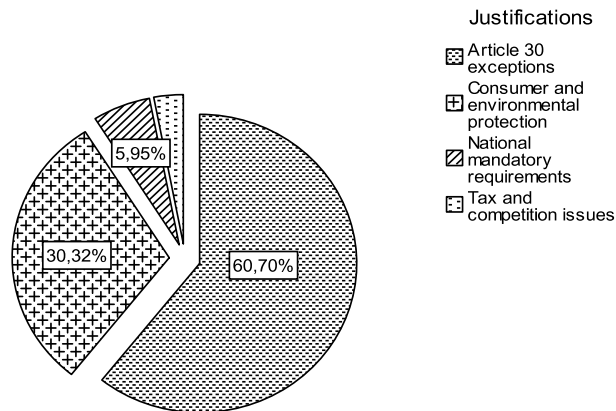


Figure 5. Member states' justifications for the use of NTMs in the agri-food sector

Consumer and environmental protection rank second as justifications for the use of NTMs (30%). These results are associated with consumer health protection and public health safety arguments. Increasing consumer safety concerns have led to the inappropriate application of the 'precautionary principle', which should only be used "where there is uncertainty as to the existence or extent of risks to human health"; in this instance protective measures may be taken "without having to wait until the reality and seriousness of those risks became fully apparent"^{vii}. However member states often overextend their leeway in deciding what measures to take to protect consumers against health risks in cases of scientific uncertainty. Environmental protection arguments are in line with current narratives on the "greening" of the free movement of goods" in the EU (Commission, 2010), but often represent a disguised restriction to trade. The alleged need to adopt national mandatory requirements associated with interests of domestic producers or manufacturers (Commission, 1997) and the prevention of tax evasion and of non-competitive practices are very seldom used as explanations for the erection of NTMs (respectively, in 6% and 3% of the cases).

Removing agri-food NTMs in the EU

Tracing the way the infringements in the agri-food sector are solved provides insights on the variety of ways that the EU member states use to acquiesce to the Commission's demands to bring NTMs to an end. The findings show that in almost half of the cases the member states change their laws to conform to the EU legislation (Figure 6). Cases which involve removing existing administrative practices add up to 1/5 of the total observations. In 6% of the cases the member state itself provides a solution to its misapplication of the EU law, while 5% of the NTMs are subject to harmonisation with EU law or the member state transposes existing EU legislation to replace its mismatching NTM.

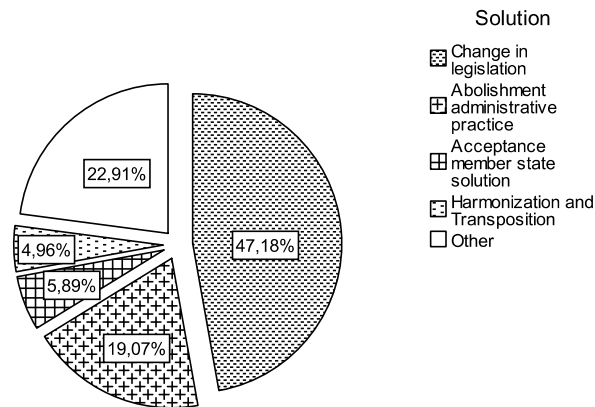


Figure 6. Solutions for removing NTMs

Member states have different preferences on whether or not to refer a case to the EU Court. In the agri-food sector the majority of cases are settled in the initial, non-judicial stages of the proceedings. Indeed, member states prefer to yield to the Commission’s pressures to eliminate the NTM by soft mechanisms of compliance (71.8%), instead of having the case solved in the European Court (28.2%). Soft law methods include ad hoc contacts, package meetings and other bilateral contacts between the Commission and the member state, and comprise also the letters of formal notice and reasoned opinions issued by the Commission in the pre litigation stage. As shown in Figure 7, the preference for these soft law arrangements is more pronounced in Portugal and Spain, where about 80% of the cases do not reach the EU Court and are resolved by informal methods and arrangements. On the contrary, The Netherlands and Belgium prefer their cases solved in the EU Court in about 70% of the cases. All remaining EU countries solve their proceedings following an EU Court ruling in between 40 and 50% of the cases.

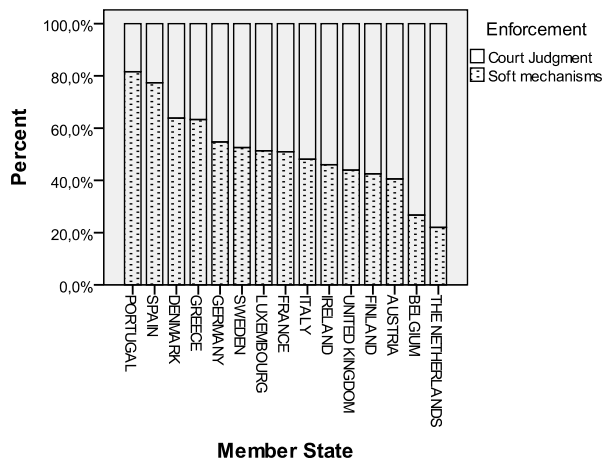


Figure 7. Preferred enforcement mechanisms by EU member state

Looking at the policy instruments the member states use to implement NTMs and to the enforcement mechanisms that remove those NTMs (Figure 8), the data shows that regulations with a regional scope are for the most part only removed after a court decision (86%). For national regulations that percentage decreases to 54%. If the NTM is applied by an administrative practice then it is removed before reaching the EU court in more than 60% of the cases.

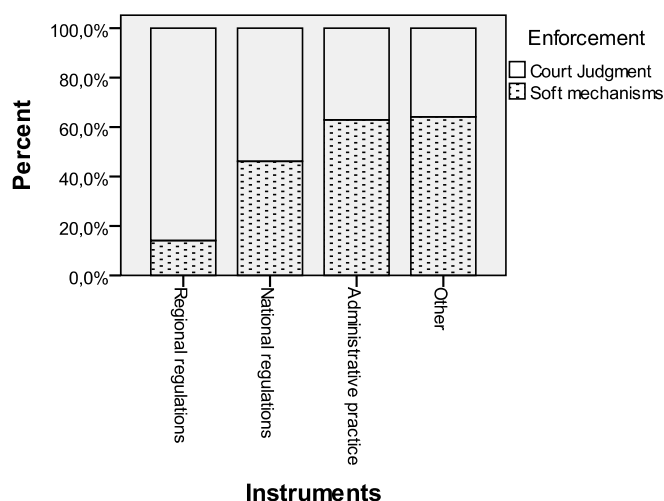


Figure 8. NTMs implementation instruments and enforcement mechanisms

In sum, the preference for litigating in the EU Court or for more informal methods varies across EU countries and depends on the policy instrument that applies the trade impeding NTM.

Concluding remarks

This study concludes, as previous literature on compliance with EU law has noted, that there are cross-country differences in the use of NTMs in agri-food trade. Moreover, it shows that there are differences in the relative pervasiveness of different types of NTMs, and that national legislative acts impair the free movement of agri-food products in the EU single market more frequently than administrative practices. Our analysis clarifies the instances in which informal mechanisms and soft law arrangements are used to remove NTMs in the agri-food sector and shows that legislative acts are mostly solved by the formal sanctioning powers of the EU Court. Similarly, there are cross-country variations in the preferred approaches to address the Commission's pressures to reduce agri-food NTMs. Some countries seem to prefer resolving the proceedings quickly to maintain their reputation and credibility and avoid legal costs, while for others their cost-benefit calculations suggest that formal judicial decisions should be sought.

In the period under consideration the agri-food sector registered the highest number of NTMs in the EU. However, their frequency has decreased over the last decades. The EU Annual Reports on Monitoring the Application of Community Law for the period 2003 to 2010, though very succinct in their content, confirm our results on the

decreasing number of agri-food NTMs due to violations of articles 28 and 30. In 2003 and 2004 only three and two cases of non-compliance with those articles, respectively, were registered, and from 2005 to 2010 no cases were listed. An analysis of border rejections of products originating in the EU, compiled by the EU rapid alert notification system for food and feed (RASFF), also supports this finding. Under this system official authorities have the obligation to notify rejections of these products at the EU border in case of non-harmonized quality standards, which may be viewed as NTMs. Though the number of these rejections has increased in recent years, they are not prevalent in trade among EU member states.

Our findings draw on a data set that has some limitations. It includes only 15 EU member states as it was not updated after 2002, and thus does not provide information on the post 2004 enlargement member states. The inclusion of the more recent member states in a future analysis may provide insights on whether, with the increased post enlargement regulatory heterogeneity, similar patterns in the use of NTMs occur. Additionally, it should be noted that in the period covered in the analysis (1961 to 2002) the composition of the EU changed significantly and most importantly, the implementation of the free movement of goods expanded gradually with the accession of new member states in different years. Therefore, because of the time period of the data set, our findings on the incidence of NTMs must be taken with caution. Additionally, as the data set does not include infringements to harmonized EU legislation, the incidence of NTMs in agri-food cross-border trade may be underestimated. Indeed, in the period under scrutiny, the EU passed a growing amount of secondary legislation to harmonize the agri-food sector.

The interpretation of our results must also be done in light of the evolution of the Common Agricultural Policy (CAP) as well as of the potential impact that periods of economic offset may have in the implementation of NTMs. Over the years there have been a number of reforms of the CAP, influenced by factors such as international trade reforms set by the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) to free agricultural markets, by food safety concerns and more recently by food security issues. Increasingly higher EU food standards and the implementation of new regulations such as the 2004 "food hygiene package" illustrate how much the policies in this sector have undergone change and how these policies may potentially be used as NTMs. Similarly, in periods of economic downturn, protectionist pressures tend to increase and NTMs may be more frequently employed as barriers to trade. Indeed, the most recent EU regulatory efforts of harmonization in the agri-food sector are often used as evidence to support accusations of disguised protectionism of the EU agricultural market. As an example, the recent increase in border rejections of food and feed products originating from third countries is attributed to a regulation imposing reinforced checks for goods imported from outside the EU (European Commission, 2011). These controls may be interpreted as reflecting the EU growing concerns with food security after the world food crisis in 2008 but may also be viewed as intended to reduce import penetration of agricultural products into the EU in a period of economic offset.

The NTM variable used in this study is many-sided as it informs on the type of measure employed, on the policy instrument that implements it, on the member state's justification to apply the NTM, and on the preferred mechanisms to bring violations to

an end. However, it is a count variable that does not contain information on the impact of the barrier on intra-EU trade, and does not tell for how long the NTM has affected agri-food trade. Hence, the current study suggests that an analysis directed to the trade restrictiveness of these NTMs should follow as a complement to these preliminary, though novel, findings on NTMs affecting intra-EU agri-food trade. Additionally, the inclusion in the analysis of the more recent EU member states may provide insights on whether, with the post enlargement regulatory heterogeneity, similar patterns in the use of NTMs and in the modes of eliminating them remain.

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ⁱ Presently articles 34 to 36 of the Treaty on the Functioning of the European Union.

ⁱⁱ The analysis does not cover the infringements to secondary community law (directives and regulations).

ⁱⁱⁱ The Commission discontinued the database during 2002.

^{iv} Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, Portugal, Spain, Sweden, The Netherlands, United Kingdom.

^v The dataset was weighed so that if the infringement relates to more than one sector, a proportional weight is given to the sector, such that the total number of sector observations is equal to the total number of infringements on the dataset.

^{vi} The most relevant taxonomies in the literature include Baldwin (1970), Lair and Vossenaar (1991), Deardorf and Stern (1998), and especially UNCTAD (2000).

^{vii} Case C-157/96 National Farmers' Union and Others (1998) ECR I-221.