

Chapter 12 The Internal (or Common, or Single) Market

Context for this chapter

Bristol, 14 March 2019

Dear Ingrid,

So—a lot has happened since I last emailed you! Sorry it's been so long, but I think you'll get why once you read the rest of this! 😊

You know how I went on vacation to Barcelona last November? Right, so, I kind of met someone there; his name is Andreas and he's the head chef at this really posh tapas restaurant. Johnny knew him from a few years ago and introduced us, and well, four months later... and I'm thinking very hard about moving to Spain to be with him.

Of course, figuring out how that's going to work has been a nightmare, not least of all because of Brexit, even if that hasn't happened yet (I think!). I can't speak more than about seven sentences of Spanish, and according to Andreas, Spanish law would require me to be fluent in order to teach (even if I were to teach English!) so I'm not sure what I'd be doing—probably nothing for a while, except cashing in unemployment benefit while I learn Spanish! (And no, I won't go back to protesting against private education—one time getting arrested for defacing government property as a 19-year-old was more than enough!)

Andreas has offered to move here instead but that seems stupid for any number of reasons. Sure, he has connections with restaurants in London—a friend of a friend has already told him he's got a job if he moves over, so that side of it is easy. But he's got a son (Sergio) from a previous marriage, and while he's got sole custody, I'm not sure either of us want to make a seven-year-old move to the UK if he doesn't speak English or know anyone here. Plus, Andreas has been asking me about how child benefit works and I have no idea if they would qualify for it. Maybe they can come visit me for an extended time and then we can all move to Spain once I speak some Spanish...?

I thought you might be able to give me some advice, 'cause you've been through this with Mitchell, haven't you? You two got married in the US and then you moved to the UK from Germany for work and he came to be with you. But I remember you saying that was also an EU thing even though he's American... right? So was it easy to get Mitchell to the UK, and is it the same thing as Andreas and Sergio would have to do? And what about after Jeremy was born, when you all went back to Germany? Was that an EU thing as well, even though you're German? I know that I'm basically asking for legal advice for free, haha—please don't charge me your normal hourly rate!

Anyway, I'm not looking for an urgent answer—I've got some saving to do if I am the one to give up my job here and move to Spain, and Andreas would have to sell his restaurant and there'd be some stuff to arrange with Sergio's mother, so this isn't going to happen

tomorrow. Probably still a year or so away—maybe 2020 or 2021. So if you want to take six months to get back to me (sorry again it's taken me so long!) that's actually not a problem at all.

Hope you and Mitchell and Jeremy (who must be getting so big by now!) are all well, and I won't let it be this long again—pictures of A attached, just in case you're curious!

Much love,

Emma

Discussing the scenario

Use the material in this chapter in order to write a response to Emma on Ingrid's behalf. Treat each paragraph as setting out a specific scenario, and explain how EU law applies to that scenario. Take care to distinguish between the rights Emma and Andreas held in 2019, the rights they hold in 2020, and the rights they will hold in 2021.

Approaching the scenario

This scenario takes the form of a fairly standard law exam question at university: it describes a factual scenario that has legal repercussions, and in your answer, you are expected to give 'advice' (in this case to Emma, on behalf of her legally trained friend Ingrid) on what those legal repercussions are.

What you are required to do is go through the scenario, paragraph by paragraph, and see what *facts* occur there and what *law* applies to those facts. Assessing that combination of *law* and *facts* will enable you to demonstrate that you not only understand how the law works in the abstract, from having read Chapter 12 in the book, but you are able to apply it to a particular situation that you have not seen before.

The majority of the work you need to do in order to give Emma accurate advice will have been done as you answered the '**Discussing the scenario**' boxes throughout Chapter 12. They are addressed here in turn—with a small conclusion on how to summarize this as advice to Emma at the end.

Discussing the scenario

Identify the EU nationals and third-country nationals in Emma's scenario at the start of the chapter. Who are the mobile EU nationals in each of the scenarios she sets out? (Remember she was writing in 2019!)

Chapter 12 has demonstrated that many of the rights that EU national workers have only 'activate' if those workers are moving across borders. They also only apply to EU *national* workers. The first step in addressing a problem question about free movement of workers is identifying who in the scenario are EU nationals—and then considering if they are *mobile*.

The EU nationals in this scenario, from the facts you are given, are Emma (as the UK was a Member State in 2019); Andreas (who is Spanish); Andreas' son Sergio (who, in the absence of further information, you can *assume* is Spanish); Ingrid (who is German); and Ingrid's son Jeremy (who, again, in the absence of further information, you can assume holds dual German and American nationality—and may even hold UK nationality as well, as he was born in the UK).

Ingrid's husband Mitchell, on the other hand, is American—a third country national.

As such, in Emma's different scenarios, the mobile EU nationals would be:

- 1) If *Emma* moved to Spain, she would be a mobile EU national. Andreas would be a static EU national.
- 2) If *Andreas* moved to the UK in 2019, he and Sergio would be mobile EU nationals. Emma would be a static EU national.
- 3) *Ingrid*, when moving to the UK for work, would have been a mobile EU national. She *also* would have been a mobile EU national *when moving back to Germany* from the UK, under the *Surinder Singh* principle. Jeremy was born in the UK according to the facts, so he likewise was a mobile EU national upon the move back to Germany; and Mitchell is not an EU national.

In a later '**Discussing the scenario**' question we will revisit what happens to Emma's and Andreas' statuses if they move in 2020 and in 2021.

Discussing the scenario

Consider what you have just learned. In 2019, would Emma have been a worker if she moved to Spain? What about Andreas—would he have been a worker if he had moved to the UK in 2019? Are Ingrid and Mitchell 'workers', under the Treaty definitions? Why or why not?

You will need to start any response to this question with a definition of 'worker' in EU law. Rely on cases like *Levin* and *Trojani* to set out what *is* and *is not* work. The facts of the scenario should then tell you the following:

- 1) If *Emma* had moved to Spain in 2019 without having a job lined up, as the scenario implies, she would *not* have been a worker. (She would have been a job-seeker, however.)
- 2) If *Andreas* moved to the UK and accepted one of the mentioned 'jobs', you would need to consider if that job made him a 'worker' using the CJEU case law definitions. Does this seem like marginal and ancillary work, or genuine and effective work?
- 3) When *Ingrid* moved to the UK, she did so for 'work'. There is no need to further interrogate that statement—she sounds like she was an EU law 'worker'.
- 4) *Mitchell*, when he moved with Ingrid to the UK, would *not* have been a 'worker' under EU law—as he is not an EU national. He would have moved as a family member *of* an EU national.
- 5) When Ingrid and Mitchell returned to Germany, it is unclear if they did so for work or personal reasons. If Ingrid *had* a job when she returned, she would have

retained her EU ‘worker’ status under the *Surinder Singh* rules. If not, she would have ceased being a ‘worker’ under EU law upon her return to her home country.¹

Discussing the scenario

Consider the (fictional) Spanish law Emma mentions that requires teachers in Spain to speak Spanish, regardless of what they teach. Do you think this violates Article 45 TFEU? Why? And what about child benefit for Sergio if Andreas had come to work in UK before Brexit—do you think child benefit is covered by Article 45 TFEU? What makes you think that?

The ‘requirement to speak Spanish’ makes access to teaching employment more difficult for other EU nationals than it does for Spanish nationals. On the face of it, this therefore represents a form of indirect discrimination. This restricts the free movement of workers to Spain in a given profession, and Article 45 TFEU has been interpreted broadly by the CJEU (as we have seen in the case law you should be citing here!), so it would have caught this measure.

(At this point you might think that this is ridiculous: if classes are to be taught in Spanish, which they probably are, it would be bizarre if EU nationals who did not speak Spanish were given teaching jobs! But that is looking at whether the measure can be *justified*. In and of itself, it is a breach of Article 45 TFEU.)

You should mention here that, while it is possible to reserve some work for home State nationals under the Article 45(4) TFEU ‘public service’ exception, case law has demonstrated that teaching (which ordinarily does not require dealing with matters of national security) would not be a profession that qualifies for that exception.

Regarding ‘child benefit’, the main issue to consider is if this is an ‘employment benefit’. Is it a benefit made available to all UK nationals who are employed? If so, the equal treatment provision in Article 45 TFEU requires that it is also available to other EU nationals who are in a comparable position: e.g. also employed. If, on the other hand, ‘child benefit’ is available on different grounds—e.g. anyone resident in the UK for 3 years is entitled—then Andreas may not qualify under Article 45 TFEU. You are not *expected* to know who qualifies for child benefit in the UK, but you should be able to apply case law examples like *Kraus* and (negatively) *Graf* to demonstrate how equal treatment under Article 45 TFEU works.

Discussing the scenario

Say Emma learned to speak Spanish by September 2019 and moved to Spain but did not have a job lined up when she first arrived there. Would she have been a job-seeker, and if so, what rights would she have had?

If Emma was *seeking* a job, she would qualify as a job-seeker for at least six months. This would entitle her to benefits *related to access to the employment market*, but only insofar as she could demonstrate a genuine connection to the Spanish employment market, as

¹ Note Chapter 13, however: as an EU citizen, she may have retained EU freedom of movement rights anyway, if she had sufficient resources and comprehensive sickness insurance, and thus been able to bring Mitchell with her to Germany as an EU family member regardless of her employment status.

we learned from *Antonissen* and *Collins*. Is it likely she would receive benefits like a job-seeker's allowance, in that case? You can at most speculate—but if *Collins* is anything to go by, someone *just* arriving in a new Member State and immediately applying for a benefit will not satisfy many 'real link' requirements set out by the Member States.

Discussing the scenario

Think back to your answer to the restriction on employing teachers in Spain—did you think it violated Article 45 TFEU? Now consider if you think the requirement for teachers in Spain to speak Spanish, even if they teach English, can be justified. Does such a requirement meet the *Gebhard* test? What would make such a requirement proportionate?

This question is inviting you to apply the *Groener* case and the *Gebhard* test to the facts in Emma's scenario. There is no conclusion possible except that the language requirement was a restriction of Article 45 TFEU rights—but it is also one that is highly likely to be justifiable under *Gebhard*:

- The measure must be applied in non-discriminatory manner;
- The measure must be justified by imperative requirements in the general interest;
- The measure in place must be suitable for securing the attainment of the objective which they pursue;
- And the measure in place must not go beyond what is necessary to attain the objective.

The measure applies 'neutrally'—i.e. to both Spanish and non-Spanish teachers—so the first condition is satisfied. Ensuring the survival of the Spanish language and/or the Spanish education system (and ensuring children understand their teachers!) are goals that are easily arguable as being 'imperative requirements in the general interest', so the second condition is also satisfied. A language requirement would ensure that Spanish education takes place in a language the children understand—so the third condition is satisfied. The fourth condition in the *Gebhard* test is that of proportionality, and here we need to consider if there are *less restrictive* measures that could ensure that Spanish children were taught in a language they understand. You can argue this either way: if you think that 'fluency' is asking for more than is necessary, you would think the measure disproportionate. If, on the other hand, you think that anyone who does not speak Spanish fluently would not be qualified for this job, you would argue that the fourth condition of the *Gebhard* test is also satisfied in this case.

If all the conditions are satisfied, the measure violates Article 45 TFEU but is justifiable and proportionate, and so Spain would be able to maintain its language requirements for teachers, as was the case in *Groener*.

Discussing the scenario

In 2019, were all of Emma's suggested ways of being with Andreas 'cross-border situations' under EU law? As Ingrid is a German national, what conditions would she have needed to meet to ensure her move back to Germany with Mitchell and Jeremy was covered by EU law?

As discussed earlier, in 2019 both Emma and Andreas would be ‘mobile EU nationals’ if they had moved to be with each other. She doesn’t set out any suggestions that include them both staying in the country of which they are nationals, so EU law definitely applies to Emma’s suggestions.

Ingrid is in a slightly different position when moving back to Germany. As a German national, when she is in Germany, only domestic law applies to her—she would not find herself in a cross-border situation. However, key to her situation (as discussed above) is that she had *exercised free movement rights* to work in the UK. As such, both she and Mitchell moved to the UK under EU law (him as her EU family member)—and their move back to Germany will *also* be treated as falling within EU law if she meets the *Surinder Singh* conditions (with Jeremy as an additional family member). This is beyond the scope of Chapter 12, but while Jeremy is probably an EU national in his own right, he is traveling with Ingrid as her family member (direct descendant), and as he is probably a minor, he will not have to be ‘working’ himself.

The *Surinder Singh* conditions mean her period spent abroad must have been ‘legitimate’ (which in practice means that she and Mitchell would have needed to spend at least 3 months living and working in the UK), and that she again finds herself exercising EU rights once in Germany, by (for example) having work lined up there.

Discussing the scenario

Imagine you are receiving this letter from Emma in early 2020. If you were advising her in early 2020, what rights do she and Andreas have now that they may lose if she or Andreas move after the transition period?

Key to answering this question is knowing what applies in the transition period contained in the Withdrawal Agreement, and knowing (or, rather, not knowing) what will apply after the transition period. As such, if Emma or Andreas move to live together in 2020, they will *both* still be treated as EU nationals—and thus continue to benefit from rights in Article 45 TFEU.

After 2020, if the transition period is not extended, Andreas’ moving to the UK would be a matter of UK immigration law; and Emma moving to Spain would be a matter of Spanish immigration law (or, perhaps, one of the EU directives regulating Schengen visas, if Spain was experiencing a teacher shortage, for example). They would both lose the ability to move *freely*, as in without documentary obligations other than a passport or ID card. They would also lose the right to equal treatment in access to employment, employment conditions, and employment benefits.

Summary

As Ingrid, you should be telling Emma the following:

- In 2019, as a UK national, she had the right to move to Spain for work purposes. If on arriving she did not have a job, she would be treated as a job-seeker, and have access to employment-related benefits if she could demonstrate a genuine/real link to the Spanish employment market. The Spanish law requiring her to be fluent in Spanish to teach is in principle indirectly discriminatory and so a violation of Article

45 TFEU, but it is likely to be justifiable on public policy grounds, e.g. children needing to understand their teacher. It is up to you to determine whether it is proportionate. Is 'fluency' necessary, per se? Or would competence suffice? Depending on what you decide, you would tell her that this Spanish law does or does not violate EU law.

- If Andreas moved to the UK in 2019, this would have meant he was exercising his EU free movement rights as a Spanish national. If he had a job lined up and took it, he would be an EU worker if the work was 'genuine and effective'. Otherwise, he, too, would be a job-seeker in the UK. Regarding child benefit, if this is a benefit applicable to all UK nationals who are employed, an employed Andreas would also be eligible under Article 45 TFEU. If, on the other hand, it was a benefit linked to how long someone has lived in the UK, he would probably not be eligible.
- Ingrid and Mitchell, after getting married in the US, moved to the UK under EU free movement rights—as Ingrid is a German national who moved to the UK for work, and Mitchell was her non-EU family member. The situation that Andreas and Sergio would be in is slightly different, in that they both have EU free movement rights *themselves*. Unlike Mitchell, their rights are not dependent on anyone else exercising EU free movement rights. When Ingrid's family returned to Germany, this would have fallen within the scope of EU law if Ingrid had worked in the UK for more than 3 months and if she also took on work once back in Germany, under the *Surinder Singh* judgment. Mitchell and Jeremy likewise would have rights as EU family members, as opposed to family member of a German national.
- If Emma or Andreas move in 2020, they will continue to benefit from Article 45 TFEU rights, as outlined previously. If they move in 2021 and the transition period has by then ended, they will not be covered by EU law, and they will not have equal treatment rights or movement rights. (You are welcome to speculate that the move to Spain or the UK is likely to be significantly more difficult, if not impossible, depending on how much money Emma and Andreas make!)