The Implementation of the Services Directive in Portugal

Miguel Gorjão-Henriques

1 General Remarks on the Transposition Strategy and General Comprehension of the Implementation

1.1 Main References Used in this Research

By the time the first draft report was delivered,[1] Portugal had not yet implemented the Services Directive (SD). According to the Constitution of the Portuguese

The author is Assistant professor at the Faculty of Law at Coimbra University. He is also Partner of Sérvulo & Associados Law Firm.

[1] I expressly wish to thank Mestre Bernardo Azevedo of the Faculty of Law of the Coimbra University for his most valuable comments on the draft report. I would also like to thank my Colleagues of Sérvulo & Associados and, particularly, Professor Sérvulo Correia, for the confidence and support. I would also like to thank Mr. Ângelo Seiça Neves, coordinator of the implementation in Portugal of the SD in the Directorate-General of Economic Activities, Mr. António Maia, also of the same Directorate-General and task force, and Mrs. Sónia Santos, of AMA, I.P., for their kind availability. Any error is of course of mine responsibility.

The present report was done prior to the 2011 general elections that caused a major change in the Portuguese Government, now ruled by a Social Democrats/Christian Democrats coalition—the current structure of the XIX Constitutional Government may be found in DL 86-A/2011 of July 17.

Some major changes ocurred after the completion of the present report and are worth mentioning, although not analysed in the present report, e.g. (a) Law 17/2010, of August 4 ("*exercício da actividade de agente da propriedade industrial*"), (b) DL 32/2011, of

M. Gorjão-Henriques (✉)
Sérvulo and Associados Law Firm, Lisbon, Portugal
e-mail: mgh@servulo.com

M. Gorjão-Henriques
Coimbra University, Coimbra, Portugal

U. Stelkens et al. (eds.), *The Implementation of the EU Services Directive*,
DOI: 10.1007/978-90-6704-840-8_21,

Republic (the Portuguese Constitution) and since Constitutional Law 1/1997,[2] directives must be implemented through a decree-law (of the Government) or a law (of the parliament, the "Assembleia da República"), under Article 112 (8) of the Portuguese Constitution. Whenever the subject matter involves the reserved legislative competence of Parliament, only Parliament may act, directly or conceding a legislative authorisation to the Government. However, through Decree-Law no. 92/2010 of July 26 (hereinafter "DL 92/2010"), Portugal adopted a horizontal diploma implementing the SD.[3]

Previously, and through DL 49/2010 of May 19, implementing Directive 2007/36/EC, the Government took the opportunity to modify Article 4 of the Commercial Societies Code, stating that the obligation for foreign companies to have a permanent representation in Portugal according to Portuguese law and the regimen applicable to those not complying with those obligations were not applicable to «companies exercising its activities in Portugal under the freedom to provide services according to Directive 2006/123/EC...».[4]

1.2 Impact of the Services Directive

1.2.1 Profound Cause to Change National Law?

The SD did not cause a profound change of national administrative law beyond the requirements of the SD. However, it must be stressed that implementation of the SD will eventually have a profound impact on our administrative law, mainly due to the implementation of the tacit authorisation principle in the administrative procedure in the case of no reply in procedures intended to

---

Footnote 1 (continued)
March 7 ("*acesso e de exercício da actividade de organização de campos de férias*"), (c) DL 37/2011, of March 10 ("*contratos de utilização periódica de bens, de aquisição de produtos de férias de longa duração, de revenda e de troca (time sharing)*"), (d) DL 48/2011, of April 1st (the *omnibus* law, so to speak); (e) DL 61/2011, of May 6 ("*agências de viagens e turismo*"); (f) DL 69/2001, of June 15 ("*actividades de construção, mediação e angariação imobiliária*") and (g) DL 84/2011 ("*simplificação dos regimes jurídicos da deposição de resíduos em aterro, da produção cartográfica e do licenciamento do exercício das actividades de pesquisa e captação de águas subterrâneas*").

[2] Constitutional Law 1/2004 of July 24 allowed for Directives to be implemented in the autonomous regions of Azores or Madeira through a "decreto legislativo regional" in some cases.

[3] Prior to DL 92/2010, there were available references in the Directorate-General of Economic Activities website, at http://www.dgae.min-economia.pt/, including the draft Decree-Law implementing the Directive (hereinafter, the Draft Decree-Law Implementing the SD, e.g., 'Draft SDIL') and an 'Explanatory Note' (Nota Explicativa). DL 92/2010 is available at DL 92/2010, July 26.

[4] The diploma is still available at DL 49/2010—May 19.

allow access to services activities. This is in clear contraposition with the actual principle of tacit refusal under Articles 108 and 109 of the Code of Administrative Procedure. Also, the SD will have a profound impact due to the principle of the mutual recognition of habilitations (for the access and exercise of the free provision of services).

1.2.2 Involvement in the Transposition Process

The implementation procedure was coordinated by the Directorate-General of Economic Activities of the Ministry of Economy and Innovation and included all departments of the administration, whether direct (under the power of direction and strict hierarchy), indirect (to which the Government may not impose specific conducts, although some acts must be authorised or communicated to the Government), or autonomous (mainly the municipalities). A former view on the authorities involved in earlier stages of the discussion of the then draft of the SD and its initial implementation period can be found in the Portuguese report to the 2008 FIDE Congress in Austria, by Ferreira Malaquias (2008), pp. 299–307.

More recently, coordination undertaken by the Directorate-General of Economic Activities involved direct dialogue with all the governmental departments, including the "Central" Administration (including the ministries, the direct administration, hierarchically organised), other public services (indirect administration), and autonomous administration (the municipalities).

In addition, the professional orders, including lawyers, solicitors, economists, engineers, architects, biologists, veterinarians, and accountants, were also included in the procedure, at least as far as the "screening" was concerned.

1.3 (National) Scope of Application

1.3.1 Scope of the Services Directive

There is no clear answer to the question about a prevailing opinion towards the directive's scope of application. However, one may argue that the Directive's scope of application and the way Portugal intends to implement it are two different things. In fact, according to the principle of conferral laid down in Article 5 of the EU Treaty, EU law is only applicable where the situation interferes with the internal market, for instance, when a transnational element is involved. However, it is settled European Court of Justice (ECJ) case law that one cannot exclude that a situation involving only nationals may implicate the application of EU law.

1.3.2 Application of Transposing Legislation to Domestic Service Providers

DL 92/2010 also applies to service activities in Portugal carried out by service providers established in Portugal. The Portuguese Constitution establishes a principal of assimilation of nationals and foreigners, except in certain circumstances (Article 15), alongside with the principle of equality and non-discrimination (Article 13). In addition, the preamble of DL 92/2010 is based on the principle and policies of procedural simplification and *debureaucratisation*, which is considered to make the «services markets more competitive, contributing to economic growth and to job creation».

1.3.3 Application of Transposing Legislation Beyond Service Providers

Generally speaking, the laws/regulations implementing the SD are applicable also in relation to everybody, so that they could be claimed by everybody. We are not sure in how to interpret the scope of the law, in certain features, for regarding its interference over actual authorisation regimens, it seems a "framework law", establishing the principles laid down by the Directive and applicable whenever a regimen of "administrative permissions" will be created in the future. The wording of Article 4, establishing the principles of freedom of establishment and the provision of services, and the provisions of Chapter III defining cases when "permissões administrativas" ('administrative permissions') may be created allow, however, for a benign interpretation.

In other respects, it is worth noticing that several provisions of the new DL 92/2010 apply even to service providers from outside of the European Economic Area—see Article 2/2 of DL 92/2010, in relation to Articles 5 (debureaucratisation and simplification of administrative procedures), 6 (electronic points of single contact, or POSCs, and procedural dematerialisation), 7/4 (documents issued by other identified MSs), 8 (the "permissões administrativas", new administrative permissions for the exercise of the provision of services), 16 (principle of unlimited duration of "permissões administrativas", etc.), 20 (information to be provided by the service provider), and 22 (information requests and complaints).

1.4 Incorporation of Transposing Legislation

The requirements seem to have been adopted by DL 92/2010. The principle is that of the freedom of establishment or of provision of services, limited in the cases where "permissões administrativas" may be created (under Chapter III). The rules regarding debureaucratisation and procedural simplification will be applicable as of January 2011. However, a clearer picture can only be drawn when the DL 92/2010 begins to be applied and interpreted by the courts of law and relevant doctrine.

DL 92/2010 is a law of its own and does not explicitly modify any of the provisions of the Code of Administrative Procedure. However, it will eventually affect in a significant way provisions of the administrative legislation, due to its nature as a national measure implementing an EU directive. Significantly, it should be highlighted that the provision contained in the Draft SDIL (see footnote 3) establishing that the provisions of the Code of Administrative Procedure contradicting the diploma implementing the SD are revoked (Article 9 (9) of the Draft SDIL, which basically establishes that the Code of Administrative Procedure is only applicable as long as it does not contradict the SD implementing national legislation) does not appear in the new DL 92/2010.

In addition, an *omnibus* type of law was then foreseen, to adapt specific legislation that does not seem in line with the principles and rules laid down in the Draft SDIL. This law was meant to eventually modify more than 100 other laws, but it has not yet been adopted[5]. However, Chapter VIII of DL 92/2010 deals with changes in several sectoral regimens, such as

- Thermal activities (modifying DL 142/2004, of June 11),
- Dolphin and whale (et al.) observation in continental Portuguese territory (not including the Azores and Madeira—see Article 11 of Law 34/2006),
- Water for human consumption (DL 306/2007, of August 27),
- Municipal or multimunicipal public water supply and urban waste water treatment (DL 194/2009 and DL 379/93, under its current wording, given by DL 195/2009), or
- The incineration and co-incineration of waste (DL 85/2005, in its actual wording).

1.5 The Relationship of the Services Directive to Primary EU Law

In all areas not covered by the SD, Articles 49 and 56 of the Treaty on the Functioning of the EU (TFEU) remain applicable. However, in those areas covered by the SD, our reading of the ECJ case law suggests that the SD's application to any given type of service provision precludes the *direct effect* of the Treaty provisions.

Problems have not been identified in this context yet.

1.6 Screening

In each governmental department, one authority was designated to perform the screening of all the activities and administrative proceedings in force affected by the SD and the Draft SDIL.

[5] Cf. fn. 1.

As far as we know, a comprehensive report on the screening under Article 39 (1) and (5) of the SD was presented by the Portuguese government involving authorisation regimens (Article 9 (2) SD), evaluation under Article 15 (5) of the SD, and pluridisciplinary activities (Article 25 (2) SD). The results were very significant for a huge number of areas. The Annex of the DL 92/2010 provides a non-exhaustive list of activities covered by DL 92/2010 and to which the principles and rules laid down in DL 92/2010 are applicable.

2 Individual Articles of the Services Directive

2.1 Article 6 SD: Point of Single Contact (POSC)

2.1.1 Establishment of the POSC

Regarding this question, the Agência para a Modernização Administrativa, IP (Agency for Administrative Modernisation, Public Institute, hereinafter AMA, available at www.ama.pt, a public service created by Articles 5 (b) and 19 of Decree-Law 202/2006 of October 27 and implemented in 2007) expressed informally that "one of the key transformations on enterprise public services provisioning, to enhance Portugal's business climate position, is the implementation of a multi-channel approach. The POSC will be integrated into the Business Portal.

«The **Business Portal** (www.portaldaempresa.pt) is an integrated access point to the public services provided to companies. It was launched at the end of June 2006, easing access to public services provided to businesses through the Internet and all the information available in the Business Formalities Centres organized by the Business Life Cycle. It intends to be the privileged point of contact between businesses and public administration.

«In fact, the Business Portal is split into four main areas that report to the traditional cycle of business life: Creation, Management, Expansion, and Extinguishing. In each one of them, the managers will be able to find a set of information and, progressively, an extensive sample of interactive and transactional electronic services, with special attention for the following ones:

- Online process for the creation of a business, with fully digital supporting mechanisms, including upload documents and the recently launched Citizen's card;
- Online registration of business and commercial acts, such as the enterprise's social members and quotas;
- Enterprise electronic dossier, where the different processes of each enterprise with the public administration are assembled and made available to the enterprise representatives.

«The **POSC** will be available in the transaction of the Business Portal and will be available from day December 21, 2009.

«In three steps: Search, Select and View, you can find the answer to questions like: "What licenses do I need?", "What documents I need to upload?";

"Who can I contact?", "Can I submit the service online?"

«The licences are organized by activities (economic and non-economic) that the citizen/company pursues or intends to pursue. The activities are categorized into general themes for the intuitively find what you need. This research presents the name of "Search Activity".

«For each service activity there the following information:

- Possibility of access to information, guidance and contacts required for each type of licence or administrative authorisation, what procedures to perform, the necessary documents for the completion of the service and average time of execution, etc.;
- Access, with electronic authentication, to the online services that will allow companies to obtain the licences or administrative authorisations, previously identified as necessary to initiate the activity.
- Fill "smart forms" whose fields are constructed based on the search and results for indications, made by the service provider, or redirecting (via link) to the form or online service of the organism responsible for licence or administrative authorisation;
- Follow-up (monitoring) of the requested online service (time spent, where the process is, estimate time for completion, etc.). In this area information and services are clusters operated dynamically according to the user profile and the coordination process is simplified. Each user can access their personal data, the services required, the status and the documents that support them. The confidentiality of information available in this area is guaranteed for communications made between the bodies involved in the provision of services. Thus it is possible to provide public services in a way simple, transparent and safe for the entrepreneur.»

«In parallel to the electronic PSC, a physical network of single contact points providing access to procedures and formalities on activity services under the scope of the directive that will be created in the **company's Shop** (*Loja da Empresa*)."

2.1.2 Subjective Understanding, Competence Structure

In the Draft SDIL there was only supposed to be one SD POSC, the national coordinator for administrative cooperation in the area of services (*Coordenador Nacional para a cooperação administrativa na área dos serviços*—see Articles 29 and 30 of the Draft SDIL), and that POSC would not have any competences on licencing. In some cases, administrative competences may be reallocated as a result of the law simplification process, although the attributions of the POSC are very specific and mainly involve strict *coordination* attributions, with the EU and with national authorities competent in the field of authorisations, licencing, and so on. On the contrary, DL 92/2010 does not create such an entity and says, in Article

26/5, that the «ministry responsible for the area of economy indicates to the European Commission and Member States the name and address of a point of contact, in order to assure the mutual assistance coordination and the cooperation between competent administrative authorities». This looks to be an even more decentralised regimen than was in the draft SDIL.

2.1.3 Authorities with POSC-Function

The authority responsible for the management of the POSC is the AMA, identified above and established in 2007 (see also Portaria n.° 498/2007 de 30 de Abril—Define os estatutos da AMA and DL 116/2007 de 27 de Abril—Aprova a orgânica da AMA). However, the competent authorities for each licence/authorisation remain responsible for its own procedure and related information.

2.1.4 Involvement of Private Partners

Private partners have not been involved in the introduction of the POSC. Of course, private parties with specific attributions in areas covered by the SD will have to cooperate in the coordination and inter-administrative cooperation schemes to ensure the adequate functioning of the "single balcony". We have no information about if and how this kind of cooperation occurred.

2.1.5 Liability

Each competent authority is responsible for the accuracy and completeness of the contents and any other information regarding the licencing procedures it grants. The civil liability of the State and, generally, of any other public entities is regulated by Law 67/2007 of December 31. According to Law 67/2007, there is public liability (except in cases of risk responsibility or when special sacrifices may be imposed to ensure the public interest) when there are illegal actions or omissions, that is, when the violation of rules (*normas*) and legal principles are at stake. In principle, the liability is imposed on the administration service legally responsible for providing the information, independently of the internal relations between the public services involved.

2.2 Article 7 SD: Right to Information

Only Article 7 of the Draft SDIL recognises the rights granted by Article 7 of the SD. Of course, information rights herein established will in fact enlarge the catalogue of rights now established in our legislation. Article 6 of DL 92/2010 deals with information provided through the points of contact or service providers.

The rights apply also to national service providers, but not to business outside the scope of the SD. See our reply to "Application of Transposing Legislation to Domestic Service Providers".

2.3 *Article 8 SD: Procedures by Electronic Means*

2.3.1 Establishment

In Portugal the former government (XVII Constitutional Government) adopted a significant number of measures designed to dematerialise and simplify legislative (see, e.g., the *Simplex* programme) and administrative procedures. The electronic procedures established depend largely on the specific characteristics of each licence/authorisation. For example, some procedures demanded the use of digital signatures, given the risks involved in the licenced activity (e.g., lawyers), and others did not. However, guidelines have been delivered to lead the authorities in this complex process.

Electronic procedures were also thoroughly developed through the adoption of the Code of Public Contracts (*Código dos Contratos Públicos,* or CCP) implementing the public procurement directives (Directive 2004/18/EC, among others). Decree-Law 18/2008 (CCP) consecrates not only totally electronic procedures (e.g., electronic auctions) but also the systematic use of electronic platforms in the context of public contract adjudication procedures in the fields of public works contracts, public supply contracts, and public service contracts.

Article 6 DL 92/2010 formally creates a "single balcony", or single electronic point of contact, through the Internet in the already existing "Portal da Empresa" (see http://www.portaldaempresa.pt/cve/pt).

2.3.2 Innovative Impact of the Services Directive in this Regard

The implementation of the SD has an innovative impact in Portugal regarding the establishment of electronic procedures. However, Portugal already has a high level of online service sophistication. Some good examples are the ability to start a business totally online with the *On-line Firm* (*Empresa na Hora*), the dematerialisation of the Commercial Registry, industrial licences, and public contracts, etc.

2.3.3 Removal of Other Means

There has been a removal of other means of administrative proceedings. Apparently, according to Article 6 DL 92/2010, «the single electronic point of contact allows for any service provider or services recipients to accede electronically to the competent administrative authorities», giving them «the possibility to fulfil

directly and immediately all acts and formalities necessary to accede to and exercise a services activity, including electronic means of payments, and the right to accede to procedures still running» (free translation, *Balcão Único Electrónico*).

2.4 Article 9 SD: Authorisation Schemes

2.4.1 Means of Less Restrictive Measure

This is one of the areas where we find it difficult to ascertain the scope of DL 92/2010. In a sense, on the one hand, looking at the question, we are inclined to say that in all areas described in the non-exhaustive annex, *a posteriori* control applies. On the other hand, the *a posteriori* regimen is not sufficient whenever the legislator feels that an "administrative permission" may be created (Article 9). This, however, must be done by the legislator according to the criteria defined in DL 92/2010.

Regarding existing regimes, the possibility of interpreting the law under the principle of *lex posterior derogate lex anterior* and uniform and coherent with the idea of the reasonable legislator (mainly with the EU law principle of indirect effect or conform interpretation) and the unity of the legal order seem to imply that the principle of freedom may be invoked by individuals or companies from the entry into force of DL 92/2010 (if not under EU law principles, even prior to this entry's into force).

2.4.2 Existing Authorisation Schemes/Procedures

When addressing this issue, we consider that the term "authorisation" is taken by the SD in a broader sense, as Recital 39 SD states:

«(39) The concept of "authorisation scheme" should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession».

Similarly, taking into consideration national administrative act classifications, such as that proposed by Professor Freitas do Amaral with Torgal (2001), pp. 256 et seq., we can say that among the "permissive acts" known to the doctrine one may find "authorisations" (by which the Administration allows someone to exercise a right or a pre-existent competence), "licences" (whenever the Administration allows someone to exercise a private activity relatively prohibited), "concessions" (involving the exercise of a public activity by a private party) or "admissions" (through which the Administrations empowers a private party with a certain "quality" attributing to it some rights and duties). The impact of the SD, for

instance, in the duration of concessions is probably yet to be determined, although concessions, if included under EU law's principle of conferral, should generally be included in the scope of Article 12 of SD.

One main implication will be that regarding the tacit authorisation principle, which will subvert, in a sense, the administrative practices (and law) valid thus far. Many authorisation schemes are probably eliminated, but some may be created, for there are imperative reasons of public interest. Since the implementation limit period has already expired, the principle of tacit authorisation is already in force in the fields of services covered by the SD, given the principle of vertical direct effect of non-implemented EU directives. Under the Code of Administrative Procedure, administrative procedures have a general duration of 90 days and, after this period elapses, the individual may presume its claim to be denied (*indeferimento tácito*) or deferred (*deferimento tácito*). Now, although the DL 92/2010 does not in fact establish a maximum deadline for administrative procedures, it results from it, implicitly though, that even when a "permissão administrativa" is deemed necessary and created (in cases where Article 9 (1) is complied with), a tacit authorisation should be recognised. Of course, this *a maiori ad minus* argument is not exempt of criticism (and so the lack of clarity of DL 92/2010 is evident). Exceptions are overriding reasons of public interest (see Articles 8 (2) (b) and 30).

2.4.3 Simple Notifications

In my perspective, simple notification requirements, especially if they can be complied with after establishment in Portugal, are not to be considered "authorisation schemes" under the SD. Of course, the broader interpretation of the notion of "requisite" laid down in Article 4 (7) of the SD (as to include any "obligation" whatsoever) and the readings of the Handbook (p. 14, p. 2.3.1: "[the obligation to] present a declaration to the competent authorities") may lead to a different conclusion. However, we submit that a posteriori declaration obligations may be easily justified (at least) and are treated from a very different perspective by ECJ case law.

2.5 Article 10 SD: Conditions for the Granting of Authorisation

2.5.1 Recognition of Requirements

A variety of EU legislation and ECJ case law already acknowledges or imposes the principle of mutual recognition of legislations and authorisations in a variety of forms (even though more evident when we consider goods and not services—but see, e.g., a case of mutual recognition in the field of the wholesale distribution of medicines). Since the SD is barely implemented, so far there are no specific problems from the SD and this particular proviso. Article 11 (1) (a) of DL 92/2010

implements Article 10 (3) of the SD. Some problems were already identified—even before the SD—in the fields of public contractors, service providers, and vendors and in the leasing of goods in the field of public contracts.

2.5.2 Granting Authorisation Throughout the Whole National Territory and Exceptions

Article 17 of DL 92/2010 establishes the principle according to which an authorisation gives the service provider the right to accede and exercise its activity in the entirety of the national territory. For the authorisation to be limited in its geographical area, imperative reasons of mandatory public interest (overriding reasons relating to the public interest) must exist. Given our administrative organisational model and taking into consideration that the autonomous regions (Madeira and Azores[6]) and municipalities (*autarquias locais*) have scarce attributions in this areas (safe for some particular activities, due to their natural, e.g., territorial scope, such as ambulant vendors or commercial licencing), being the regulation of these activities dealt under State administration (even if indirect, as explained above) or by associations or entities integrated within the corporative autonomous administration with jurisdiction over the national territory, this issue is not likely to lead to many problems.

In DL 92/2010 no areas of 'overriding reasons relating to the public interest' (Article 10 (4) SD) to justify regional authorisation are specifically identified as such.

2.5.3 Entitlement to Grant Authorisation, Court Review of Administrative Decisions

Generally speaking, Portuguese law guarantees that, whenever the conditions for the granting of an authorisation are met, the authorisation must be granted. However, in some cases the law may recognise in some specific cases a certain level of "administrative freedom", "discretion" or "public autonomy" (Prof. Sérvulo Correia) in determining whether the requirements are met or not. In those cases, the courts may determine the legal principles that the administration must apply, but not the specific contents of the decision (Article 71 (2) of the Code of Procedure before Administrative Courts, CPTA):

«When the emission of the intended act involves the formulation of judgments typical of the administrative function and the case does not allow the identification of just one solution as legally possible, the Court may not determine the contents of the act that must be adopted, but should determine the obligations pending over

[6] Under article 228 of the Constitution, the Regions have legislative powers in the matters provided for in the "estatutos politico-administrativos" that are not reserved to the sovereign powers of the Republic.

the Administration when deciding and adopting the contested act» (free translation and adaptation).

In sum, it is fair to say that all decisions can be appealed to the administrative courts, who can review the legality but not the merits of any decision.

However, we ought to say that whenever discretionary powers are conferred to the administration (recognising its direct possibilities of action—through the expression "may" (*pode*) or the use of subjective or imprecise type concepts ("*conceitos subjectivos ou imprecisos tipo*"—through formulas such as «exceptional reasons of public interest», «strategy defined for the sector», etc.), judicial review will in fact be quite limited (error in facts, misuse of power, manifest error of appreciation, compatibility of the discretionary powers used with the general principles of administrative activity, like equality, proportionality, good faith, impartiality, justice, etc.).

2.5.4 Reasoning Administrative Decisions

Article 268 (3) of the Portuguese Constitution establishes that every act of the administration must be motivated (*fundamentação*) both expressly and in a clear way (accessible to the recipient) every time it affects rights or legally protected interests. Accordingly, the Code of Administrative Procedure, approved by the Decree-Law (DL) 442/91, of November 15, in wording resulting from DL 6/96 of January 31, also consecrates such an obligation in Articles 124 (1) (a) or (c) (cases where the motivation is mandatory) and 125 (duty to give an express reasoning and its content). The case law of the administrative courts of law is consistent with the idea that the administrative acts must be clearly and expressly reasoned, guaranteeing that the applicant can understand the foundations of the administration act. This duty of formal reasoning (indication of motives) and material reasoning (provision of sufficient and adequate reasons to substantially justify the adopted decision) must also be contextual (go alongside the adopted act). Non-compliance with these reasoning obligations turns the decision into an invalid one, except if the administration was not *obliged* (*vinculada*) or if the decision could not be different in its contents, transforming the essential formality into a non-essential formality.

2.5.5 Allocation of Competences

There has been no (re)allocation of competences in this context.

2.6 Article 11 SD: Duration of Authorisation

According to Article 16 (1) of DL 92/2010 authorisations will be granted for an unlimited duration and, whenever limited, they will be automatically renewed, assuming that all the conditions relevant to the granting of the authorisation remain

fulfilled. Decree-Law DL 92/2010 excludes from these principles authorisations limited in number or duration by an overriding reason relating to the public interest, in accordance with Article 11 (1) (c) of the SD. There is no specification about the cases under which these exceptions would apply.

On the one hand, before the SD (so, for the Administration, until 28 December 2009), Portugal did not have the unlimited validity of the authorisations granted as a legal or general principle. On the other hand, no provision or principle forebodes the concession of limited duration authorisations. It could most probably be said, however, that, in principle, authorisations (in the stricter sense, i.e., pre-existing rights in the legal sphere of the recipient whose exercise is "deconditioned" by a permissive administrative act adopted by the competent administrative authority) have no pre-designed limitation in duration, and, even when that validity is limited, renovation is only dependent on the requisites that founded the original concession.

2.7 Article 12 SD: Selection from Among Several Candidates

There is no general provision corresponding to Article 12 of the SD in the national legislation. Only Article 17 (3) of DL 92/2010 implements it, imposing the application of the Code of Public Contracts (DL 18/2008, which implemented, e.g., Directive 2004/18/EC and Directive 2004/17/EC). Of course, as is pointed out in the questionnaire, ECJ case law and EU law is well known and applicable in Portugal, to the extent provided for under the EU law, namely, under Article 8 (4) of the Portuguese Constitution.

In our view, comparable regulations already exist, for instance, in certain areas outside the scope of the SD, such as telecommunications.

2.8 Article 13 SD: Authorisation Procedures

2.8.1 A Priori Determination of the Duration of Administrative Procedures

Usually the legislator determines a priori the duration of an administrative procedure. Often, the competent public authorities have the power to extend the duration of the administrative procedure, though in limited terms in duration and reason. In other cases, the duration is pre-established and it is up to the legislator to define the deadlines that, if not complied with by the competent authority for the granting of the authorisation, allows for the applicant to presume (tacit) denial in order to appeal against the tacit decision, requiring the administration to adopt the act (*acção de condenação para a prática de acto devido*).

2.8.2 General Rule for the Duration

Generally speaking, Articles 108 (2) and 109 (2) of the Code of Administrative Procedure establish a general deadline of 90 days in the case of tacit authorisation (*autorização tácita*) or tacit non-authorisation (*presunção de indeferimento*). This 90-day deadline may be, in some cases, prorogued and, whenever the beginning is dependent on the compliance of specific formalities, only when these are fulfilled do the 90 days start to count. So, in fact, the effective duration of administrative procedures is generally quite a bit longer than the 90 days specified. Of course, special laws may establish different specific deadlines for the Administration's decision, which often happens.

2.8.3 Exceptions of the General Rule for the Duration

It is not possible to differ from the prescribed duration of procedures, except if the law applicable to the procedure confers the administration the power to suspend or interrupt the, in principle, applicable deadlines. If this is not the case and if the authority does not respond to the filed application within the prescribed time, the authorisation is "deemed to have been granted to the provider" (Handbook 6.1.8).

2.8.4 Tacit Authorisation in the National Legal Order So Far

The question of tacit authorisation is very delicate in Portugal. Limiting the answer to the actual legislation in force, it must be recognised that the Code of Administrative Procedure states, in Article 108 (1) that «[w]henever the adoption of an administrative act or the exercise of a right by an individual [including e.g. companies, of course] depend on the approval or authorisation granted by an administrative organ, [these] are considered granted, except if the law provides differently, if the decision is not granted in the deadline established by law.» In Article 108 (3), the legislator nominates the cases where such tacit authorisation may happen. Some doctrine strived to increase the scope of these tacit authorisation scheme (see for instance Esteves de Oliveira et al. (1998), pp. 476–484). Alongside with the "tacit act", however, Article 109 of the same Code states that "without prejudice to the former article", the lack of decision in the deadline established by law enables the individual to presume its pretension as overruled and denied, e.g. for effect of appealing to the Courts against the Administration decision. The consistent case law of the Administrative Courts (including the Supreme, the STA) has been limiting the scope of the tacit authorisation regime under the actual legislation.

Of course, it must now be considered that, although under Article 9 (2) of the Draft SDIL it was said that to «procedures and formalities (...) applies the principle of tacit authorisation», DL 92/2010 has no specific provision in the same

direction. In fact, the legislator does not recognise in this regard a general permission of a tacit non-authorisation, clearly stating that only «for certain specific [both elements must be present] activities a tacit non-authorisation scheme may be established, if it is justified by overriding reasons of public interest, particularly the legitimate interests of third parties».

In our view, this means that the scope of the tacit authorisation principle will increase significantly. For us, the administrative courts are bound to read the reference to "special laws" in Article 108 of the Code of Administrative Procedure as including services covered by DL 92/2010. The principle of full effectiveness of EU law and Article 8 (4) of the Portuguese Constitution will both command such an interpretation.

2.8.5 Formal and Substantive Effects of Tacit Authorisation

A tacit authorisation has both formal and substantive effects. The tacit authorisation under Article 108 (3) of the Code of Administrative Procedure and in some urbanistic legislation is considered, for all legal purposes, an administrative authorisation act with all the legal and practical effects.

2.8.6 Rules of Formally Granted Authorisations Applicable to Tacit Authorisation

The same rules apply to tacit (fictitious) authorisations which apply to formally granted administrative authorisations.

2.9 Articles 14, 15, 16 SD

The national legislator identified a need to adapt national law to implement these articles. An *omnibus law* covering all the activities that ought to be subject to modifications due to the principles and rules laid down in the SD is being prepared.

As regards the self-screening of the Member States some concern was expressed by civil society in a conference held in Lisbon on 10 November 2009 and promoted by the Directorate-General for Economic Activities.

2.10 Articles 14–19 SD and Articles 22–27 SD

There are no relevant issues in this context, since Portugal has long engaged in the modern regulation tradition and the state model is assumed, in general, to be that of the state regulator instead of the state provider.

2.11 Articles 28 ff. SD: Administrative Cooperation

2.11.1 Transnational Administrative Cooperation Prior to the Implementation of the Services Directive

There were no provisions on transnational administrative assistance in Portugal prior to the transposition of the SD. There are provisions generally applicable to domestic administrative assistance under the Code of Administrative Procedure and in several specific areas (e.g., medicines, competition, etc.).

2.11.2 Re-Arrangement with National Rules on Administrative Cooperation

The SD did not give a cause to (re)arrange the provisions for administrative assistance in a general or uniform way. The Draft SDIL (even in the perspective of the individuals concerned) would have had an impact on the scope and contents of administrative assistance obligations. The matter is regulated in a broader way in Articles 21 and 22 of DL 92/2010.

2.11.3 Provisions on Financial Compensation for Transnational Administrative Cooperation

As far as we are aware of, there are no provisions on financial compensation.

2.11.4 Adaption of Rules on Data Protection and Professional Secrets

No specific change was introduced in the data protection legislation. The SD on professional secrets may be directly invoked before the Administration, beginning on the 29 December 2009.

2.12 Article 29 SD and Chapter VI in General

There have been no further discussions and discourses in this context.

2.13 Convergence Programme (Chapter VII of the Services Directive)

We are aware that there are doubts on whether some service activities are included, for instance, those covered by Directive 96/96/EC, which seem to be formally included in the exception of services covered by acts adopted under the former Title V of the EC Treaty (Article 2 (2) (d) SD).

3 Assessment of the Impact of the Services Directive

3.1 Extent of the Impact

The impact of the SD on administrative procedure law, administrative law for business activities, and even beyond can be assessed as severe in Portugal, too. But the discussion has yet to be developed. Some authors have already expressed this same perspective, since the SD will have a significant impact on the need for the Administration to adapt to tacit authorisation principles. The academy has long been discussing the SD and will certainly consider it in a thorough way after publication of the implementing legislation.

3.2 Assessment on the Transposing Legislation

So far, no implementation has been carried out, except, probably, the presentation of the screening reports on the 28 December 2009. The Draft SDIL divulged by the Directorate-General for Economic Activities seems to transpose the SD in a general way, and this judgement is confirmed to a significant extent when we analyse first hand DL 92/2010. This may lead to some legal uncertainty regarding the implications of the SDIL (as *lex generalis*) in the specific authorisation regimens (*lex specialis*) still in force.

3.3 Most Important and Profound Changes Induced by the Services Directive

The adaptation of the Administration to the principle of tacit authorisation and the simplification of administrative procedures (suppressing a significant number of authorisation procedures), contravening historical Portuguese administrative tradition.

References

For legislation, jurisprudence and websites please refer to 1.1 of the report and footnotes directly.

Commission Handbook on the Implementation of the Services Directive (2007) Available at http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_pt.pdf

Esteves de Oliveira M, Gonçalves P, Pacheco de Amorim J (1998) Código de Procedimento Administrativo—comentado, 2.ª Edição, Almedina, Coimbra, pp 476–484

Freitas do Amaral D, Torgal L (2001) Curso de Direito Administrativo, vol. II, Almedina, Coimbra, pp 256 et seq

Ferreira Malaquias P (2008) Portuguese Report. In: Koeck HF, Karollus MM (eds) The New Services Directive of the European Union—Hopes and Expectations from the Angle of a (Further) Completion of the Internal Market, FIDE XXIII Congress Linz 2008, vol 3. Congress Publications, Nomos, Vienna, pp 299–307