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THE CONSEQUENCES OF BREXIT FOR GIBRALTAR

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ABSTRACT: Within the framework of negotiations between the United Kingdom (UK) and the European Union (EU), a Protocol on Gibraltar was included in the Agreement on the Withdrawal of the UK from the EU, signed in January 2020. That Protocol makes reference to the four bilateral agreements or Anglo-Spanish Memoranda of Understanding (MoU) on citizens' rights, tobacco and other products, environmental cooperation and police and customs cooperation, with provision for the adoption of an international treaty on taxation and protection of financial interests.

Withdrawal Agreement negotiations have implied a major shake-up in Anglo-Spanish relations concerning Gibraltar, as Spain is recognized as an essential role for the application of EU law to said territory. This position of negotiating strength is maintained since after leaving the UK the EU must reach an agreement on the future EU-UK Relations Treaty before the end of the transitional period in December 2020. Spain's relationship with the UK and Gibraltar is also conditioned by the express recognition given to the competent authorities (not only those of Gibraltar, but also those of the surrounding area) in the Memoranda of Understanding as well as in the Protocol on Gibraltar adopted by the EU and the UK.

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The object of this Study will be to analyse the consequences of Brexit for Gibraltar in relation to the following EU freedoms and policies, among others: Cross-border cooperation and economic, social and territorial cohesion: the creation of a European Grouping of Territorial Cooperation (EGTC)-Campo de Gibraltar/Gibraltar; Area of freedom, security and justice: police cooperation; Free movement of persons - frontier workers; Freedom of establishment and freedom to provide services and; Environmental cooperation. All these aspects are examined from a double perspective: with a 'hard Brexit' without an agreement, or with a Brexit with a UK-EU agreement.

KEYWORDS: Cross-border cooperation, Gibraltar, Andalusia and Campo de Gibraltar, Brexit, UK, European Union, cross-border workers, Withdrawal Treaty.

LAS CONSECUENCIAS DEL BREXIT PARA GIBRALTAR

RESUMEN: En el marco de las negociaciones entre el Reino Unido (RU) y la Unión Europea (UE), se incluyó en el Acuerdo sobre la Retirada del RU de la UE, firmado en enero de 2020, un Protocolo anexo sobre Gibraltar. En este aparecen referenciados los cuatro acuerdos bilaterales o Memorandos de Entendimiento hispano-británicos sobre derechos de los ciudadanos; tabaco y otros productos; cooperación en materia medioambiental; y cooperación policial y aduanera, previéndose la adopción de un Tratado Internacional sobre fiscalidad y protección de intereses financieros.

La negociación del Acuerdo de Retirada ha supuesto un gran revulsivo en las relaciones entre España y el RU en relación con Gibraltar, al reconocerse a España un papel esencial para la aplicación del Derecho de la UE a dicho territorio. Esta posición de fortaleza negociadora se mantiene ya que tras abandonar el RU la UE debe llegarse a un acuerdo sobre el Tratado de relación futura UE-RU antes de que finalice el periodo transitorio en diciembre de 2020. La relación de España con RU y Gibraltar se ve también condicionada por el reconocimiento expreso que se hace a las autoridades competentes (no sólo a las de Gibraltar, sino también a las de la zona circundante) en los Memorandos de Entendimiento así como en el Protocolo sobre Gibraltar adoptado por la UE y el RU.

Analizaremos en el presente estudio las consecuencias del *Brexit* para Gibraltar en relación, entre otras, con las siguientes libertades y políticas de la UE: Cooperación transfronteriza y Cohesión económica, social y territorial: la creación de una Agrupación Europea de Cooperación Territorial (AECT)-Campo de Gibraltar/Gibraltar; Espacio de Libertad, Seguridad y Justicia: la cooperación policial; Libre circulación de personas – los trabajadores fronterizos; Libre prestación de servicios y establecimiento y; Cooperación en materia de medio ambiente. Todos estos aspectos se analizan bajo una doble perspectiva: con un 'Brexit duro' y sin acuerdo, o con un Brexit con acuerdo RU-UE.

PALABRAS CLAVE: Cooperación transfronteriza, Gibraltar, Andalucía y el Campo de Gibraltar, Brexit, Reino Unido, Unión Europea, trabajadores fronterizos, Tratado de Retirada.

I. INTRODUCTION

The now distant British referendum of June 2016, in which a marginal majority voted in favour of Brexit and the United Kingdom (UK) consequently gave formal notice of its intention to withdraw from the European Union (EU), will have unpredictable consequences that are yet to unfold, since the European Council recently agreed to extend the deadline until 31

January 2020. The severe political turmoil currently engulfing British institutions, with all possible options still on the table, renders it very difficult to predict a definite outcome, which may plunge the country into the darkest uncertainty.

This situation has tremendous economic, political and geostrategic implications for Spain. For example, the possible return of tariffs at the borders between the EU and the UK in the event of a hard Brexit would affect many Spanish sectors that traditionally export to the UK, such as the fishing and wine sectors. However, one of the most visible consequences of Brexit is undoubtedly its impact on the question of Gibraltar. The colony of Gibraltar, ceded by the Kingdom of Spain in the Treaty of Utrecht in 1713, has influenced Anglo-Spanish bilateral relations for the last 306 years. Continuing disagreements and the existence of up to three legal disputes mean that Gibraltar has become a major issue in the national interests that have surfaced during the withdrawal procedure. EU Member States have unanimously supported Spain's position, stressing that the dispute over Gibraltar is a bilateral issue between the two Member States involved and forms no part of negotiations over Article 50 of the Treaty of the European Union (TEU); thus, any agreement reached between the UK and the EU would require the prior consent of Spain before being applied to the British colony. This represents an unprecedented victory for Spain.

Within the framework of negotiations between the UK and the EU, the Council authorised the signing in January 2019 of the Agreement on the Withdrawal of the UK from the EU, of 25 November 2018 (henceforth the Withdrawal Agreement), of which the Protocol on Gibraltar forms an integral part², although it has not yet been approved by the British Parliament. In

² See Council Decision (EU) 2019/274 of 11 January 2019 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ L* 47 I, of 19.2.2019. See also Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ C* 66 I, of 19.2.2019. The Protocol on Gibraltar on pp. 150-ss, recovered from <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT&from=EN>>. After reaching agreement between the UK and the EU on a revised text of the Protocol on Ireland/Northern Ireland included in the Withdrawal Agreement and on the necessary adaptations to Articles 184 and 185 of the agreement,

accordance with Article 50(3) of the TEU, the deadline established for the Treaties to cease to apply to the UK after Brexit, with or without an agreement³, has already been extended three times. The most recent extension, granted to allow completion of ratification of the Withdrawal Agreement, sets a deadline of 31 January 2020, a decision that was adopted by the European Council in agreement with the UK⁴. However, this Withdrawal Agreement establishes a transitional period until 31 December 2020, during which time a second agreement must be negotiated to regulate future relations between the UK and the EU once the UK has become a third (non-member) State.

What is certain is that the UK's withdrawal from the EU also implies the withdrawal of Gibraltar, pursuant to Article 355.3 of the Treaty on the Functioning of the EU (TFEU), relating to the scope of application of the Treaties of the EU. The provisions of the Treaties apply to Gibraltar because it is a European territory for whose external relations a Member State (the UK) is responsible, but Gibraltar does not form part of the State of "the United Kingdom of Great Britain and Northern Ireland". According to the UK, Britain has sovereignty over Gibraltar by virtue of Article X of the Treaty of Utrecht (under which the Spanish Crown ceded the town and castle of Gibraltar, together with its port, defences and fortress, to Britain) and over the Isthmus (sovereignty by acquisitive prescription), but the territory does not form part of the British State. Instead, according to domestic British law, it is a separate territory termed a British Overseas Territory. Furthermore,

as well as on a revised text of the political declaration of 17 October 2019, the European Council approved the amended agreement on withdrawal and the revised text of the political declaration. On 21 October 2019, the Council adopted Council Decision (EU) 2019/1750 of 21 October 2019 amending Decision (EU) 2019/274 on the signing of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ L* 274, of 28.10.2019.

The Withdrawal Agreement was finally signed in Brussels and London the 24th of January, 2020. (*OJ C* 384I, 12.11.2019, p. 1–177, and Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom *OJ C* 34, 31.1.2020, p. 1–16).

³ That is, two years after the UK had notified the European Council of its intention to withdraw.

⁴ See European Council Decision (EU) 2019/1810 taken in agreement with the United Kingdom of 29 October 2019 extending the period under Article 50(3)TEU, *OJ L* 278, of 30.10.2019.

the United Nations has included Gibraltar on its list of non-self-governing territories pending decolonisation, and it thus has a differentiated international status⁵. Gibraltar also has a special status within the EU. Community legislation has applied to Gibraltar since 1973, following the accession of the UK to the EC/EU in 1972, with exceptions in the following areas: customs union; free movement of goods; common trade, agricultural and fisheries policies; and VAT. Gibraltar is also outside the Schengen Area due to the UK's non-participation in the Schengen agreements, and consequently, EU external border controls apply to Gibraltar.

II. BILATERAL RELATIONS BETWEEN SPAIN AND THE UNITED KINGDOM REGARDING GIBRALTAR

The historical Anglo-Spanish dispute over the Rock of Gibraltar has shaped not only bilateral relations between Spain and the UK within the framework of the EU but also relations with other Member States as regards the application of EU law in Gibraltar. Thus, since Spain and the UK signed the “Agreed arrangements relating to Gibraltar authorities in the context of EU and EC instruments and related treaties” on 19 April 2000⁶, EU Member States have not entered into any direct communication with the Gibraltar authorities, all communication being effected via the British authorities, evidencing that Gibraltar is a territory for whose external relations the UK is responsible. Consequently, it is the UK which is responsible for any failure to comply with European legislation applicable to the territory of Gibraltar in matters within its competence, and Spain does not recognise the Gibraltar authorities as valid interlocutors within the framework of the EU.

To a large extent, this is due to the United Nations' position on the decolonisation of Gibraltar, which envisages a process of negotiation between Spain and the UK that takes into account the interests and aspirations of Gibraltar. This bilateral process was established in the Brussels Declaration of

⁵ Gibraltar's status as a colony in the EU's post-Brexit visa policy (decision adopted on 3 April 2019 by the plenary the European Parliament with 502 votes in favour, 81 against and 29 abstentions) reflects its international legal status within the framework of the United Nations. See Position of the European Parliament, of 04/04/2019, EP-PE_TC1-COD(2018)0390.

⁶ See Doc. Council 7998/00, Gibraltar authorities in the context of EU and EC instruments and related treaties, of 19.04.2000.

1984, which in point 1 c) expressly linked issues of sovereignty to cross-border cooperation in the matter of Gibraltar. Hence, the historical dispute concerning sovereignty over Gibraltar has shaped relations between the two States in the matter of cooperation. At present, there are no open channels for dialogue on sovereignty because the Brussels Process was suspended following the breakdown of Anglo-Spanish negotiations on co-sovereignty of Gibraltar in 2001-2002, nor are there any channels for dialogue on cross-border cooperation because the Spanish Government withdrew in 2012 from the Forum for Dialogue (2004-2011) following unsuccessful attempts to modify the tripartite format which endowed the Gibraltar authorities with representation on the same footing as the regional and local authorities in the surrounding area (the Regional Government of Andalusia and the Association of Municipalities in the Region of Campo de Gibraltar).

In consequence, **Withdrawal Agreement** negotiations have implied a major shake-up in Anglo-Spanish relations concerning Gibraltar, not only as regards recognition of Spain's fundamental role in application of EU law to the territory once the UK has left the EU⁷, but also in terms of express recognition of the competent authorities (in Gibraltar and the surrounding

⁷ In accordance with the European Council Guidelines, of 29.04.2017: "After the United Kingdom leaves the Union, no agreement between the EU and the United Kingdom may apply to the territory of Gibraltar without the agreement between the Kingdom of Spain and the United Kingdom". These guidelines were reiterated in the supplementary negotiating directives of the Council of 29 January 2018 and in the guidelines of the European Council of 14 March, 2018 (see Proposal for a COUNCIL DECISION on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Doc. COM (2018) 833 final, Brussels, of 05/12/2018, pp. 5-6). In addition, in accordance with the Declaration of the European Council and of the European Commission, in the Statements on the occasion of the European Council meeting, of 25.11.2018, "After the United Kingdom leaves the Union, Gibraltar will not be included in the territorial scope of the agreements to be concluded between the Union and the United Kingdom. However, this does not preclude the possibility to have separate agreements between the Union and the United Kingdom in respect of Gibraltar. Without prejudice to the competences of the Union and in full respect of the territorial integrity of its Member States as guaranteed by Article 4(2) of the Treaty on European Union, those separate agreements will require a prior agreement of the Kingdom of Spain". See also the interpretative declaration of the European Council (Art.50) and of the European Commission on Article 184 of the Withdrawal Agreement and the territorial scope of future agreements. *Ibidem*, p. 6.

area alike) in the Anglo-Spanish Memoranda of Understanding (MoU) and the Protocol on Gibraltar adopted by the EU and the UK.

The outcome of negotiations between the UK and the EU has been the adoption of the Withdrawal Agreement, an integral part of which is the annexed Protocol of Gibraltar, which makes reference to the four bilateral agreements or MoUs on citizens' rights, tobacco and other products, environmental cooperation and police and customs cooperation, with provision for the adoption of an international treaty on taxation and protection of financial interests, which was finally adopted in March 2019, although it is currently in the process of ratification by both States.

The sole mention of Gibraltar within the Withdrawal Agreement is contained in Article 3.1 establishing the agreement's territorial scope of application, which encompasses other territories besides the UK, including Gibraltar (under point b), insofar as EU law applied to Gibraltar before the deadline for entry into force of the Withdrawal Agreement. This raised the need to adopt a Protocol on Gibraltar, the application of which must be carried out in accordance with the respective constitutional provisions of Spain and the UK. This Protocol establishes a safeguard clause in relation to the legal positions of both States as regards sovereignty and jurisdiction of Gibraltar.

Although the validity of the MoUs is dependent on the entry into force of the Withdrawal Agreement, the Spanish position of favouring an orderly withdrawal of Gibraltar in order to mitigate negative consequences in Campo de Gibraltar, protect the rights of cross-border workers and safeguard the socio-economic stability of the region, together with recent statements by the British Ambassador to Spain, leave open the possibility of endowing validity to the MoUs in the context of a **hard Brexit without an agreement**.

Below, we shall analyse the consequences of Brexit for Gibraltar in relation to EU freedoms and policies, considering the two possible scenarios of a Brexit with or without an agreement and the fact that all options remain open given the flexible nature of the extension granted the UK until 31 January 2020.

III. AREA OF FREEDOM, SECURITY AND JUSTICE: POLICE COOPERATION

In the field of police cooperation, there are two clearly defined dimensions to Gibraltar's position. One is the European dimension, regulated by

the Treaties and secondary legislation, and the other is the dimension of Anglo-Spanish bilateral relations with a direct bearing on the colony.

At European level, we must first examine the UK's position under EU law, given Gibraltar's dependence on the UK. Under the Treaties of the EU, as amended by the Treaty of Lisbon, the UK has a specific status in the area of freedom, security and justice. Thus, Protocol no. 21, on the position of the UK and Ireland, maintains an opt-out clause for measures related to border control, asylum and immigration, judicial cooperation in criminal and civil matters and police cooperation. In practice, this clause implies that each time the EU legislates on any of these matters, the UK and Ireland will be excluded from participating unless they voluntarily notify their interest in taking part in the process of adoption and application of the legislation. Similarly, this initial exclusion implies that the UK and Ireland are not subject, unless otherwise decided, to the jurisdiction of the European Court of Justice (CJEU) on these matters. Along the same lines, Protocol no. 19 on the Schengen acquis establishes stronger cooperation between Member States in this area. The UK and Ireland may at any time request to participate in some or all of the provisions of the Schengen acquis, subject to unanimous approval of the Council. However, the UK and Ireland can also opt out of any Schengen acquis measure, despite having previously accepted the act on which such measures are based. As a result of these provisions, the UK currently participates in police cooperation, mutual assistance in criminal matters, application of the *non bis in idem* principle, extradition, transmission of executions of criminal judgements and personal data protection, but is expressly excluded from policies concerning movement across external European borders, thus legalising the possibility of controls at the Gibraltar border by the Spanish authorities. Nevertheless, within the framework of police cooperation, legislation on police assistance and cooperation in the matter of information processing and personal data protection apply to Gibraltar. Conversely, Gibraltar is expressly excluded from application of the legislation on police cooperation in relation to the right of hot pursuit and cross-border surveillance.

In the event that the **Withdrawal Agreement** is approved and enters into force, the scant regulation on procedures for police cooperation in this agreement is limited to maintaining the current legislation within the fra-

mework of the Schengen acquis. Thus, during the transitional period (initially until 31 December 2020), there will be no change and current infrastructures and practices related to the exchange of information will remain essentially the same. **Meanwhile, in the event that there is no agreement**, European legislation provides for the participation of third States —as would be the case of the UK— in the Schengen acquis and even via the so-called “working arrangements” of entities as important as the European Police (Europol), the European Border and Coast Guard Agency (Frontex) and the European Border Surveillance System (Eurosur). All that will be necessary to prevent any hindrance to police cooperation in the event of a hard Brexit is the mutual will and trust of the parties.

At the bilateral Anglo-Spanish level, effective police cooperation already exists, primarily as part of the fight against drug trafficking. The legal framework for this cooperation is an Anglo-Spanish agreement on the prevention and suppression of illicit drug trafficking and misuse of drugs, of June 1989, which is applicable to Gibraltar⁸. This is limited to cooperation through the exchange of information and the promotion of collaboration in prevention, treatment and rehabilitation, and between security forces; the mutual recognition of judicial decisions regarding the seizure of substances is also envisaged. Nevertheless, the possibility of refusing to help is also envisaged in the case that a request from one of the States party could affect the sovereignty, security or national or other essential interests of the other, among other reasons. More specifically, current operational cooperation between the Spanish and British authorities in the waters around Gibraltar is based on a technical agreement on police cooperation entered into in April 2000 within

⁸ Agreement between the Kingdom of Spain and United Kingdom of Great Britain and Northern Ireland concerning the prevention and suppression of Drug Trafficking and the misuse of Drugs, of 26/06/1989 (Acuerdo entre España y el RU en materia de prevención y represión del tráfico ilícito y el uso indebido de las drogas, de 26/06/1989, *Boletín Oficial del Estado*, no. 299, of 14/12/1990). On Gibraltar, see Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Spain extending the Agreement between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Spain concerning the Prevention and Suppression of Drug Trafficking and the Misuse of Drugs, signed at Madrid on 26 June 1989, to Gibraltar (Canje de Notas de 3 de abril de 1991 con el RU de Gran Bretaña e Irlanda del Norte para extender a Gibraltar el Tratado bilateral de Prevención y Represión del Tráfico Ilícito y el Uso Indebido de Drogas de 26 de junio de 1989, *Boletín Oficial del Estado*, no. 78, of 31/03/1992).

the framework of the Schengen acquis. This agreement covers cooperation in the prevention and fight against transnational organised crime and other forms of crime in the region whether organised or not, including terrorism, human trafficking, crimes against children, illegal trafficking in firearms, drugs and goods, environmental crimes, corruption, money laundering and fraud. All this is achieved through the official channels of information exchange, and even through direct contact between the various commanders of the units involved in the operation.

In the event that the **Withdrawal Agreement is approved**, this bilateral cooperation would continue through application of the MoU on police and customs cooperation linked to the Protocol on Gibraltar, which essentially seeks to ensure security in the Campo de Gibraltar area. This MoU sets down the need to continue to exchange information, to adopt joint protocols to strengthen the existing 2000 agreement and to create a joint coordination committee formed by representatives of the Spanish and Gibraltar security forces. **However, in the event of a hard Brexit**, there would be two complementary channels for cooperation. First, there is Royal Decree Law 5/2019, adopting contingency measures for the withdrawal of the UK of Great Britain and Northern Ireland from the EU⁹, which provides for the application of existing international conventions and Anglo-Spanish bilateral protocols, in clear reference to the bilateral agreement on drugs of 1989 and the joint protocol of 2000. Second, there is the possibility of the entry into force of the MoU on police and customs cooperation, based on the free and sovereign will of the two States, effectively regularising current practice.

IV. FREE MOVEMENT OF PERSONS - FRONTIER WORKERS

Under current European regulations, the free movement of workers applies to the UK, and therefore to Gibraltar since its incorporation into the process of European integration. The concept of worker includes frontier

⁹ Royal Decree of 1 March, adopting contingency measures for the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union without reaching the agreement envisaged in Article 50 of the Treaty of the European Union (Real Decreto-Ley 5/2019, de 1 de marzo, por el que se adoptan medidas de contingencia ante la retirada del Reino Unido de Gran Bretaña e Irlanda del Norte de la Unión Europea sin que se haya alcanzado el acuerdo previsto en el artículo 50 el Tratado de la Unión Europea, *Boletín Oficial del Estado*, no. 53, de 2 de marzo de 2019).

workers, defined as people who reside in a “border area” of one Member State but work in the territory of another Member State, returning to their place of residence every day or once a week. In our opinion, regardless of their nationality, workers residing in Campo de Gibraltar who cross the border to perform paid work in Gibraltar (territory of employment) but return to their place of residence in Spain (State of residence) every day or once a week, are, for all applicable legal purposes, frontier workers, according to European and Spanish law. Without prejudice to the exclusively political dilemma, this affects the recognised rights of Spanish frontier workers in Gibraltar because these are not strictly speaking two States; instead, Gibraltar is a non-self-governing territory for whose external relations a Member State is responsible, in this case the UK.

In the event of the **approval and entry into force of the Withdrawal Agreement**, this expressly envisages the registration and accreditation of frontier workers through an official document, applicable equally to EU and UK citizens. **If there is no agreement**, frontier workers would be regulated by the States through their laws on foreign nationals, under which obligatory registration as a frontier worker is established. The ultimate aim of this is to combat tax fraud and regulate labour relations.

Current Spanish legislation, which affects frontier workers in Gibraltar, is intended to combat fraud but also to facilitate border crossing. Hence, the Customs and Excise Department of the State Tax Administration Agency (Agencia Estatal de Administración Tributaria: AEAT) adopted a resolution in 2014 which permitted frontier workers to use any of the existing border crossing points, whether or not they had goods to declare. Nevertheless, they were required to register with the AEAT, presenting their identity card, work contract and certificate of residence.

In the event of the **approval and entry into force of the Withdrawal Agreement**, the obligation to register would already be covered by Spanish national legislation in force since 2014, applicable to Spanish workers in Gibraltar and third State nationals who perform paid work in Spain. This latter is in line with legislation on Moroccan workers in Ceuta and Melilla, in accordance with organic law 4/2000 on the rights and freedoms of foreign nationals in Spain.

More specifically, the MoU on citizens, linked to the Protocol on Gibraltar, is aimed at safeguarding the rights of frontier workers residing within the “Association of Municipalities in the Region of Campo de Gibraltar” and ensuring the quarterly exchange of information between the authorities, through the creation of a bilateral coordination committee. The ultimate goal is to safeguard the interests of Spanish frontier workers in Gibraltar, avoiding major disruption to their daily lives, and to forestall negative effects on socio-economic development in the region.

However, the tremendous failure as regards the obligation to register on the part of frontier workers in Gibraltar, in accordance with the resolution of 2014—with only 10% of the total registered—merely confirms the complexity of these workers’ situation and the uncertainty in the event of a **withdrawal without agreement**. Should the UK leave the EU, for all applicable legal purposes Spanish frontier workers would be working in a third State, subject to the market and labour legislation of that State without any protection from EU legislation. Consequently, the national contingency measures adopted in recent months (Royal Decree 5/2019) stress the need for accreditation of frontier workers and for reciprocal recognition of rights by the British authorities. Similarly, Spain seeks reciprocity in the field of social security, based on the sovereign will of the States and aimed at ensuring protection of workers. As is the case for police cooperation, agreements have been reached, especially bilateral agreements between Spain and the UK via the MoUs, and the option remains open for their entry into force and application. The latter would evidently give rise to a very interesting bilateral scenario aimed at regularising relations in the area.

V. FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES

Under the **current situation of application of the Treaties** in the UK, one of Gibraltar’s main sources of income is the services and establishments sector, especially in the areas of banking, insurance and online gambling. Both freedoms are enshrined in the Single Market and fully operational in the UK, and therefore in Gibraltar; hence, all EU legislation is applicable. In this case, the essential element is the requirement for the existence of cross-border movement between two Member States, which given the new technologies, need not be physical. This takes us back to the problem raised

concerning the definition of a frontier worker, which is that Gibraltar is not strictly a State, and therefore cross-border movement in the provision of services or the freedom of establishment would be difficult to apply between the colony and a Member State such as Spain.

In reference to the freedom to provide services, CJEU case-law is not applicable in the case of a Member State national established in a third State or, more specifically, in the case that all the elements of an activity are located inside one Member State. The CJEU ruling of June 2017 regarding case C-591/15, *The Gibraltar Betting and Gaming Association*, calls into question the territorial application of EU law to Gibraltar, in reference to a British law establishing a duty for some online gambling which is equally applicable to distributors of these games in the British colony. In this case, most of the services were provided to individuals resident in UK territory. Both the Advocate-General and the Court of Justice considered that Gibraltar and the UK should be considered a single entity, and that this was therefore an internal situation in which the freedom to provide services does not apply.

In the event that the **Withdrawal Agreement is approved**, this agreement will regulate relations between the EU and the UK during the transitional period; a period during which a final agreement must be reached on the relation between the two subjects from, initially, January 2021. It is therefore surprising that this Withdrawal Agreement makes no specific mention of the Single Market or, therefore, the freedom to provide services or the freedom of establishment. However, the European Commission's clarification on the agreement, issued in November 2018, clearly indicates that during the transitional period, all Single Market legislation, including its four freedoms, shall be fully applicable in the UK. The only reference to application of Single Market legislation occurs in relation to the border between Ireland and Northern Ireland, and is aimed at avoiding the creation of a physical border between the two territories. With regard to Gibraltar, and bearing in mind point 24 of the directives established by the European Council in April 2017 discussed earlier, we believe it would be clearer and more effective to reach an Anglo-Spanish bilateral agreement—prior to the final agreement on the UK's withdrawal from the EU—which clearly established the legislation applicable in each case within the Single Market.

Given the imminent prospect of a **hard Brexit**, many companies based in Gibraltar —especially online gambling companies— have recently explored the possibility of moving their headquarters to the territory of another Member State. In response, the town council of La Línea de la Concepción has proposed the town as a potential new site for their headquarters, hoping to benefit economically from such a relocation. However, these companies have finally opted for Malta, which has one of the most flexible taxation regimes in the EU. It would perhaps be desirable to adopt special measures for special situations, such as the one arising from the poor socio-economic development of Campo de Gibraltar and its residents, who will undoubtedly be among those worst affected by the —supposed— withdrawal the UK and Gibraltar from the EU.

If there is no agreement and the UK abruptly withdraws from the EU, the international rules of the WTO would apply to the freedom to provide services, namely the 1995 General Agreement on Trade in Services (GATS), which would open the British market, or the European market as the case may be, to foreign competition as agreed between States. With respect to the freedom of establishment, the corporate law of the Member State in which the headquarters were located would be applicable, which would probably prompt modifications to Spanish tax and corporate law in order to render Spain a more attractive candidate for any possible relocation. Nonetheless, it is clear that at some point it will be necessary for the EU and the UK to reach a bilateral agreement on trade relations, independently of whether Brexit occurs with or without an agreement.

VI. ENVIRONMENTAL COOPERATION

Current EU framework: responsibility for the environment is shared between the EU and the Member States, according to Articles 11 and 191 to 193 of the TFEU, whose scope of application is governed by the principle of subsidiarity. As a result, the effectiveness of EU environmental legislation depends to a large extent on application at national, regional and local level, and in the case under study is strongly affected by the historical Anglo-Spanish dispute concerning sovereignty over Gibraltar (Rock and Isthmus), which also extends to the surrounding maritime spaces, the airspace over the territory and the internal waters of the port of Gibraltar. Since environmental

matters are the responsibility of the Government of Gibraltar, this latter is also responsible for transposing environmental directives, whereas the UK is answerable to the EU for compliance with them.

To take marine environment protection as an example, the Marine Strategy Framework Directive¹⁰ envisages cooperation between Member States when these border the same region or sub-region (for which a marine strategy must be established) and when the state of the sea is so critical that it requires urgent measures and a common plan of action. Such cooperation has not been achieved between Spain and the UK in the maritime area of the *Strait and Alboran*, which encompasses the Bay of Algeciras/Gibraltar. This lack of cooperation between the States is evidenced by the overlapping of spaces protected under the Habitats Directive¹¹ and included in the European Natura 2000 network of protected areas as Sites of Community Importance (SCI) and Special Areas of Conservation (SAC), for which the adoption of conservation measures is envisaged, including regulation of fishing activity and navigation, environmental impact assessment of projects with trans-boundary effects that may derive from the practice of land reclamation (in accordance with the Environmental Impact Assessment Directive¹²), pollution prevention, bunkering and scientific research. For several years, these activities have been challenged in European courts by the Campo de Gibraltar Verdemar-Ecologists in Action Association, and have also been the subject of complaints and protests on the part of the Spanish Government to the UK, since they are carried out by the UK and Gibraltar in the Spanish SCI/SAC, *Estrecho Oriental*, which overlaps with the British SCI/SAC, *Southern Waters of Gibraltar*, which both States claim are under their own sovereignty. To date however, the European Commission has failed to find any breach of EU environmental legislation by the UK in the so-called *British Gibraltar Territorial Waters*, defined unilaterally by the UK in British Admiralty Nautical Chart

¹⁰ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), *OJ L* 164, of 25.06.2008.

¹¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *OJ L* 206, of 22.07.1992.

¹² Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, *OJ L* 124, of 25.04.2014.

1448. In application of the equidistance principle, these waters extend 1.5 miles to the west, encompassing part of Algeciras Bay/Gibraltar, and are internal waters since they are within the port of Gibraltar, and 3 miles of territorial waters to the east and south of the Strait, which include the waters adjacent to the Rock (by virtue of principle that the land dominates the sea) and the Isthmus (sovereignty by prescription).

Brexit with an agreement: focusing on the MoU on environmental cooperation, this marks an important step forwards as regards the current state of cross-border cooperation between Spain and the UK in relation to Gibraltar (characterised by the absence of an institutional framework on cross-border cooperation ever since Spain withdrew from the tripartite Forum for Dialogue in 2011). In effect, this MoU envisages the creation of a Technical and Coordination Committee with representatives of the competent authorities, which include not only the two States (which will participate in all meetings), but also the Government of Gibraltar, the Regional Government of Andalusia and the Association of Municipalities in the Region of Campo de Gibraltar. In fact, cooperation between the different entities (which will rotate as President, responsible for coordinating the committee, every five months) is essential to ensure effective implementation of the measures established in the MoU. Meanwhile, participation of the competent authorities implies implicit recognition of Gibraltar as interlocutor and guarantor of the MoU's application together with the UK¹³. The MoU is intended to ensure that the competent authorities act in good faith, in the sole interest of protecting and improving the environment, and envisages that the EU will participate in the committee's meetings and that the committee shall report regularly to the Specialised Committee on issues related to implementation of the Protocol on Gibraltar¹⁴.

It should be noted that the MoU expands the scope of responsibility for cooperation laid down in Article 4 of the Protocol on Gibraltar (Environment protection and fishing), because in addition to serving as a forum

¹³ In accordance with the MoU: "The activities of the Technical and Coordination Committee and of the competent authorities in respect of the Technical and Coordination Committee will be without prejudice to the requirements of EU law applying during the transition period".

¹⁴ This Specialised Committee acts as a subcommittee of the Joint Committee (EU-UK) which oversees the execution, functioning and consequences of Brexit, in accordance with the provisions of Article 165 of the Withdrawal Agreement.

for waste management¹⁵, air quality¹⁶, scientific research¹⁷ and fisheries¹⁸, the Technical and Coordination Committee is responsible for cooperation regarding “assessment of the environmental impact of projects proposed in both Gibraltar and the surrounding area, in particular the territory of the municipalities that make up the Association of Municipalities of Campo de Gibraltar (including land reclamation) that are likely to have a significant transboundary effect”¹⁹; for “water quality and the protection of the marine habitat in both Gibraltar and the surrounding area”²⁰; for the marine environment “consistent with the desire to maintain high environmental standards and protection and facilitate sustainable development both in Gibraltar and in the surrounding area”²¹; and for refuelling activities²².

¹⁵ “The TCC, alongside the Working Group on Customs referred to in the Memorandum of Understanding on Police and Customs Cooperation, will also provide a forum for enhanced cooperation in respect of solid waste and rubble crossing from Gibraltar to Spain for treatment in places other than the landfill of the Mancomunidad de Municipios del Campo de Gibraltar”.

¹⁶ “The TCC will provide a forum for enhanced cooperation, and for the exchange of information on request between the competent authorities, on air quality in both Gibraltar and the surrounding area, in particular the territory of the municipalities that make up the Mancomunidad de Municipios del Campo de Gibraltar”.

¹⁷ The Technical and Coordination Committee will provide a forum for “sharing of related scientific data”, particularly “scientific research vessels of EU or UK flag which intend to carry out their activities in that area (Gibraltar and the surrounding area, in particular the territory of the municipalities that make up the Mancomunidad de Municipios del Campo de Gibraltar) will inform the TCC of their route, duration, objectives and any other matter the Committee will consider relevant with reasonable notice before the beginning of the activities”, receiving a copy of the findings of the research activities.

¹⁸ “The TCC will provide a forum for discussion of fishing activities”, bearing in mind that in accordance with the 1972 Act of Accession, the EU’s common fisheries policy shall not be applicable to Gibraltar.

¹⁹ The Technical and Coordination Committee “will provide a forum for enhanced cooperation, and for the exchange of information on request between the competent authorities”.

²⁰ The Technical and Coordination Committee will provide a forum for enhanced cooperation between the competent authorities.

²¹ The Technical and Coordination Committee “will provide a forum for enhanced cooperation between the competent authorities”.

²² The Technical and Coordination Committee “will provide a forum for promoting the highest environmental protection”.

Thus, the Technical and Coordination Committee is envisaged as a forum to promote discussion, cooperation and the exchange of information, on request, on issues that have been raised before the European Commission, which has not detected any breach by the UK of EU environmental legislation (in relation to land reclamation, bunkering, fisheries, protection of the marine environment or harassment of oceanographic vessels) in waters close to Gibraltar that fall within the Spanish *Estrecho Oriental* SCI. This does not affect the two States' claims to sovereignty over Gibraltar, since the MoU and the Protocol on Gibraltar both establish a safeguard clause on the legal positions of the Kingdom of Spain and the UK as regards sovereignty and jurisdiction of Gibraltar.

Brexit without an agreement: as noted earlier, the declarations made by the States (Spain and the UK) leave open the possibility to endowing validity to the MoUs in the event of a hard Brexit without an agreement. For example, the MoU on environmental cooperation expressly envisages that it will cease to have effect on 31 December 2020 (the end of the transitional period established in the Withdrawal Agreement), “unless the parties decide otherwise”.

In this respect, previous experience of cross-border cooperation indicates that within the institutional framework of the tripartite Forum for Dialogue (2004), Spain and the UK were capable of putting aside questions of sovereignty in order to foster cooperation, and in 2007, of expressly including environmental issues on the agenda. Moreover, in July 2009, agreements on environmental issues and on maritime communications and security were expressly defined in the proceedings and outcome of the matter then pending before the Court of First Instance of the European Communities on the overlap of Spanish and British SCIs around Gibraltar²³. Thus, at policy level,

²³ See appendix to press release 51-2009 of the Spanish Ministry of Foreign Affairs on the ministerial meeting of the Forum for Dialogue on Gibraltar, of 21 July 2009, *Marco para próximas negociaciones* [Framework for upcoming negotiations], both the section on environmental issues and the section on maritime communications and security: “Neither the designation of Sites of Community Importance nor the Decisions of the European Union Commission in relation to the same, taken in accordance with Council Directive 92/43/EEC, have implications for, and therefore do not change, the sovereignty, jurisdiction and control of the waters to which they refer, which consequently remain as they were before.

Nothing in this Paper (especially but not exclusively the contents of the preceding paragraph) or in any arrangement reached in accordance with or as a result of it, and nothing carried

the Forum for Dialogue served as a bridge in the absence of an institutional and legal framework for regulating cross-border relations with Gibraltar.

VII. TRANSNATIONAL COOPERATION AND ECONOMIC, SOCIAL AND TERRITORIAL COHESION: THE CREATION OF A EUROPEAN GROUPING OF TERRITORIAL COOPERATION (EGTC)-CAMPO DE GIBRALTAR/GIBRALTAR

The EGTC is a legal instrument that allows the authorities and other public entities (municipalities, provinces, regions, public companies, etc.) to meet as a new entity with a legal personality. Such entities can be formed of at least two EU Member States, or a single Member State and one or more neighbouring third countries, including their outermost regions²⁴. The goal is to strengthen the economic, social and territorial cohesion of the EU, reducing regional and developmental inequalities between the regions and the European States (objective regulated in Article 3.3 of the TEU and in Articles 174-178 of the TFEU), and for several years, EGTCs have fostered decided advances in transnational and inter-territorial cooperation in the EU.

Focusing on transnational cooperation between Spain and the UK in relation to Gibraltar, concerns about the effect of Brexit on socio-economic relations between Gibraltar and Campo de Gibraltar prompted the Transnational Group-Cross Frontier Group in 2016 to create an EGTC as an autonomous entity to manage joint cooperation activities and projects between Gibraltar and Campo de Gibraltar. This was a civil society initiative²⁵ supported by the

out or omitted pursuant to such an arrangement, will prejudice any position in relation to any stage or matter arising in relation to Case T-176/09 in the Court of First Instance of the European Communities. This Paper and any arrangements, acts or omissions referred to above may not be cited or presented, serve as the basis, or used in any way, in any stage in connection with this Case”.

²⁴ See Regulation (EU) no.1302/2013 of the European Parliament and of the Council of 17 December 2013 amending Regulation (EC) no. 1082/2006 on a European grouping of territorial cooperation (EGTC) as regards the clarification, simplification and improvement of the establishment and functioning of such groupings, OJ L 347, of 20/12/2013.

²⁵ This group was created following a crisis in the summer of 2013 caused by the Gibraltar authorities’ sinking of seventy concrete blocks (for the construction of an artificial reef in waters that Spain claims are under its sovereignty and which are traditionally trawled by Spanish fishermen), and Spain’s tightening of border crossing controls and intensification of the fight against smuggling. Participants in the Transnational Group include the Cádiz and Gibraltar Chamber of Commerce; the association of small and medium-sized enterprises in

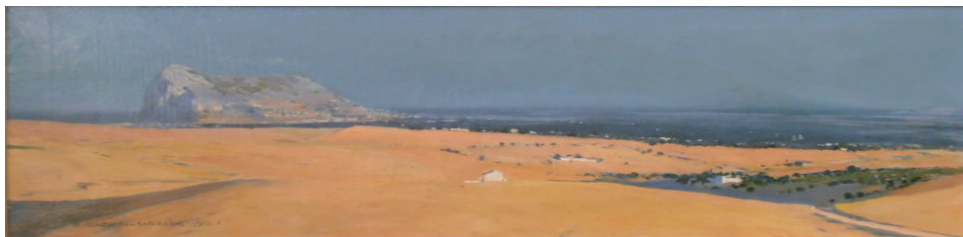
Association of Municipalities of the Region of the Campo de Gibraltar, the Provincial Government of Cádiz and the Andalusian Parliament.

However, the inclusion of Gibraltar as a participant in an EGTC requires an analysis of whether the EU's territorial cohesion policy is applicable to Gibraltar, in other words, whether this policy provides for the participation of Gibraltar or the Government of Gibraltar in representation of this territory. The answer is yes it does; not in application of Article 3 bis of the EGTC Regulation (in accordance with the UK's domestic classification of Gibraltar as a British Overseas Territory, because Gibraltar is not on the list of Overseas Countries and Territories of Annex II of the TFEU), but in application of Article 355.3 of the TFEU. In this context, European legislation regarding Economic and Social Cohesion and Structural Funds is not excluded by the UK's 1972 Act of Accession or by subsequent acts, and in fact has applied to Gibraltar since 1994. At present, Gibraltar is the subject of an operative FEEDER programme within the framework of the UK-Commission Association Agreement for the period 2014-2020, which expressly includes Gibraltar together with Scotland, Wales, Northern Ireland and England. This means that in principle, EU legislation on Funds and Cohesion, in the context of which this EGTC Regulation was adopted (Article 175 of the TFEU), applies to Gibraltar, since during the process of negotiating the Withdrawal Agreement, an EGTC was created with the participation of Gibraltar and Member States (Spain and the UK). In this respect, on 11 May 2018, the Regional Government of Andalusia (through the Secretary General of External Action of the Ministry of the Presidency, Local Administration and Democratic Memory) presented drafts of the statute and agreement of the EGTC to the mayor of La Línea de la Concepción and representatives of Transnational Group, since the EGTC would be composed of the Regional Government of Andalusia, the town council of La Línea de la Concepción and the Transnational Group, without the participation of the Government of Gibraltar. However, despite having been stated on 10 February 2018 that this initiative must be registered (sending the request to the Secretary of State for Public Administrations in order to receive the necessary authorisation), there is no evidence that this has happened to date (following changes in central and regional government: then, the PP led national government and the PSOE led the Regional Government La Línea and Gibraltar; the UGT/CCOO trade unions; the trade union in Gibraltar for State employees, UNITE; and the CEOE (Cadiz business association).

nment of Andalusia; subsequently, the PSOE led national government and the PP led the regional government). This viable initiative would require the consent of Spain and the UK for its constitution, and it would fall to Spain, as the host country for the proposed headquarters of the EGTC, to give formal approval of its articles of agreement, in accordance with Royal Decree 23/2015 of 23 January, adopting [in Spain] the measures necessary for effective application of the EGTC Regulation of 2013, whose Article 4.1 establishes the procedure for presenting an application for the creation of a EGTC.

In principle, following the transitional period laid down in the Withdrawal Agreement (ending 31 December 2020) or following withdrawal without an agreement, the economic, social and territorial cohesion policy would cease to apply to Gibraltar and thus any EGTC created with the participation of public entities from Gibraltar would cease to be between two Member States but would instead be between entities from one Member State (Spain) and a third (non-member) State (the UK), in accordance with the EGTC Regulation and the abovementioned Spanish Royal Decree. However, the announced suspension of the plan to create a Campo de Gibraltar/Gibraltar EGTC does not close the door to possibilities for cooperation between Spain and the UK in relation to Gibraltar. Other institutional entities or structures for cooperation have been envisaged within the **framework of a Brexit with an agreement**. Both the Protocol on Gibraltar and the 2018 MoUs between Spain and the UK contemplate the creation of Coordination Committees or Technical Coordination Committees in relation to frontier workers' rights, environmental protection and police cooperation. Meanwhile, **in the event of a hard Brexit without an agreement**, the States' assurances that they will maintain the validity of the MoUs suggests that the possibility remains of expanding transnational cooperation to other areas of responsibility such as culture, education, sport, tourism and health, by agreement between the States and with the participation of the competent authorities in both Gibraltar and the surrounding area (Regional Government of Andalucía and the Association of Municipalities in the Region of Campo de Gibraltar).

For all these reasons, we believe that the Protocol on Gibraltar and the MoUs enshrine stable cross-border cooperation with Gibraltar in primary European law.



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