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The Implementation of the EU Services Directive

Transposition, Problems and Strategies

Ulrich Stelkens
Wolfgang Weiß
Michael Mirschberger *Editors*

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Preface

The Services Directive is one of the most recent cornerstones in the realisation of the internal market and has attracted a lot of attention both from the general public and from economic and legal experts, in part due to the considerable share services contribute to the GDP of the Member States. The Services Directive was one of the subjects of the 2008 FIDE congress. After quite a long period of deliberation and legislation and heated debates, including between and within European institutions, it was finally adopted in 2006 and was to be transposed into domestic law by the end of 2009. This book presented here is an attempt to take stock of the impact the Services Directive had on the national administrative regulations of the Member States now that the transposition period is over and the Member States have for the most part transposed the exigencies of the directive into their domestic rules.

This volume on the legal implementation of the Services Directive is the result of the collective endeavour of the participants of a Europe-wide legal research project conducted by the editors under the umbrella of the German Research Institute for Public Administration Speyer (Deutsches Forschungsinstitut für Öffentliche Verwaltung Speyer; [http://www.foev-speyer.de/EU-DLR]). It will first of all explain and analyse in detail the different steps taken by each individual Member State in the implementation process of the directive, thus not only providing information about the changes in national law adopted by the Member States (which is good to have for anyone interested in doing business within the EU), but also allowing for a comparison of the different implementation strategies applied by the Member States. Beyond that, it will allow certain basic conclusions to be drawn from this comparison as regards the heterogeneity or homogeneity of implementation concepts and the varying impact that the Services Directive has had on national services regulations, in particular the relevant administrative rules. One can observe, for example, that some Member States used the transposition to implement far reaching alterations of domestic administrative law and intensely modernise the citizen-state/public administration relationship, whereas others made reforms only where absolutely demanded by the Services Directive. The Services Directive shows how European legislation touches even

those fields of legislation originally nationally dominated, such as the law of national administration. The volume will also illustrate, by taking the Services Directive as an example, which basic problems arise when European law interferes with established domestic administrative structures and national legislative/dogmatic concepts and traditions in administrative law as well as how deep the impact of the European legislation can be in different administrative traditions in Europe. Thus, this implementation study hopes to raise the awareness of European institutions regarding the specific conditions and problems in the different national transposition contexts, all the more so since EU law after the Lisbon Treaty is often seen as demanding greater respect for fundamental national structures and different legal traditions (allegedly derived from Art. 4 (2) TEU). Analysing and comparing the national transpositions of the EU Member States also allow verifying whether the expectations of the European Commission for cooperation between the Member States in their implementation endeavours and for the development of common examples of best practice have finally been met. If so, this implementation study could form a starting point for further research with regard to the question of which administrative tradition and conception could drive European institutions in their legislative processes, at least as regards the Services Directive.

The aforementioned project started in August/September 2009 with the establishment of the expert network and ended in September 2010. Most reports, therefore, reflect the national situation regarding the implementation process around July 2010 in the respective Member State, though some have been updated since then. The research project was inspired by the difficulties in the transposition process in Germany and by the approach finally adopted by German legislators, which saw the transposition used to initiate ground breaking reforms of core administrative laws in Germany, driven by an awareness of the need for modernisation that went well beyond the requirements of the directive. In order to ensure a common research focus and that the same questions were addressed the participants were provided with a detailed questionnaire to guide their enquiry. This questionnaire and the associated explanations are included as an annex to the general comparative report.

Initially the volume intended to gather the national reports on the implementation results of the Services Directive in all 27 EU Member States and then draw comparative conclusions on the research questions alluded to above. However, during the project period there were some changes as regards the participation of legal experts from some countries. In the end, the only Member State of the European Union that is unfortunately missing in this volume is Greece. Due to the current crises in Greece there are several problems in its public administration/sector, hence our participants could not provide a final version of the implementation of the Services Directive for this publication. This is very disappointing for us, but we still can provide an overview of the other 26 Member States. The volume profits not only from the expertise of each contributor about his/her national jurisdiction but also from an intensive exchange of views and common analysis of the similarities and differences in the implementation processes which

took place at a symposium in Speyer in April 2010. This symposium was kindly supported by the Fritz Thyssen Foundation (http://www.fritz-thyssen-stiftung.de), for which we would like to extend our thanks once again.

We finally would like to thank all the participants for their willingness to take part in this research and to redraft their reports several times due to new developments in the implementation process. Furthermore, we thank the German Research Institute for Public Administration Speyer for their contribution to the funding of the research. Moreover, we thank Hanna Schröder, LL.M. and Olivia Seifert, Ass. Jur., for their excellent help at the symposium. Furthermore, we would like to thank Marion Pfundstein for her valuable support at the symposium and during the whole book project.

July 2011 The Editors

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Part I
Comparative Perspective

General Comparative Report on the Research Project 'The Implementation of the Services Directive in the EU Member States' of the German Research Institute for Public Administration Speyer

Ulrich Stelkens, Wolfgang Weiß and Michael Mirschberger

1 Introduction

Function of the General Report

This general and comparative report demonstrates the main guidelines of the implementation of the Services Directive (SD) in the Member States of the European Union (EU). This overview serves as a general summary and analysis of the implementation and, therefore, cannot substitute for the national reports in this book. Hence, for more details the reader is referred to the reports or references given.

This general report is based on the results and assessments of the national reports enclosed in this book, which were drafted according to a common questionnaire (see the Annex to this chapter) during the end of 2009 through September

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2010 (and partially updated later on). Therefore, statements with regard to certain Member States and implementation of the SD therein are based not only on information provided in these reports, but have also been slightly amended by official documents of the European Commission. Due to the length of time the implementation of the SD took, even beyond the expiry of the transposition period, certain legislation and data given in the survey may have changed again. Furthermore, it may well be the case that the specifics of certain Member States in the transposition of the SD highlighted in this general report are shared by other legal systems not being explicitly mentioned here, due to the fact that these specifics are not or cannot be reported in the national reports.

Research Motivation

The motivation for this research was the German method of implementation, since the implementation process was discussed in Germany very intensively, for various reasons: first, and in particular, because of its federal system and, second, because the implementation process was assessed as an opportunity to modernise administrative law in general terms. Every single provision of the SD was diligently examined as to its need for transposition both by legal scholars and in the course of the political process of transposition. The huge legal and political effort in transposing the SD is evidenced by the very existence of a legal commentary[1] solely dedicated to the SD[2] that comments on every single article and analyses how each can be interpreted and applied. It is quite unusual to have a standalone commentary that reflects all the provisions of a piece of secondary EU legislation in Germany. Furthermore, there have been several monographs primarily on the SD itself, and not just on the implementation of its requirements. Because of the intense discussion and observance of the SD itself and its implementation into the German administrative legal system, the German method of implementation could, in our point of view, engender criteria for implementation concepts and strategies in other Member States as well.

Research Method

Based on the discussions among German scholars and administrative and political bodies, we elaborated a questionnaire containing questions primarily pertaining to the implementation's strategy, the inducement of changes by the SD in the national legal order, and possible spillover effects to other areas of (administrative) law.

[1] There is a long and widespread tradition of commentaries on statutes in the German legal literature written by both judicial practitioners and legal scholars. Every piece of main legislation has been the subject of at least one but usually several commentaries. The commentaries include interpretations of the legal text combined with analyses of and references to related jurisprudence of the courts, as well as references to monographs, journal articles, and so forth. Hence, commentaries are a cornerstone of the German scholarly system, at least regarding daily legal practice. Usually only important pieces of legislation are subject to such commentaries.

[2] Schlachter and Ohler (2008).

Furthermore, questions on the implementation of certain articles of the SD in concreto were provided. This questionnaire was sent to colleagues and practitioners in administrations who are experts in the administrative and European law. They prepared their corresponding country reports on the implementation of the SD according to the issues covered in the questionnaire. As already mentioned in the preface, we initially managed to find reporters from all 27 Member States. Unfortunately, in the end, the current problems in Greece did not allow an up-to-date full report from Greece, so the published research now covers 26 Member States.

Several participants of the research network thus created met in Speyer at the end of April 2010 for a symposium that was kindly supported by the Fritz Thyssen Foundation to specify the questionnaire in more detail and have comparative discussions of the initial research results. Discussing problems of the implementation process and crucial requirements of the SD itself was a vital and important step forward to a comparative perspective on the implementation of the SD in the EU. The symposium also served to identify further specific issues to be highlighted more explicitly in the national reports to elucidate more clearly communalities and differences in the implementation strategy.

The reports of the experts from each Member State can be found in the following chapters and comprises the basis of this general comparative report.

Additional Benefits and Amendments of European Commission Reports

The European Commission published a broad and detailed report on the results of the so-called mutual evaluation process with SEC(2011) 102_final.[3] This process derives from the procedure imposed on the Member States in Article 39 SD. All Member States had to report to the European Commission the measures they had taken to fulfil the requirements of Articles 9, 15, 16, and 25 SD to the European Commission until 28 December 2009 (the so-called "self-assessment reports"). After that there was a period of mutual evaluation based on these reports by working groups of several Member States, meeting in plenary sessions with all Member States to discuss the implementation of the above-mentioned articles of the SD in the Member States. The European Commission document presents the results of this process.

For this book's research topic, these EU documents (as well as others; see the References) can be seen as a marvellous amendment. The report(s) of the European Commission concentrate(s) on a 'negative' transposition approach, whereas the research covered in this book concentrates on a 'positive' approach. This means that the EU documents deliver detailed information from the perspective where national administrative regulations pertaining to providing services within the scope of the SD have been maintained and how this maintenance is justified by the Member States, by recourse to justifications and exceptions

[3] This report is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0102:FIN:EN:PDF and builds the basis for COM (2011) 20_final.

(allegedly) stated in the SD. In contrast, our research focuses more on the positive aspects of change caused by the actual transposition and the improvements and alterations induced by the implementation of the SD. As a consequence, legal and political stakeholders gain from two assessments of the transposition process made from two different but complementary perspectives: On the one hand, there is the EU documentation on what has been maintained despite the requirements of the SD and, on the other hand, our research, which focuses on the way national administrative law systems have adapted to the new requirements. Our research also analyses which general improvements of national administrative law were adopted in the course of the transposition of the SD and which consequences and political agenda settings create the blueprint of the national transposition. In a nutshell, the European Commission's view assesses the SD implementation from the view of lowering hurdles on the Internal Market (a transnational perspective),[4] whereas our perspective looks closer at the Member States and their adaptation efforts within their national administrative law tradition, trying to find commonalities (a national perspective, in comparison).

2 Comparison

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

1.1 Main References Used in this Research

Please indicate the main references of your research (e.g., parliamentary documents and laws implementing the SD or adopted for the occasion of transposition…). We would be very pleased if you could indicate the place of publication, particularly if available online.

In general, the main references for the research of all participants have been—as might be expected—the documents accompanying the implementation process, including, first of all, the passed legislation itself, in conjunction with the corresponding parliamentary documents issued by the legislative bodies of each Member State. Usually the Member States adopted both a horizontal law (which provided for specific rules on the provision of services) and a vertical law, which contained the necessary amendments to specific administrative laws and regulations. This applies even to federal states or states with strong autonomous regions, such as Spain, which adopted a horizontal 'umbrella law', and Austria, which plans to transpose the SD at the federal level through a federal law (in addition to bills already passed by the Austrian states) whose adoption, however, requires a

[4] See SEC (2011) 102_final, pp. 4 ff.

still-pending amendment to the Austrian constitution (for most recent developments and changes on this issue see the comment of the authors of the Austrian report on page 65). In Ireland, the transposition of the SD was achieved merely by adopting a statutory instrument (European Communities Regulations 2010). In Italy, as well as in Portugal, the transposition was—besides single amendments—accomplished by legislative decree. It is worth mentioning that in Italy's case, initially amendments on special single issues were adopted before the legislative decree was passed by the government. This seems to be unique, since usually the transposition took place the other way round. In Romania a horizontal government decree was approved by parliament to implement the SD. Those Member States with a federal system had to pass laws and regulations at diverse levels of government. Germany did so without introducing a specific services law: It transposed the procedural stipulations of the SD by amending its General Administrative Procedure Acts.[5] In addition, France did not choose a horizontal implementation but, rather, a sectoral one.

Particularly remarkable seems to be the documentation of the implementation in the Netherlands. As far as we can assess, no other Member State published such an intensive discussion process regarding the implementation of the SD.

Some Member States initiated the implementation process only quite recently, and it usually took a long time for transposition legislation to be passed. Although there may be different reasons for the delays, it must be stated that the given deadline for transposition in Article 44 (1) SD, 28 December 2009, was not met by several countries. Several countries already implemented the main parts of the SD but have yet to finalise certain amendments.[6] Thus, it does not come as surprise that the European Commission had to initiate proceedings against seven Member States for failure to comply with EU law under Article 258 Treaty on the Functioning of the European Union (TFEU) due to lack of complete transposition of the SD.

1.2 Impact of the Services Directive

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?

Concerning the impact of the SD to induce fundamental changes or reforms in public administration or to alter national codifications of administrative law or administrative legislation, the survey highlights that, apparently, in general, there has been only very limited impetus in this regard. Most participants report that there was no cause or only little cause to alter pre-existing administrative laws

[5] The German Federation and states do—with some exceptions—have own general administrative procedure acts.

[6] See the notice from the Council of the European Union of 26 February 2010 on the state of implementation of the SD, available at http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/20100301_council_en.pdf. In addition, still recognising the yet to be finalised implementation, SEC (2011) 102_final, p. 9; see also COM (2011) 20_final, pp. 8 and 12.

in general. In Bulgaria, Denmark, Estonia, Finland, Ireland, Italy, Latvia, Romania, Slovakia, and the United Kingdom, more or less no cause for further general changes was perceived. As far as the partially still pending implementation in Luxembourg is concerned, probably the final implementation will not lead to a profound change in the existing system of administrative law in general either; the restrictive scope of the tacit authorisation especially indicates this. In Austria, Belgium, Cyprus, the Czech Republic, France, Lithuania, the Netherlands, Portugal (seeing impact only in certain parts of administrative law), Slovenia, and Sweden, the national rapporteurs see a certain impetus for the national legislator, but usually not beyond the SD's requirements and not in a profound way but, instead, usually limited to selective aspects. Generally speaking, in these countries the SD did release changes in administrative laws (and, partly, there were many of them), but these changes were not seen as a profound change in administrative law in general. Regarding Malta, the SD was used as an impetus for the general liberalisation of services markets and engendered general and universal standards beyond a mere minimum transposition. Besides Germany, only in Spain did the rapporteurs recognise a considerable and profound impact of the SD, since it gave profound cause for altering administrative laws *in general*.[7] In Poland, at least, a profound change in the system of administrative economic law in general can be observed.

All in all, one can conclude that Germany was the only country in Europe that used the implementation of the SD to implement new and potentially generally applicable administrative procedures beyond the scope of the SD, given the restriction in altering the General Administrative Procedure Act in Spain by introducing tacit authorisation only and the still existing uncertainties about the extension of SD standards to economic stakeholders and citizens in Ireland.

The reports also evidence that the establishment of Points of Single Contact (POSCs), procedural simplifications, particularly the introduction/considerable extension of a tacit (fictitious) authorisation, and the establishment of a system of administrative assistance appears to be the most important features of the SD-stipulated changes for national administrative law.

Furthermore, it seems quite peculiar that in Lithuania, and to some extent Ireland (where the importance of the transposition of the SD has been primarily viewed through the prism of its importance to further liberalise the services sector) and Poland, the SD is primarily perceived in light of economic matters, and not in regard to administration. This seems to relocate the focus of the implementation and has, of course, consequences for the implementation process. In addition, in other Member States, the implementation was carried out and/or coordinated by those ministries competent in economics, of course, but nevertheless the discussion and focus of the implementation in these other Member States seem to pertain more to legal questions in the context of administration than to pure economic views. Hence, in all Member States economic growth through lowering hurdles for

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[7] See also SEC (2011) 102_final, p. 9: most requirements have been reported to the EU by Germany, the Netherlands, Spain and Austria.

transnational service provision was seen as the *reason* for the SD and its implementation, but the *implementation itself* was seen in most cases from an administrative law perspective, and not from an economic one.

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

First of all, there is a commonality in that in all Member States those ministries competent in economics take a decisive role in the implementation process (although in different contexts and with divergences in detail). In Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Lithuania, Luxembourg (with the Ministry of State), Malta, the Netherlands, Poland, Portugal, Slovakia, and the United Kingdom, the ministry responsible for the economy took over the supervising and coordinating role in the transposition process, partly together with other (state) institutions and ministries.

In the case of Denmark, the so-called Danish Internal Market Centre took leadership over the implementation, but this centre is organised by the ministry competent in economics together with the Danish Enterprise and Construction Authority. In Latvia the coordination was conducted by the Cabinet of Ministers, with the Ministry of Economics also taking a decisive role in this regard.

Interestingly Lithuania hired a private law firm to assist in identifying legal areas to be changed or amended due to the provisions of the SD. Moreover, a working group installed by the prime minister was established to prepare the horizontal legislative transposition in Lithuania (alongside the competence of the Ministry of Economy). Since the transposition was seen more from an economic point of view in Lithuania, subsequently the Ministry of Interior Affairs has not been part of this working group.

In Cyprus the already existing Planning Bureau, a public office under the auspices of the Ministry of Finance and competent in matters of economic and social growth, took the lead in the transposition process.

In Hungary and Sweden, the coordinative role was surprisingly (for us) assigned to the Ministry for Foreign Affairs. Romania delegated the overall coordinative role in the transposition process to the Department for European Affairs, which is subordinate to the prime minister's office, while special working groups of representatives of different ministries worked on certain parts of the transposition.

In Spain, inter-ministerial cooperation in coordinating the implementation of the SD was established since the beginning.

In Italy it appears that the government in general was mandated by parliament to conduct the implementation process by legislative decree. Despite this mandate, several governmental departments and levels of government have been involved. The screening process was coordinated by the Department for EU Policies. In Ireland as well, implementation was assigned to the government that adopted a statutory instrument.

In addition to the general supervising institutions, further ministries, representatives of municipalities, non-governmental organisations, trade organisations, chambers, and so forth (including stakeholders in general) have been involved in the legislative process in nearly every Member State. It is not clear whether this involvement is the standard procedure for passing bills in all Member States; probably it is. The Polish report explicitly states that the usual legislative procedure took place. Furthermore, the Czech report explains the usual way of preparing legislative drafts for parliament.

Member States with a federal organisation had to involve further state authorities. This was accomplished by establishing or, if already existing, using certain inter-level groups to coordinate the implementation throughout the whole country (e.g., Austria and Germany). In addition, certain non-federal states such as Denmark or Finland set up inter-organisational working groups to cover all facets of the SD in the implementation process.

In sum, intensive cooperation took place within each Member State. This may be linked to the fact that the SD affects one of the most important branches of the national economy, one with a lot of stakeholder interest. Furthermore, one should bear in mind the very controversial debate and genesis of the SD and the public's and stakeholder's reactions in the Member States. Thus accurate preparation of the transposition appears necessary to ensure that all relevant economic and social groups go along with the implementation. There is only one Member State in which at least a *close* cooperation on all levels of government has been reported as not perceptible: In Estonia, the municipalities were not identified as involved partners, but only as units that have to be informed about the process without being part of it.

1.3 (National) Scope of Application

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 Articles 5-15 SD also seen as compulsory for the Member States with regard to purely domestic services/establishment?

Regarding the scope of the SD, there are two different positions among the Member States.[8] Irrespective of the application of the transposing instruments to domestic service providers, many of Member States perceive the SD to be binding for transnational services only.

In Cyprus, Denmark, (probably) Hungary, Ireland, Latvia, Luxembourg, Malta, (partially) Poland, Slovakia, (partially) Slovenia, (probably) Spain, and the United Kingdom, the scope of the SD was not seen as limited to transnational service providers, but was perceived as encompassing also domestic service providers.

[8] This reflects the different positions in the legal literature. See, for example, Barnard (2008), pp. 351–352, 389; Hessel (2009), pp. 84–85.

Several rapporteurs could not answer this question, since there has been no debate or even a prevailing opinion about this issue in their countries.

A different question is whether the national rules transposing the SD are applicable to domestic service providers as well. This problem is dealt with in the following paragraph.

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?

According to the present reports, in transposing the requirements of the SD, a great majority of Member States extended (sometimes only partly, e.g., with regard to procedural rights only) the scope of application to domestic service providers as well. This was mainly based on the assessment that national service providers would otherwise suffer from discrimination and thus be weakened in competition. It is, however, not always clear whether the Member States extended the rules to domestic services for domestic and particularly constitutional reasons alone (as was done in Slovenia) or because they perceived the SD to be binding with regard to national services as well.

Only two Member States[9] do not grant the equal treatment of domestic service providers: In Austria, the new transposing rules do not apply to domestic service providers at all. In the Czech Republic, the transposition was limited to transnational service providers, at least to a great extent; daily practice regarding POSCs in the Czech Republic seems to be different, in any case. In Finland, the general perception is that the SD regulates transnational activities, but since this perception has not been explicitly spelled out anywhere in the transposing legal rules, these rules may very well be applied to domestic service providers too. Similarly, in Estonia now, the transposing rules can be applied to domestic services and even beyond, to providers of goods. In the Netherlands, basically there is no equal treatment either, but as regards the POSCs, tacit authorisation and Internal Market Information System (IMI) equal treatment are granted to domestic service providers. The situation in Sweden, where only partially equal treatment applies, is comparable.

Are the laws/regulations implementing the SD also applicable (fully or partly) to everybody, that is, do they engender general and universal standards for the way authorities deal with all citizens or all economic stakeholders, so that these laws/regulations can be claimed by everybody?

[9] This is true for Member States as a whole. In Germany, for instance, the Free State of Bavaria did not grant equal treatment to their domestic service providers, arguing that they would be familiar with the existing system of public economic law anyway.

Regarding the question of whether the newly implemented laws are applicable to other economic stakeholders, besides domestic service providers, or even beyond, in relation to every citizen, the results are much more heterogeneous.

Only in the Czech Republic (as regards the daily practice of POSCs), Estonia, (potentially) Germany (but not yet in use, as far as perceptible), Latvia, Italy, Poland, Portugal, Slovakia, Slovenia, and Sweden (as regards POSCs) are the transposing rules also (potentially) applicable to businesspersons besides service providers. This may not be very surprising. Considering, however, that most Member States extended their implementation legislation (though sometimes only partially) to domestic services providers and surpass the SD′s minimum requirements in their implementation (assuming that the SD does not require the extension to domestic service providers), the additional step to an even more encompassing scope of application could not have been too far away. Obviously this step was too ambitious.

The application of the newly introduced implementation legislation in relations between citizens and authority, in all potential ways, has been established in Estonia, Germany, Latvia, Portugal, Slovenia, and probably, as regards the POSC, in Sweden. In Finland, it is assumed that the new rules could analogously be applied to the relation between citizens and authority. Similarly, the Irish rapporteurs assume that citizens might finally benefit from the implementation in Ireland as well, even though there is currently no legal source for such extension, but judicial clarification on that matter is expected in the future.

In Bulgaria, the new implementing rules are seen as applicable erga omnes; hence we assume that the rules are applicable even to other businesspersons and citizens.

It is interesting that, for example, in Portugal the implementing decree is also partially applicable to the service providers of third countries, that is, countries outside the European Economic Area.

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

As indicated above, Austria does not treat transnational and domestic service providers alike since Austria did not want to go beyond a mere minimum transposition. In Austria this is a consequence of the requirement of a (still pending) amendment to the Austrian Constitution.

In the case of the Czech Republic, equal treatment was not directly provided, but, besides applying to the practice of the POSCs, the implementing law also repealed temporal limitations of licences for domestic service providers. Nevertheless, it is stated that the implementing law only refers to transnational situations.

The fact that certain Member States did not grant equal treatment to the full extent can obviously be explained by the argument that, in their view, equal treatment does not call for more.

As far as Finland and Estonia, however, this question appears not to have been discussed during transposition.

1.4 Incorporation of Transposing Legislation

How and to what extent were the requirements of the SD relating to administrative proceedings implemented in your Member State?

Most Member States implemented (as far as the laws that were already passed) requirements via a so-called horizontal approach. Usually there was one horizontal law in the national administrative laws implementing basic provisions or giving certain basic definitions. Additionally, there have been sectoral changes and amendments.[10]

Germany and France did not choose the horizontal approach; Germany could not do so due to its federal system. Spain explicitly divided the implementation legislation into an umbrella law and an omnibus law. In Belgium, the German-speaking community chose not to opt for a horizontal law for implementation, whereas the other regions obviously did.

Did your Member State incorporate the new rules/regulations into existing statutes or was a new codification passed?

Most Member States established both new codifications and amendments and changes to existing statutes. A considerable number of Member States codified new laws for the implementation of the SD, which is supposed to be the paramount source of law for (transnational) service provision (i.e., lex specialis), such that the general rules on administrative law do not apply. Austria and Slovakia, for example, adopted this approach.

1.5 Relationship of the Services Directive to Primary EU Law

How is the relation of the SD to Articles 43 and 49 EC Treaty (now Articles 49 and 56 TFEU) assessed?

Have any problems been identified in this context?

With the exception of Slovenia, the relation of the SD to primary EU law (now Articles 49 and 56 TFEU) was not been intensely discussed by the Member States in general, if there was any discussion at all (e.g., there was none at all in Estonia). It does not come as a surprise that the SD was assessed as a clarification and specification of primary EU law and that the SD must be interpreted in light of primary EU law.

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[10] Also in accordance with the results in the recent notice from the Council of the European Union of 26 February 2010; see footnote 6.

Accordingly, only a few problems were identified concerning the relation of the SD to primary EU law. Many countries, such as the United Kingdom and Spain, did not identify any problems. One particular point mentioned, for example, in the reports from Denmark, the Netherlands, Lithuania, Germany, and Sweden, was the limitation of justifications (in the parlance of the Court of Justice of the EU, 'imperative requirements in the general interest'[11]) in Article 16 (1), (3) SD to the narrow grounds listed there ('reasons of public policy, public security, public health or the protection of the environment'). Apparently this wording was seen as exhaustive, and no recourse to primary EU law was deemed possible.[12] This is assessed differently in the Romanian report.

A rather intensive discussion took place in the Netherlands regarding the question of whether there should be a direct transposition of Article 16 SD. Finally, a direct transposition was assessed as not being necessary, since it is assumed that the de facto behaviour of the authorities sufficiently safeguards the requirements. There were also discussions on whether services of general economic interest are included in the SD or not. The Austrian report complains about the poor wording in parts of the SD and about several gaps that can result in future problems.

Some reports address the question of which consequences the SD engenders with regard to services outside its scope. All reports dealing with this question agree in that, at least in this regard, primary EU law or other specific directives apply.

The Czech report discusses the influence of the SD on jurisprudence in the Czech Republic, but concludes that there will be no real change. Furthermore, the report states that the freedom to provide services deriving from primary EU law has been 'neglected' in the last years and that therefore the SD is viewed as a sort of 'new' perspective in this regard.

The question of whether the SD can have a direct effect (within its scope) has been treated by some of the reports. The Estonian report, for instance, sees room for a direct effect in some areas, whereas, for instance, the Portuguese report does not. Thus, there is no detectable prevailing opinion as far as this aspect is addressed in the reports.

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[11] Court of Justice of the European Union, Case C-55/94 (1995), ECR, I-4165, para 37, Gebhard.

[12] Even though the Court of Justice of the European Union (ECJ) holds that primary EU law exceptions to fundamental freedoms cannot justify national derogations from EU secondary law (see van de Gronden and de Waele (2010), pp. 397, 410), the question remains as to whether the SD as a secondary legal instrument conforms to primary EU law (cf. Barnard (2008), p. 367; van de Gronden and de Waele, ibid., pp. 411–415, who expect the ECJ to interpret the SD́s justification clauses more broadly to bring them in line with its jurisprudence on exceptions to the fundamental freedoms).

1.6 Screening

How did your Member State accomplish the 'screening' in concreto (e.g., authorities concerned, committees, division of tasks), and what were the results?

The screening of national law for its conformity with the SD′s requirements has been a great challenge to the Member States. Although there are huge differences in detail with regard to screening in the Member States, the process has been driven in a rather complex and challenging way.[13] Basically, the screening took place in a sectoral approach, which means that every ministry and, particularly in federal systems, every level of government had to screen its regulations as a matter of its own responsibility and competence. Some rapporteurs mention assistance specifically provided by the central government or other institutions or expert opinions in the screening process (e.g., Austria and Lithuania). Most often the ministry competent in economics took over the leading and coordinative role in the screening process (except, e.g., in Italy, Hungary, Romania, and Sweden).

In Austria, Salzburg University conducted a study to identify demands for legislative amendments. In Belgium, the Agency for Administrative Simplification supervised and supported the screening process. In the Netherlands, as in many other Member States, leaflets, courses, and information in form of 'Frequently Asked Questions' were provided for the screening process to help the screening authorities. Many countries established specific task forces, working groups, or committees (e.g., Cyprus, France, Germany, Ireland, Malta, Romania, Spain, Sweden, and the United Kingdom). In Germany, a complex screening raster containing many questions to identify the needs of adaptation (about 50 A4 paper pages) was elaborated by a special task force. This raster was transformed into an electronic raster available to all authorities competent for the screening. Thus not only the data of the screening but also the data for the report to the European Commission could be electronic way. In addition, Lithuania provided an electronic information system for the screening, called TAPIS, and involved more than 100 state institutions and municipalities in the screening process.

Besides the aforementioned study of the University of Salzburg in Austria, in Finland, Lithuania, and Poland external agencies and experts were involved in the screening process.

Some of the rapporteurs describe the individual steps of the screening process. The basic steps should be the same for every country (although, of course, there are always country-specific differences): first, identifying those areas affected because they fall under the scope of the SD; second, identifying certain provisions in these areas needing amendments or alterations; and, finally, decision framing/drafting the necessary amendments or alterations of the single provisions.

Furthermore it should be noted that Spain established 'collaboration lines' for the municipalities, where big municipalities acted as role models for the

[13] Not all Member States conducted their screening in comparably complex ways (see SEC (2011) 102_final, p. 9).

implementation and passed on their experience to smaller municipalities. Additionally, the Spanish government established a special application and control mechanism to monitor municipal screening.

As for the results of the screening, due to the complexity of the task, only some specifics could be given in the reports.[14] In France, the screening was not transparent enough to provide further information. The following presents some of the remarkable points of these reports.

In Belgium, at the federal level more acts were maintained than amended, and in the French-speaking community the pre-screening did not indicate that further action was necessary at all. In Bulgaria, as a result of the screening, seven acts are to be amended. In addition, in Denmark, only a few adjustments were identified as compulsory. In Italy more than 300 administrative procedures were screened. At the Italian regional level, most regulations were kept on the assumption that they do not contradict the SD. In Latvia, 69 legal acts were identified as requiring amendments and changes. In the Netherlands, the screening started at the national level as early as in 2006 and led, together with subsequent regional/local screenings, to the perception that there was only a very limited need for adaptation, which was justified by the active role deregulation has played in recent years. In contrast, Portugal identified a huge range of areas that needed to be changed. In Romania, 52 acts had to be amended. In Slovakia, 36 acts had to be amended, besides the passing of a new horizontal law. The overall finding from the Slovenian screening was that there is no direct discrimination in the national legislation of the service providers of other Member States, but some indirect discrimination can be identified. In Sweden, at the national level, changes were identified in 20 acts, and at the municipal level only a few changes were identified as well.

It is interesting and surprising that the duty of the screening described by Articles 5, 9, 15, and 25 SD in combination with Article 39 SD was assessed as a great challenge, whereas in none of the Member States[15] was the cross-sectoral screening of all national legal norms, with regard to their compatibility with the administrative simplification requirements of the SD—together with the duty to report these results to the European Commission and to give reasons why certain national provisions were maintained[16]—perceived as an exchange of the active role at the European level. For, now it is the Member States that must deliver information to the European Commission that can be used by it to impose infringement proceedings upon the Member States. Hence a change in the roles of the Member States and the European Commission has taken place: The burden of proving the national law′s compatibility with European law—here the SD—has

[14] Further details can be found in SEC (2011) 102_final, at least regarding the targets of the reporting duties of the Member States. An elaborate overview is given for the relevant service sectors in SEC (2011) 102_final, pp. 62–110.

[15] At least regarding official statements and documents.

[16] See Cornils in Schlachter and Ohler (2008), Article 39 SD, mn. 6 ff.; J. van de Gronden and H. de Waele (2010), pp. 417 ff.; Klamert (2008), pp. 829 ff.; Lemor and Haake (2009), pp. 65, 68 ff.

been shifted away from the European Commission to the Member States themselves. It is the Member States themselves that must now determine and deliver the necessary proof for infringement proceedings.[17] This fact has obviously not been treated in an extensive way by the Member States; the enormous efforts to accomplish the screening itself appear to have primarily captured the attention of the national administrations and the political agendas.

Moreover, one must assume that the SD has been a large but only a single step further towards achieving a real Single Market. Therefore, reported obstacles to free service provision in the EU that can still be maintained in accordance with the requirements of the SD may be subject to further and even stricter secondary legislation in the future.[18]

2. Individual Articles of the Services Directive

2.1 Article 6 SD[19]: Point of Single Contact (POSC)

How were 'points of single contact' (POSCs) in concreto introduced in your Member State?

Does your legislator agree with a subjective understanding of the POSC? Or did your national legislator introduce only a few or even only one POSC in your Member State? How many POSCs will be introduced in your country (approximately)? Did your national legislator reallocate administrative competences (despite Article 6 (2) SD) with the introduction of the POSC(s)?

Were the POSCs introduced in your country as new and independent authorities/ offices or were the tasks of the POSCs assigned to already existing authorities? Were private partners involved in the introduction of POSCs? If so, in what way (e.g., by licence, accreditation)?

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

One cornerstone of the implementation of the SD regarding procedural rights and simplification is, without doubt, the introduction of POSCs throughout the internal market of the EU.

[17] Calliess and Korte (2009), pp. 65, 91 f.; Lemor and Haake (2009), p. 70.

[18] See COM (2011) 20_final, pp.6 ff., 8 ff.

[19] For further information on this very prominent topic of the implementation of the SD, see also the following studies: RKW Kompetenzzentrum, Umsetzung der Europäischen Dienstleistungsrichtlinie: Analyse der Einrichtung der Einheitlichen Ansprechpartner in den europäischen Staaten, 2010, available at: http://www.rkw-kompetenzzentrum.de/fileadmin/media/Dokumente/Publikationen/2010_Doku_Einheitlicher-Ansprechpartner.pdf; SPOCS, Points of Single Contact Research Study, 2011, available at http://ec.europa.eu/internal_market/services/docs/services-dir/studies/spocs_en.pdf.

All reports indicate that this establishment had a decisive role in the implementation process. But as lively as the discussion on the establishment of POSCs may have been in the Member States, the outcomes of the implementation process are quite different. Therefore, the different solutions found in the Member States will be divided into four main groups, with some Member States belonging to more than one group. Therefore the grouping can only be a rough assessment of what seems to be the prevailing way of establishing POSCs in the Member States.

The first group comprises those countries that already had similar administrative structures prior to the implementation of the SD, such as Cyprus, Ireland, Italy, and Slovenia. These countries already knew the system of 'one-stop shops' to a comparable extent before the implementation of the SD and (except for Ireland) simply enlarged the duties of pre-existing one-stop-shops during the implementation process.

The second group refers to those POSCs that were introduced by using already existing institutions and structures competent in business in a broader sense. This means that in those states belonging to the second group, the duty to operate a POSC was assigned to a pre-existing entity or platform already competent in business issues. Belgium installed POSCs by assigning the POSC tasks to already existing 'company dockets' (nine with service offices) that were already entrusted with certain official tasks in the field of business and the economy, with different levels of government involved in their functioning. Similarly, Finland assigned the POSC tasks to the Enterprise Finland Network. In Lithuania, the POSC tasks were assigned to a new division of the pre-existing public organisation Enterprise Lithuania (with the new website Business Gateway), using the Dutch way of establishing a POSC as a role model. In France, the POSC tasks were ascribed to the Centres for Business and Administrative Proceedings, maintained by different chambers and national agencies/authorities (seven networks), with numerous offices throughout France. There is at least one office for commercial service providers per Department. Additionally, a virtual portal exists. In Portugal, the tasks of the POSC were physically assigned to company shops (Loja da Empresa), and one virtual national POSC was established within the already existing system of the Business Portal (Portal da Empresa). In Luxembourg, the tasks of the POSC—besides the establishment of a virtual POSC through the expansion of an existing system of business portals—were delegated, on the one hand, to businesses within the Chamber of Professional Trades and the Chamber of Commerce and, on the other hand, to consumers at the *Centre Européen des Consommateurs GIE de Luxembourg*.

The third category consists of those Member States that assigned the tasks of the POSC to pre-existing authorities or institutions. This group seems to be the prevailing one[20]and is often mixed up with the other categories. As a federal state, Austria established POSCs at the government level (*Amt der Landesregierung*), after lengthy debates about their establishment, in each of the nine states. Estonia also assigned the tasks of POSCs to pre-existing authorities and established a virtual POSC. The Czech Republic built up new units within the general

[20] Compare also the SPOCS study (footnote 19), pp. 8 and 39.

administration of economic activities and thus, more or less, assigned the tasks to already existing authorities. The Czech Republic established 15 POSCs mirroring the administrative division of the country. Ireland introduced a virtual POSC as a virtual national POSC administered by the Internal Market Unit of the Department of Enterprise, Trade and Innovation (now renamed the Department of Jobs, Enterprise and Innovation). Latvia assigned the POSC function to the State Regional Development Agency, which maintains the virtual POSC. In Slovakia, the 50 District Bureaus, particularly the Trade Licensing Offices, became POSCs. But these District Bureaus can build up further offices, and there are currently 64 of these offices in Slovakia, for a total of 114 POSCs. All these offices comprise a single authority holding office throughout Slovakia. Eight physical district bureaus are responsible for EU citizens, one in each region of Slovakia; the others are for Slovak providers.[21] A single virtual POSC is still under construction. In Spain, the task of POSCs is performed as a virtual POSC by a nationwide electronic front desk that takes into account Spain's administrative structure.

Germany seems to have established POSCs in a unique but possibly confusing manner. In Germany, the POSCs are not established the same way throughout the whole country but, rather, very heterogeneously. This is, first of all, the result of the divided competences between the Federation and the federal states. Although one can also categorise the ways in which the federal states established POSCs, it may suffice to state here that there are at least five different models of implementation, which leads to a complex net of POSCs in Germany. One can guess that at least about 150–200 POSCs[22] will finally be established in Germany. The tasks are usually assigned to existing authorities (except in the state of Schleswig–Holstein, where a new public entity was introduced) or to (all) the chambers in a federal state. In Romania, the tasks of the POSC were given to the public agency National Centre Digital Romania, which is subordinated to the Ministry of Communication and built on the pre-existing Agency for Services of Information Society. Since the National Centre Digital Romania is supposed to play an eminent role in the promotion of foreign investments in Romania, a private consortium of three companies provided the centre with all the necessary tools for the establishment (for about 3.8 million euros). A main part of this work was dedicated to the establishment of the POSC function. In Sweden, the Chamber of Commerce, the Agency for Economic and Regional Growth, and the Swedish Consumers Board, already existing state institutions, were put in charge of establishing and maintaining the POSCs.

Finally, the fourth group can be identified as those Member States that introduced the POSC more or less only virtually (whereas other Member States operate a virtual website for the POSCs in addition to a physical infrastructure). These Member States include Bulgaria (at least at the national level), Denmark, more or less (although the POSC functions are assigned to the Danish Commerce and Companies Agency, it seems that the POSC is run only virtually by expanding an already existing website,

[21] Information from http://www.minv.sk/?points-of-single-contact.

[22] Compare the RKW study (footnote 19), p. 34.

although contact by phone and e-mail is possible), as well as Finland, Hungary, Ireland, Latvia (expanding an already established web portal operated by the State Regional Development Agency), Lithuania (although the tasks were assigned to Enterprise Lithuania), Malta, the Netherlands, Poland, Slovenia, Spain, Sweden, and the United Kingdom. At least in Estonia, Hungary, Latvia, Poland, Malta, and Slovenia, a physical POSC should be introduced later on.[23]

Every Member State has at least established a virtual platform for POSCs or expanded already existing websites.[24] The federal states established several POSCs, but non-federal states also established more than one POSC in their countries. Hence, the implementation was very heterogeneous, and it is difficult to group the different ways of introducing POSCs. This may be due to the different administrative traditions and institutions among the Member States. Many POSCs are established by having POSC tasks assigned to pre-existing institutions/ authorities. With the one exception in Germany, no new authorities were established in the EU. As, for example, in Italy, new offices have only been established within pre-existing authorities.[25]

In some Member States, for example, Austria, there have been discussions about whether different chambers should be exclusively entrusted with the tasks of the POSC. These considerations partially resulted in the chambers bearing the task of representing, organising, and helping the local economy. By taking over the tasks of the POSC, the chambers would have to fulfil tasks outside their given framework; moreover, the chambers would even work to the benefit of their members' potential competitors. Furthermore, an entrustment of the chambers would give rise to a new legal framework for chambers. Obviously, this was assessed differently in, for example, Luxembourg, where the Chamber of Commerce and the Chamber of Professional Trades are the physical POSCs for companies.

With regard to the question as to whether an objective or a subjective understanding operates in a Member State, the question has explicitly only been dealt with by a few reports that agree on a subjective understanding. Austria and Germany, by establishing more than one POSC for their country, of course, by necessity had to present the subjective view. The Netherlands, perceiving the SD as allowing more POSCs, did not follow this approach when establishing only one POSC. The Irish rapporteurs mention that, even though unlikely, further POSCs could be established for special service sectors. Those states that established only one POSC may have done so because of an objective perception of the SD′s conception about POSC. But this is mere speculation, since no answers have been provided in this regard.

Regarding the reallocation of competences when the POSC is introduced, the picture is homogeneous. Although in three reports (Ireland, Portugal, Sweden) such reallocations are perceived as not impossible in the further process of

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[23] Council document 17470/10, p. 4.

[24] An assessment of the POSCs and their individual functions can be found in both studies mentioned in footnote 19.

[25] According to the SPOCS study (footnote 19), there are 500 physical POSCs in Italy.

implementation, all other rapporteurs report that the reallocation of competences was not and is not planned in their Member State. One peculiar exception is Italy, where the law provides that, in case local administrations do not create a POSC, the competence can be transferred to the Chamber of Commerce.[26]

Private partners have not been involved in establishing the functions and work of POSCs in most Member States, but they have been partially involved in infrastructural and predefining work (e.g., Lithuania). In Finland, for instance, private involvement only concerned information technology consultants. Similarly, in Hungary, contractors were involved in the establishment of the procurement procedure of virtual POSCs. In France, the health protection offices, which build one of the seven networks of the Centres for Business and Administrative Proceedings, are a private legal body. Thus, one can assume that private partners are involved in France's POSC system. In Germany, the state of Bremen assigned the POSC tasks to entities run as in a private law firm. In Italy, private partners may be involved in verifying the existence of legal conditions to start, modify, transfer, or close an undertaking, and this verification is equivalent to authorisation if no discretionary power is to be exercised in the course of the verification. Private partners therefore need accreditation, but regulations for this have not yet passed. In Luxembourg, the accreditation of private partners is possible by law but has not yet been established. As mentioned above, in Romania, a private consortium was involved in establishing the POSC infrastructure. Other Member States assume the possibility of involving private partners but have not yet done so.

Finally, with regard to the liability of POSCs, the Member States basically have not established any new rules but have maintained general rules on (state) liability. Only Hungary seems to have drafted a special decree concerning the liability of POSCs. In some other Member States, liability is provided for in specific rules about the division of liability between POSCs and the competent authorities (e.g., Austria, Latvia, and Sweden). In Belgium, insurance against professional liability for POSCs is needed, but besides the usual principles of Belgian administrative law apply. In several cases, the liability is subject to civil law, which is partially the case in France, depending on the network's legal identity, and in Lithuania, where however the administrative courts decide upon state liability issues.

From the inexistence of any *special* remarks in the national reports, one can conclude that, *basically,* there are either no fees for the use of a POSC or only those that usually apply in the national legal systems.

One problem that has not really been solved is whether the POSC portals must be presented in different languages or whether the domestic language suffices. Besides many other topics, this issue was discussed with the participants of this research in a symposium supported by the Fritz Thyssen Foundation[27] in April 2010. The SD itself does not contain any provision on language requirements;

[26] The SPOCS study (see footnote 19) indicates decisional powers in the Czech Republic and Slovakia. However, the country reports do not hint at this assumption.

[27] See http://www.fritz-thyssen-stiftung.de.