



# Transposition of the Services Directive and subsidiarity: A view from Galicia

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**Alberto Núñez Feijóo**

## Abstract

The implementation of the directive on services in the internal market has been a challenge in many parts of the EU. This is particularly true with regard to the interaction between the member states and their public entities, for example, the interaction between the Kingdom of Spain and Galicia. Implementing the directive in Spain required the passage of important legislation, at both the Spanish and Galician levels, and this took several years. Galicia's experience is particularly interesting since the implementation of the directive had to take into account the community's cross-border business activities with Portugal. This article argues that European regions, especially those with legislative powers, cannot confine themselves to merely being recipients of matched funding from the EU budget. Instead, they must take shared responsibility and work together as equal collaborators in implementing European law, even where it clashes with the status quo and the vested interests of certain minorities.

## Keywords

Subsidiarity, Galicia, Spain, Services Directive

## Introduction

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2016 (the 'Services Directive') has extraordinary economic, legal and political significance (European Parliament and Council 2006). Through its provisions for fighting red tape, it is improving the lives of millions. It is not just another EU directive among hundreds of others. It is a horizontal provision which has an economic impact on thousands of small and medium-sized enterprises (SMEs) across all of the EU member states and

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## Corresponding author:

A. Núñez Feijóo, President of Xunta de Galicia, San Caetano, S/N; 15704 Santiago de Compostela, Galicia, Spain.

Email: [secretaria.presidente@xunta.es](mailto:secretaria.presidente@xunta.es)



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which helps to improve the lives of millions of European workers and consumers. However, any major economic policy measure faces some degree of resistance. In the case of the Services Directive, there is some resistance to change and liberalisation, which can be seen in small local or sector-specific markets, whether at municipal, regional or even state level. And it is at the local and regional levels that this resistance to change and liberalisation is strongest. This makes the work of a regional government more complex, as it has to reconcile implementing EU law with specific regional considerations and the reservations of much of its electorate.

This article sheds light on the complications that arose during the transposition of the Services Directive into the Galician legal system. It pays special attention to the particular ties between Galicia and the Portuguese Republic. It argues that European regions, and especially those with legislative powers, cannot confine themselves to merely being recipients of matched funding from the EU budget. Instead, they must take shared responsibility and work together as equal collaborators in implementing European law, even where it clashes with the status quo and the vested interests of certain minorities.

The rest of the article is divided into four sections. The first explains why the Services Directive stands out from other EU directives. The second focuses on the challenges that Galicia encountered in implementing the directive. Section 3 looks at subsidiarity and the importance of the local and regional levels in implementing directives. And the fourth section provides a brief conclusion.

## The Services Directive

The Services Directive was published in the *Official Journal of the European Union* on 27 December 2006. It is not just any directive, because its objective is to remove the legal and administrative barriers to trade so that Europe's services markets can realise their full potential. To understand its extraordinary economic, legal and political significance, as well as its importance in the day-to-day activities of both SMEs and Europeans in general, we need to call to mind some key facts.

First, before the directive was adopted, the European press referred to it as the draft Bolkestein directive (European Parliament 2006). This is because it was spearheaded by Frits Bolkestein, who was then the European Commissioner for Internal Market, Economic and Financial Affairs, and Taxation and Customs. The mainstream media considered this draft to be the impetus behind much of the French campaign against the failed Treaty Establishing a Constitution for Europe. After a substantial review, it became the directive currently in force.

Second, Recital 2 of the Service Directive reminds us of its importance for SMEs and consumers:

A competitive market in services is essential in order to promote economic growth and create jobs in the European Union. At present numerous barriers within the internal market prevent providers, particularly small and medium-sized enterprises (SMEs), from extending their

operations beyond their national borders and from taking full advantage of the internal market. This weakens the worldwide competitiveness of European Union providers. A free market which compels the Member States to eliminate restrictions on cross-border provision of services while at the same time increasing transparency and information for consumers would give consumers wider choice and better services at lower prices.

Third, Recital 4 provides a very good illustration of the Services Directive's macroeconomic importance for the economy:

Since services constitute the engine of economic growth and account for 70% of GDP and employment in most Member States, this fragmentation of the internal market has a negative impact on the entire European economy, in particular on the competitiveness of SMEs and the movement of workers, and prevents consumers from gaining access to a greater variety of competitively priced services. It is important to point out that the services sector is a key employment sector for women in particular, and that they therefore stand to benefit greatly from new opportunities offered by the completion of the internal market for services.

Fourth, the Services Directive also points out why we need to help European SMEs: 'One of the fundamental difficulties faced, in particular by SMEs, in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures' (Recital 43).

Fifth, the Services Directive stresses that cutting red tape is a key objective for the success of European SMEs:

It is necessary to provide in this Directive for certain rules on high quality of services, ensuring in particular information and transparency requirements. These rules should apply both in cases of cross border provision of services between Member States and in cases of services provided in a Member State by a provider established there, without imposing unnecessary burdens on SMEs. They should not in any way prevent Member States from applying, in conformity with this Directive and other Community law, additional or different quality requirements. (Recital 97)

Thus, the Services Directive is not just another directive among hundreds of others. It is a horizontal provision which has an economic impact on thousands of SMEs across all the EU member states and which helps to improve the lives of millions of European workers and consumers. However, any major economic policy measure faces some degree of resistance. And in this case there is some resistance to change and liberalisation, which can be seen in small local or sector-specific markets, whether at municipal, regional or even state level. It is at the local and regional levels that this resistance to change and liberalisation is strongest. This makes the work of a regional government more complex, as it has to reconcile implementing EU law with specific regional considerations and the reservations of much of its electorate.

## **The view from Galicia**

Galicia is an autonomous community within the Kingdom of Spain. The Spanish constitution lists Galician as one of the country's three historic 'nationalities', along with

Catalonian and Basque. As part of a country which subscribes to the rule of law, Galicia holds that respect for the hierarchy of norms and legal procedures entails recognising the primacy of EU law and observing the relevant formalities.

Certain aspects of the Services Directive are complex when it comes to various economic activities, and in particular, those based in regions that share a border with another EU country. But legal certainty is crucial for economic development and social well-being, and thus, Galicia did not for a moment doubt the need to transpose the directive into its legal system. However, under the Spanish constitution, on which all the statutes of autonomy of the 17 autonomous communities in Spain are based, transposition of the Services Directive in Galicia was not possible until Spain's central government had submitted the basic legal framework to the national parliament, to ensure the proper transposition of the directive throughout the country.

Article 44 of the Services Directive sets a deadline of three years from 28 December 2006 for completing the transposition in each EU member state. However, the preparatory work was complex, and it took time for Spain's minority government to find the political support needed. Thus, the completion of the legislative bills was delayed until 2009. This, along with the time it took for the bills to go through the parliament (the Congress of Deputies and the Senate), meant that Galicia did not have the requisite national legal framework until the end of 2009—and for the retail sector, even a few months later.

To transpose the Services Directive and to help the various autonomous communities do the same, the Spanish parliament adopted three core laws. The first of these was Law 17/2009 of 23 November on free access to service activities and the exercise thereof (known as the 'Umbrella Transposition Law', it was published in the official state gazette the following day). The second was Law 25/2009 of 22 December, which amended dozens of laws to bring them into line with the 'Umbrella' law. (The second law is known as the 'Omnibus Transposition Law'. It was published the following day in the state gazette but entered into force on the day before the last possible date allowed by the Services Directive). The third and final law was Law 1/2010 of 1 March, which amended Law 7/1996 of 15 January on retail trade (published in the state gazette on 2 March 2010, it entered into force on 3 March).

The legal framework for transposing the Services Directive in Spain having thus been defined, Galicia moved quickly to adopt Law 1/2010 of 11 February (Galicia 2010a). This law amended a number of Galician laws to bring them into line with the Services Directive.

Previously, Galicia had approved Law 7/2009 of 22 December amending Law 10/1988 of 20 July on trade within Galicia (Galicia 2009). This it did precisely because of the uncertainty created among Galician traders by the far-reaching changes that were about to be brought in by rolling out the Services Directive. However, the delay in adopting the corresponding Spanish state law due to the significant pressure the actors involved were under

meant that Galicia subsequently had to adopt Law 13/2010 of 17 December on trade within Galicia (Galicia 2010b). The difficulty of the negotiations is the reason why the amendment of Spanish trade law was not included in the above-mentioned ‘Omnibus’ law.

Therefore, Galicia quickly took measures to ensure the effective implementation of the Services Directive in the community, taking into account the Spanish legal framework and the necessary procedures and formalities for informing the public before and after the parliamentary formalities.

A particular consideration to be borne in mind is that Galicia shares a long and porous border with the Portuguese Republic, with which it has significant historical, social, cultural and linguistic ties (there are many similarities between the Galician and Portuguese languages). One of the fears voiced by Galician interest groups regarding the effective roll-out of the Services Directive concerned cross-border professional services. This fear arose precisely on account of the social porosity of our common border with Portugal and the differences between Galicians and Portuguese in income and social contributions—all of which, theoretically speaking, ought to make Galicia’s southern neighbours more competitive.

Competitiveness is not just a matter of income, tax and social contributions. The training and education of workers and professionals, the integration of value chains, the availability of cooperative networks to achieve economies of scale and so forth—all of these factors are less obvious but equally or even more important. Moreover, nothing stands still in an open economy such as the European internal market. Above all, however, respect for the law—in this case the prevailing EU legislation—is the cornerstone of legal certainty, without which economic prosperity is impossible to sustain.

All of this meant that the Galician legislation transposing the Services Directive was the most advanced in Spain, going even beyond what was strictly required by the directive. Moreover, in implementing this legislation, we took executive decisions to maximise the effectiveness of the Internal Market Information System, mainly with regard to cross-border professional services.

The task of cutting red tape called for a considerable effort on the part of the Galician regional government—the government and public administration of our autonomous community. We wanted to approach this task as an opportunity rather than as a threat. First, work was speeded up as much as possible on extending e-government to all procedures, not just those for which the Services Directive was directly binding. Second, the time needed to issue administrative licences was reduced to a minimum, and the applicability of official statements and notifications was broadened to embrace the vast majority of procedures associated with the establishment of businesses and the provision of professional services. Third, the information channels connecting service providers and consumers were improved. Fourth, administrative charges were abolished or reduced. Fifth, the training of officials was stepped up so that, rather than just carrying out pre-emptive oversight, they would be enabled to act as facilitators for new economic activities.

It should be noted that public authorities that are closer to interest groups make greater and better efforts in the area of education and constructive dialogue than do those authorities that are further removed. The people of Galicia understand that, as in other areas of life, resilience and adapting to change are prerequisites for success in the economic and business worlds. It is not enough to tell people that a faraway, anonymous entity generally referred to as ‘Brussels’ requires things to be changed for the sake of goals that do not inspire confidence. On the contrary, regional authorities must learn to play a guiding and interpreting role. They have to convey to the national and European authorities both the fears voiced by our citizens and alternatives they suggest—citizens who, let us not forget, are also citizens of the EU.

## **Subsidiarity and the application of EU law**

Subsidiarity was on the table throughout the European debate at the time of the 1992 Maastricht Treaty, which created the modern EU. It is addressed in Article 5 of the Treaty on European Union, which entered into force in 2009. According to Article 5(1), ‘The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.’ Article 5(2) further clarifies that ‘Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.’ Finally, Article 5(3) explains:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Specialists in EU law consider regional authorities to have great responsibility in the area of the internal market (Wiehler and Stumm 1995). Without these authorities’ cooperation it would be impossible to properly implement EU provisions such as the Services Directive—which is perhaps the most ambitious of all the EU directives, and the one with the greatest direct impact on citizens. It is therefore well worth remembering that subsidiarity—especially as it concerns the regional level—is a vital component in the European legal, social and economic machinery. Regional subsidiarity is not limited to minor issues, at least not from a macroeconomic standpoint.

Galicia is a pioneer in cross-border cooperation with Portugal. This cooperation is firmly rooted in shared European culture thanks to the fruitful heritage of the Santiago Pilgrim Way. This was the major route for cultural exchange during what were possibly the least prosperous centuries in European history. Thus, Galicia is a region which boasts a wealth of experience in this field.

European regions, especially those with legislative powers, cannot confine themselves to merely being recipients of matched funding from the EU budget. They must

also take shared responsibility and work together as equal collaborators in implementing European law, even where it clashes with the status quo and the vested interests of certain minorities. This is necessary in the common interest of integration and cohesion.

Europe is in an increasingly complex, competitive situation within the global picture.

Between 1965 and 2015 . . . [t]he EU's share fell from about 13% to around 7% of the world population. . . . G20 members generated 86% of global GDP in 2016. The United States accounted for 25% of the world's GDP in 2016, ahead of the EU, whose share fell from 30% in 2006 to 22% in 2016. China's share of world GDP rose significantly from 5% to 15% during the same period, overtaking Japan (9% in 2006 and 7% in 2016). India's share of world GDP also increased significantly, propelling it from the 10<sup>th</sup> largest G20 economy in 2006 to the fifth largest by 2016. China and India had the highest GDP growth of all countries between 2006 and 2016. Note that these relative shares are based on current price series in euro terms, reflecting market exchange rates. (Eurostat 2018)

Therefore, in a context in which rising numbers of increasingly large, competitive stakeholders are interacting more and more, we need to increase our internal cohesion. Greater internal cohesion calls for respect for EU law but also more proactive implementation and enforcement thereof. Galicia has interpreted the need for greater internal cohesion in this way and is acting as an integral part of the EU within the Kingdom of Spain.

Moreover, improving the EU is a prerequisite for securing our well-being and that of future generations of Europeans. It is therefore vital that we become more competitive; and to do this, we have to fully realise the potential of our internal market. In this way, our businesses and professionals will grow in scale and be able to increase the diminishing share of the global market we represent. In this strategy, subsidiarity is an element which ensures that cohesion will be preserved. As the implementation of the Services Directive has demonstrated, European regional authorities have much to contribute, and they must do so to increase European citizens' shared engagement with and for the EU. Only the success of our EU can safeguard our prosperity and well-being.

## Conclusion

The Autonomous Community of Galicia rapidly took measures to ensure the effective implementation of the Services Directive, and as a result, the community achieved the most advanced transposition of the directive in Spain, going even further than what was strictly required. This meant implementing several measures to cut red tape, and listening closely to interest groups in the process. It is important to remember that European regions, especially those with legislative powers, cannot confine themselves to merely being recipients of matched funding from the EU budget. They must take shared responsibility and work together in implementing European law, even where it clashes with the status quo.

Thanks to the principle of subsidiarity, citizens are being heard by authorities and thus are more involved in legal changes. These authorities, and especially those at the regional level, can also use the autonomy they have to bring about the proper transposition of the

directive. In this way a balance is achieved, which allows deep legal changes to be made in the way of doing business without stirring up significant social and political resistance among those who have to modify the services they offer or their business models.

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## Author biography



**Alberto Núñez Feijóo** has been the President of the Autonomous Community of Galicia (Xunta de Galicia), Spain since 2009. He is also the Chairman of the Galician branch of the Popular Party and has held several positions in the regional government He is also a past director of the Spanish National Institute of Health and President of the Spanish Postal and Telegraph Service.