
de Lange, T.

Published in:
The Single Permit Directive

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Download date: 05 Feb 2020
The Single Permit Directive: a limited scope, a simple procedure and limited good administration requirements

Tesseltje de Lange*

1. Introduction

After four years of negotiations the Single Permit Directive was published on 23 December 2011. The Directive lays down a single application procedure for third country nationals (TCN) to reside for the purpose of work in a Member State of the EU. This single application procedure is meant to simplify existing procedures and to facilitate the inspection and control of the working migrants’ status. The Directive also presents the right to equal treatment for all TCN legally working in a Member State, irrespective of the purposes for which they were initially admitted: both migrating workers and working migrants are protected.

In this chapter I will first discuss the scope of the Single Permit Directive (hereafter also: Directive or SPD). The goal of the SPD being to simplify existing procedures, one would expect a wide scope. Otherwise the EU single application procedure, and the single permit that results from it, would only add yet another (albeit simple) procedure and permit to the myriad of national labour migration procedures in place in many EU Member States. However, I will show that the Directive nevertheless has a limited scope (section 2). Secondly I will discuss the reasons behind the single administrative act as required by the Directive and how the Directive deals with the consequence of abolishing the work permit. Because the Directive deletes this permit, it also deletes an administrative body’s legal authority in those many Member States mentioned before. In doing so the Directive interferes not just with national procedural law but also with national political structures (section 3). Finally, a Directive prescribing detailed administrative procedures can be seen as a lex specialis of the general EU rights to good administration and effective remedies as laid down in article 41 and 47 of the EU Charter of Fundamental Rights. The detailed prescription of national administrative procedures has become common in EU (migration) Law, with the recent Directive 2013/32/EU on asylum procedures as the most recent example. In the final section (section 4) of this chapter I will analyze if, and if so what, the Directive adds to or how it specifies the existing EU right to good administration and effective remedies. The negotiating history of the Directive, the equal

* Assistant Professor in Migration Law at the University of Amsterdam, senior researcher in Labour Law and Social Policy at Tilburg University

1 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJEU 23 December 2011, L-343/1

2 Preamble 3.

3 Article 12.
treatment clauses and the implementation in selected Member States, will be discussed by others in this volume.

2. The Limited Scope of the Directive

It is important to take a close look at the long list of migrating workers and working migrants that do not fall within the scope of the Directive, with twelve categories in total. TCN who are family members of EU nationals fall under the scope of Directive 2004/38/EC and are therefore excluded (a) as are TCN who enjoy rights of free movement equivalent to EU citizens under agreements with third countries, such as the EFTA countries and Switzerland (b). Next, posted workers and – under the Posting Directive qualified as such well – intra-corporate transferees are excluded. In the newly adopted Intra-corporate transfers Directive (ICT) indeed the transfer is given equal treatment to posted workers (c–d). Excluding posted workers from the equal treatment provided by this directive echoes the dichotomy in EU law between workers and the employees of service providers (posted workers). You could argue that the Single Permit Directive is another brick in the EU wall between the employees of service providers and worker-employees receiving equal treatment with nationals, or in the words of Barnard on the Posted Workers Directive: it is a tension between the EU free market and the preservation of national social models. So far internal market arguments have been more powerful before the ECJ and social policy arguments for equal treatment of posted workers have failed. Does it make sense to echo this dichotomy? This issue will be discussed further by Verschueren and Groenendijk in this volume. It also means that for the details on the administrative procedure to be applied to intra-corporate transferees we have to look at the ICT Directive. This ICT Directive also aims to reduce administrative burdens. It also prescribes a single application procedure but does not refer to the SPD and the intra-corporate transferee will not receive a SPD permit but an ICT permit.

Also excluded from the scope of the SPD are workers with a typical temporary right to stay, seasonal workers and au pairs (e). Au pairs will not qualify in all countries of the EU as ‘workers’ or as ‘working’ and as such are already outside the scope of the Directive. A separate Directive was agreed upon for seasonal workers, with no reference to the SPD but once more with a single procedure prescribed for seasonal workers. The next group of exempted migrants are those who receive (temporary) protection (f–h). The Qualification Directive does oblige Member States to allow beneficiaries of protection under that Directive access to employment. Equal access to social rights is dealt with in the Qualification Directive itself, albeit less than in the SPD. Long-term residents are excluded (i) because they have their own right to equal treatment in the Long-term residence directive. Those whose removal is suspended on the basis of fact or law are excluded as well. How could this exclusion be relevant? I would argue that this would only be relevant in case these migrants may be legally employed at all. This might be permitted under national law and would then not constitute illegal employment under Directive 2009/52/EC. If employed illegally, Directive 2009/52/EC provides for a right to equal pay. The other equality rights do not apply, although the right to association applies in the EU Member States on the ground of international (ILO) norms. The last two categories that are excluded from the scope of the Directive are those who have applied for or have been admitted as self-employed (k) and a category of migrant workers with a historical ‘claim’ to a separate status excluding them from many conventions on migrant workers’ rights: seafarers (l).

Who remain? In general terms TCN Students when employed and researchers, Blue Cards and most migrating workers coming in through other national schemes as well as family members of nationals and family members who came in under the Family reunification Directive. Some will already have a single permit, like the Blue Card, or they will have national ‘single permits’. Although Member States may not exclude categories of (temporary) migrant workers from the equal treatment clauses they may decide not to apply the single permit procedure to those workers who will be authorized to work for no more than six month as well as students. In conclusion, the long list of excluded working migrants and the derogations from the application of the single permit procedure and permit allowed for will in my opinion only create less administrative burdens in those (new) EU Member States where there was no decent procedure for labour migration in place to begin with. In the other Member States it just introduces an additional legal procedure. Although it intends to simplify and lessen administrative burdens the myriad of exceptions from the scope and national derogations will probably still require expert knowledge of national procedures in each Member State one might want to take up employment.

3. A Single Administrative Act

The SPD does not deal with the material aspects of admission of labour migrants. It says explicitly the Directive is without prejudice to the MS’ powers concerning admission of TCN to their labour markets. I’d like to note two possible exceptions. First, I identify the right to consider an application ‘inadmissible’ on the grounds of vo-

5 C. Bernard, EU Employment Law, Oxford University Press 2012, p. 249.
6 Directive 2014/66/EU, article 3, under k and l.
7 Article 26 Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).
9 Article 6, par. 1 under a Directive 2009/52/EC.
10 Art. 6 ILO Convention nr. 97.
11 Seafarers are for instance also excluded from the scope of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (article 3 (f)) and from the scope of the ILO Migration for Employment Convention (Revised), 1949 (No. 97) article 11 par. 2, c.
12 Article 3, par. 3.
13 Article 1, par. 2.
lume of admission of TCN coming for employment and, on that basis, need not to be processed (art. 8(3) SPD) a clause with a material character. True, article 79(5) TFEU allows the Member States to determine quota for admissions of TCN coming to seek work. Because the application will not need to be processed in case of set volumes, there is no need to give consideration either to questions such as whether the applicant does indeed fall under the reign of the quota, if the right quota is applied, if the set volume has indeed been reached or if grounds of exception apply in the specific case.

A second clause that stands in between procedural and material requirements deals with fees. Member states may require applicants to pay fees, where appropriate, for handling applications in accordance with the Directive. The level of such fees shall be proportionate and may be based on the services actually provided for the processing of applications and the issuance of permits. "This requirement laid down in the Directive echoes ECJ case law on excessive fees in the Netherlands. In the Netherlands the fees for the admission of labour migrants still run up to about € 1000, which means it is a matter of time before we have another Excessive Fees case. Fees are procedural, but when excessive, they become material and they select migrants and employers based on financial criteria: the willingness to pay (excessive) fees. Apart from these two 'material' issues, I will focus on the procedure in the remaining part of this chapter.

3.1 Single Application Procedure

First let us look at the application: Member States may have the employer apply for it, or the worker, or both of them together. It is definitely a simplified application procedure when the worker and the employer no longer have to apply for two permits, no longer have to fill out two forms and send two stacks of largely the same papers to two different authorities. Under the Directive, if the application is filed by the worker this can be done, if provided for by national law, from the territory of another Member State in which the TCN is legally present. The phrase 'if provided for by national law' means that if this is not provided for, the TCN probably needs to return to his home, and so leave the EU, and then apply. It would have been easier for the applicant and probably also better for intra-EU mobility of TCN if the Directive had required all Member States to allow the TCN to file an application from within the EU. The application procedure will be without prejudice to the visa procedure required for initial entry.

3.2 A Single Administrative Act: Deleting an Administrative Authority?

When discussing the single administrative act the Directive required of the Member States one may wonder why Member States did not have a single application procedure and a single administrative act yet. Not because they fancy inefficiency I am sure. Some have single application procedures, but — at least in the Netherlands — not for all labour migration, just for highly skilled labour migration. The highly skilled are highly sought-after in most Member States, so there is little political risk in letting them in through simplified and fast track procedures. But other fields of labour migration are often politically sensitive, such as seasonal labour, domestic or hospitality workers, other migration for lower and intermediate skilled jobs. Here the policy fields of, on the one hand, migration and on the other hand the labour market have not necessarily been merged. Under EU pressure, administrations now do have to merge, shifting the legal power of granting migrant worker rights to one single authority; with the legal shift to one authority, has the political power to decide on labour migration also shifted? Likely it is still a minister of labour who is held accountable in national parliaments when the labour market is instable due to labour migration influx. And probably it is the minister of migration affairs held responsible for the entry of new migrants who need to be accommodated by society, who need to find jobs or are seen as 'taking' jobs of the indigenous residents. The Directive simplifies the power balance within the national state, in which different authorities are responsible for different aspects of (collective) interests. In doing so one may wonder if this Directive does not just require the Member States to perform a single administrative act but also to create a one dimensional political responsibility? If so, the Directive does not just effect national procedural autonomy but also the national political autonomy.

The Directive does indeed take into account that deleting a permit — the work permit — from the national map of permits also deletes an authority's administrative power. The Member States are free to designate the competent authority under this Directive and this 'should be without prejudice to the role and responsibilities of other authorities and, where applicable, the social partners, with regard to the examination of, and the decision on, the application' (preamble 12). Other authorities may have a role and may keep their own 'responsibilities' but no longer have the legal power to decide and defend their decision in court or have their Minister defend a decision in parliament. This makes the whole procedure less simplified from the States' perspective. The reason why the Directive prescribes one single administrative act when admitting migrant workers is given in preamble (3). The single administrative act 'will contribute to simplifying and harmonizing the rules currently applicable in Member States.' Simplified procedures are more efficient for migrants and for their employers, according to the Directive, and I'm sure most workers and employers will agree. The perspective of simplicity of procedures taken by the Directive is that of employers and migrants, not necessarily of administrations and national governments.

3.3 The Additional Document

Another objective of installing a single administrative act is that it allows for 'easier controls of the legality of their residence and employment' (preamble 3). In order
facilitate these controls and in contradiction with the aim of less administrative bur­
den the Dutch government lobbied for an ‘additional document’ to be allowed for. The additional document can be used ‘in order to be able to give more precise infor­
mation on the employment relationship for which the format of the residence permit leaves insufficient space. Such a document can serve to prevent the exploitation of third-country nationals and combat illegal employment but should be optional for Member States and should not serve as a substitute for a work permit thereby com­
promising the concept of the single permit.’(preamble 16). I’m sure such information could have been made available in another format (digital, or a chip?) without a separate document.

In conclusion, legally speaking, there is one single permit, but practically speak­
ing, there can still be two documents, and possibly the additional document is not drafted by the same administration as the one deciding on the permit. So we may still have two documents and two administrations, but one single administrative act.

4. Principles of Good Administration

As stated previously, the procedural requirements set by this Directive are not neces­
arily working in favour of the efficiency of the administration(s) involved. Also mentioned is that the single administrative act seems designed for efficiency for em­
ployers and workers. This external dimension of the procedural requirements links to
the European right to good administration (enshrined in articles 41 of the EU Funda­
damental Rights Charter (hereafter Charter)) that right reflects a general principle of EU law. This right to good administration includes a right to have his or her affairs handles impartially, fairly and within a reasonable time, a right to be heard, a right to access of ones file and the obligation of the administration to give reasons for its decisions. The basic principle of good administration responds to administrations’ service obligations and the increased call for transparency. The procedural require­
ments are not just for internal use, but have this external dimension and, I would argue, also have direct effect. This position is underlined by the Directive explicitly stating that the procedure is meant to give applicants a simplified procedure. This means the single application procedure is not just a set of instructions for national administrations, but can be called upon by employers and workers who apply for a single permit under the SPD.

Preamble 5 of the SPD gives an often used general outline of the good adminis­
tration requirements under the Directive:

20 Article 6, par. 1.
21 Paul Craig describes in: ‘A General Law on Administrative Procedure, Legislative Competence and Judicial Competence’, European Public Law 19, no.3 (2013): 503-524, how in other European Direc­tives, dealing for instance with competition or the prevention of pollution, procedural requirements are meant for internal use. In those Directives, procedural requirements were meant for the ‘safeguarding of good administrative culture to increase efficiency and legibility’.
22 ECJ 8 May 2014, C-604/ 12 (par. 49) H.N. v Minister for Justice, Equality and Law Reform, Ireland.
23 Craig 2013, p. 510.

Limited scope, simple procedure and administration

‘A set of rules governing the procedure for examination of the application for a single permit should be laid down. That procedure should be effective and manageable, taking account of the normal workload of the Member States’ administrations, as well as transparent and fair, in order to offer appropriate legal certainty to those concerned.’

These requirements clearly echo article 41, where the effectiveness and manageability of the procedure relate to article 41, first paragraph’s requirement of a timely decision (par. 5.1). The requirement of transparency and fairness go to the right to be heard, to have access to ones file and to give reasons for its decisions (par. 5.2). The obliga­tion to provide legal certainty covers both the right to a reasoned decision as well as the right to an effective remedy and right of defense under article 47 of the Charter (par 5.3). I’ll discuss what the Directive requires of the Member States with regard to timely decisions, transparency and fairness, and legal certainty.

4.1 Timely Decision

According to article 5 the decision on the complete application shall be adopted ‘as soon as possible and in any event within four months of the date on which the application was lodged’. The procedure may last more than four months in exceptional circumstances, and only if the exceptional circumstances are linked to the complexity of the case. Given that labour market tests and recruitment efforts to mobilize workers with community preference (EU nationals and legally residing TCN with free access to the national labour market) may also take a couple of weeks, it may take quite some time before the single permit application is decided on. I fear that from a busi­ness perspective when in dire need or staff with certain skills, a procedure lasting more than four months does not qualify as handled within a reasonable time.

My curiosity was aroused by article 5 par. 4 SPD: it starts by setting out a rather clear obligation for the competent authority to give the applicant some, reasonable, deadline to provide missing information in case of an incomplete application. The time limit for the competent authority to adopt a decision is suspended awaiting the additional information. The clock starts ticking again as soon as the information is rece­ived by the competent authority or other relevant authorities. This means that the other relevant authority has to communicate with the competent authority as soon as the information has been received (and must know the information request was sent out). Using email or being able to log into the same computer network, no delays need to be feared. But I am not sure at all if the competent and the relevant authority use the same systems in all EU Member States. It is indeed practical to send the information directly to the other relevant authority and not loose time by sending it to the compe­tent authority who then forwards it to the other relevant authority. One would wonder why, if there is to be one application procedure, one administrative act, why not one authority, to keep the process simple (transparent) and limit the risk of losing time tracking files between authorities. But that would probably go against the Mem­ber States’ procedural autonomy, or what’s left of it.
4.2 Transparent and Fair

The other relevant authority just mentioned is also present in preamble 12, which says that the Directive is without prejudice to the role of other authorities with regard to the examination of, and the decision on, the application. I read in this preamble that it is indeed so that another authority than the competent one plays a role in the decision making process. The inclusion of the other authority in the procedure should not jeopardize the required manageability and transparency of the procedure as mentioned in preamble 5.

Another obligation under the Directive that is somewhat dubious in the light of the required transparency as well as every persons' rights under article 41 of the Charter, is the obligation to notify the applicant of the decision. As we have seen, the applicant can be the employer or the employee, or both. If national law allows for the employer to be the applicant the Directive does not require the competent authority to inform the (future) migrant worker. As it will be his or her residence permit, I assume in practice the worker will be informed one way or another, but I would say that under the general principle of good administration the Member States must always also notify the migrant worker. From a migrant workers' rights perspective the employee is largely dependent on the employer for doing everything right with regards to the workers residency status. A high level of dependence of the migrant worker on the employer can easily cross a line of abuse, which may be prevented by the Member States to inform the worker and the host entity, although only in case of refusal or withdrawal of a permit based on the SPD.

Finally, article 9 of the Directive requires the Member States, upon request, provide adequate information to TCN and future employers on the documents required to make a complete application. It would have been better for transparency and efficiency, as is the case in other Directives, to make the Member States have this information available online in at least English or another commonly used language.

4.3 Legal Certainty

The written notification of a decision rejecting an application to issue, amend or renew a single permit, or a decision withdrawing a single permit shall give reasons based on the criteria provided for by Union or national law. Reasons for rejecting that cannot be traced back to criteria set by law will not hold. Sometimes one may also want to know the reasons for a positive decision; for instance for comparison with other cases; but the Directive does not entitle the applicant to reasons in case of a positive decision. The general principle of good administration as enshrined in Article 41 of the Charter, which applies directly only to EU institutions, does not limit the obligation to give reasons to rejections. Reasons must be given for all decisions. I would say the SPD cannot limit that obligation.

In its Coorplan Jeni judgment the European Court of Human Rights (ECHR) held that the employer applicant as well as the worker both have a right to appeal under article 6 of the ECHR. Although only the applicant must be notified, the SPD does not limit the right to appeal to the applicant. Who can challenge is a matter of national law; the written notification, which is only to be sent to the applicant, should specify the court or administrative authority where the person concerned (not just the applicant apparently) may lodge an appeal. Under article 47 of the Charter everyone whose rights and freedoms guaranteed by the law of the Union are violated has a right to an effective remedy, so this would also include the non-applicant, migrant worker or employer. The Directive does not require that the decision be challengeable before an independent and impartial court, which does follow from article 47 of the Charter.

5. Conclusion

The first issue discussed in this chapter is the scope of the SPD. Many migrants are exempted from the scope of the Directive, some because they may have a single permit procedure or rights based on other Directives. The limited scope means a myriad of admission policies and procedures for different kind of labour migrants stay in place. Secondly I discussed the single administrative act, which is introduced in order to achieve simple procedures. That's definitely a goal worth fighting for. Because the Directive allows for other administrative authorities to participate in the decision making process and allows for an additional document I doubt that the procedure will always be straightforward, albeit simplified. Harmonization between the administration procedures in place in the Member States will occur, but the Directive does not change the political organization of migration and labour market policy in the Member States. The political relevance of having competence over policy specific issues is overlooked and this may hinder the achievement of an efficient and transparent procedure. The third aspect discussed are the principles of good administration, meagerly articulated in this Directive. One will need to turn to general principles of good administration for further guidance. With many Directives setting good admin-

24 Article 15(3) ICT-Directive.
25 Article 11 under (6).
26 See for example article 12 par. 3 of the Returns Directive. During the Eastern Partnership expert meeting on labour migration in Minsk in May 2015 it was mentioned that in Eastern EU countries English is not the best language to properly inform labour migrants from the Eastern Partnership countries.
27 Article 8 (1).
28 ECHR 27 July 2006, Case of Coorplan Jeni GmbH and Hanic v. Austria (Application no. 10523/02).
29 Article 8 par. 2.
30 Article 8, par. 3.
istrative standards, often in far more details than the SPD does, I’d support a call for a European Administrative Law.\textsuperscript{31}

\textsuperscript{31} http://www.reneual.eu/, visited on December 6, 2014. See also European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)).