
EU Single Permit Directive: a small step forward in EU migration policy

Yves Pascouau and Sheena McLoughlin

BACKGROUND – A LONG AND DIFFICULT NEGOTIATING PROCESS

The proposal for a 'Single Permit Directive' was published by the European Commission in 2007. Legal problems, political reluctance and institutional gamesmanship all complicated a negotiating process which finally ended in December 2011.

Member states reluctance and legal problems

As a matter of principle, member states are reluctant to adopt EU rules on admission of third-country nationals. They proved this in 2001 by rejecting a proposal by the Commission to adopt a horizontal Directive on conditions for entry into and residence in the EU of third-country nationals for work and self-employment.

Governments showed this once again a few years later when they agreed to accept common rules in the field but only on a selective and sectoral basis. Following the publication by the Commission of an Action Plan in 2005, they designed the possibility of adopting separate directives: several on the admission of certain types of worker – e.g. highly-skilled workers, intra-corporate transferees, seasonal workers and remunerated trainees – and a general Framework Directive establishing a single application for a joint work/residence permit and guaranteeing workers already residing in an EU member state a common set of rights, the so-called 'EU Single Permit Directive'.

Despite this sign of openness, the negotiation process following the Commission's proposal for an 'EU Single Permit Directive' revealed lingering resistance. The process slowed down in 2009. While divergences regarding the scope of the Directive were discussed, some countries – including the Czech Republic – considered that the Treaty of Amsterdam did not offer the appropriate legal basis to act. Consequently, the process was frozen until the entry into force of the

Lisbon Treaty and the beginning of the Spanish EU Presidency, which restarted discussions on the content of the text.

Internal difficulties in the European Parliament

A series of obstacles coming from the European Parliament (EP) have complicated negotiations on adopting the Directive, some of which were not directly linked to its content.

Negotiations within the EP were intense since the two competent rapporteurs (from the Civil Liberties, Justice and Home Affairs [LIBE] – and Employment and Social Affairs [EMPL] committees) represented different views and 'political families'. While the first sought to reach an agreement on the text that was primarily based on a migration perspective, the second fought to extend the scope of the directive as much as possible, mainly from a social perspective. This made discussions more contentious and delayed the legislative process.

The legislative process was also delayed for a full year after Liberal MEPs voted against the Directive during the EP's December plenary session in 2010. This unexpected decision meant that negotiations had to be reopened in view of adopting the directive at 2nd reading, creating a legal dispute between the LIBE and the EMPL committees. The LIBE Committee wanted to reopen the dossier with regard to specific provisions on which it claimed it was exclusively competent. The EMPL Committee did not share that view and asked to remain involved. The legal wrangling was resolved by the EP's Constitutional Affairs Committee, which clarified obligations deriving from the EP's internal rules and decided that the EMPL Committee had to remain involved.

Inter-institutional quarrels

There was one last obstacle at the end of the process in the shape of a dispute between the Council and the EP. The Commission's proposal contained a provision which required member states to detail national norms for transposing the Directive into a "table of correspondence". The EP agreed to maintain this obligation in the Directive, but member states were fiercely opposed to it, primarily due to fears that it would be too administrative and would give rise to infringement procedures. Hence, they made their backing conditional upon abandoning the obligation to fill in such a table of correspondence. The issue was resolved by a Joint Political Declaration by the member states and the Commission, according to which the notification of

transposition measures is only accompanied by more detailed documents "in justified cases".

After four years of lengthy negotiations, which spanned a treaty change and the empowerment of the EP as co-legislator, Directive 2011/98/EU 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 – was finally adopted.

It is now time to evaluate what this will mean for EU member states that are obliged to transpose the Directive into national law (Denmark, the UK and Ireland are not bound by the Directive), to assess how much of a step forward the Directive is, and to identify any shortcomings.

STATE OF PLAY – LIMITED ADDED VALUE

The Directive pursues two objectives. It seeks to establish a simplified and harmonised procedure that a non-EU migrant must go through in order to obtain a work and residence permit in an EU member state. It then defines a common set of rights awarded to migrants in order to address the rights gap between third-country workers and EU citizens.

Scope of the Directive

According to Article 3, the Directive applies to two main categories of third-country nationals. The first category covers third-country nationals who apply to reside in a member state to work, to whom the single application procedure is applicable. The second group includes those who have already been admitted to a member state for the purpose of work or purposes other than work and who are allowed to work, such as family members of migrant workers, students and scientific researchers. All categories should be awarded the benefit of common rights when legally residing in a member state.

But at the same time the directive defines a long list of no less than 12 categories of people excluded from its scope (Article 3). Some are excluded because they already benefit from an enhanced status, such as being family members of EU citizens or long-term EU residents, or because they are already covered by EU legislation. Others are excluded due to their situation. For instance, posted workers and intra-corporate transferees (ICTs) are excluded, as they are not considered to be part of the labour market to which they have been posted. Seasonal workers are excluded too, due to the temporary nature of their status.

While it is right to highlight the disappointingly narrow scope of the Directive, two elements should be recalled. Firstly, the scope defined by the final text is broader than some versions proposed by several delegations during negotiations, and closer to the one initially proposed by the Commission. Secondly, the scope is

nothing else than the product of the overly-sectoral approach developed in the field of migration.

Procedure

The added value of the Directive is the single application procedure, which leads to the issuance of a single permit covering both residence and work permits. This would provide true procedural simplification by reducing the number of steps and authorities involved. It would also make it easier to control the legality and residence of migrant workers.

The problem is that the Directive falls short of providing sound harmonisation between member states in several important areas.

Firstly, the Directive gives extensive leeway regarding the beginning of the procedure. Member states are able to decide whether third-country nationals or employers – or even both – have to apply for the single permit. Similarly, member states may decide whether applications should be submitted in the country of origin or in the member state. The only obligation deriving from the Directive is to establish a procedure, as the conditions under which applications have to be introduced remain largely within the remit of national governments (Article 4).

Secondly, the time limit for examining the application is long and subject to significant derogations (Article 5). While the EP advocated a three-month period, the Directive indicates that a decision is adopted "within four months". The time limit may be extended due to the complexity of examining a particular application. But the Directive does not give any detail on this, which leaves room for manoeuvre regarding its interpretation and implementation. Additionally, Article 4 states that "the single application procedure shall be without prejudice to the visa procedure which may be required for initial entry". Hence when a long-term visa is

required, the application may last more than four months. Member states retain significant room for manoeuvre given that long-term visa policies remain their exclusive competence. Recital 4 of the Preamble, which calls for visas to be issued in a timely manner, is of little help in this regard. In the end, procedures for deciding on an application are still likely to remain too long compared to some countries, where it takes only a few days.

Thirdly, there is no harmonisation regarding the consequences if no decision is taken within the time limit. The course of action is determined by national law (Article 5). This means that it could lead to an application's acceptance or its rejection. In the vast majority of cases, and according to previous experience, the outcome will be the latter.

Fourthly, during the negotiations the Dutch government called for the possibility to issue an "additional document" to accompany the Single Permit. This possibility, endorsed by the European Parliament's first parliamentary report, was contested by the Liberals, as it contradicts the logic of a single application procedure leading to the issuance of a single permit. The Liberals saw this argument as a reason to vote against the Directive in 2010. Thankfully, Article 6 of the Directive now goes in a different direction, as no additional document will accompany the issuance of the single permit. The text specifies "when issuing the Single Permit, member states shall not issue additional permits as a proof of authorisation to access the labour market". However, the article also states that it "may indicate additional information related to the employment relationship (...)" in a paper format or store such data in an electronic format.

Finally, the Directive introduces a series of procedural guarantees regarding *inter alia* the obligation to provide, in writing, reasons for rejecting an application or renewing a permit, to open the door to legal challenges or to provide upon request information regarding the documents required for an application. Fees should be proportionate and based on services actually provided to process applications and issue permits. These guarantees are important, because they frame member states' room for manoeuvre.

Despite procedural guarantees, the rules related to the procedure were drafted broadly and give member states comfortable margins of manoeuvre. This will not ease the harmonisation process, and will certainly lead to divergences in the interpretation and implementation of the Directive.

Common set of rights

The second main aim of the Directive is to provide a common set of rights for third-country workers legally residing in a member state. This should help to address a number of different objectives: filling in the 'rights gap' between migrant workers and nationals of EU member

states, harmonising member states' rules, which vary mainly due to bilateral agreements between member states and third countries, and establishing a tool to combat exploitation in the workplace as well as a way to protect EU citizens from unfair competition deriving from the rights gap.

However, it is unlikely that the Directive will succeed in addressing these challenges. While it calls for equal rights to be awarded in a large number of domains, at the same time it contains numerous restrictions, which may undermine its impact.

The Directive grants core rights to migrant workers and other third-country nationals legally residing in an EU member state. Article 12 states that migrant workers "shall enjoy equal treatment with nationals of member states" in eight fields. The right to equal treatment includes working conditions (pay, dismissal, health and safety), freedom of association and trade union membership, education and vocational training, recognition of qualifications, social security, tax benefits, access to goods and services – including procedures for obtaining housing – and support services provided by employment offices.

While equal treatment is a rule in fields directly linked to professional activities, i.e. working conditions, freedom of association and affiliation to trade unions, recognition of qualifications and advice services from employment offices, the Directive enables member states to restrict the right to equal treatment in specific situations.

For example member states are entitled to deny grants and loans for education and vocational training. Family benefits may not be awarded to workers authorised to work for a period of six months or less, or to students or third-country nationals entitled to work on the basis of a visa. Tax benefits may be restricted in cases where the registered or usual place of residence of family members for whom a third-country worker is claiming benefits lies in the territory of the member state concerned. Finally, housing restrictions may also be imposed.

During the negotiations, the issue of the portability of pension rights was much debated. One delegation – Germany – wanted to limit this right to 70% of the pension rights. But this was not accepted, in the face of resistance from the EP in particular. The final text indicates that third-country workers moving to a third country shall receive statutory pensions based on previous employment, under the same conditions and at the same rate enjoyed by EU nationals when they move to a third country.

Finally, Directive 2011/98/EU defines the areas in which equal rights have to be guaranteed, but it also allows some restrictions which may hamper the harmonisation process. Overall, the Directive follows the 1999 Tampere conclusions and grants "comparable" but not equal rights to migrants.

PROSPECTS – A STEPPING STONE FOR FURTHER ACTION

But overall, the Directive has a very low harmonising effect. Its scope is too narrow, the procedure related to applications relies very much on national law and the rights it grants fail to provide the level of guarantee expected by the EP's EMPL Committee. Thus it only represents a small step forward in EU legal and labour migration. What lessons can be learnt for the future?

The nexus between the fragmented approach and future needs

The Directive does not overcome the fragmented approach developed since 2005 at EU level, which addresses legal and labour migration issues on a sectoral basis. It is not applicable to migrants who will be covered by future specific EU rules, such as seasonal workers or intra-corporate transferees; nor is it applicable to migrants falling under the scope of the Highly-Skilled Workers Directive (Directive 2009/50/EC), which provides better rights.

Consequently, this diversity of regimes sends very negative signals to the outside world. The exclusion of seasonal and temporary workers from the scope of the Single Permit Directive and from specific rights is significant. Temporary workers may consider that their contribution to EU and member-states' labour markets is not being respected in comparison to highly-skilled workers. This calls into question whether the EU will be able to help third-country nationals suffering from exploitation and social exclusion.

Moreover, this fragmented approach – which over-complicates the legal landscape – raises the issue of whether the EU will in future be able to create the conditions to attract the migrant workers it requires.

The lessons of the EP's action

It is not easy to deliver a clear-cut appraisal of the EP's involvement in this procedure as co-legislator, since its actions – although positive – fall short of generating enthusiasm. Its capacity to check the Council's desire to downgrade the content of the Directive was not fully exercised. It did not oppose the exclusion of some categories from the scope of the Directive, nor did it manage to raise the level of rights awarded to migrants legally residing in the EU. Furthermore, the EP delayed the adoption of the

Directive for reasons that were irrelevant to the content of the text. Finally, the EP's involvement in the procedure did not contribute to improving the clarity or the quality of the text, both of which remain quite low.

The EP may also learn a lot from this first experience and become a key player in the field, able to convince member states to go beyond their reluctance to develop EU rules in this area, even in times of crisis.

Future steps

Firstly, the adoption of the EU's Single Permit Directive is of major importance in the field of legal migration. Indeed, without the agreement, further negotiations in the field would have been more difficult and perhaps abandoned. Hence it raises hope of further developments in ongoing negotiations on seasonal workers and intra-corporate transferees.

Secondly, although insufficient the Directive is a first step, and it will now be subject to the interpretation of the European Court of Justice. The court may limit the margins of manoeuvre of member states in favour of migrants, as it has already done in its interpretation of the Family Reunification Directive (Directive 2003/86/EC).

Directive 2011/98/EU opens the door for further rules to be adopted. Therefore the Single Permit Directive is a very small but necessary step along the long and torturous road of EU action in the fields of legal and labour migration.

Yves Pascouau is a Senior Policy Analyst at the European Policy Centre. Sheena McLoughlin is Project Manager at the European Programme for Integration and Migration (EPIM).



This paper was written in the framework of a joint project on labour migration governance in Europe (LAB-MIG-GOV), coordinated by the Turin-based research institute FIERI (www.fieri.it) and benefiting from the support of the "Europe and Global Challenges" Programme promoted by Compagnia di San Paolo, Riksbankens Jubileumsfond and VolkswagenStiftung.

European Policy Centre ■ Résidence Palace, 155 rue de la Loi, 1040 Brussels, Belgium
Tel: +32 (0)2 231 03 40 ■ Fax: +32 (0)2 231 07 04 ■ Email: info@epc.eu ■ Website: www.epc.eu



Europe for Citizens
Programme

With the support of the Europe for Citizens
Programme of the European Union.