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The Legal Status of Gibraltar after Brexit in Light of the Provisions of the Protocol on Gibraltar

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Abstract

Gibraltar remains subject of an ongoing British-Spanish dispute over sovereignty. Nevertheless, membership of the United Kingdom in the EU stabilized the cross-border situation. Clearly, Brexit has threatened the established status quo. The legal status of Gibraltar is regulated in a special Protocol attached to the Withdrawal Agreement. It provides for deepened British-Spanish collaboration in the sectors of fishing, environmental protection, police and customs cooperation and the rights of citizens living in border areas (especially important for the Spanish region of Mancomunidad de Municipios del Campo de Gibraltar). However, compared to other Protocols, the arrangements for Gibraltar are extremely narrow. It was undecided to subject the peninsula in a greater extent to EU law than the rest of the United Kingdom. It is likely that these shortcomings will be regulated by a future EU-British Agreement governing the status of Gibraltar.

Keywords

Gibraltar, Protocol on Gibraltar, Withdrawal Agreement, Brexit, British-Spanish cooperation, Mancomunidad de Municipios del Campo de Gibraltar, future Agreement on Gibraltar

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Introduction

Since the 18th century, Gibraltar has been the subject of an incessant British-Spanish dispute over its sovereignty.¹ The divergent positions of the parties were of significant importance during the Spanish accession negotiations to the European Communities.² The complicated status of Gibraltar was equally visible during the United Kingdom's membership in the European Union. The British Overseas Territories were not part of the territory of the EU – they were associated with it under Part Four of the TFEU and were not subject to EU law. The sole exception was Gibraltar.³ Nevertheless, numerous derogations in this regard applied to the peninsula.⁴ Gibraltar's status as part of the EU has contributed to peace in the region. Market freedoms played a significant role, which was extremely important for the Spanish town of La Línea de la Concepción (part of the frontier region of Mancomunidad de Municipios del Campo de Gibraltar), where unemployment was highest in the country and whose inhabitants were massively crossing the border with Gibraltar every day for work. However, this did not resolve the British-Spanish dispute, which manifested itself, for example, during the proceedings before the Court of Justice of the European Union in a case concerning the right to vote in the elections to the European Parliament.⁵

Thus, Brexit threatened to aggravate the dispute, especially in the no-deal scenario. Ultimately, on 24 January 2020, the European Union and the United Kingdom concluded a bilateral international agreement regulating the conditions of withdrawal from the EU – 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 (hereinafter *Withdrawal Agreement*).⁶ It entered into force on 1 February 2020.⁷ Three Protocols were attached to the Withdrawal Agreement: on Northern Ireland, on British military bases in Cyprus, and on Gibraltar (hereinafter *Protocol on Gibraltar*), which were to reflect the specificities of the territories covered by them. Under Article 182 of the Withdrawal Agreement, they constitute its integral part.

The aim of this article is to present how the Protocol on Gibraltar has been shaping the legal status of Gibraltar after Brexit. This is urgent as EU-British negotiations on a new international agreement only concerning Gibraltar will begin at any moment.⁸

1. The article was prepared on the basis of the author's master thesis, entitled "Agreement on the withdrawal of the United Kingdom from the European Union and control of its implementation", defended at the University of Lodz in July 2021 under the supervision of Professor Anna Wyrozumska.

2. Following the unsuccessful referendum for Spain in 1967, General Franco ordered isolation of the peninsula until the 1980s: 1982 - partial opening of the border; 1985 - complete opening of the border.

3. TFEU, Consolidated version of the Treaty on the Functioning of the European Union, OJ C326/47, 2012, Article 355(3): "The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible."

4. They included, *inter alia*, aviation law.

5. *Case C-145/04, Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2006:543, Judgment of the CJEU of 12th September 2006.

6. 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 L29/7, 2020, pp. 7-187.

The legal status of the United Kingdom resulting from the Withdrawal Agreement

The Withdrawal Agreement was concluded for an indefinite period and represents a classic international agreement to which the rules of international law apply, in particular, the obligation to perform it in good faith.⁹

According to the assumptions contained in the Withdrawal Agreement, Brexit was to be carried out in two stages:

- An 11-month transition period was established in order to prevent a sharp change in the British legal order (*cliff-edge*). It started at the very date of the official withdrawal from the EU (1 February 2020) and was not provided for in Article 50 TEU. During its operation, the United Kingdom was treated like any other EU Member State, i.e., was fully subject to all EU laws and the jurisdiction of the CJEU. However, due to the lack of participation in the work of the EU, the British side had no influence on the shape and scope of the applicable law.¹⁰
- After the end of the transition period (31 December 2020), the UK ceased to be treated as an EU Member State, so *per se* it was no longer subject to any EU law or to the jurisdiction of the CJEU. Nevertheless, the Withdrawal Agreement was concluded in order to conduct an orderly Brexit process; therefore, under its provisions, the UK is still bound by EU law to a limited extent. This shapes the UK's post-Brexit status:

First, the Withdrawal Agreement regulates the legal status of EU nationals legally residing in the UK and British nationals legally residing in the EU. The right of residence and mutual recognition of professional qualifications were, *inter alia*, guaranteed.¹¹ However, the free movement of people was not maintained.

Second, the United Kingdom has committed itself to continued application of EU intellectual property rules, such as protection of geographical indications, e.g., Parma ham, Champagne or Tokaji wine.¹²

Third, the provisions of the Withdrawal Agreement foresee a gradual phasing out of the effects of British membership in the EU, such as continued application of the provisions on the European Arrest Warrant in proceedings initiated before the end of the transition period¹³ or the question of responsibility for containment of fissile materials located at the British territory.¹⁴

7. Declaration by the European Union made in accordance with the third paragraph of Article 185 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 L29/188, 2020, p. 188–188.

8. European Commission, *Recommendation for a Council Decision authorising the opening of negotiations for an agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, in respect of Gibraltar*, COM/2021/411 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0411>, (access 25.11.2021).

9. See, *inter alia*, Article 26 of the Vienna Convention on the Law of Treaties, (opened to signature on 23 May 1969, entered into force on 27 January 1980): “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”; *Nuclear Test Case (Australia v. France)*, Judgment of 20th December, 1974, I.C.J. Reports 1974, p. 253.

10. See, PART FOUR 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 L29/7, 2020.

In addition, the UK has to settle all its financial liabilities to the EU, estimated at up to £ 34 billion.¹⁵ Finally, in accordance with the provisions of the Withdrawal Agreement, disputes arising from its application may be resolved only on the basis of the mechanisms indicated therein.¹⁶ The Withdrawal Agreement is supervised by the Joint Committee – acting as a permanent forum for contact between the EU and the UK.¹⁷ The unique body authorised to resolve disputes is a special arbitration panel established within the system of the Permanent Court of Arbitration. Its jurisdiction is obligatory and exclusive, and its decisions are final and binding.¹⁸ As regards the Withdrawal Agreement, the CJEU has retained its jurisdiction limited, as a rule, to EU law.¹⁹

Introductory remarks

As already mentioned, under Article 182 of the Withdrawal Agreement, the Protocol on Gibraltar (and other Protocols) form an integral part of the Withdrawal Agreement. As in the case of the Withdrawal Agreement, only the United Kingdom and the European Union are parties to the Protocol on Gibraltar.

Nevertheless, the Preamble to the Protocol states that it is to be implemented in accordance with the constitutional orders of the Kingdom of Spain and the United Kingdom, and is without prejudice to the Spanish and British legal position on the sovereignty of Gibraltar and jurisdiction over that territory.²⁰

Contrary to other Protocols, the Protocol on Gibraltar entered into force upon the beginning of the transition period (1 February 2020) and all its provisions, except Article 1, ceased to apply as at the end of the transition period (31 December 2020).²¹ The purpose of the Protocol is to widen – comparing to the United Kingdom – the scope of EU law and international law applicable to the peninsula. Consequently, it was intended to regulate the life of the frontier population in Mancomunidad de Municipios del Campo de Gibraltar. For this reason, it had to be done as quickly as possible, and in addition, the Protocol for each “enlargement” required Spanish-British consultations in this regard. During the transitional period, the United Kingdom was subject, just like Spain, to all EU law, so in the event of failure to comply with the obligations set out in the Protocol, the European Commission or states reciprocally could bring complaints to the CJEU under Articles 258 and 259 TFEU.²² Addition-

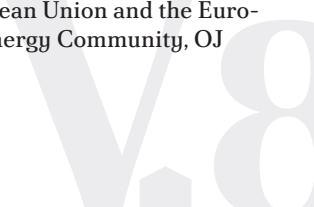
11. Respectively, Articles 13-23 and Articles 27-29 of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L29/7, 2020.

12. Articles 54-61 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 L29/7, 2020; House of Lords, *Brexit: The revised Withdrawal Agreement and Political Declaration*, European Union Committee 1st Report of Session 2019–20, paras 62 et seq., <https://publications.parliament.uk/pa/ld5801/ldselect/lddeucom/4/4.pdf>, (access 26.11.2021).

13. Articles 62-65 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 L29/7, 2020; House of Lords, *Brexit: The revised Withdrawal Agreement and Political Declaration*, European Union Committee 1st Report of Session 2019–20, paras 69 et seq., <https://publications.parliament.uk/pa/ld5801/ldselect/lddeucom/4/4.pdf>, (access 26.11.2021).

14. Article 80 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 L29/7, 2020.

The legal status of Gibraltar under the provisions of the Protocol on Gibraltar



ally, the fulfilment of the parties to the Agreement (EU and UK) of their obligations under the Protocol may still be subject of disputes before an arbitration panel. As a result, the division into provisions that no longer apply and those that continue to apply is to be considered as rather technical (the time when a given instruction had to be fulfilled).

Provisions of the Protocol that were to be implemented before the end of the transition period

The regulations in this category can be divided into three groups:

First, Spain and the United Kingdom were to establish Coordination Committees on Environmental and Fisheries issues²³ and on Police and Customs cooperation.²⁴

Second, Spain and the United Kingdom were to establish the forms of joint actions necessary to achieve full tax transparency and to safeguard the financial interests of all parties concerned. This was to prevent Gibraltar from turning into a tax haven. In addition, Gibraltar was obliged to comply with international standards, including the field of good budget management as well as transparency and exchange of information on harmful tax practices. In addition, Gibraltar's tax system was to be changed to prevent frauds related to smuggling alcohol and gasoline and began to possess a system of traceability of protection measures for tobacco products which meets the requirements and standards set out in EU law. By 30 June 2020, the British side ensured that Gibraltar was covered by international regulations on tobacco products.²⁵ The above regulation is to prevent a possible introduction to the EU market through the territory of Gibraltar, inter alia, illegal tobacco products, especially since La Línea de la Concepción is one of the centres of drug trafficking from Morocco to Europe.²⁶ Nevertheless, it is worth noting that the European Union considers that the United Kingdom has failed to comply with its obligation to properly bring Gibraltar under the tobacco regulation.²⁷

Finally, Spain and the United Kingdom were to reach an agreement on the date from which EU aviation law, which did not extend to the territory of Gibraltar as a result of a prior derogation, would apply to it.²⁸ However, this power was not exercised.

15. M. Keep, *Brexit: the financial settlement - in detail*, House of Commons Library 2021, p. 3, <https://researchbriefings.files.parliament.uk/documents/CBP-8039/CBP-8039.pdf>, (access 16.11.2021).

16. Article 168 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 L29/7, 2020.

17. Articles 164-166 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 L29/7, 2020.

18. Articles 167-181 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 L29/7, 2020.

19. Including Articles 158-163 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 L29/7, 2020.

21. See the Preamble to the Protocol on Gibraltar in 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 L29/7, 2020.

The provisions of the Protocol that are subject to permanent execution

The wording of Article 1 of the Gibraltar Protocol expressly confirms that Part Two of the Withdrawal Agreement (citizens' rights) applies in its entirety to Gibraltar. This is notably crucial for the rights of frontier workers residing in Gibraltar or Spain, in particular, in the territory of the municipality of Mancomunidad de Municipios del Campo de Gibraltar.

Effective application of Part Two of the Agreement requires close British-Spanish cooperation, to which both countries are bound by Article 1 of the Protocol. To this end, the Spanish and British sides provide each other quarterly with updated information on persons residing in Gibraltar or in the territory of Mancomunidad de Municipios del Campo de Gibraltar.²⁹

In addition, Spain and the United Kingdom have established a Coordination Committee as a forum for regular discussions to monitor issues relating to employment and working conditions. However, the Protocol does not provide for the free movement of persons between Spanish and Gibraltar territory.

Monitoring the application of the Gibraltar Protocol

Under Article 165 of the Withdrawal Agreement, a Special Committee on matters related to the implementation of the Protocol on Gibraltar has been established. Its tasks are specified in the Protocol on Gibraltar. These include facilitating the application of the Protocol, discussing any related and problematic issues, examining the reports of the coordination committees, and making recommendations to the Joint Committee on the operation of the Protocol.³⁰

De facto, the Protocol on Gibraltar does not contain any provisions significantly modifying the content of the Withdrawal Agreement with regard to dispute resolution. A particular emphasis has been placed on ensuring observance of the rights of cross-border workers and on bilateral British-Spanish cooperation. The indication of the specific obligations of the Kingdom of Spain results not only from historical and political events, but also from the fact that it is a party interested in proper implementation of the provisions of both the Agreement and the Protocol. Three Spanish-British Coordination Committees (Employment and Working Conditions, Environment and Fisheries, Police

22. Article 185 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 L29/7, 2020.

23. Article 258 TFEU (Failure of a Member State to fulfil its obligations under the Treaty), Article 259 TFEU (Suing another Member State).

24. Article 5 of the Protocol on Gibraltar in 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 L29/7, 2020.

25. United Nations, *WHO Framework Convention on Tobacco Control, adopted in Geneva on 21 May 2003, United Kingdom of Great Britain and Northern Ireland: Territorial Application in Respect of Gibraltar*, C.N.271.2020.TREATIES-IX.4 (Depositary Notification), 2020, <https://treaties.un.org/doc/Publication/CN/2020/CN.271.2020-Eng.pdf>, (access 25.11.2021); United Nations, *Protocol to Eliminate Illicit Trade in Tobacco Products, adopted in Seoul on 12 November 2012 United Kingdom of Great Britain and Northern Ireland: Territorial Application in Respect of Gibraltar*, C.N.272.2020.TREATIES-IX.4.a (Depositary Notification), 2020, <https://treaties.un.org/doc/Publication/CN/2020/CN.272.2020-Eng.pdf>, (access 25.11.2021).

and Customs Cooperation) are required to report regularly to the Special Committee.³¹ It has an EU-British character, but it cannot be ruled out that the EU side will be represented exclusively or primarily by the Spanish.³² The Special Committee, in turn, is a subsidiary body of the Joint Committee, which plays a primary role in the process of resolving disputes arising from the implementation of the Agreement. Thus, a potential British-Spanish dispute could directly result in the EU-UK proceedings before an arbitration panel.

It is equally possible for the European Commission to complain, based on Article 258 TFEU, about Spain's failure to fulfil its obligations under the Protocol. This is due to the fact that under Article 216(2) TFEU, agreements concluded by the Union are binding on the institutions of the European Union and its Member States and constitute acts of EU law.

Conclusions

In conclusion, the status of Gibraltar after Brexit under the provisions of the Protocol on Gibraltar does not differ considerably from the rest of the United Kingdom. The lack of solutions providing for the binding of the territory of the peninsula to a greater extent by EU law and, consequently, extension of the jurisdiction of the CJEU is distinctly visible. That model has been adopted in two other Protocols: on Northern Ireland and on British military bases in Cyprus. The British obligation to subordinate Gibraltar to a certain extent to EU law and international law was intended to level out the derogation from the application of EU law in this area during British membership and to avoid the peninsula becoming a tax haven. In addition, there is no provision for free movement of persons between Mancomunidad de Municipios del Campo de Gibraltar and Gibraltar. This significantly hampers effective exercise of civil rights provided for in Part Two of the Withdrawal Agreement and confirmed in Article 1 of the Protocol on Gibraltar. Moreover, the question remains whether the Spanish interests have been adequately secured and whether, in the possible proceedings before an arbitration panel, the objection of inadmissibility of the dispute due to the rights of third parties would not be justified.³³ Nevertheless, it is worth noting that shortcomings were noticed in the provisions of the Protocol. On 31 December 2020, the British and Spanish parties reached a provisional agreement on ensuring the free movement of persons at the Gibraltar border and covering the entire territory with the Schengen regime.³⁴ However, this has not yet been finally formalised. In addition, the EU's preparations to conclude such an Agreement meet with British blackmail of not approving it at all.³⁵ It therefore appears that the current legal status of Gibraltar is only of a transitional nature.

26. Article 3 of the Protocol on Gibraltar in 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 L29/7, 2020; A. Torres, *La Línea, entre la crisis de ayer y la de hoy*, <https://www.publico.es/sociedad/paro-droga-cadiz-linea-concepcion-crisis-coronavirus.html>, (access 25.11.2021).

27. *Statement following the third meeting of the Specialised Committee on Gibraltar between the European Union and the UK Government via videoconference*, https://ec.europa.eu/info/publications/statement-following-third-meeting-specialised-committee-gibraltar-between-european-union-and-uk-government-videoconference_en, (access 26.11.2021).

28. Article 2 of the Protocol on Gibraltar in 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 L29/7, 2020.

29. Article 1(2) of the Protocol on Gibraltar in 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 L29/7, 2020.

30. Article 6 of the Protocol on Gibraltar in Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European

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Union and the European Atomic Energy Community, OJ L29/7, 2020.

31. More about the functioning of the Coordination Committees: *Second meeting of Coordination Committee provided for in Memorandum of Citizens' Rights signed between Spain and United Kingdom on Gibraltar*, https://www.lamoncloa.gob.es/lang/en/brexit/news/Paginas/2020/20200710_Gibraltar.aspx, (access 25.11.2021); *Third meeting of coordination committee provided for in Memorandum of Understanding on Citizens' Rights signed by Spain and United Kingdom on Gibraltar*, <https://www.lamoncloa.gob.es/lang/en/brexit/news/Paginas/2020/20201021brexit-gibraltar.aspx>, (access 25.11.2021).

32. This has happened during all meetings so far: *Statement following the meeting of the Specialised Committee on Gibraltar between the European Union and the UK Government via videoconference*, https://ec.europa.eu/info/publications/statement-following-meeting-specialised-committee-gibraltar-between-european-union-and-uk-government-videoconference_en, (access 18.11.2021); *Statement following the second meeting of the Specialised Committee on Gibraltar between the European Union and the UK Government*, https://ec.europa.eu/info/publications/statement-following-second-meeting-specialised-committee-gibraltar-between-european-union-and-uk-government_en, (access 18.11.2021); *Statement following the third meeting of the Specialised Committee on Gibraltar between the European Union and the UK*

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35. R. de Miguel, *UK threatens no-deal scenario for Gibraltar due to plans for Spain-run border controls*, <https://english.elpais.com/international/brexit/2021-09-23/uk-threatens-no-deal-scenario-for-gibraltar-due-to-plans-for-spain-run-border-controls.html>, (access 25.11.2021).

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