Questionnaire

The Services Directive (SD, 2006/123/EC; (2006) OJ, L 376, p. 36) had to be transposed in all Member States (MS) of the EU pursuant to Art. 44 I SD until December 28th 2009. Besides the "Handbook on the implementation of the Services Directive" of the Commission – which is not binding on the MS – a common transposition strategy or a transnational arrangement for a uniform transposition concept of the MS is not perceptible.

The following questionnaire conduces to analyse the various transposition concepts in the 27 MS of the EU. Due to different administrative traditions in the EU MS it might happen that some questions or problems do not arise in your country.
The separate questions and comments serve more or less to show possible (legal) problems of the transposition process and to help getting a uniform structure of the questionnaire and the later report.

The questionnaire serves as guideline for a preferably uniform structure of all reports on the transposition in the member states, so there will be a comparable structure for the planned publication later on.

I. General remarks on the transposition strategy and general comprehension of the implementation

1. Please indicate the main references of your research (e.g. parliamentary documents, laws implementing the SD or adopted on occasion of transposition,…). We would be very pleased if you can indicate the place of publication, in particular if available online.

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 Republic (Portuguese Constitution) and since Constitutional Law 1/1997, directives must be implemented through a Decree-Law (Government) or a Law (of the Parliament, "Assembleia da República"), under article 112 (8) of the Portuguese Constitution. Whenever the subject-matter involves reserved legislative competence of the Parliament, only the Parliament may act, directly or conceding a legislative authorisation to the Government. However, through Decree-Law nr. 92/2010, of July 26th (hereinfter "DL 92/2010"), Portugal adopted a horizontal diploma implementing the SD[2].
Previously, and through DL 49/2010, of May 19th, implementing Directive 2007/36/EC, the Government took the opportunity to modify article 4 of the Commercial Societies Code, stating that the obligation for the foreign companies to have a permanent representation in Portugal according to the Portuguese law and

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[1] I expressly whish 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.

[2] 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..

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…»[3].

2. Impact of the SD

a. Did the transposition of the SD give a profound cause to the national legislator to alter – beyond the minimum requirements and a one-to-one transposition of the SD – administrative laws in general?

No. However, it must be stressed that the implementation of the SD will eventually have a profound impact on our administrative law, mainly due to the implementation of the tacit authorization principle in the administrative procedure in case of no reply in procedures intended to allow the 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 an profound impact due to the principle of mutual recognition of habilitations (for the access and exercise of the free provision of services).

b. Which authorities and partners were involved in the transposition process? Did a close cooperation and coordination with the several levels of administration take place?

The implementation procedure was coordinated by the Directorate-General of Economic Activities of the Ministry of Economy and Innovation and included all the Administration, direct (under the power of direction and strict hierarchical), indirect (to which the Government may not impose specific conducts, although some acts must be authorized 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 SD and its initial implementation period can be found in the Portuguese report to the 2008 FIDE Congress in Austria made by Mr. Pedro Ferreira Malaquias (in Koeck, H. F./Karollus (eds.), *The News 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, Congress Publications, Vol. 3, Nomos, Wien, pp. 299-307).

More recently, the coordination held by the Directorate-General of Economic Activities involved a direct dialogue with all the Governmental Departments, whether pertaining to the "Central" Administration (including the Ministries, the direct administration, hierarchally organised), but also other Public Services (the indirect administration) and the autonomous administration (the municipalities).

[3] The diploma is still available at DL 49/2010 - May 19.

Also the professional Orders, including lawyers, solicitors, economists, engineers, architects, biologists, vets or accountants were also included in the procedure, at least as far as the "screening" is concerned.

3. Scope of application and extension to other fields of administrative law

    a. What is, according to the (prevailing) opinion in your member state, the directive's scope of application? Are the requirements of the SD perceived as binding only for providing transnational services/for transnational establishment, or are at least Art. 5-15 SD also seen as compulsory for the MS with regard to purely domestic services/establishment?

There is no clear answer to the question, about a prevailing opinion. However, one may argue that one thing is the Directive scope of application and a different one is the way Portugal intends to implement it. In fact, according to the principle of conferral laid down in article 5 of the EU Treaty, the EU law is only applicable where the situation interferes with the Internal Market, for instance when having a transnational element. However, it is settled ECJ case law that it can not be excluded that a situation involving only nationals may implicate the application of EU law.

    b. Can only transnational service providers refer to the laws/regulations implementing the SD? Or are the implementing laws/regulations applicable also to domestic service providers, and if so, to what extent?

No. DL 92/2010 also applies to service activities in Portugal 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). Also, the Preamble of DL 92/2010 is based on the principle and policies of procedural simplification and *deburocratization*, which is considered to make the «services markets more competitive, contributing to economic growth and to job creation».

    c. Are the laws/regulations implementing the SD applicable (fully or partly) also in relation to everybody, i.e. did they engender general and universal standards for the way authorities deal with all citizens or with all economic stakeholders, so that they could be claimed by everybody?

Generally speaking, yes. We are not sure in how to interpret the scope of the law, in certain features, for regarding its interference over actual authorization 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 of provision of services, and the Chapter III provisions defining the cases when "permissões administrativas" may be created allow however for a benign interpretation.
In other respects, it is worth noticing that several provisos 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 (Deburocratization and

simplification of administrative procedures), 6 (electronic points of single contact e procedural dematerialization), 7/4 (documents issued by other identified States), 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 services provider) and 22 (information requests and complaints).

d. In case your MS did not treat transnational and domestic service providers equally, what was the intention for this? Was there at least a discussion about equal treatment?

Not applicable.

4. Incorporation of the implementing legislation

a. How and to what extent were the requirements of the SD relating to administrative proceedings implemented in your member state?

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 a "permissões administrativas" may be created (under Chapter III). The rules regarding deburocratization and procedural simplification are applicable as from January 2011. However, a more clear picture can only be drawn when the DL 92/2010 egins to be applied and interpreted by the Courts-of-Law and the relevant doctrine.

b. Did your member state incorporate the new rules/regulations into existing statutes or was a new codification passed?

The 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 of a national measure implementing an EU directive. Significantly, it should be highlighted that the provision contained in the Draft SDIL 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 – basically, this proviso 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.
Also, a kind of *Omnibus* type of law was then foreseen, in order to adapt the specific legislation that seems not to be in line with the principles and rules laid down in the Draft SDIL. This law was meant to eventually modifying more than one hundred other laws but it is not yet adopted. 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);
- Dolphins and Whales (et al.) observation in Continental Portuguese territory (not including 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
- Incineration and co-incineration of waste (DL 85/2005, in its actual wording);

5. Relation of the SD to primary EC law

a. How is the relation of the SD to Art. 43 and 49 EC Treaty assessed?

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

b. Have any problems been identified in this context?

Not yet.

6. creening

How did your member state accomplish the "screening" *in concreto* (e.g. authorities concerned, committees, division of tasks), and which were the results?

In each Governmental Department, one authority was designated in order to perform the screening of all the activities and administrative proceedings in force that are affected by the SD and the Draft SDIL.

As far as we know, a comprehensive report on the screening under article 39 (1) and (5) SD was presented by the Portuguese Government, involving the authorization regimens (article 9 (2) SD), the evaluation under article 15 (5) SD and the pluridisciplinary activities (article 25 (2) SD).

The results were very significant for a huge number of areas. The Annex of the DL 92/2010 gives 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.

II. Individual articles of the SD

1. Art. 6 SD

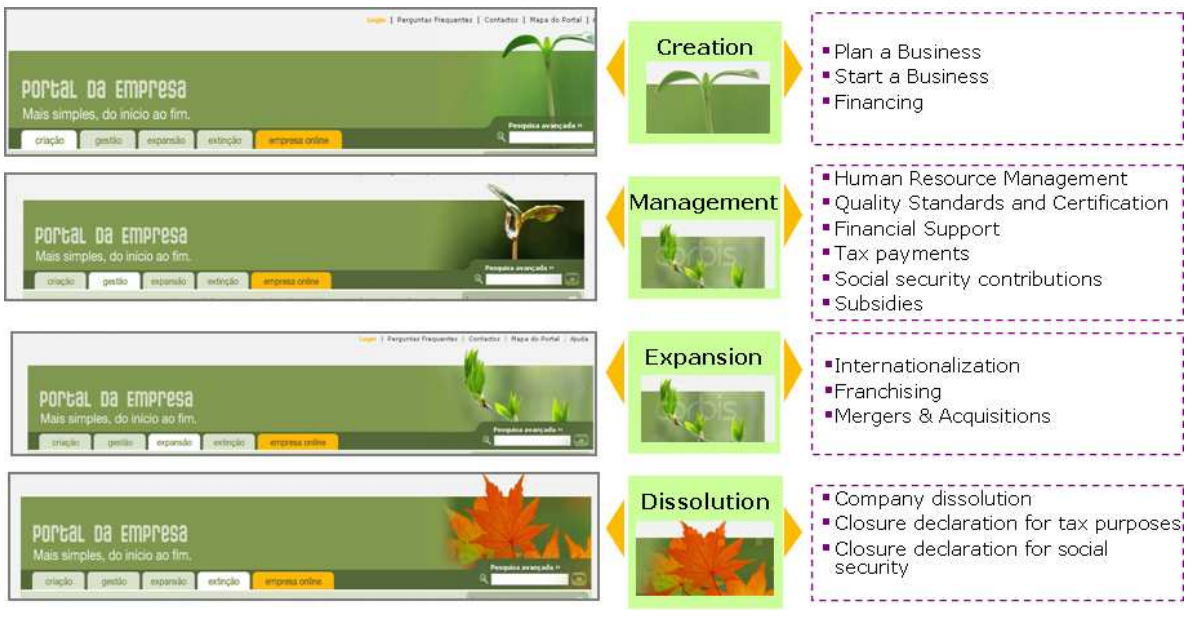
a. How have "points of single contact" (POSCs) *in concreto* been introduced in your member state?

Regarding this question, we received from the Agência para a Modernização Administrativa, IP – Agency for the Administrative Modernization, Public Institute, hereinafter AMA, available at www.ama.pt, public service created by articles 5 (b) and 19 of Decree-Law 202/2006, of October 27th, and implemented in 2007 – the following information, that we are grateful for: «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.

In fact, the Business Portal is split in 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 licenses 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 license or administrative authorization**, 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 licenses or administrative authorizations, 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 license or administrative authorization;

- **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 traded clusters dynamically according to the user profile and coordination process is simplified. Each user can access their personal data, the services required, its status as 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 tradable. Thus it is possible to provide public services 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*)».

b. Does your legislator agree with a subjective understanding of the POSC? Or does your national legislator introduce only a few or even only one POSC in your MS? How many POSCs will be introduced in your country (approximately)? Did your national legislator re-allocate administrative competences (despite Art. 6 (2) SD) with the introduction of POSC?

In the Draft SDIL the Services Directive POSC was supposed to be only one, the national coordinator for the administrative cooperation in the area of services (*Coordenador Nacional para a cooperação administrativa na área dos serviços* - see articles 29-30 of the Draft SDIL) and will not have any competences on licensing. 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 the national authorities competent in field of authorizations, licensing, etc. DL 92/2010, on the contrary, does not create such 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 a even more decentralized regimen than it was in the draft SDIL.

c. Were the POSCs introduced in your country as new and independent authorities/ offices or were the tasks of the POSCs attributed to already existing authorities?

The authority responsible for the management of the POSC is the *Agência para a Modernização Administrativa, IP*, above identified and established in 2007 (see also Portaria nº 498/2007 de 30 de Abril - Define os estatutos da AMA- Agência para a Modernização Administrativa, I.P. and Decreto-Lei nº 116/2007 de 27 de Abril - Aprova a orgânica da AMA - Agência para a Modernização Administrativa, IP). However, the competent authorities on each license/authorisation remain responsible for its own procedure and related information.

d. Were private partners involved in the introduction of POSCs? If so, in which way (e.g. by licences, accreditation)?

No. 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, in order to ensure the adequate functioning of the single balcony. We have no information about if and how this kind of cooperation did occur.

e. Who is liable for mistakes of the POSCs? According to which principles?

Each competent authority is responsible for the accuracy and completeness of the contents and any other information regarding the licensing 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 the cases of risk responsibility or when special sacrifices may be imposed in order to ensure the public interest) when there is illegal actions or omissions, i.e. when it is at stake the violation of rules (*normas*) and legal principles. 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. Art. 7 SD

    a. Were the "rights to information" extended in your national legislation during the transposition process?

Only article 7 of the Draft SDIL recognizes the rights granted by article 7 SD. Of course, information rights herein established will in fact enlarge the catalogue of right now established in our legislation. Article 6 DL 92/2010 deal with the information provided through the point of contacts or the services provider.

    b. For which fields have the "rights to information" been implemented? Only within the scope of application of the SD or beyond?

See reply to Question I. 3 b. The rights apply also to national service providers but not to business outside the scope of SD.

3. Art. 8 SD

    a. How did your MS establish electronic procedures *in concreto*?

In Portugal the former Government (XVII Constitutional Government) adopted a significant number of measures designed to dematerialise and simplify legislative (see a *Simplex* programme, for instance) and administrative procedures. The electronic procedures established depend largely on the specific characteristics of each licensing/authorisation. For example, some procedures demanded the use of digital signatures given the risks involved on the licensed activity (e.g. lawyers) and others did not. However, guidelines have been delivered in order to lead the authorities in this complex process.
Electronic procedures were also extremely developed through the adoption of the Code of Public Contracts (*Código dos Contratos Públicos* - CCP) implementing the public contracts directives (Directive 2004/18/EC, amongst others). Decree-Law 18/2008 (CCP) consecrates not only totally electronic procedures (v.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 services contracts.
Article 6 DL 92/2010 creates formally a "single balcony" or a single electronic point of contact, through the Internet, in the "Portal da Empresa", which already exists (see http://www.portaldaempresa.pt/cve/pt).

b. Did the transposition in this context release great innovative impact or had your MS already established electronic procedures to a comparable extent?

The implementation of the SD has an innovative impact in Portugal in what regards the establishment of electronic procedures. However, Portugal already has a high level of sophistication of online services. It is possible to highlight some good examples: the possibility of starting a business totally online with the *on-line Firm* (*Empresa na Hora*); the dematerialisation of the Commercial Registry, among others, industrial license, public contracts, etc.

c. Did your MS – in contrast to the intention of the SD (cf. recital No. 52; Handbook 5.4.1.) – remove other means of administrative proceedings?

Yes. 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*).

4. Art. 9 SD

a. In which areas of administrative law an "*a posteriori* inspection" pursuant to Art. 9 I lit. c) SD is not seen as sufficient so that the national legislator maintained the "authorisation scheme"?

This is one of the areas where we find difficult to ascertain the scope of DL 92/2010. In a sense and in one hand, looking at the question, we are inclined to say that in all areas described in the non exhaustive annex the *a posterior* control applies. On the other hand, the *a posteriori* regimen is not sufficient whenever the legislator feels that a "administrative permission" may be created (article 9). This, however, has to be done by the legislator according with the criteria defined in DL 92/2010.
Regarding existing regimes, the possibility of a interpretation of the law under the principle *lex posterior derogate lex anterior* and the 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 into force…).

b. Which types of authorisation schemes/authorisation procedures exist in your member state and which one usually applies? Which types had to be abolished or altered due to the requirements of the SD?

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 acts classifications, such as the one proposed by Prof. Freitas do Amaral (*Curso de Direito Administrativo*, with Lino Torgal, Vol. II, Almedina, Coimbra, 2001, pages 256 et seqs), we can say that among the "permissive acts" known to the doctrine one may find "authorizations" (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 the EU law conferral principle, should generally be included in the scope of article 12 SD.

One main implication will be that regarding the tacit authorization principle, which will subvert, in a sense, the administrative practices (and law) so far valid. Many authorization 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, it is already now in force the principle of tacit authorization 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 establishes a maximum deadline for administrative procedures, it results from it, implicitly though, that even when a "permissão administrative" is deemed necessary and created (in cases article 9 (1) is complied with), a tacit authorization should be recognized. 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). The exception are overriding reasons of public interest (see article 8 (2) (b) and 30).

c. According to your national understanding, are simple notification requirements included in Art. 9 ff SD and therefore had to be abolished?

In my perspective, simple notification requirements, especially if they can be complied with after the 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) SD (as to include any "obligation" whatsoever) and the reading done in the Handbook (page 14, p. 2.3.1.: "[the obligation to] present a declaration to the competent authorities" may lead to a different conclusions. However, we submit that *a posteriori* declaration obligations may be easily justified (at least) and are treated in a very different perspective by the ECJ in its case-law.

5. Art. 10 SD

a. Art. 10 III SD implies the recognition of authorisations granted by other MS. Where and how has this requirement been implemented? Did problems occur in this context?

ECJ case-law and a variety of EU legislation 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, for instance, a case of mutual recognition in the field of wholesale distribution of medicines). As the SD is barely implemented, so far there are no specific problems arising from the SD and this particular proviso. Article 11 (1) (a) of DL 92/2010 implements article 10 (3) SD. Some problems are already identified – even before the SD – in the field of public contractors, service providers, vendors and in the leasing of goods in the field of public contracts.

b. Was it difficult for your MS to grant authorisations which give access to the service activity, or to exercise that activity, throughout the whole national territory? If it was difficult, how was this problem solved? If not, why?

Article 17 DL 92/2010 establishes the principle according to which the authorization gives the services provider the right to accede and exercise its activity in whole the national territory. For the authorisation to be limited in its geographical area there will have to be imperative reasons of mandatory public interest (overriding reasons relating to the public interest). Given our administrative organizational model e taking into consideration that the Autonomous Regions (Madeira and Azores) and the municipalities (*autarquias locais*) have scarce attributions in this areas (safe for some particular activities, due to its natural e.g. territorial scope, like ambulant vendors or commercial licensing), being the regulation of these activities dealt under the State administration (even if indirect, as above explained) or by associations or entities integrated within the corporative autonomous administration with jurisdiction over the national territory, this problem is not likely to give raise to many problems.

c. Did your member state identify areas of "overriding reasons relating to the public interest" (Art. 10 (4) SD) to justify regional authorisation only?

In the DL 92/2010 there is no area specifically identified as such.

d. According to Art. 10 (5) SD the applicant is entitled to get an authorisation once all conditions for the authorisations have been met. Is there a difference to your existing administrative laws? To which extent will courts review the decisions by the granting of authorisation? Do courts also review the use of discretion by authorities? Did the transposition of Art. 10 (5) SD change this in any way?

Generally speaking, the Portuguese law guarantees that, whenever the conditions for the granting of an authorization are met, the authorization must be granted. However, the law in some cases may recognize 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 the Administration when deciding and adopting the contested act*» (free translation and adaptation). In sum, it is fair to say that all the decisions can be appealed to the Administrative Courts and the Courts may review the legality and not the merits of any decision.
However we ought to say that whenever discretionary powers are conferred to the Administration (recognizing it direct possibilities of action – through the expression "may" (*pode*) – or through the use of subjective or imprecise type concepts "conceitos subjectivos ou imprecisos tipo – using 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.).

e. Was there a need to change national law due to the obligation to fully reason the decision of the authority (Art. 10 (6) SD)?

No. Article 268 (3) of the Constitution (the Constitution of the Portuguese Republic) 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 15th, in the wording resulting from the 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 of giving an express reasoning and its content). The case-law of the Administrative Courts of law is consistent with this idea that the administrative acts must be clearly and expressly reasoned, guarantying 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) has, also, to be contextual (go alongside the adopted act). Non compliance with these reasoning obligations turns the decision into an invalid decision, except if the administration was not *obliged* (*vinculada*), if the decision could not be different in its contents, transforming the essential formality into a non essential formality.

f. The SD did not alter the allocation of administrative competences also with regard to granting of authorisations (Art. 10 (7), like Art. 6 (2) SD on the POSC). Despite this intention: did your national legislator change the allocation of competences in the context of Art. 10 SD?

No.

6. Art. 11 SD

Was the principle of unlimited validity of authorisations implemented in a generally applicable rule/regulation? Which exceptions have been made according to Art. 11 (1) SD in your MS? Has there previously been a prohibition on time-limited authorisations in your national legal system?

Yes, in the article 16 (1) of DL 92/2010. The authorisations will be granted for unlimited duration and, whenever limited, they will be automatically renewed, assuming that all the conditions relevant to the authorisation granting remain fulfilled. 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) SD. There is no specification about the cases under which these exceptions would apply.
On one hand, before the SD (so, for the Administration, until the 28th December 2009), Portugal did not have as a legal or general principle that of an unlimited validity of the authorizations granted. On the other hand, no provision or principle forebode the concession of limited duration authorizations. It could most probably be said, however and in principle, that authorizations (in the stricter sense, i.e. preexistent rights in the legal sphere of the recipient whose exercise is "deconditionated" by a permissive administrative act adopted by the competent administrative authority) know no pre-designed limitation in duration and, even when that validity is limited, renovation is only dependent of the respect of the requisites that founded the original concession.

7. Art. 12 SD

To which extent caused the requirements of Art. 12 SD (regarding the selection from among several applicants) a change in your legal system? Was there a need for transposition of these requirements, at all (as these requirements had previously been stated in the case law of the ECJ)? Did comparable regulations already exist in your national legal system?

There is no general provision correspondent to article 12 SD in the national legislation. Only article 17 (3) DL 92/2010 implements that provision of article 12 SD, imposing the application of the Code of Public Contracts (DL 18/2008, that implemented v.g. Directive 2004/18/EC or Directive 2004/17/EC). Of course, as it is pointed out in the questionnaire, the ECJ case-law and EU law is well-known and applicable in Portugal, to the extension 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 some areas outside the scope of the SD, like telecommunications.

Art. 13 SD

a. Which authority determines a priori the duration of an administrative procedure? The legislator by law or the responsible authority by decision?

Usually the legislator. Often, the competent public authorities have the power to extend the duration of the administrative duration, though in limited terms in duration and reasons. 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 authorization for the granting of the authorization, allows for the applicant to presumed denied (tacitally) in order to appeal against the tacit decision, requiring the administration to adopt the due act (*acção de condenação para a prática de acto devido*).

b. Did your national legislator establish a general rule on the duration of the procedures? Is this general rule only applicable within the scope of application of the SD or does it apply even beyond? In case there is a generally fixed duration: how long is it? If no, did your legislator prescribe different durations in different, specific administrative laws?

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

c. Is it possible to differ from the prescribed duration of procedures? If yes, is this possibility used?

No, except if the procedure applicable law 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.).

d. Is a tacit (fictitious) authorisation already usual in your legal system? Is it usual in general administrative procedure law or only in specific administrative laws?

The question of tacit authorisation is very delicate in Portugal. Limiting the answer to the actual legislation in force, it must be recognised that although 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 no granted in the deadline established by law. In article 108 (3), the legislator nominates the cases where such tacit authorisation may happen. Although some doctrine strived to increase the scope of these tacit authorisation scheme (see for instance Mário Esteves de Oliveira/Pedro Gonçalves/J. Pacheco de Amorim, *Código de Procedimento Administrativo – comentado*, 2.ª Edição, Almedina, Coimbra, 1998, pages 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», the DL 92/2010 has no specific provision in the same direction. In fact, the legislator does not recognize 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 the services covered by DL 92/2010. The principle of full effectiveness of EU law and the article 8 (4) of the Portuguese Constitution will both command such an interpretation.

e. Does a tacit (fictitious) authorisation have just formal or also substantive effects?

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, as a administrative authorization act with all the legal and practical effects.

f. Do the same rules apply to tacit (fictitious) authorisations which apply to formally granted administrative authorisations? (e.g. nullity, revocability, or as regards imposing collateral/additional conditions later-on…)

Yes.

g. Are there other aspects concerning the tacit (fictitious) authorisation that are worth mentioning?

No.

8. Art. 14, 15, 16 SD

    a. Did your national legislator identify a need to adapt national law to implement these articles? If yes, how was this adaption achieved?

Yes. A *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.

    b. Is there a discussion about the self-screening of the MS?

There is some concern expressed by the civil society, that we heard being expressed in a conference held in Lisbon in November 10th 2009 by the Directorate-General for Economic Activities.

    c. Are there further problems or discourses regarding these articles in your MS?

No.

9. Art. 14, 15, 16, 17, 18, 19 SD

    Are there any discussions with regard to prohibited requirements/restrictions (Art. 14, 15, 16, 19 SD) and further exemptions (Art. 16 III, 17, 18 SD) in your MS?

10. Art. 22-27 SD

    As regards the transposition of Art. 22-27 SD, have there been discussions? Are there issues from the transposition process regarding the SD´s impact on modernisation of administrative law and administrative procedure law? How is the role of the MS as an initiator of private regulation (Art. 26 SD re certification schemes, quality charters) assessed?

No. There are no relevant issues since Portugal as for 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.

11. Art 28 ff. SD

    a. Were there provisions on transnational administrative assistance in your MS prior to the transposition of the SD? If so, were these provisions congruent with the rules on domestic administrative assistance (if there is such in your country)?

No. There are provisions generally applicable on domestic administrative assistance, under the Code of Administrative Procedures and in several specific areas (e.g. medicines, competition, etc.).

    b. Did the requirements of the SD give a cause to (re)arrange the provisions for administrative assistance in a general, maybe uniform way?

No. The Draft SDIL and even (in the perspective of the individuals concerned) will have an impact in the scope and contents of the administrative assistance obligations. The matter is regulated in a broaden way in article 21 and 22 of the DL 92/2010.

c. Are there provisions on financial compensation for the quite wide range of assistance?

As we are aware of, no, before the SD, of course.

d. Was there a need to change rules on data protection and professional secrets due to the wide range of information obligations? Have such rules only been adapted, or did a profound change take place?

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 29th December 2009.

12. Art. 29 DLR

    To what extent is this article seen as problematic? Have there been discussions regarding the confirmation of not unlawful business conduct enshrined in Art. 29 I SD?

    No.

13. Were there any problems or discourses as regards Chapter VI (administrative cooperation) which are worth mentioning?

    No.

14. Chapter VII on Convergence: As regards this chapter, are there any discussions that took place in your MS you think are worth mentioning here? How is the role of the MS as an initiator of private regulation in Art. 37 (re codes of conduct) assessed?

We are aware that there are some doubts on whether some service activities are included, for instance those covered by Directive 96/96/EC, that 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 82) (d) SD).

III. Assessment of the impact of the SD

1. In Germany the impact of the SD on administrative procedure law, administrative law for business activities, and even beyond is assessed as severe. From the perspective of your MS, do you agree?

Yes, but the discussion is yet to be developed. Some authors have already expressed this same perspective since the SD will have a significant impact in the need for the Administration to adapt to tacit authorization principles. The academy has long been

discussing the SD and will consider it certainly in a thorough way after the publication of the implementing legislation.

2. How is the transposition of the SD judged in your MS? Is it perceived as great success and improvement or did only a minimum transposition take place? Which aspects guide your assessment?

So far, no implementation was done, except, probably for the presentation of the screening reports on the 28th of December 2009. The Draft SDIL divulged by the Directorate-General for Economic Activities seems to transpose the SD in a general way and this judgment is confirmed at a significant extent when we analyse at first hand the 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. In your view, what is the most important and most profound change induced by the transposition of the SD in your MS, and why?

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