THE NEW SERVICES DIRECTIVE OF THE EUROPEAN UNION – HOPES AND EXPECTATIONS FROM THE ANGLE OF A (FURTHER) COMPLETION OF THE INTERNAL MARKET: SPANISH REPORT

Luis M. Hinojosa Martínez[*]

I. National Debates and Expectations

1. Debates during the negotiation process

From the beginning, the Spanish Government placed itself among the supporters of the Services Directive (SD, hereinafter), taking the general point of view that our services sector would benefit from enhanced openness and competition in the European Union. Shortly after the European Parliament voted on the first reading of the draft in February 2006, the Spanish Government, together with some other Member States, signed a letter supporting the Commission in its attempt to open the service sector[1].

During the negotiation process, the Spanish government, together with the United Kingdom, Italy, Holland and the new Member States, often found itself defending the wider scope of the Directive.

In the Spanish Parliament there was no political debate between the two most important political parties (the Socialist Party and the Popular Party) during the negotiation of the Directive. Only *Izquierda Unida* (*United Left*, the coalition which includes the Communist Party) presented a non legislative proposal in Parliament in 2005 to press the Government either to introduce important changes in the draft during the negotiation or to vote against it in the Council[2].

The position of the social partners changed during the negotiation process. The socialist trade union UGT issued an official press release on 23 March 2005 opposing the draft SD, arguing that it would break social cohesion and the harmonisation of workers' rights. Its main concern focussed on the rights that should be respected in the transfrontier posting of workers, which ought to include those inferred from collective agreements in the hosting country. In February 2006, UGT assessed positively the text amended by the European Parliament at first reading, because the Directive "will not affect labour law or the Social Security system". Although more critical, *Comisiones Obreras* (CCOO, the trade union closer to *Izquierda Unida*) followed a similar evolution.

It is clear that the position of the trade unions and the left-wing political parties changed after the negotiations in the European Parliament and the approval of its amendments at first reading. The crucial point was the elimination of former Articles 24 and 25 on the

[*] Ph.D., LLM (LSE, London), Licence spécial en droit européen (ULB, Brussels), Professor of European Law, Department of Public International Law, Granada University <hinojosa@ugr.es>.

[1] Letter to the Commission of 21 February 2006, signed by Spain, United Kingdom, Holland, Poland, Hungary and the Czech Republic.

[2] Boletín Oficial de las Cortes Generales, Serie A, n.º 127, 19 April 2005, 2-4. The proposal was unanimously approved in the Joint Commission Congress-Senate for European Affairs (*Comisión Mixta Congreso Senado para asuntos Europeos*), after *Izquierda Unida* accepted some amendments introduced by the Socialist Party. This text emphasised the necessity to reconsider the general application of the country of origin principle and a more detailed study of the Directive's consequences with regard to services of general interest and services of general economic interest.

posting of workers. Spanish legislation (Ley 45/1999[3]) imposes several obligations on a provider of services transferring workers to Spain, such as the obligation to communicate to the Spanish authorities the identity of the undertaking and workers involved before the movement takes place, as well as the conditions and duration of stay (Article 5), and the obligation to name a representative that will have to appear before the Labour Inspectorate when required, and to keep employment documents on its territory (Article 6). These provisions were clearly incompatible with former Article 24 (1) of the SD that only established a later right of information in Article 24 (2) in a period of up to two years after the end of the posting[4]. Besides, the elimination of former Articles 24 and 25 of the Directive, and the introduction of paragraph 6 in Article 1, establishing that the Directive does not affect labour law[5], nor the national social security legislation, were accompanied by a Commission Communication on the posting of workers in the framework of the provision of services[6]. In this Communication, the Commission to some extent softened its position, and considered compatible with ICJ case-law the obligation to name a foreman to act as a link with the Labour Inspectorate, the legality of the obligation to provide some prior declarations or the requirement to keep certain social documents on the host country territory. All these developments explain the lessening of the opposition to the Directive.

2. Debates during the referendum on the Treaty establishing a Constitution for Europe

During the campaign for the referendum some of the NO supporters used the opposition to the 'Bolkenstein' Directive to stress the anti-social character of the European integration process, demagogically confusing both debates, so that it would seem that the Directive was inserted in the Constitution. The free movement of services was sometimes presented as one of the 'novelties' of the Constitution, and one of the biggest threats to the European social model in recent history.

Nevertheless, the strong support for European integration in Spanish society overcame those arguments, and the fact that both the Socialist and the Popular parties (the majority ones) wholeheartedly supported the YES vote, prevented those complaining about an anti-social Constitution from succeeding[7].

3. Macroeconomic studies on the impact on economic growth and employment

The Spanish government has not made any independent report on the economic effects of the SD, and trusts the studies developed by the Commission and other independent entities[8]. Therefore, the negotiation of the text and its amendments was not affected by macroeconomic considerations but by political and legal arguments.

[3] Ley 45/1999, 29 November 1999, BOE n. 286, 30 Nov. 1999, 41231.
[4] SERRANO OLIVARES, R., 'La propuesta de "Directiva Bolkenstein": ¿es razonable la alarma política y sindical suscitada?, February 2005, available at www.upf.edu.
[5] This is confirmed by Article 16 (3) of the SD, which establishes that the provisions on the free provision of services do not prevent the Member States from applying its rules on employment conditions, including those laid down in collective agreements.
[6] COM (2006) 159 final, issued on the same date that the Commission approved its modified draft of the Services Directive (4 April 2006).
[7] Final outcome in the Spanish referendum for the European Constitution: Yes (76,73%), No (17,24%).
[8] E. GORDO/ J. JAREÑO/ A. URTASUN: Radiografía del sector servicios en España, Documentos Ocasionales del Banco de España No. 0607, Madrid, 2006; Copenhagen Economics: Economic Assessment of the Barriers to the Internal Market for Services. Final Report, January 2005; L. VOGT,

The Spanish Chambers of Commerce confirmed to this reporter that they had not performed any specific research on the macroeconomic effects of the SD for their associates or the Spanish services sector.

II. Constitutional Aspects of the Directive

4. Competent authorities to transpose

Spain is a highly decentralized country from the political and administrative perspectives. Each Administration (central, regional and local) is responsible for developing or applying European legislation falling within the boundaries of its constitutional competencies. Well established jurisprudence of the Constitutional Court has certified this division of competencies on numerous occasions[9].

It is precisely the great variety of Administrations involved and the multiplicity of legislations concerned that poses the greatest challenge to the correct and comprehensive implementation of the SD in Spain.

In March 2007 the Government Commission for Economic Affairs (CDGAE hereinafter) created a Working Group for the Transposition of the SD (Working Group, hereinafter). This Group arranged several meetings during 2007 with all the Ministries concerned, with the Regions (*Comunidades Autónomas*, CCAA hereinafter), and with the Spanish Federation of Local Authorities (*Federación Española de Municipios y Provincias*, FEMP hereinafter). Some European Commission officials have been invited to these meetings. The presidency of the Working Group, and the main responsibility for the coordination of the transposition process, have been given to the Ministry of Economy and Finance. The CDGAE has also created a Technical Working Group with the task of drafting the Framework Law that will implement the SD at a general level.

Each Region has undertaken the obligation to name a Single Coordinator that will be recognised by the State, by the other Regions and by the local authorities as the person responsible for the transposition of the Directive with regard to regional legislation. This person will be also responsible for the coordination of the different Regional Government Departments. Sectorial conferences will be arranged between the State and the Regions, and the coordination on general issues will be dealt with in the CARCE[10].

The coordination of the transposition by the local authorities will be organised through the FEMP, which represents most but not all the Spanish municipalities[11]. The complexity of this coordination is undoubtedly fearsome, because the local authorities keep a considerable amount of competencies related to internal commerce and

---

The EU's Single Market: At your Service?, OECD Economics Department Working Paper, Doc. ECO/WKP(2005)36, 7 October 2005.

[9] Tribunal Constitucional (Constitutional Court), judgement 95/2001, 5 April 2001, BOE n. 104, 1 May 2001, point 2.

[10] *Conferencia para Asuntos Relacionados con las Comunidades Europeas* (Conference for European Communities Affaires), which is the organ of general coordination between the State and the Regions for European Affaires.

[11] The National Commission of Local Administration (*Comisión Nacional de Administración Local*), an organ of the Ministry of Public Administrations will also be given a leading role in this coordination.

authorisation regimes, and the evaluation of all that legislation will need time and considerable technical assistance.

Although each Administration is responsible for the compatibility of its legislation with Community law (at the domestic level), the coordination of the transposition process is necessary because some of the normative reforms will have to be consistent for the three main levels of Administration. Aware of the huge dimension of the task ahead, the Ministry of Economy is preparing, with the cooperation of the responsible Departments of the Regions, a training programme for civil servants, aimed at the personnel that will have to identify and evaluate the legislation affected by the SD in each Administration unit. The EU Commission has been asked to cooperate in this program.

5. Changes in the Spanish Constitution?

No changes will be needed in the Spanish Constitution to implement the SD, because it does not alter the constitutional distribution of competencies. The existence of points of single contact does not predetermine the Administration competent to develop the legislation applicable to each service activity or to enforce the authorisation regimes [Article 6 (2) of the SD].

In any case, the State continues to be the Administration with final responsibility for the correct application of European Law (Article 93 Spanish Constitution).

6. Legal form of the transposition

The SD will certainly need transposition, and this will be done in two levels: on the one hand, a general Framework Law and, on the other hand, several sectorial normative initiatives.

A) The general Framework Law

The Spanish Government intends to enact a Framework Law that will transpose the Directive on general issues valid for the whole territory of the country and for all service sectors concerned. The objective is to fulfil the obligation to transpose the SD with this Law[12] and to provide a framework for the regional and local legislation. Thus, this Law is intended to perform a very important and comprehensive coordinative task, which will be especially important for local authorities. This Framework Law will also implement all the horizontal obligations imposed by the SD that fall under State competence.

A Technical Working Group has been created by the CDGAE in order to prepare a draft, which is expected in a preliminary form for March/April 2008. This proposal should be approved by the Government in autumn 2008, so that it would pass through the parliamentary procedure during 2009, and could enter into force at the end of 2009.

B) Sectorial normative initiatives

[12] The General Framework Law may literally reproduce the text of several Articles of the SD, so that any legislation at regional or local level eventually contravening it would be void in the Spanish legal system.

The process of identification of the norms affected by the SD is still in process at the time of writing, and it is supposed to be finished by the end of December 2007. The State Government has sent the CCAA and the FEMP instructions to identify and evaluate the legislation that falls within the scope of the Directive.

The process of evaluation of the compatibility of the sectorial legislation with the SD should finish in January 2009 for norms with legislative rank and in May 2009 for norms of lower rank. Each Ministry of the Central Government will coordinate the work of evaluation of the sectorial legislation within its scope of activity, and will organize thematic Conferences with the relevant Departments of the CCAA and the representatives of the local authorities. The horizontal coordination of the evaluation process will take place in the CARCE, which will be called for general meetings or even to deal with sectorial issues whenever necessary. Every Ministry of the Central Government and every Region shall send an evaluation report to the Ministry of Economy and Finance identifying the sectorial norms that should be eliminated, modified or justified in accordance with the SD. After the examination of these reports, the Ministry of Economy will present a preliminary report to the CDGAE on the legislative proposals needed to comply with the Directive. As said before, this will allow the CDGAE to approve the report on the sectorial legislative changes to be made in January 2009. During that year, the necessary legislation will pass through the Parliamentary procedure, so that it can enter into force in December 2009 at the latest.

The Departments of the CCAA and the local authorities shall communicate to the corresponding State Ministry the sectorial legislative changes enacted to implement the SD (non sectorial laws will be communicated to the Ministry of Economy). Afterwards, each Ministry will elaborate a report on the sectorial transposition process (including the three levels of Administration) for the Ministry of Economy, which will send all this information to the Foreign Affairs Ministry. The last will transmit these data to the European Commission.

To sum up, the SD will be transposed through a general Framework Law at state level, and both sectorial legislative norms and sectorial administrative norms at the three main levels of Administration (State, regional and local).

III. Scope and General Aspects and Effects of the SD

7 & 8. Service sectors most substantially affected by the existence of legal impediments incompatible with the SD

At present, it is difficult to foresee which service sectors will be most substantially affected while the Spanish Administrations are still identifying the legislation concerned by the SD. Nevertheless, some general comments can be made at this stage.

On the export side, the strong Spanish building and public works sector expects to benefit from enhanced liberalisation in the provisions of services and from the increased transparency of the regulatory system of other Member States where the Spanish firms have found entry hurdles in the past (for example, in Portugal)[13].

[13] The Commission has also brought an action against Spain before the ECJ for failing to comply with Directive 2004/18/EC, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Case C-255/07, 30 May 2007).

On the import side, the SD may produce a strong impact on the national law regulating the establishment of commercial premises. Spanish law is very concerned with the protection of the retail sector, and it has established various obstacles for the creation of big new supermarkets. It also gives the regions wide competencies to regulate the granting of authorisations, taking into account commercial considerations, the needs of the market, and the impact of any potential new premises on existing traders[14]. Thus, the regional Parliaments have exercised this legislative capacity establishing very burdensome requirements for the construction of new premises, and the Commission has already sent a reasoned opinion to the Spanish government in relation to Spanish and Catalan commercial town planning rules, following a complaint from distributors of several Member States[15]. More specifically, the Catalan laws questioned by the Commission impose a tax on supermarkets of more than 2,500 square metres (Catalan Law 16/2000), and make the authorisation to open new premises subject to several economic conditions, such as "its negative impact on retail trade in the area". In the decision-making leading up to the authorisation, a *Commission on Commercial Premises* (where the traders already established are represented) drafts a report on the desirability of the concession of the authorisation, which will be taken into account by the local authorities when deciding upon the authorisation (Catalan Law 17/2000[16]). These regulations seem clearly incompatible with Article 14 (5) and (6) of the SD, which may thus contribute to a considerable liberalisation of the commercial sector[17].

The SD could also have an impact on some regional regulations that require the possession of a certificate issued by that Region in order to have access to certain professions. Their autonomous competencies allow them to establish those certificates which may not exist in other Member States or even in the rest of Spain. While Directive 2005/36/EC should solve all the problems related to the requirement of a professional qualification, Article 15 (2)(d) of the SD would oblige Member States to prove the non discriminatory effect, the necessity and the proportionality of other certificates that cannot be considered professional qualifications, strictly speaking, but limit access to certain professional activities (for example, because of deontological, cultural or bureaucratic reasons)[18].

Finally, a sectorial analysis may discover some specific rules that will hardly pass the test to justify non discrimination, necessity and proportionality. For example, the testers of installations emitting greenhouse gases have to communicate to the regional authorities that they intend to operate in their territory one month in advance, if they are

[14] See Article 6 of Ley 7/1996 on the retail sector, BOE No. 15, 17 January 1996.
[15] IP/07/1518, 17 October 2007.
[16] See Articles 7 and 8 of Catalan Law 17/2000, BOE No. 20, 23 January 2001.
[17] ANGED, the Association grouping the big supermarket companies in Spain, declared in February 2007 that 3,000 million euros failed to be invested every year because of the restrictions to the establishment of new premises imposed by regional laws, and pointed to Catalonia, the Basque country, Asturias, and the Canary and Balearic Islands among the most restrictive regions.
[18] See for example Catalan Law 12/2001, BOE No. 206, 28 August 2001, establishing the compulsory registration in a professional body for the exercise of the professions of jeweller, gold/silversmith, and watchmaker, with the objective of conserving the "traditional ethical values" and the "social function" of the career. The law created an organ (within that professional body) to authorise the exercise of this profession to those without the official regional certificate and three years of experience only if this was sought during the first year of validity of the law.

established in a different Spanish Region, and three months in advance if they are established in another Member State[19].

9 & 11. Taking into account the codification of ECJ's jurisprudence, will the Directive leave things unchanged (will no transformation be necessary)?

As explained in the answer to question 6, the SD will require a huge effort of implementation. Besides Chapters III and IV, the SD incorporates many other obligations that do not reflect ECJ's case-law and need legislative implementation, such as the rules on administrative simplification, points of single contact, rights of recipients of services, quality of services and administrative cooperation.

As regards Chapter III on freedom of establishment, it is true that the SD basically reproduces the criteria already developed by the ECJ in its jurisprudence, and theoretically all national legislation should already be compatible with these rules. Nevertheless, the thorough examination of all authorisation schemes in the complex world of Spanish administrative law, and the reporting obligations provided for in Articles 9 (2) y 15 (5) of the SD, may unveil some hidden administrative restrictions, above all at the local level.

In Chapter IV on free movement of services, the Commission interprets the list of reasons of general interest [Article 16 (3)] that may justify an exception to the prohibition of restrictions on that freedom as a closed one, and "this excludes Member States from invoking other public interest objectives"[20]. If this reading is upheld by the ECJ, it would reduce the ability of the Member States to justify limitations to other European providers of services beyond the Courts' case-law[21]. It is likely that during the evaluation process some national norms may be found incompatible with this further liberalisation.

The reform of the draft SD in relation to the posting of workers (see the answer to question 1) may avoid any changes to the Spanish legislation on this issue, even if it fits only with difficulty in the criteria established by the Commission in its Communication on the posting of workers in the framework of the provision of services[22].

10. Would sector specific measures be better?

The general approach applied by the Commission will clearly have more positive and comprehensive effects than sector specific measures. The negotiations for the adoption of these sectorial norms would have delayed the liberalisation of many service areas for years. Many of the sectors with specific characteristics are exempted from the Directive (Article 2 SD) or from the free provision of services principle (Article 17 SD).

[19] Royal Decree 1315/2005, BOE No. 268, 9 November 2005.
[20] EC Commission, Handbook on the Implementation of the Services Directive, Luxembourg, 2007, 49-50.
[21] ECJ's case-law does not accept the restrictions imposed by national legislation for the protection of a public interest when there are Community harmonisation norms that already deal with such a public interest (Judgement of 18 May 2000, Commission v. Belgium, C-206/98, § 45). In the past, however, the Court has admitted other general interests different from those mentioned in Articles 16 (3) and 17 of the SD that could justify restrictions to the provision of services (i.e. the promotion of research and development [judgement of 10 March 2005, Fournier, Case C-39/04]).
[22] COM (2006) 159 final, 4 April 2006.

Therefore, the SD combines the horizontal approach with the acknowledgement of the existence of different degrees of liberalisation and distinct social interests in specific sectors.

From the Spanish point of view, the horizontal approach is especially interesting because one of the main problems for the liberalisation of services lies in the complexity of the legislation concerned. The multiplicity of authorities and competencies shapes a rather opaque normative environment. The general perspective of the SD will help to clarify and harmonise national law, improving efficiency and legislative techniques.

IV. Substantive Provisions of the SD

12 and 13. Most important existing restrictions for the establishment of service providers (Chapter III) and changes needed

During the coordination meetings for the implementation of the SD, the Ministry of Economy insisted on the wide approach that should be taken when identifying the affected authorisation regimes. In order to promote awareness of the full scale of the task ahead, it has diffused the ample definition of authorisation contained in Recital 39 of the SD.

A reference has already been made in the answer to questions 7 & 8 to the problems of compatibility with the SD that may arise in relation to the rules on the authorisations for the establishment of commercial premises and for the exercise of certain professions that require a regional certificate.

The authorisation regimes in the context of the transport and distribution of energy may also encounter some problems of consistency with the transparency and objectivity requested by the SD [Article 10 (1) and (2)]. When deciding upon the granting of an authorisation for the establishment of distribution installations the Administration enjoys a wide margin of discretion, and it may reject the authorisations if it considers that they will have 'a negative incidence on the functioning of the system'[23]. The Commission is also prosecuting the Spanish Government before the Court for failing to adopt the laws, regulations and administrative provisions necessary to transpose Directive 2004/17/EC, on the coordination of the procurement procedures of entities operating in the water, energy, transport and postal services sectors[24].

Besides, the Commission is especially pressuring the Spanish Government in the energy sector, following the legislative changes and administrative decisions that have taken place in the fight for the control of Endesa (the biggest Spanish electric company). In 2006, following E.ON's bid for Endesa, the Government extended the powers of the National Energy Authority (*Comisión Nacional de Energía*, the Spanish electricity and gas regulator, CNE hereinafter). Royal Decree-Law 4/2006 included provisions that subject to an authorisation procedure the acquisition of over 10% of share capital, or any other percentage giving significant influence, in a company that engages, directly or indirectly, in regulated activities or activities subject to special administrative control, as well as the direct acquisition of assets to carry out these activities. The Commission has

[23] Article 40 of Ley 54/1997 on the Electric System, BOE No. 285, 28 November 1997.
[24] Action brought on 30 May 2007, Case C-254/07.

asked the ECJ to declare that these provisions violate articles 43 and 56 of EC Treaty[25]. In the same affair, the Commission considered that some of the conditions imposed by the CNE on E.ON's bid[26], and later on Acciona/ENEL's bid[27], were incompatible, among other provisions, with those regulating the freedom of establishment. Therefore, the jurisprudence of the ECJ in these cases, and the stringent rules imposed in the SD in relation to authorisation regimes, may significantly push forward the liberalisation of the energy sector in Spain. However, the important presence of the State in the 'national energy champions' of other Member States will continue to pose political and legal problems in the future, as in Spain it is felt that there is no level playing field in the European energy market.

In the construction sector, after the adoption of Ley 38/1999 on the Ordering of Building Works, several CCAA have approved implementing legislation in which they condition the authorisation to operate in their region to enterprises dedicated to the quality control of building, to the establishment in their territory of a branch, with sufficient human, material, and technical resources to fully comply with their responsibilities[28]. If these obligations collide *prima facie* with the prohibitions on restrictions to the provision of services established in Article 16 (2) (a), (b), and (c) of the SD, they could also infringe the authorisation criteria for establishment, or at least they would have to be justified according to Article 15 (2) (b) or (f): the provider is obliged to adopt a specific legal form and, in practice, to hire a minimum number of employees. It is to be hoped that if these rules are reformed, among other things, in order to allow other EU providers to operate throughout the whole territory of Spain [Article 10 (4) of SD], the benefit will be extended to the Spanish providers of services (that now have to seek authorisation for each region) to avoid reverse discrimination.

A final remark can be made concerning the heterogeneous world of authorisation regimes created by local authorities. The trend towards political decentralization in Spain, and the fund raising needs of the 8112 municipalities existing in the country, have resulted in a myriad of very different authorisation regimes established and managed locally. In spite of the efforts of the Ministry of Economy, it would be surprising if a comprehensive evaluation of the compatibility of these regimes with the SD reached every hidden and remote corner of the Spanish State.

14. Black list of prohibited restrictions [Art. 16 (1) and (2)]: changes needed

On the one hand, in the answer to questions 7 & 8, it was said that the testers of installations emitting greenhouse gases have to communicate to the regional authorities that they intend to operate in their territory one month in advance, if they are established in a different Spanish Region, and three months in advance if they are established in another Member State. This is difficult to reconcile with the non discrimination obligation provided for in Article 16 (1)(a) of the SD.

[25] Action brought on 19 April 2007, Case C-207/07.
[26] Doc. IP/06/1853, 20 December 2006.
[27] Doc. IP/07/1858, 5 December 2007. The Commission considers incompatible with the right of establishment, among other things, the obligation to maintain Endesa as an independent company, including its brand, and its decision-making centre in Spain, the limitation in Endesa's debt service ratio, or the limitation with respect to Endesa's dividends distribution policy.
[28] See Article 14 (3)(b) of the Ley 38/1999, BOE No. 266, 6 November 1999.

On the other hand, in the answer to questions 12 and 13, a reference has already been made to Ley 38/1999 on the Ordering of Building Works, and its implementation by several CCAA, requiring the establishment in their territory of premises in order to develop activities of quality control of building [see Article 16 (2)(a), (b), and (c)]. In the answer to questions 7 & 8, it was said that the exercise of some professions requires a compulsory registration in a professional association [see Article 16 (2)(b)][29]. All these obligations seem to collide with some of the blacklisted prohibitions of Article 16 (2) of the SD, and they will be almost impossible to justify on the grounds of the four public interest objectives mentioned in paragraph 3 of the same Article.

It is almost certain that the identification and evaluation procedure now in course will unveil other service sectors where some of the blacklisted restrictions can be found.

15. National restrictions are justified by many overriding requirements of general interest to some extent contained in the SD [Arts. 1, 2 (3), 3 (2), 16 (3), 17 and 18]: will it induce changes?

Almost all the requirements of general interest that could justify a restriction to the freedom of establishment or the provision of services, according to the case-law of the ECJ, have been taken into account in the SD, either through the exclusions made in Article 2, or in the exceptions to the free provision of services principle of Article 17. For example, the protection of the good reputation of the financial system[30], or the promotion of savings in the medium and long term[31] [Article 2 (2)(b) excludes financial services from the scope of the SD]; the cohesion of the tax system[32] [(Article 2 (3) says that the Directive will not apply to taxes]; the safeguarding of cultural pluralism on television[33] [Article 2 (2)(g) excludes audiovisual services from the scope of the SD]; the navigational safety[34] or road traffic safety[35] [Article 2 (2)(d) excludes transport services from the scope of the SD]; the protection of intellectual property rights[36] [Article 17 (11) excludes these rights from the free provision of services principle], etc.

Furthermore, the whole open list of general interests drawn from ECJ's case-law may continue to be invoked for the justification of authorisation regimes[37] (Articles 9, 10 and 15) and for the explanation of any restrictive national measures in the service sectors mentioned in Article 17. Thus, the SD will not have such a revolutionary impact in the reduction of requirements of general interest that may be invoked by the Member States in order to justify national measures which restrict the provision of services in a non discriminatory manner, and respecting the principles of necessity and proportionality. In most of the cases where the invocation was justified in the past, it will continue to be so.

[29] E.g., for the exercise of the professions of jeweller, gold/silversmith, and watchmaker in Catalonia.
[30] Judgement of 10 May 1995, Alpine Investments, C-384/93.
[31] Judgement of 5 October 2004, CaixaBank, C-442/02.
[32] Judgement of 28 January 1992, Bachmann, C-204/90.
[33] Judgement of 25 July 1991, Commission v. Netherlands, C-353/89.
[34] Judgement of 17 May 1994, Corsica Ferries, C-18/93.
[35] Judgement of 10 July 2003, Commission v. Netherlands, C-246/00.
[36] Judgement of 18 March 1980, Coditel, 62/79.
[37] Thus, for example, the Spanish Government has claimed that its legislation on commercial premises (see answer to questions 7 and 8) is justified for protecting the environment and the needs of town and country planning.

16. Understanding the difference between the 'country of origin principle' and the final draft (Art. 16)

As an obvious first submission, it should be remembered that any change introduced by the amendments to Article 16 only affects service sectors not excluded from its scope of application (mainly by Articles 2 and 17).

The ECJ case-law already limits the kind of measures that Member States may apply to the access to or exercise of a service activity in their territory. Any restriction on the free provision of services has to be justified by imperative reasons relating to the public interest, applied non-discriminatorily, necessary in order to ensure compliance, and not exceeding what is necessary to attain those objectives. In particular, a Member State may impose a requirement only 'in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established'[38]. Therefore, all national measures imposing any kind of hindrance on the free provision of services already have to pass the test established by Article 16 (1) of the SD final draft. The only difference to the current jurisprudence of the ECJ lies in the number of principles of general interest which may be invoked [reduced by the SD to the four mentioned in Article 16 (1)(b) and (3)][39]. In practice, the ECJ case-law establishes a country of origin principle only limited by the overriding requirements of general interest.

The 2004 SD draft arrived at the same situation as the 2006 draft, because the country of origin principle did not apply to 'specific requirements of the Member State to which the provider moves, (…) indispensable for reasons of public policy or public security or for the protection of public health or the environment' [Article 17 (17) of the 2004 draft]. Thus, there is no substantial change between the 2004 and the 2006 drafting. The latter simply disguises the country of origin principle for political reasons. This explains why some French and Belgian socialists, the communists and the ecologists were against the definitive version of the SD.

Even the exclusion of the consumer protection rules from the scope of the SD in its Article 3 (2) will not provoke any difference in practice from the 2004 draft, where these rules were exempted from the country of origin principle [Article 17 (21) of the 2004 draft]: after both texts, any restriction imposed by the Member States for this reason has to be evaluated according to the traditional jurisprudence of the ECJ on the overriding requirements of general interest.

17 and 18. Legislative changes needed in relation to rights of recipients of services (Chapter IV, Section 2) and the standards of quality of services (Chapter V)

[38] Judgement of 25 July 1991, Säger, C-76/90, § 15. As a question of principle, in Bacardi France the ECJ established that 'Article 59 of the Treaty requires the elimination of any restriction on the freedom to provide services, even if it applies to national providers of services and to those of other Member States alike, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services', judgement of 13 July 2004, C-429/02, § 31.

[39] G. DAVIES, The Services Directive: Extending the Country of Origin Principle and Reforming Public Administration, 32 E.L.Rev. (2007) 232, at 238-239; P. PELLEGRINO, 'Directive sur les services dans le marché intérieur. Un accouchement dans la douleur', 504 RMC et de l'UE (2007) 14, at 17-18.

The improvement of rights of the recipients of services must be considered as one of the most outstanding achievements of the SD, although the demagogy that surrounded the negotiating process overshadowed this attainment. That may partially explain why both the Spanish authorities and the Commission seem to be more concerned with the implementation of the rules applicable to the providers of services rather than those that concern the consumers of services.

In spite of this, the SD rules on recipients of services will need some implementation in Spain, because they establish obligations that go beyond the previous legal *statu quo*. For example, the prohibition on discrimination in the general conditions of access to a service relating to the nationality or place of residence of the recipient [Article 20 (2) of the SD] is intended to have horizontal effect among private persons, and will need transposition in the Framework Law implementing the Directive. From a more general point of view, this Law should be carefully and comprehensively drafted in order to harmonise the normative work that will be developed by the local authorities. Many service activities are regulated at the municipal level, and without a very precise implementing Law, which can be relied upon by consumers before the national courts, the SD will not develop its full effectiveness.

In any case, from a material perspective, the content of chapters IV (Section 2) and V of the SD will not generate major reforms in the Spanish legal system for consumer protection. For example, practically all the information rights established in Article 22 of the SD seem to be already laid down by the General Law for the Defence of Consumers and Users[40]. However, some particular points may require specific implementation, such as Article 27 (4) of the SD, on the obligation of information by providers who are subject to a code of conduct, or are members of a trade association or professional body, on the recourse to a non-judicial means of dispute settlement.

V. Procedural and Administrative Provisions

19. Challenges and benefits of administrative simplification in Spain

The administrative simplification requested by the SD has been tackled by the Spanish government in the context of the National Action Programme for Reducing Administrative Burdens, approved as a result of the European Council Presidency Conclusions of 2 May 2007. In this meeting, it was agreed that Member States would try to reduce by 25% the administrative burdens arising from national legislation by 2012[41].

In fact, Articles 6, 7 and 8 of the SD have already been transposed by Articles 6 (3) and 44 (2) of the Ley 11/2007 on the Electronic Access of Citizens to Public Services[42]. They oblige every public Administration to guarantee that all the procedures and formalities for the access to services activities, and all the information related to those activities, will be available through points of single contact and by electronic means on

[40] *Ley General para la Defensa de los Consumidores y Usuarios*, Ley 26/1984, whose present text has been rewritten in the Real Decreto Legislativo 1/2007, BOE No. 287, 30 November 2007.
[41] Presidency Conclusions of the European Council, 8/9 March 2007, Doc. 7224/1/07, 2 May 2007, at 9-10. The Commission agreed to achieve the same objective with regard to the burdens resulting from EU legislation.
[42] BOE No. 150, 23 June 2007.

31 December 2009. This date is compulsory for the State administration, but for regional and local administrations the obligation is qualified by the phrase 'if it is possible according to its budget availabilities'[43].

At present, there are two networks in Spain that could have some similarities with the points of single contact:

a) 060 empresas[44]: There are 31 of these centres in Spain, covering 13 CCAA. These give information and enable all the State, regional and local formalities to create an enterprise to be carried out, although not yet electronically.

b) PAIT[45]: In order to become a PAIT, an entity has to sign an agreement with the Ministry of Industry (there are now more than 180 offices throughout Spain). They make possible the electronic processing of the State (and some regional) formalities for the creation of different kinds of companies.

Although neither of these networks can be used at present for the recognition of professional certificates or qualifications, nor may they be used for anything apart from creating an undertaking, the Spanish Government intends to merge both webs as the basis for the establishment of the points of single contact. With this fusion, the network would cover all the Spanish CCAA except the Basque Country (16 out of 17). It has not been decided yet how the local legislation will be incorporated in the system and whether every town hall will become a point of single contact. Only 31 local entities participate in the existing network and they do it on a voluntary basis.

If it is successfully completed, administrative simplification will be the most important outcome of the SD in Spain. The main problem for the access to the Spanish service sector derives from the multiplicity of authorities with regulatory competences[46]. The complexity and the lack of transparency of the legal system are, in themselves, serious obstacles to the free provision of services, and may help to hide restrictions incompatible with Community law. From a more general perspective, the modernisation of Member States administrations seems to be the key contribution of the SD to the improvement of service sector competitiveness in Europe.

20. Challenges and benefits of administrative cooperation in Spain

For the purposes of Administrative cooperation, the Spanish government intends to designate as liaison points one national general coordinator (in the Ministry of Public Administrations) and 17 delegated coordinators (one for each region). At the time of writing, the designation has been delayed by the belated appointment of some of the 17 regional liaison points.

Some Spanish officials seem to be worried about the problems that may arise out of the obligation to accept documents which are not delivered in their original form, or as a

[43] Ley 11/2007, Third Final Section.
[44] See http://www.vue.es.
[45] *Puntos de Asesoramiento e Inicio de Tramitación* (PAIT). See http://www.circe.es.
[46] EUROCHAMBRES, Mapping the Implementation of the Services Directive in the EU Member States - The Chamber's Perspective, May 2007, at 23; L. VOGT, L., The EU's Single Market: At your Service?, OECD Economics Department Working Paper No. 449, 7 Oct 2005, at 14, §13.

certified copy or as a certified translation [Article 5 (3) of the SD]. They also point out that there will be budgetary problems and lack of human resources in some Administrations if the SD generates too many demands for cooperation. Other officials trust their good experience with the Internal Market Information System promoted by the Commission and think that administrative cooperation will work reasonably well. Articles 30 and 31 of the SD impose very concrete obligations. In fact, if the system of cooperation functions properly, it could spread its benefits well beyond the SD, fostering administrative cooperation in other fields between Member States administrations as stipulated by the principle of reasonable cooperation[47] (Article 10 EC Treaty).

There is also some concern in the Spanish Administration about the absence of Community norms harmonising the certificates of electronic signature[48]. This instrument has been developed with success in Spain, and the confidentiality and security of the system has been reinforced by experience. It is feared that the reliability of this structure may suffer if these delicate data are used by other Member States administrations without the same experience and security filters.

Finally, it is hoped that the speed in the circulation of information will function in both senses, that is to say, not only to adopt measures against those providers of services who commit acts that could cause serious damage to the health or safety of persons or to the environment, or that show a lack of competence or professional reliability, but to communicate their innocence when that is proved by the investigation undertaken.

21. Challenges and benefits of mutual evaluation (screening - Art. 39) in Spain

The convergence programme and the mutual evaluation system turn the SD into an open-ended negotiating process, which will promote future Community legislation in the services area. We find announcements about codes of conduct (Article 37), future legislation on the judicial recovery of debts, private security and transport of cash and valuables (Article 38), the possibility of introducing new proposals to solve the problems detected in the mutual evaluation procedure [Article 39 (4) and (5)], and the review clause of Article 41. Among other things, this means that many of the doubts which the interpretation of Article 16 of the SD poses will be dealt with in the next few years. The Spanish Government intends to face these developments with the full cooperation of the private sector. It has contacted the Chambers of Commerce so that they are entirely associated with the mutual evaluation regime, and they advise the Government on the assessment of other Member States' legislation, giving practical information about the barriers they find when providing services abroad.

On the reporting side, the Ministry of Economy is distributing the forms prepared by the Commission in order to fulfil the information obligations established in Article 39 (1) and (5) of the SD. The harmonisation of the reports to be drawn up by the different Administrations (with distinct political leaderships and material interests) is essential to provide meaningful information to the Commission and to the other Member States. Some Administrations will need technical assistance to prepare the reports, above all at the local level, and the FEMP and the *Diputaciones Provinciales* (the Provincial

[47] Judgement of 11 June 1991, Athanasopoulos, C-251/89.
[48] Directive 1999/93/EC on a Community framework for electronic signatures has not been implemented in an interoperable way by the Member States.

Administrations) should develop implementation programmes if there is the political will to comply with the SD successfully.

The Working Group for the Transposition of the SD (see answer to question 4) is also preparing forms to unify the information to be provided by the different Administrations in the identification and evaluation procedures in relation to Articles 5, 10, 11, 12, 13, 14, 19, 21 and 22 of the SD. These forms will be used on a voluntary basis, but the Government expects that its distribution will improve the utility of the information at the disposal of the central authorities coordinating the SD implementation. Nevertheless, from the beginning, it is possible to appreciate different degrees of cooperation from one region to another.

22. Would it make sense to extend the application of Chapters II, VI, and VII of the Directive to service sectors not covered?

Of course it would. Such an extension would enhance the efficiency of those service sectors, which are in any case covered by the provisions of the EC Treaty on the right of establishment and free provision of services. It is submitted that the Directive cannot curtail the scope Articles 43 and 49 of the EC Treaty[49], and the ECJ has confirmed the application of these provisions to the service sectors excluded from the SD[50]. In those fields, Member States will continue to be obliged to justify their restrictions using the three-fold test of non discrimination, necessity to safeguard a general interest, and proportionality, and must respect the principle of reasonable cooperation (Article 10 EC Treaty).

As a matter of fact, the 060 network, which will be used as the basis for the creation of the points of single contact in Spain (see answer to question 19), can already be employed to create undertakings in some of the service sectors excluded from the Directive (for example, in the financial or the transport areas). This means that at least Chapter II on administrative simplification should in practice also benefit these excluded services.

23. Report on Article16 [Art. 39 (5) of the SD]. Will it suffice taking into account the other overriding principles of general interest which may be invoked (mainly Articles 1, 2, 17 and 18 of the SD)?

There are too many exceptions, and therefore this report will not provide a general picture of the principles of general interest actually invoked by the Member States in all service sectors. Although the wide coverage of the SD should not be undervalued[51], the most sensitive sectors have been excluded from this more intense scrutiny, and the only possible result is a partial view of the situation.

In any case, Article 44 obliges the Member States to communicate to the Commission the laws, regulations or administrative provisions adopted to comply with the SD, and

[49] T. UYEN DO, 'La proposition de directive relative aux services dans le marché intérieur… définitivement hors service ?, 1 Revue du Droit de l'Union Européenne (2006), 128-129.
[50] See, for instance, judgement of 13 November 2003, Lindman, C-42/02 for games of chance [Article 2 (2)(h) of the SD], judgement of 5 October 2004, CaixaBank, C-442/02 for the financial sector [Article 2 (2)(b)] or judgement 16 May 2006, Watts, C-372/04 for health services [Article 2 (2)(f) of the SD].
[51] See Recital 33 of the SD.

this should give a wider picture (including the service sectors mentioned in Article 17 of the SD). The answer to question 6 explains how this information will be gathered to be sent to the Commission.

As set out in the answer to question 21, the Working Group is preparing for the evaluation process (with an internal and voluntary character) forms that will cover almost every aspect of the SD. Besides, on 29 June 2007, the Ministry of Public Administrations issued a report for the rest of the Spanish Administrations with 'Orientations for the Identification of the Norms affected by the SD'. This document stresses the wide coverage of the Directive and, in particular, the ample definition of 'service' or 'requirement' in Article 4. It also gives many examples of services which arguably should be included in the scope of the SD, and requests previous consultation before ruling out any service sector where doubts may exist.

VI. Obligations under the GATS

24. Is the SD compatible with commitments under GATS?

As recognised by the Commission[52], the SD deals only with the internal market, and does not cover the case of operators from third countries who wish to establish or to provide services in the EU, or the case of branches of companies from third countries. Therefore, this Directive should not affect the obligations assumed in the GATS, and it would be in any case generally covered by the economic integration clause (Article V of GATS). Taking into account the fostering of liberalisation that the SD will produce, it is difficult to see how it could endanger any commitment previously assumed in the WTO.

From a future perspective, the main impact that the SD could have would be the reinforcement of the Commission's powers to negotiate services agreements, as the SD has become part of the Community *acquis*[53]. However, the Commission already represents the Member States in GATS negotiations using Article 133 of the EC Treaty as the legal basis, and the Treaty of Lisbon establishes the general inclusion of the agreements on trade in services in the common commercial policy (Article 188 C Treaty of Lisbon) as an exclusive competence of the European Union. Therefore, in practice, the relevance of the SD for the Commission's powers in the GATS will be very relative.

VII. Conclusions

25. Summary of the most important legal effects

As can be deduced from the answers to questions 4, 6 and 19, administrative simplification will be the major legal consequence of the SD implementation. The Spanish services market suffers from legal opacity and complexity due to the mixture of regulating competencies of different Administrations. From a general point of view, this is the most important entry barrier for foreign providers of services. The establishment of points of single contact, accessible by electronic means, if successfully achieved, will represent a revolutionary progress in a traditionally burdensome and bureaucratic set of

[52] COM (2004) 2 final, 13 January 2004, 15.

[53] E. VAN DEN ABEELE, 'La proposition de directive sur les services : instrument visionnaire au service de la compétitivité ou cheval de Troie dirigé contre le modèle social européen ?', Bilan social de l'Union européenne (2004) 34-37.

Administrations. It will also reduce the economic inefficiencies derived from political decentralisation.

From a material point of view, the evaluation process may help to detect regional and local norms which have to be reconciled with Community law, and that have passed unnoticed in the past, because of their limited territorial scope of application.