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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 2011.1 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.2 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.3

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

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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 transferee 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

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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 (i)) 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.
The application procedure worker this can be done, if provided for by national law, from the territory of another
duette and a single administrative act yet. Not because they fancy inefficiency I am
When discussing the single administrative act the Directive required of the Member
States to allow the TCN to file an application from within the EU. It would have been easier for the appli-
cant and probably also better for intra-EU mobility of TCN if the Directive had re-
quired 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.15

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.16 It is definitely a simplified application pro-
cedure 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 na-
tional law’ means that if this is not provided for, the TCN probably needs to return
home, and so leave the EU, and then apply. It would have been easier for the appli-
cant and probably also better for intra-EU mobility of TCN if the Directive had re-
quired 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
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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 pro-
cedure and a single administrative act yet. Not because they fancy inefficiency I am

14 Article 10.
15 ECJ Commission vs. Netherlands Excessive Fees I & II (C-92/07 and C-508/10).
16 Article 4, par. 1.
17 Article 4, par. 3.
18 Preamble 12.
19 Preamble 3.
facilitate these controls and in contradiction with the aim of less administrative burden 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 information 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 compromising 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 speaking, 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 necessarily working in favour of the efficiency of the administration(s) involved. Also mentioned is that the single administrative act seems designed for efficiency for employers and workers. This external dimension of the procedural requirements links to the European right to good administration (enshrined in articles 41 of the EU Fundamental 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 handled 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 requirements 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 administration 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 legitimacy’. When evaluation the SPD the Commission should indeed consider if there elements are sufficiently safeguarded.
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.

‘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.
Limited scope, simple procedure and administration

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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 Coopplan 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-

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 SPD only requires the Member States to inform the holder of a single permit of his or her own rights linked to the permit conferred by the Directive and/or by national law. So there is no obligation to inform the worker of his legal status in case of refusal or withdrawal of his residence permit based on the SPD.

Finally, article 9 of the Directive requires the Member States, upon request, to 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

24 Article 15(3) ICT-Directive.
25 Article 11 under (a).
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.
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)).