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EDITORIAL

GIBRALTAR AFTER BREXIT: LOOKING FOR A NEW AND IMAGINATIVE MODEL OF CROSS-BORDER COOPERATION IN THE EU FRAMEWORK

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I. INTRODUCTION – II. CONTROVERSY AND EVOLUTION OF CROSS-BORDER COOPERATION WITH GIBRALTAR – III. THE BREXIT PROCESS: THE OUTLOOK FOR GIBRALTAR – IV.- TREATY OF WITHDRAWAL AND CROSS-BORDER COOPERATION WITH GIBRALTAR – V. THE SEPARATE EU-UK TREATY ON GIBRALTAR, NEGOTIATIONS 2021-2022 – VI. FINAL IDEAS

ABSTRACT: Brexit has directly impacted Spain's relationship with the UK due to the Gibraltar issue. The British withdrawal from the EU has forced the redefinition of the European statute of Gibraltar, and its relations with Spain and the European Union, in institutional, legal and economic terms. In this context, novel mechanisms have also been devised to regulate cross-border cooperation with Gibraltar, which is frequently the subject of political ups and downs and changes with the different Spanish and British governments.

The cross-border cooperation of the territory of Gibraltar with the Campo de Gibraltar, Andalusia and Spain has had intermittent phases in its evolution over time. Within the British exit process framework, a new model has been agreed in successive EU-UK agreements that combine *Hard Law* (Primary EU Law) with *Soft Law* (Memoranda of Understanding – MOUs). This regulation has

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required a specific prior British-Spanish negotiation.

The first Withdrawal Treaty of 2019 has formed a peculiar cross-border cooperation system involving the UK, the EU, Gibraltar and Spain, through a series of MOUs interconnected with the Protocol on Gibraltar. The Protocol refers to the Tax Treaty and establishes concrete cooperation on citizens' rights and cross-border workers; tobacco and other products; cooperation in environmental matters; and police and customs cooperation.

For its part, the Future Relationship Trade Agreement does not deal with the status of Gibraltar, as it has been preferred to devote a separate UK-EU Treaty to Gibraltar's status with the EU, a Treaty that has yet to be negotiated and concluded. To this end, a prior Spanish-British 'Principle of Agreement' was agreed on 31.12.2020, then embodied in the Council Decision of 05.10.2021 authorising the opening of negotiations with the negotiating mandate and directives for the negotiation of the future EU-UK Treaty in respect of Gibraltar. This Treaty, currently under negotiation, foresees a complete and renewed legal status for Gibraltar in its relationship with the EU and Spain, with reinforced and guaranteed cross-border cooperation with the Campo de Gibraltar and Andalusia.

In short, the Brexit process seems to provide an innovative and imaginative model for cross-border cooperation with Gibraltar, bilaterally articulated by Spain and the UK and incorporated into the EU's institutional and legal framework.

KEYWORDS: Brexit, Gibraltar, Soft Law, Memorandum of Understanding, European Union, Withdrawal Agreement, Schengen, Cross-border Cooperation.

GIBRALTAR DESPUÉS DEL BREXIT. BUSCANDO UN MODELO DE COOPERACIÓN TRANSFRONTERIZA NUEVO E IMAGINATIVO EN EL MARCO DE LA UE

RESUMEN: El Brexit ha impactado directamente en la relación de España con el Reino Unido (RU) por la cuestión de Gibraltar. La salida británica ha obligado a redefinir el estatuto europeo de Gibraltar, y sus relaciones con España y la Unión Europea (UE), en términos institucionales, jurídicos y económicos. En este contexto, también se ha ideado unos mecanismos novedosos para regular y encauzar el tratamiento de la cooperación transfronteriza con Gibraltar, frecuente objeto de vaivenes políticos y cambios con los diferentes Gobiernos españoles y británicos.

La cooperación transfronteriza del territorio de Gibraltar con el Campo de Gibraltar, Andalucía y España ha tenido variadas e intermitentes fases en su planteamiento y evolución en el tiempo. En el marco del proceso de salida del RU de la UE se ha acordado un nuevo modelo en los sucesivos Tratados y acuerdos UE-RU que combinan *Hard Law* de Derecho originario con *Soft Law* de Memorandos de Entendimiento (Memorandum of Understanding - MOU). Esta regulación ha requerido de una negociación específica previa británico-española.

El primer Tratado de Retirada de 2019 ha conformado un auténtico sistema de cooperación transfronteriza que involucra al RU, la UE, Gibraltar y España, mediante una serie de Memorandos interconectados con un Protocolo sobre Gibraltar, que reenvían al Tratado fiscal y establecen una cooperación concreta sobre derechos de los ciudadanos y trabajadores fronterizos; tabaco y otros productos; cooperación en materia medioambiental; y cooperación policial y aduanera.

Por su parte, el Acuerdo comercial de relación futura no trata el estatuto de Gibraltar, pues se ha preferido dedicar un Tratado separado RU-UE al estatuto de Gibraltar con la UE, Tratado que debe aún negociarse y celebrarse. Para ello, fue acordado el 31.12.2020 un 'Principio de acuerdo' previo hispano-británico, luego plasmado en la Decisión del Consejo de 05.10.2021 autorizando la apertura de negociaciones con el mandato negociador y las directrices para la negociación UE-RU del futuro Tratado de Gibraltar. Este Tratado, en fase de negociación, prevé un completo y renovado estatuto



jurídico para Gibraltar en su relación con la UE y España, con una cooperación transfronteriza reforzada y garantizada con el Campo de Gibraltar y Andalucía.

En definitiva, el proceso del Brexit parece aportar un nuevo modelo, innovador e imaginativo, para la cooperación transfronteriza con Gibraltar, articulado bilateralmente por España y Reino Unido e incorporado al marco institucional y jurídico de la UE.

PALABRAS CLAVE: Brexit, Gibraltar, Soft Law, Memorandum of Understanding, Unión Europea, Acuerdo de retirada, Schengen, Cooperación transfronteriza.

I. INTRODUCTION

Following the 2016 referendum, the UK formally applied in March 2017 to leave the EU, effective from 1 February 2020. *Brexit* is a historical phenomenon that has led to far-reaching changes in the approach and focus of many European and international matters. In addition, notably, it has affected Spain's relationship with the UK over the issue of Gibraltar.

The UK's exit from the EU has also implied Gibraltar's exit. Under Article 355.3 of the Treaty on the Functioning of the EU (TFEU), relating to the scope of application of the EU Treaties, the provisions of the Treaties applied to Gibraltar, as a European territory whose external relations were assumed by a Member State, in this case, the UK.

The British exit has forced a redefinition of Gibraltar's European status and its relations with Spain and the EU in institutional, legal and economic terms. We are particularly interested in the treatment given to cross-border cooperation with Gibraltar, which has frequently been subject to political ups and downs and changes with the different Spanish and British governments.

To this end, after analysing the approach and evolution over time of the cross-border cooperation of the territory of Gibraltar with the Campo de Gibraltar, Andalusia and Spain (2), we will examine what is the current regulation established in the successive EU-UK Treaties and agreements in the framework of the British *Brexit* from the Union (3). This regime has required a specific prior British-Spanish negotiation. The first Withdrawal Treaty of 2019 has shaped an original cross-border cooperation system involving the UK, the EU, Gibraltar and Spain, through a series of Memoranda interconnected with a Protocol on Gibraltar (4). The Trade and Cooperation Treaty, in force since May 2021, does not deal with the status of Gibraltar. It has been preferred to regulate in a separate UK-EU (Gibraltar) Treaty, to be negotiated and concluded. To this end, a previous Spanish-British 'Principle



of Agreement' has already laid the foundations for that future negotiation and specific agreement for the future of Gibraltar in its relationship with the EU and Spain, with reinforced and guaranteed cross-border cooperation with the Campo de Gibraltar and Andalusia (5). Some final thoughts (6) will allow us to take stock of the new model in the Brexit process these treaties bring to the cross-border issue, historically pending to find a stable channel for cross-border cooperation with Gibraltar.

II. CONTROVERSY AND EVOLUTION OF CROSS-BORDER COOPERATION WITH GIBRALTAR

In the history of the Gibraltar controversy, we have always experienced, in the democratic period, a tension or difference between the aspects of cross-border cooperation with the surrounding area, on the one hand; and the traditional claim of sovereignty over the *lost city* of the Kingdom, on the other. Both aspects are linked and have known periods of greater or lesser cooperation. Today it is recognised that Spain's interests are both the recovery of sovereignty and the welfare and development of the Campo de Gibraltar, in a region of 300,000 Spanish people, negatively marked and weighed down by the history of the controversy.

In this context, the UK and Spain's membership in the EU contributed a significant influence on both aspects of the bilateral dispute. The EU's mediating or facilitating role in smoothing out the bilateral confrontation has had a particular impact on the practical aspects of European Law applied in Gibraltar and the Campo de Gibraltar.

The historical Spanish-British dispute over the Rock of Gibraltar has conditioned the bilateral relations between Spain and the UK within the EU and those of the other Member States concerning the application of EU law in Gibraltar. Thus, for example, the EU Member States do not maintain any direct communication with the Gibraltar authorities, everything having to be done through the British authorities.

These situations are mainly due to the United Nations doctrine on the decolonisation of Gibraltar, which provides for a negotiated process between Spain and the UK to that end, in which Gibraltar's interests and aspirations will be taken into account. This bilateral process was set out in the 1984 Brussels Declaration, the point 1(c) expressly linked sovereignty issues to cross-border



cooperation on Gibraltar. This cooperation aims to resolve the problems caused by the border and to satisfy the common interests of the populations living on either side of the fence/border -in areas such as the environment, fisheries, transport, health, sport, culture and tourism, judicial cooperation in civil matters, taxation, the fight against illicit trafficking and social and labour issues, among others-.

This link between cross-border cooperation and historical controversy over the Rock has hindered, but not prevented, cross-border cooperation initiatives between the Spanish sub-State territorial entities, on the one hand, and the Government of Gibraltar, on the other. Spontaneity has traditionally been one of the particularities of cross-border cooperation with Gibraltar. There is a spontaneous practice of collaboration, through the adoption of agreements of a political nature, mainly between Gibraltar and the surrounding area of Campo de Gibraltar, in the absence of an institutional and legal framework adopted by the States².

However, the creation on 16 December 2004 by the Governments of Spain, the UK and Gibraltar of the *Forum for Dialogue on Gibraltar* was conceived as a qualitative change in strategy, formally detaching cross-border cooperation from the historical dispute over the sovereignty of the Rock.³ Within the framework of this tripartite Forum, the Cordoba Agreements of 2006 were adopted (on pensions, joint use of the airport, greater fluidity in the crossing of the border, communications and the opening of the Cervantes Institute). These 'agreements' covered, at the political level, the lack of a legal framework regulating cross-border relations with Gibraltar, being an example of *gentlemen's agreements* and the adoption of *Soft Law* rules. In 2004 the "Joint Commission for Cooperation and Collaboration between Gibraltar and the

² See GONZÁLEZ GARCÍA, I., "El marco estatal y subestatal de la cooperación transfronteriza entre Gibraltar y el Campo de Gibraltar", in the collective work *Gibraltar, 300 años*, Cádiz, 2004, pp. 315-338.

³ See Communiqué n° 9.556, 27.10.04, of the Diplomatic Information Office (OID) of the Ministry of Foreign Affairs and Cooperation (MAEC). On the formal creation of the Tripartite Forum, see OID Communiqué no. 9.583, 16.12.04. On the Forum, see: GONZÁLEZ GARCÍA, I. and DEL VALLE GÁLVEZ, A. (Eds.), *Gibraltar y el Foro tripartito de Diálogo*, Ed. Dykinson, Madrid, 2009 and GONZÁLEZ GARCÍA, I., "Gibraltar: Cooperación transfronteriza y nuevo foro tripartito de diálogo", *Revista Electrónica de Estudios Internacionales (REEI)*, n° 9, 2005. By the same author: "La nueva estrategia para Gibraltar: El Foro tripartito de diálogo y los acuerdos de 2006", *Revista Española de Derecho Internacional (REDI)*, vol. 58, no. 1, 2006, pp. 821-842.

Association of Municipalities of the Campo de Gibraltar Region” was set up, a framework for cooperation of a local or sub-state nature, in which the Regional Government of Andalusia joined on 12 March 2007.

However, the changes of government that took place in 2010-2011 in the UK, Gibraltar, and especially in Spain led to the suspension of the functioning of the Forum of Dialogue on Gibraltar (2004-2011)⁴ and with it, of the ‘agreements’ that were adopted within its framework and incorporated into its working agenda⁵.

A new phase of deadlock and a complete lack of dialogue between the governments of the main parties concerned with the Gibraltar issue began. Thus, on the question of sovereignty at the inter-State level, the Brussels Process was frozen following the failure of the Spanish-British negotiations on the co-sovereignty (Joint Sovereignty) of Gibraltar in 2001-2002. As for cross-border cooperation, the tripartite format of the Forum could not be replaced by an *ad hoc* mechanism for four-party regional collaboration in the Campo de Gibraltar, which would also involve the States and the European Commission, which was invited to participate as an observer⁶.

In the end, it was not governments but the civil society that mobilised. The crisis of the summer of 2013⁷ began with the launch by the Government of Gibraltar of seventy concrete blocks reef in waters that Spain claims under its

⁴ See the study by DEL VALLE GÁLVEZ, A., “Gibraltar, de foro tripartito a cuatripartito: entre la cooperación transfronteriza y la soberanía”, *Análisis del Real Instituto Elcano*, ARI 21/2012 of 23.03.2012 and *Revista ARI -Real Instituto Elcano*, núm. 96, April 2012, pp. 18-24.

⁵ These Agreements, in Spanish and English, in *Gibraltar y el Foro tripartito de Diálogo... cit*, pp. 415-510. Some documents in “Gibraltar: principales documentos oficiales” docs 14, 15, 16, *Elcano Royal Institute*, 01.09.2013.

⁶ See Spanish Minister of Foreign Affairs *Press Release 199*, The Secretary of State for Foreign Affairs reiterates to the United Kingdom the proposal to launch the “ad hoc” mechanism for regional cooperation in the Campo de Gibraltar”, 03.08.2015. See the Notes by DEL VALLE GÁLVEZ, A.: “Gibraltar, de foro tripartito a cuatripartito...” *cit.* and “Gibraltar, controles en la verja y nuevo diálogo ad hoc: la UE se involucra en la controversia”, *ARI*, n. 62/2014, Elcano Royal Institute, 19.12.2014.

⁷ About this crisis, GONZÁLEZ GARCÍA, I., “La pesca y el medio ambiente en las aguas de Gibraltar: la necesaria cooperación hispano-británica en el marco de la Unión Europea” in *Cuadernos de Gibraltar-Gibraltar Reports*, no. 1, 2015, pp. 149-170 and DEL VALLE GÁLVEZ, A., “The Gibraltar crisis and the measures, options and strategies open to Spain” *Cuadernos De Gibraltar – Gibraltar Reports*, n. 1, 2015, pp. 135-147, available at <https://revistas.uca.es/index.php/cdg/article/view/4585>.



sovereignty, preventing Spanish fishermen from fishing in those waters. This crisis started in a context of an absolute lack of institutional frameworks for dialogue and negotiation. The previous attempts to establish stable cooperation through the creation of ad hoc groups, quadripartite groups, etc., failed, so there were no places for direct dialogue at the same level between the Gibraltar authorities and the regional and local authorities in the surrounding area –the Andalusian Regional Government and the Association of Municipalities of the Campo de Gibraltar region–.

It was then from the civil society that a joint cross-border initiative arose, for the first time: the *Cross Frontier Group*, (Grupo Transfronterizo) with the participation of the Chamber of Commerce of Cadiz and Gibraltar, the Association of small and medium enterprises of La Linea and Gibraltar, the trade unions UGT/CC.OO. The Gibraltar Union of Civil Servants-UNITE and the CEOE (Cadiz employers) came together to raise and assert their common interests.

Precisely within the *Cross-Frontier Group* has launched the eventual creation of a European Grouping of Territorial Cooperation (EGTC) as an autonomous entity to manage activities and collaboration projects Gibraltar and Campo de Gibraltar. Indeed, the concern about the impact of *Brexit* on socio-economic relations between Gibraltar and its Campo⁸ led in 2015 to this civil society initiative, which supports the Association of Municipalities of the Campo de Gibraltar region, the Diputación (Province of Cadiz-County Government) de Cádiz and the Parliament of Andalusia. There is no doubt that this figure of the EGTC is possible to envisage for cross-border cooperation in the Campo de Gibraltar⁹, since Article 355.3 TFEU was applicable, not being excluded

⁸ There is a Socio-economic study of the impact of Brexit in La Línea de la Concepción, prepared by the City Council of this border town, which reflects in figures its concern about Brexit impact. See also the Report of the Chamber of Commerce of Gibraltar published in 2015 (update of a previous report of 2009) under the title *An Economic impact study and analysis of the economies of Gibraltar and the Campo de Gibraltar*, <https://infogibraltar.com/wp-content/uploads/2020/06/Economic%20Impact%20Study%20FINAL.pdf>.

⁹ See the Report by A. DEL VALLE GALVEZ: “Establishment of an EGTC —European Grouping of Territorial Cooperation— Campo de Gibraltar / Gibraltar (Brief Guide on Approach, Requirements and Procedure)”, *Cuadernos de Gibraltar - Gibraltar Reports*, no. 4, 2021, <https://revistas.uca.es/index.php/cdg/article/view/7539#:~:text=https%3A%2F%2Frevistas.uca.es/index.php/cdg/article/view/7539>. GONZÁLEZ GARCÍA, I., “El *Brexit* y la cooperación transfronteriza con Gibraltar: la creación de una Agrupación Europea de Cooperación

European legislation on Economic and Social Cohesion and Structural Funds. In fact, the cohesion Policy is being implemented in Gibraltar since 1994, being the subject of an ERDF operational programme under the UK-Commission Partnership Agreement for the period 2014-2020, which expressly integrated Gibraltar. After Brexit, the possibilities of creating an EGTC with the participation of public entities of Gibraltar would no longer be between two Member States, but to be formed between entities of a Member State (Spain) and a third non-member State (UK), under the current EGTC Regulation.¹⁰

In this regard, the Andalusian Government (General Secretariat for External Action of the Presidency, Local Administration and Democratic Memory) presented on 11 May 2018 to the Mayor of La Línea de la Concepción and representatives of the Cross-Frontier Group the draft statute and agreement of a specific EGTC, being composed of the Andalusian Government, the City Council of La Línea de la Concepción and the Cross-Frontier Group, without the participation of the Government of Gibraltar. However, although it announced in February 2018 that it would register this initiative formally in the Madrid Ministry (Secretary of State for Public Administrations) for the mandatory authorisation, the fact is that to date, there is no evidence that it has happened. It is a viable initiative, which required for its constitution of the consent of Spain and the UK, corresponding to Spain, the country in which the proposed registered office of the EGTC would be located, the formal approval of its constitutive convention. However, the “Principle of Agreement” of 31 December 2020, and the Council Decision of 05.10.2021 authorising the opening of negotiations, as we will see later, opens up the possibility of a specific financial instrument for Gibraltar and the Campo de Gibraltar.

Since 2012 we have therefore been living without an agreed and functioning institutional format for cross-border cooperation with Gibraltar.

Territorial (AECT) - Campo de Gibraltar/Gibraltar” in Martín Rodríguez, P. (Dir.), *Nuevo Mundo, Nueva Europa. The redefinition of the European Union in the era of Brexit*. AEPDRIRI-Tirant lo Blanch, Valencia, 2021, pp. 523-537.

¹⁰ Art. 3a, taking into account its internal classification in British Law as a *British Overseas Territory*, since Gibraltar is not on the list of Overseas Countries and Territories in Annex II TFEU “Overseas Countries and Territories to which the provisions of Part Four of the TFEU apply”, i.e. Articles 198 to 204 TFEU (Association of Overseas Countries and Territories).



III. THE BREXIT PROCESS: THE OUTLOOK FOR GIBRALTAR

The UK's withdrawal from the EU has had a direct impact on Gibraltar, as it has forced a change in its European status and relationship with the EU, which has been in force since 1973.

In the context of *Brexit*, the *domestic legal framework* of British Law is not altered, as Gibraltar is not part of the State “United Kingdom of Great Britain and Northern Ireland”. According to the UK, it has sovereignty over Gibraltar under Article X of the Treaty of Utrecht of 1713 (by which the Spanish Crown ceded to the British Crown the city and castle of Gibraltar, together with its port, defences and fortress), and over the Isthmus (by acquisitive prescription), but it is not a territory integrated into the British State. On the contrary, it is a territory separate from the UK, according to the internal qualification it receives in British Law as an overseas territory (*British Overseas Territory*).

Nor does *Brexit* alter the *International nature* of a territory labelled in International Law and the United Nations with a peculiar international status. It is on the list of non-self-governing territories pending decolonisation within the framework of the UN.

Instead, its *European status* needs to be completely reconfigured. The European status that Gibraltar has enjoyed within the EU is very particular: EU law has been applied to Gibraltar since 1973 (after Gibraltar joined the EC/EU with the UK's accession in 1972), with exceptions in the following areas: Customs Union; free movement of goods; common commercial, agricultural and fisheries policies; VAT; Gibraltar also being outside the Schengen Area due to the UK's non-participation in the Schengen Pacts (consequently, European external border controls with Gibraltar apply).

In these circumstances, the result of the *Brexit* referendum unexpectedly gave Spain a favourable position concerning Gibraltar. This situation has been reflected in the two main Treaties through which the British exit process has been articulated: a first Treaty of Withdrawal of the UK from the EU,¹¹ and a second EU-UK ‘Future Relationship’ Treaty.¹²

¹¹ “Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community”. This Treaty was endorsed in November 2018, and finally adopted by the parties on 17 October 2019. It entered into force on 1 February 2020. *OJ*, L, 29, 31 January 2020.

¹² “Trade and Cooperation Agreement between the European Union and the European

Concerning Gibraltar, we must analyse the regulations agreed in the Treaties and agreements linked to the UK's withdrawal from the EU. The legal framework of the impact of *Brexit* on Gibraltar is schematically constituted by:

- The EU-UK Withdrawal Treaty 1, dated October 2019 and in force since 01.02.2020. This Treaty contains:
 - A Protocol on Gibraltar
 - References to 4 UK-Spain Memoranda (MOUs signed in November 2018).
 - References to the UK - Spain Bilateral Tax Treaty, which came into force in March 2021.
- Future Relationship or Trade and Cooperation Agreement, UK-EU Treaty of 30.12.2020, which entered into force on the 1st May 2021. This Treaty does not apply to Gibraltar.
- A specific EU-UK Treaty on Gibraltar, yet to be negotiated and concluded.

For this future Treaty a prior “Principle of Agreement” was reached between the UK and Spain on 31.12.2020. The negotiating directives were approved by the Council the 5th October, 2021.

Let us then look at the role of the EU and Spain in this post-Brexit period, with the exit of the UK and the passage of Gibraltar to a different international and European status.

IV. TREATY OF WITHDRAWAL AND CROSS-BORDER COOPERATION WITH GIBRALTAR

Undoubtedly, the negotiation of the Withdrawal Treaty has meant a substantive rethinking of the relations between Spain and the UK about Gibraltar. Spain enjoys now a decisive role in the application of EU law to this territory. The competent authorities of Gibraltar and the surrounding area have been expressly recognised with direct interlocution and specific functions in the 4 Spanish-British Memoranda of Understanding (MOUs) and in the

Atomic Energy Community, on the one part, and the United Kingdom of Great Britain and Northern Ireland, on the other part”. Treaty agreed on the 30th December 2020, was ratified and entered into force in May 2021, OJ L 444 of 31 December 2020.

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Protocol on Gibraltar adopted by the EU and the UK.

Indeed, for the Withdrawal Treaty, from the very first moment of negotiation in 2017, Spain obtained in the European Council Negotiating Guidelines the guarantee of Clause 24, consisting in the fact that any agreement on Gibraltar requires prior agreement between Spain and the UK; in practice, this has excluded Gibraltar from the list of EU-UK negotiating topics¹³. Subsequently, the need for Spain's prior agreement on all matters relating to the EU-UK relationship on Gibraltar was confirmed for the October 2019 Withdrawal Treaty.

However, the only mention that the Withdrawal Treaty makes of Gibraltar is contained in Article 3(1), which establishes its territorial scope of application, including alongside the UK other territories, such as Gibraltar (in letter b), to the extent that EU law would apply to Gibraltar before the date of entry into force of the Treaty (which is 1 February 2020). Therefore, the adoption of a Protocol on Gibraltar (agreed of November 2018) was necessary. The Protocol provides a safeguard clause concerning the legal positions of both States about the sovereignty and jurisdiction of Gibraltar.

In this first Treaty on the Withdrawal of the UK from the EU, it wanted

¹³ The European Council adopted on 29 April 2017 the Guidelines following the UK's Notification under Article 50 TEU. According to Clause 24 "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", available at <https://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf>. It is also reiterated in the complementary negotiating directives of the Council of 29 January 2018 and European Council Guidelines of 14 March 2018.

Regarding the 'Future Relationship' Treaty, according to the statement by the European Council and the Commission at the European Council meeting of 25 November 2018: "Once the United Kingdom has left the Union, Gibraltar will not be included in the territorial scope of agreements to be concluded between the Union and the United Kingdom. This does not, however, exclude the possibility of separate agreements being concluded between the Union and the United Kingdom in respect of Gibraltar. Without prejudice to the competences of the Union and with full respect for the territorial integrity of its Member States as guaranteed by Article 4(2) of the Treaty on European Union, such separate agreements shall require the prior agreement of the Kingdom of Spain". Furthermore, on the occasion of the Draft Withdrawal Treaty of November 2018, Interpretative Declarations were made guaranteeing in the future that the regulation on Gibraltar in the Treaty on the future EU-UK relationship must have the prior acquiescence of Spain to any new situation (and that once the UK had left the EU, Gibraltar would not be included in the scope of application of the agreements to be concluded between the EU-UK).

to focus on cross-border cooperation with Gibraltar. The *Brexit* situation has accentuated the problems of the existing cooperation with the Campo de Gibraltar and the need to take into account the interests of this region; especially to guarantee the rights of frontier workers¹⁴, whose defence has been assumed by all the Spanish political forces. For years, there is also an urgent need to regulate the problems of daily life and the most immediate conflict issues with a *Modus Vivendi* with Spain, because the region and the border town of La Linea live day by day the consequences of the historical controversy.

The regulation of cross-border cooperation in the Withdrawal Treaty is settled in an annexed Protocol (EU-RU) on Gibraltar, forming an integral part of the Treaty. Four bilateral agreements or *Memorandums of Understanding* (MOUs) signed by the UK and Spain on citizens' rights and frontier workers; tobacco and other products; cooperation on environmental matters; and police and customs cooperation are referenced here.¹⁵

Indeed, the Protocol on Gibraltar (which obtained Spain's approval in a separate UK-Spanish negotiation on the 2018 *Draft Withdrawal Treaty*) refers to four Spain-UK Memoranda of Understanding on cross-border cooperation (also agreed in November 2018). Likewise, the Protocol takes into account the issues then regulated by the International Agreement on taxation and protection of financial interests between Spain and the UK about Gibraltar, made *ad referendum* in Madrid and London on 4 March 2019, and which has recently entered into force, on 4 March 2021, following the ratification process carried out in both States.¹⁶

¹⁴ See GONZÁLEZ GARCÍA, I, DEL VALLE GÁLVEZ, A, ACOSTA SÁNCHEZ, M, BERNAL SANTAMARÍA, F. *Cooperation in the Campo de Gibraltar after Brexit -New framework for frontier workers*, Colección Actualidad- Centro de Estudios Andaluces, nº 96, 2021, available at <https://centrodeestudiosandaluces.es/publicaciones/descargar/1117/documento/2585/SummaryACT96.pdf>, ACOSTA SÁNCHEZ, M. A., "Los trabajadores fronterizos en Gibraltar: el *Brexit* y más allá" in Martín Rodríguez, P. (Dir.), *Nuevo Mundo, Nueva Europa. La redefinición de la Unión Europea en la era del Brexit*, *op. cit. supra*, pp. 373-388.

¹⁵ The Spanish and English versions of the Withdrawal Treaty (selected), Protocol and MOUs, in GONZÁLEZ GARCÍA, I, DEL VALLE GÁLVEZ, A, CALVO MARISCAL, L & TORREJÓN RODRÍGUEZ, J. D. "Documentación II. Brexit and Gibraltar - Withdrawal Treaty, Protocol, Tax Treaty and MOUs (2018-2020)", *Cuadernos de Gibraltar – Gibraltar Reports*, nº 4, 2021, <https://revistas.uca.es/index.php/cdg/article/view/6882>.

¹⁶ International Agreement on Taxation and the Protection of Financial Interests Between



Protocol and MOUs create a system or institutional format for cross-border cooperation with the most urgent issues to be dealt. We can affirm that European Law with this Withdrawal Treaty (plus the MOUs) has shaped the necessary *Modus Vivendi* with Gibraltar¹⁷. It is striking that in original European Law (the Protocol is an integral part of the Withdrawal Treaty), cross-border cooperation relating to Gibraltar have been dealt with in such detail. Fundamental issues of cross-border cooperation in the region (such as the matters regulated in the MOUs and the Treaty on taxation and protection of financial interests) are thus elevated to the status of Primary Law, and a structure for monitoring these agreements is created.

The above has the powerful meaning of shielding essential matters of cooperation with Gibraltar utilising an international treaty, giving the EU's legal backing and protection to this *Modus Vivendi* previously agreed by Spain and the UK. It should be noted that this legal shielding of cross-border cooperation has been achieved thanks to the EU.

Besides, several ideas in the Withdrawal Treaty are worth highlighting about Gibraltar and the EU's role.

— Although they are different legal instruments (Protocol to the UK-EU Treaty and UK-Spanish MOUs), together they form a coherent institutional and legal framework, being interlinked thanks to institutional cross-referencing and mutual referencing of contents. The MOUs provide for Committees and Working Groups. The MOU Committees refer information to the *Gibraltar Specialised Committee* (for issues related to the implementation of the Gibraltar Protocol) and the UK-EU *Joint Committee* of the Withdrawal Treaty. Also, the Tax Treaty provides for a Joint Coordination Committee.

— Indeed the rights of citizens are the best preserved, as this part of the Protocol will not be affected by a hard *Brexit*. This has an enormous legal and political logic. The real major day-to-day problem that may arise is that the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Spain regarding Gibraltar, London and Madrid, 4 March 2019, BOE no. 62 of 13.03.2021. The Spanish and English versions can be found in “Documentation II. Brexit and Gibraltar - Withdrawal Treaty, Protocol, Tax Treaty and MOUs (2018-2020)”, Documents 5 and 6, *Cuadernos de Gibraltar – Gibraltar Reports loc. cit.*

¹⁷ DEL VALLE, A. “Brexit negotiations and Gibraltar: time for a ‘Modus Vivendi’?”, *Cuadernos De Gibraltar – Gibraltar Reports*, n. 2, 2017. pp. 19-26, available at <https://revistas.uca.es/index.php/cdg/article/view/4594>.

of the border crossing at the Verja/Border Fence, as the flow of citizens and border workers resident in Spain is vital for Gibraltar and the region. On the other hand, the contents of the MOUs and the committees on the environment and fisheries, police and customs cooperation, and tobacco, expire on 31 December 2020, “unless the parties agree otherwise”. But the logic of favouring an orderly withdrawal and the unanimous will to protect the rights of citizens and border workers in the socio-economic context of the region argued for the maintenance of the MOUs even in the context of a hard *Brexit*. In fact, three of these MOUs have seen extended their validity in two occasions, until the signing of the new Treaty on Gibraltar in 2022.¹⁸

— The combination of Treaty (Primary European Law) with Spanish-British *Soft Law* (the Memoranda of Understanding) is well adapted to the reality and interests of the parties. *Soft Law* has always been used in Spain’s agreements with the UK on Gibraltar, but this recognition by the EU is a novelty brought by the Withdrawal Treaty, as it forms the new format of cooperation for Gibraltar.

— EU “mediation” of the dispute is foreseen, institutionally and materially. The intertwining and linkages between bilateral EU-UK and Spain-UK Committees have formed a genuine and innovative institutional system for dealing with Gibraltar issues, with the EU participation and mediation.

¹⁸ On 21 July 2021, three of these MOUs were extended on the occasion of the first foreign visit of the new Foreign Minister, J.M. Albares, to the United Kingdom, Spanish Ministry of Foreign Affairs, European Union and Cooperation *Press Release 161* 20.07.2021, available at http://www.exteriores.gob.es/Portal/en/SalaDePrensa/NotasdePrensa/Paginas/2021_NOTAS_P/20210720_NOTA161.aspx. In addition, in December 2021 Ministers J. M. Albares and E. Truss “addressed the extension of the validity of the Memoranda of Understanding between Spain and the United Kingdom on Gibraltar on the matters of Police and Customs Cooperation, Environmental Cooperation, Tobacco and Other Products, which expires on 31 December 2021, with a view to guaranteeing a framework of suitable cooperation until the signing of the new Agreement between the EU and the United Kingdom on Gibraltar and the opportune complementary bilateral understandings”, Spanish Ministry of Foreign Affairs, European Union and Cooperation, *Press Release 211* “Ministers for Foreign Affairs of Spain and United Kingdom review state of negotiations with the EU on Gibraltar”, available at http://www.exteriores.gob.es/Portal/en/SalaDePrensa/NotasdePrensa/Paginas/2021_NOTAS_P/20211216_NOTA211.aspx. Other measures have also been extended by Spain: “Spain extends Brexit bridging measures on healthcare and driving licences”, *Gibraltar Chronicle*, 29.11.2021.



V. THE SEPARATE EU-UK TREATY ON GIBRALTAR, NEGOTIATIONS 2021-2022

The EU-UK Trade and Cooperation Treaty, agreed on December 2020, yet in force, does not regulate the question of Gibraltar's status with the EU and EU Law.¹⁹ In this respect, a specific and separate EU-RU Treaty on Gibraltar²⁰ is foreseen, being necessary a prior agreement of Spain. Then, after the entry into force of the EU-UK Trade and Cooperation Treaty and the specific EU-RU Treaty on Gibraltar, it will be established a long-term relationship between Gibraltar and the EU with a view to permanence and stability.

In order with what was agreed at the beginning of the *Brexit* negotiation, Spain and the UK must reach an agreement before the EU adopts any EU-UK decision and agreement on Gibraltar. So a prior agreement between Spain and the UK is needed for any subsequent agreement between the EU and the UK on the future of Gibraltar's relationship with the EU.

1. Principle of Agreement of 31.12.2020, between UK and Spain

Hence the importance of the "*Principle of Agreement*" of 31 December 2020 agreed between Spain and the UK on Gibraltar and its new European status and relationship with Spain²¹.

¹⁹ It is noted in Part Seven Final Provisions, Article FINPROV.1: Territorial Scope - "3. This Agreement shall not apply to Gibraltar and shall have no effect in Gibraltar". In this sense, Government of Gibraltar's "Joint Ministerial Statement on a treaty between the UK and EU in respect of Gibraltar" Press Release No: 259/2021, 29 March 2021.

²⁰ In the declaration of the European Council and the Commission at the European Council meeting of 25 November 2018, reproduced *supra* note 14. We can read in the 05.10.2021 Opening negotiations Decision (see *infra* Footnote 27) : "3.- The Trade and Cooperation Agreement neither applies nor produces any effect in Gibraltar, which is excluded from its territorial scope. 4.- At the European Council meeting of 25 November 2018, a statement was made to the minutes of that meeting establishing 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, and that those separate agreements will require prior agreement of the Kingdom of Spain."

²¹ Press Conference of the Minister of Foreign Affairs of 31.12.2020, "González Laya announces a principle of agreement with the United Kingdom on Gibraltar to tear down La Verja", *El Economista*, 31.12.2020. A full report on this appearance and the agreement, in *EuropaSur* 01.01.2021, "Spain and the United Kingdom redefine the relationship with Gibraltar in a historic agreement". The Agreement was published by the newspaper *El País* on 11.01.2021 and can be seen as Documentation VI of the *Cuadernos de Gibraltar/Gibraltar*

It is an “Understanding on key elements” for the future relationship between the EU and Gibraltar, which serves to negotiate guidelines for the specific UK-EU treaty on Gibraltar. This Treaty has yet to be drafted. In this informal document (*Non-Paper*), transmitted to the EU authorities in Brussels, essential agreements are reached for the future.

In summary, we can highlight these ideas from the “Principle of Agreement”:

The title (“Principle of agreement between Spain and the UK on Gibraltar and Brexit”) encompasses²² a series of documents. It is a Working Paper entitled “Letters regarding a proposed framework for a UK-EU legal instrument setting out Gibraltar’s future relationship with the EU.”²³ It consists of a letter from the Permanent Representations (REPER) of Spain and the UK to the EU, dated 31 December 2020, which annexes a *Non-Paper*, with 25 stipulations and 3 Annexes.

Therefore, this *Working Paper* is the framework agreed by the two States for the future UK-EU Treaty on Gibraltar, which should also be accompanied by other *Soft Law* instruments referred to in the *Non-Paper*.

In terms of content, everything related to mobility and transit through the border crossing point of the Verja/Border Fence stands out, with most of the articles and annexes dedicated to the movement of citizens and border workers.²⁴ In this context, the most striking aspect is a kind of ‘integration’ of the territory of Gibraltar into the *Schengen Area*, which has been interpreted as the demolition or tearing down of the Gibraltar Border Fence (removing all physical barriers), and the establishment of entry points into the Schengen Area at the port and airport. This entails joint action by FRONTEX at these points over the next four years, and Spanish intervention as the responsible Schengen State, to a degree with issues to be specified. We can also find in the

Reports, 2021, no. 4.

²² According to the expression of the *Diario de Sesiones de las Cortes Generales*, in the appearance of the Minister González Laya on 20.01.2021, *Diario de Sesiones*, Comisión Mixta UE, 2021 n° 42, XIV Legislature, session n° 10 (extraordinary), available at https://www.congreso.es/public_oficiales/L14/CORT/DS/CM/DSCG-14-CM-42.PDF.

²³ Council Doc. WK 83/2021 INIT of 5 January 2021.

²⁴ Sections on Mobility (persons), points 5-10; Mobility (Goods-customs relationship), 11-15; Citizens’ rights (21); Social Security Coordination (20); Annex 1, Checks and Schengen Area; Annex 2 (Social Security Coordination); Annex 3 (Workers/Frontier Workers).



document provisions on visas and residence permits.

Other aspects that have been the object of agreement in the *Non-Paper*, although they refer with less intensity, are transport, environment, uniform rules (level playing field), Data, Cohesion financial mechanism, and an open clause for other aspects that could be incorporated in the future agreement.

This “Principle of agreement” must be taken into account by the Commission for the negotiating mandate of the specific UK-EU Treaty on Gibraltar. The essential contents will nourish the future specific UK-EU Treaty on Gibraltar, which must enshrine them in its articles, and pass the necessary parliamentary controls for approval before entering into force.

It must be specified that this agreement is that of UK and Spain, that present the agreement in Brussels with the intention that the EU institutions assume its contents, with a view to a subsequent negotiation for the Treaty between the EU and the UK (Gibraltar). The central issue of the “Agreement Principle” of 31.12.2020 is to facilitate the agreement between the EU (as it already has the support of Spain) and the United Kingdom (which has already given the basic agreement on content) for the specific Treaty over Gibraltar.

Initially, it was thought that this set of agreements and procedures for the conclusion of the Treaty should be completed by June 2021, which clearly was an excessively short and ambitious date, given the depth and complexity of the underlying issues.

2. The Commission proposal for the Negotiating Mandate, July 2021, approved by the Council the 05.10.2021

The Commission approved a proposal for a negotiating mandate in July 2021²⁵, with the idea that the Council approves it, so that the negotiations of the specific Treaty on Gibraltar can start, with bilateral negotiations between the United Kingdom and the European Union.

In the negotiating mandate that constitutes the Recommendation for a Decision of the Council to open negotiations, the following ideas are interesting, collected in point 3 of the explanatory memorandum, and in the Annex of Directives for the negotiation of the agreement with the UK with respect to Gibraltar:

²⁵ European Commission, *Recommendation for a Council Decision authorising the opening of negotiations for an agreement between the European Union and the UK in respect of Gibraltar*, COM(2021) 411 final, 20.7.2021.

- The preponderant role explicitly recognized by Spain, during the negotiation; but also in the application and monitoring of the agreement.
- The clarity of the objectives of the agreement, which pursues a new relationship that a) eliminates physical barriers to the movement of people and goods, and b) to contribute to the shared prosperity of the region (point 3 of the explanatory memorandum)
- Equally precision and clarity regarding the movement of people: the objective is to eliminate the existing physical structures (removing all current physical barriers), that is to say, the British demarcation border Fence
- The peculiar ‘incorporation’ of Gibraltar to Schengen: the territory of Gibraltar will not integrate Schengen, nor the Customs Union. In this sense, Gibraltar residents are invited to participate in Schengen benefits, thanks to Spain (p. 3).
- Highlights the preponderant position of Spain in the future Schengen statute of Gibraltar. In this sense, in the first place, Spain guarantees the full protection of the Schengen area. Second, the decisive position of Spain is evident by the extraordinary breadth of the safeguard measures envisaged, specific cooperation mechanisms necessary for which Spain would be responsible.

Other measures are focused on the free movement of goods, transport, environment, climate, coordination of social security or citizens’ rights.

Finally, there is a very interesting institutional aspect, as it is expected to erect a solid governance structure, with its own governing body to supervise, manage, supervise application and operation, even to resolve disputes. In this body, Spain will have a privileged position.

The Council of the EU adopted the Decision authorising the opening of negotiations for an agreement between the EU and the UK in respect of Gibraltar the 05.10.2021.²⁶ The decision and its annex fully include the text of the Commission’s proposal presented in July 2021.

²⁶ Text in English in “Documentación VII. Mandato negociador para el Tratado entre el Reino Unido y la Unión Europea con respecto a Gibraltar, 5 de octubre de 2021: Decisión del Consejo por la que se autoriza la apertura de negociaciones, así como las directrices de negociación”. *Cuadernos De Gibraltar – Gibraltar Reports*, n. 4, 2021, available at <https://revistas.uca.es/index.php/cdg/article/view/8394>.



3. Negotiations and perspectives of celebration of the specific agreement on Gibraltar

The prospects for successful and rapid negotiation are not very evident if we think in the short term, taking into account these aspects and problems:

- The extraordinary objective technical complexity of the issues, which must consider aspects of International, European, British and Spanish Law
- The long shadow of the historical controversy, with susceptibilities and approaches linked to the symbolic, difficult to fit into a rational negotiation.
- The novel and original situation for Gibraltar in the *Schengen* Area that the Commission proposed and the Council approved in the October Decision authorising the opening of negotiations for an agreement EU-UK in respect of Gibraltar.
- The strengthened role of Spain and the dependent situation in which Gibraltar would remain stable with this Treaty if it entered into force, for at least 4 years until its revision, and in a subordinate position with respect to a large number of decisions daily application and interpretation when entering and leaving the territory.
- The extraordinary ambition of the objectives, which include dismantling the Verja/Border Fence (which is a unilateral British demarcation of 1908, not accepted by Spain), or the idea of shared prosperity in the region.²⁷

Both seem enormous challenges that are difficult to agree on in a short UK-EU negotiation period, with Spain and Gibraltar measuring the negotiating progress behind the EU and UK respectively.

This ambition is reflected in the regulation of the Objective and Scope of the Agreement, in the Council Decision:

- 7 . The aim of the negotiations is to establish a broad and balanced agreement between the Union and Euratom, of the one part, and the United Kingdom in respect of Gibraltar, of the other part, in view of the particular geographical

²⁷ “The envisaged agreement aims at establishing a new relationship between the Union and the United Kingdom in respect of Gibraltar that removes physical barriers to the circulation of persons and goods to contribute to shared prosperity within the region”, European Commission, *Recommendation for a Council Decision authorising the opening of negotiations for an agreement between the European Union and the UK in respect of Gibraltar*, COM(2021) 411 final, 20.7.2021... *cit.*, point 3, page 2.

situation of Gibraltar, taking into account its status under international law, and in view of the specificities of Gibraltar and its special relation with Spain.

8. The envisaged agreement should aim to attain a balanced economic and social development of Gibraltar and the surrounding area, in particular the territory of the municipalities that make up the Mancomunidad de Municipios del Campo de Gibraltar in the Kingdom of Spain.

9. The envisaged agreement should ensure a balance of rights and obligations, and a level playing field that will stand the test of time. This balance must ensure the autonomy of the Union's legal order and decision-making as well as the protection of the Union's financial interests and be consistent with the Union's fundamental principles.

And this even being aware that “The envisaged agreement between the Union and the United Kingdom should be without prejudice to the issues of sovereignty and jurisdiction. It should not affect the legal position of the Kingdom of Spain with regard to sovereignty and jurisdiction in respect of Gibraltar” (Annex, point 10 of the Decision).

– Finally, the breadth and extraordinary powers of the own governing body, for management, supervision and resolution of disputes. This governing body must adopt very sensitive capital decisions - by consensus - for issues of high sensitivity for Gibraltar and Spanish nationalisms.

Therefore, reaching an agreement on the profile, characteristics and powers of this body in an EU international treaty seems equally difficult to achieve in the short term.

In July 2021, the UK and Gibraltar have publicly shown their disappointment with this Proposal of Decision Recommendation for the Negotiating Mandate, unlike the satisfaction officially expressed by Spain. But finally this was the text adopted by the Council, with a new paragraph in point 25 about the future role of Frontex in the implementation of the provisions about free movement of people and incorporation of Gibraltar to the Schengen Area²⁸.

To sum up, the EU Directives for the Negotiation of the Agreement

²⁸ “Spain has expressed its intention to request Frontex assistance within the limits and conditions of regulation EU 2019/1896 on the European Border and Coast Guard Agency in implementing the obligations under the future agreement with regard to external border controls during this initial four year period”, text in “Documentación VII. Mandato negociador para el Tratado entre el Reino Unido y la Unión Europea con respecto a Gibraltar, 5 de octubre de 2021”, *Cuadernos De Gibraltar – Gibraltar Reports* n. 4, *cit*.



EU-UK in respect of Gibraltar, and the previous UK-Spain “Principle of Agreement”, express a clear desire to permanently regulate a stable and normalized cross-border cooperation from Spain to Gibraltar and the Campo de Gibraltar. There is a clear will to regulate a stable and normalised cross-border cooperation of Spain for Gibraltar and the Campo de Gibraltar. Sovereignty issues have been put aside for the time being, allowing this detailed regulation of the cooperation desirable for a “future of shared prosperity” in the Rock and the surrounding region. However, at some later stage, other sovereignty issues must be addressed - indeed, there appears to be necessary to regulate some aspects of free movement of people and goods that may affect the UK military bases.

VI. FINAL IDEAS

Brexit has had a direct impact on Spain’s relationship with the UK over the issue of Gibraltar. The British exit has forced to redefine the European status of Gibraltar, and its relations with Spain and the EU, in institutional, legal and economic terms.

This change seems favourable for the future possibilities in terms of cross-border cooperation between Gibraltar and the Campo de Gibraltar, since new mechanisms have been provided to regulate and channel the treatment of cross-border cooperation with Gibraltar, which is frequently subject to political ups and downs and changes with the different Spanish and British governments. Furthermore, let’s consider the Protocol on Gibraltar and the Spanish-British Memoranda of Understanding. We can find a European Primary Law obligation of keeping a permanent and stable cross-border cooperation with Gibraltar, shielded thanks to the EU.

A new and imaginative model for cross-border cooperation has been agreed with the successive EU-UK Treaties and agreements that articulate the British exit. The *Hard Law* of Primary Law is combined with the *Soft Law* of Memorandums of Understanding-MOUs. This regulation has required a specific prior British-Spanish negotiation.

The first Withdrawal Treaty of 2019, in force from 1 February 2020, has formed a genuine system of cross-border cooperation involving the UK, the EU, Gibraltar and Spain, through a series of Memoranda interconnected with a Protocol on Gibraltar, which refers back to the Tax Treaty and provides

for concrete cooperation on citizens' rights and frontier workers; tobacco and other products; environmental cooperation; and police and customs cooperation.

By recognising the neighbouring border territory of Gibraltar, Spain and the EU are taking a significant step forward with the recognition of the Gibraltarian authorities as valid interlocutors. The search for solutions to the common everyday problems of the populations living in the border area requires the recognition as interlocutors of the competent authorities (territorial and regional) located on both sides of the fence/border. Therefore, it is essential the dialogue with the Government of Gibraltar, the Andalusian Government and the Association of Municipalities of the Campo de Gibraltar region, which comes to recognise the MOUs with the creation of Technical Commissions or Coordination Committees, integrated by the competent authorities.

Following the EGTC Regulation (2013) and the Royal Decree 23/2015²⁹, we understand that the creation of the EGTC - Campo de Gibraltar/Gibraltar is feasible in the framework of the *Brexit* negotiation between an EU Member State (Spain) and a third State (the UK), being necessary the authorisation of Spain and the UK. It would correspond to the Spanish State, in whose territory the establishment of its headquarters was foreseen, the approval of its constitutive convention, having the Andalusian Regional Government, as participating entity of the EGTC, to present the request of creation of the same in the State Secretariat of Public Administrations. However, the Council Decision of 05.10.2021 authorising the opening of negotiations refers that "A financial mechanism should be established to promote cohesion between

²⁹ Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013 amending Regulation (EC) No 1082/2006 on the European Grouping of Territorial Cooperation (EGTC) as regards clarifying, simplifying and improving the establishment and operation of such groupings *OJ L 347, 20.12.2013, p. 343*; Consolidated version of Regulation (EC) No 1082/2006 of 22.06.2014. Royal Decree 23/2015 of 23 January adopting the measures necessary for the effective implementation of Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on the European Grouping of Territorial Cooperation (EGTC), as amended by Regulation (EU) No.1302/2013 of the European Parliament and of the Council of 17 December 2013, as regards the clarification, simplification and improvement of the creation and operation of such groupings, *BOE* No 27 31.01.2015, and Correction of errors of Royal Decree 23/2015, in *BOE* No 45 of 21.02.2015.



Gibraltar and the Campo de Gibraltar, for example on matter of training and employment”.³⁰

For its part, the EU-UK Trade and Cooperation Treaty, of December 2020 does not deal with the status of Gibraltar, as it has been preferred to dedicate a separate UK-EU Treaty to Gibraltar’s status with the EU. A previous Spanish-British ‘Memorandum of Understanding’, dated 31 December 2020, laid the foundations for this future negotiation and specific agreement for the future of Gibraltar in its relationship with the EU and Spain, with reinforced and guaranteed cross-border cooperation with the Campo de Gibraltar and Andalusia. In fact, the Spanish-British agreement was subsequently adopted in the format of a Commission proposal in July 2021, and adopted by the Council in October 2021.

This Treaty has recently started to be negotiated by the UK and the EU, so it has to be adopted and ratified during 2022. However, there are very complex issues and red lines linked to the historical controversy that, as was foreseeable, are hindering rapid progress in the negotiations of this Treaty.³¹

The choice of the United Kingdom, Spain, Gibraltar and the EU has been to focus in this Brexit period on solving the issue of cross-border cooperation, and of coexistence and economic integration between Gibraltar and the neighbouring region. Apparently, it has been left for a later moment to raise both the issue of sovereignty³² and that of the enormous dangers for the civilian population of the British military bases in Gibraltar.

Then, the Brexit has been revealed as an opportunity to channel the necessary cross-border cooperation between Gibraltar and the Campo de Gibraltar, which will continue to be present with the UK’s exit from the EU. Proof of this is given in the Decision to ‘integrate’ the territory of Gibraltar in the *Schengen* area of the EU and eliminate controls at the fence/border;

³⁰ Point 24, of the Directives for the Negotiation, text in Documentación VII. “Mandato negociador para el Tratado entre el Reino Unido y la Unión Europea con respecto a Gibraltar, 5 de octubre de 2021...” *Cuadernos De Gibraltar – Gibraltar Reports* n. 4, *cit.*

³¹ See for instance, the letter of W. Morton, Minister for Europe and Americas to the House of Commons, 13.10.2021, available at <https://committees.parliament.uk/publications/7875/documents/81992/default/>; “Morton letter offers insight into complex treaty talks”, *Gibraltar Chronicle*, 18.11.2021.

³² “Spain’s Foreign Minister talks of ‘shared prosperity’ and ‘a 21st century version of sovereignty’”, *Gibraltar Chronicle*, 11.02.2020.

also, with the clear commitment to maintain the rights of frontier workers in Gibraltar, in a framework of cooperation between the parties through the registration and verification of European border workers.³³

Thus, with all these provisions, the future EU-RU Treaty on Gibraltar will be able to guarantee a permanent shielding of cross-border cooperation in practice, with the presence and mediation of the EU in the new conventional framework for collaboration between the UK, Gibraltar and Spain.

In sum, the *Brexit* process seems to provide a new and original, imaginative model for cross-border cooperation with Gibraltar, bilaterally articulated by Spain and the UK with the EU and Primary European Law. This innovative model has to be developed within the institutional and legal framework of the EU. After all, it is the European Union that has facilitated this imaginative model for the peculiar and difficult cross-border cooperation with Gibraltar.

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³³ See ACOSTA SÁNCHEZ, M. “Gibraltar, trabajadores fronterizos y controles de frontera”, *Cuadernos de Gibraltar - Gibraltar Reports*, n° 2, 2017, pp. 97-12; see also the Report *Cooperation in the Campo de Gibraltar after Brexit -New framework for frontier workers cit. (supra note 15)*.



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