

Cooperation in the Campo de Gibraltar after Brexit

New framework for frontier
workers



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New framework for frontier workers

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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 the treatment of cross-border cooperation with Gibraltar, which has had intermittent phases in its evolution over time. Within the framework of the British exit process, a new model has been agreed in successive EU-UK agreements that combine Hard Law (Primary EU Law) with Soft Law (Memoranda of Understanding–MOU). This regulation has required a specific prior British-Spanish negotiation.

We will especially highlight the UK-EU Withdrawal Treaty of 2019, which has formed an authentic system of cross-border cooperation involving the UK, the EU, Gibraltar and Spain, through a series of Spanish-British bilateral Memoranda interconnected with the Protocol on Gibraltar of the Treaty, which in turn refers to the Tax Treaty. It is a new system of concrete cooperation on the rights of citizens and border workers, among other matters.

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Part 1. Brexit and cross-border cooperation with Gibraltar

1. Brexit, Gibraltar and Spain

The exit of the United Kingdom (UK) from the European Union (EU), formally requested in March 2017, has led to a myriad of changes in the approach and focus on European and international matters. Brexit is a historical phenomenon that has, due to the Gibraltar issue, affected Spain's relationship with the UK.

In this way, the exit of the UK from the EU has equally implicated the exit of Gibraltar, under article 355.3 of the Treaty on the Functioning of the European Union (TFEU), which deals with the scope of the application of EU treaties since the provisions of the treaties were applied to Gibraltar, as a European territory whose external relations were taken on by a State member (the UK). And the fact is that Gibraltar is not part of the State "United Kingdom of Great Britain and Northern Ireland". According to the UK, they have sovereignty over Gibraltar in virtue of art.X from the 1713 Treaty of Utrecht (in which the Spanish Crown gave the city and castle of Gibraltar to the British one, 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 separate territory from the UK, on the basis of its internal qualification under UK law as British Overseas Territory. In addition, Gibraltar finds itself on the list of non-autonomous territories pending decolonization under the framework of the United Nations, due to its distinct international status. In this regard, Community legislation has been applied in Gibraltar since 1973 (following Gibraltar's joining the EC/EU with the accession of the UK in 1972), with exceptions in the following material areas: Customs Union; free movement of goods; common commercial, agricultural and fisheries policies; VAT; Gibraltar being furthermore outside the Schengen Area due

to the UK's non-participation in the Schengen Pacts, and consequently, external European border controls with Gibraltar apply.

However, Brexit unexpectedly gave Spain a favourable position with regard to Gibraltar, which it will assert in the two treaties envisaged to articulate the exit from the UK: a first Agreement of the UK's withdrawal from the EU (Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU and from the European Atomic Energy Community)¹, and a second EU-UK Future Relations Treaty (Agreement on Trade and cooperation between the EU and the European Atomic Energy Community, on the one part, and the United Kingdom of Great Britain and Northern Ireland on the other).²

For Treaty 1 of Withdrawal, from the very first moment of negotiation in 2017, Spain obtained the guarantee of Clause 24 in the European Council's negotiating guidelines, which states that any agreement on Gibraltar requires prior agreement between Spain and the UK; in practice excluding Gibraltar from the negotiating list and general EU-UK negotiating issues. Furthermore, on the occasion of the Draft Withdrawal Agreement in November 2018, Interpretative Statements were made ensuring that in the future the regulation on Gibraltar in the Treaty on the future EU-UK relationship would have to count Spain's prior acquiescence to any new situation (and that once the UK had left the EU, Gibraltar would not be included in the application of any agreements to be concluded between the UK and Spain). Colonial status has even been introduced in references to Gibraltar in various negotiating documents.

This need for Spain's prior agreement in all matters relating to the EU-UK relationship on Gibraltar was subsequently confirmed: it happened both for Withdrawal Treaty 1 of October 2019 [where the annexed (EU-UK) Protocol on Gibraltar is an integral part, in which appears the four referenced bilateral agreements, or Memoranda of Understanding (MOUs), that were signed by the UK and Spain

¹ This Treaty was endorsed in November 2018, being finally adopted by the parties on 17-10-2019. It came into force on 1-2-2020. OJ, L, 29, 31-1-2020.

² This Treaty was agreed on 24-12-2020, but has not yet been ratified nor has it come into force. OJ, L, 444, 31-12-2020.

on citizens' rights; tobacco and other products; cooperation on environmental matters; and police and customs cooperation]. As has also been recognised for Treaty 2 of Future Relations of December 2020 (which will not apply to Gibraltar nor will it have any effects on said territory), providing for a separate EU-UK Treaty on Gibraltar. Precisely for the future and separate EU-UK Treaty there is a "Preliminary agreement between Spain and the UK on Gibraltar and on Brexit" (hereinafter, "Preliminary Agreement"), dated 31 December 2020.³ It talks of the "Understanding of key elements" for the future EU-Gibraltar relationship, which serves to elaborate negotiating directives for that specific UK-EU treaty on Gibraltar, a treaty which has yet to be drafted.

2. The Spanish-British dispute and cross-border cooperation issues

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 to 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 Spanish people of the Campo de Gibraltar, in a region of 300,000 people, negatively marked and weighed down by the history of the controversy.

In this context, the UK and Spain's membership of the EU has had a very important 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 that have been applied in Gibraltar and the Campo de Gibraltar.

The historical Spanish-British dispute over the Rock of Gibraltar has conditioned not only the bilateral relations between Spain and the UK within the EU, but also those of the other Member States in relation to the application of EU law in Gibraltar. Thus, for example, EU Member States have no direct communication with the Gibraltar authorities: everything must be done through the British authorities.

This is largely due to the UN doctrine on the decolonisation of Gibraltar, which foresees a negotiated process between Spain and the UK to that end, taking into account Gibraltar's interests and aspirations. This bilateral process was set out in the 1984 Brussels Declaration, point 1(c) which explicitly linked sovereignty issues with cross-border cooperation over Gibraltar. This cooperation aims to resolve the problems caused by the border and/or to satisfy the common interests of the populations living on either side of the fence - on issues such as the environment, fishing, transport, health, sport, culture and tourism, judicial cooperation in civil matters, taxation, the fight against illegal trafficking, social and labour issues, etc.

This link between cross-border cooperation and the historical dispute 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 being one of the particularities that has traditionally characterised cross-border cooperation with Gibraltar. That is, the existence of a spontaneous practice of cooperation through the adoption of agreements of a political nature, mainly between Gibraltar and the surrounding area

The dispute over the Rock of Gibraltar has also conditioned the relations of the other Member States: the EU Member States have no direct communication with the Gibraltar authorities: everything must be done through the British authorities

³ According to the exact wording in the Spanish Diario de Sesiones de las Cortes Generales, in the appearance of the minister González Laya on the 20-1-2021, Diario de Sesiones, Comisión Mixta UE, 2021 n.º 42, XIV Legislatura, session n.º 10 (extraordinary). https://www.congreso.es/public_oficiales/L14/CORT/DS/CM/DSCG-14-CM-42.PDF

of Campo de Gibraltar, in the absence of an institutional and legal framework adopted by the States.

However, the creation on 16 December 2004 by the Spanish, UK and Gibraltar governments of the Forum of 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. Within the framework of this tripartite Forum, the 2006 Cordoba Agreements were adopted (on pensions, joint use of the airport, greater fluidity in the crossing of the fence/border, communications and the opening of the Cervantes Institute), which covered, on a 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. Also in 2004, the 'Joint Commission for Cooperation and Collaboration between Gibraltar and the Association of Municipalities of the Campo de Gibraltar Region' was set up, a framework for cooperation of a local or sub-state nature, into which the Regional Government of Andalusia was incorporated 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) and with it, of the agreements that were adopted within its framework and incorporated into its working agenda, opening up a new stage of deadlock and a complete lack of dialogue between the governments of the main parties involved in the Gibraltar issue: on sovereignty at inter-state level (as the Brussels Process was suspended following the failure of the Spanish-British negotiations on Gibraltar's co-sovereignty in 2001-2002), and on cross-border cooperation (as it was not possible to replace the tripartite format of the Forum with an *ad hoc* mechanism for four-party regional cooperation in the Campo de Gibraltar, which would also include the participation of the States and the European Commission, which would be invited to participate as an observer).

After the crisis of the summer of 2013 (which began with the Government of Gibraltar launching seventy concrete blocks in

waters that Spain claims as its sovereignty, preventing Spanish fishermen from fishing there), all attempts failed to establish stable cooperation through the creation of *ad hoc* groups, quadripartite groups, etc., which would allow the regional and local authorities in the surrounding area - the Junta de Andalusia and the Association of Municipalities of Gibraltar - to be represented at the same level as the Gibraltar authorities. It was civil society that mobilised, creating a joint cross-border initiative for the first time: The Cross Border Group (Grupo Transfronterizo), that relies on the participation of the Chamber of Commerce of Cadiz and Gibraltar; the Association of Small and Medium Enterprises of La Línea and Gibraltar; the trade unions UGT/CC. OO.; the Gibraltar Union of Civil Servants-UNI- TE; and the CEOE (Cadiz employers), who joined together to present and assert their common interests.

It is precisely within the Cross-Border Group that the initiative for the possible creation of a European Grouping of Territorial Cooperation (EGTC) has been launched, as an autonomous entity to manage joint activities and collaboration projects between Gibraltar and the Campo de Gibraltar. Indeed, concern about the impact of Brexit on socio-economic relations between Gibraltar and its Campo led in 2015 to this civil society initiative, which has the support of the Association of Municipalities of the Campo de Gibraltar Region, the Provincial Council of Cadiz and the Parliament of Andalusia. There is no doubt that this figure of the EGTC can be envisaged for cross-border cooperation in the Campo de Gibraltar, since Article 355.3 TFEU was applicable to it, without excluding European legislation on Economic and Social Cohesion and Structural Funds - and in fact it had been applied in Gibraltar since 1994, being the subject of an ERDF operational programme in the framework of the UK-Commission Partnership Agreement for the period 2014-2020, which expressly included Gibraltar alongside Scotland, Wales, Northern Ireland and England. Of course, the possibilities for the creation of an EGTC with the participation of Gibraltar's public entities would no longer be between two Member States, but between entities from a Member State (Spain) and a third non-member State (UK), in accordance with the EGTC Regulation (Article 3a, taking into account the internal classification in British law of British Overseas Territory, since

Gibraltar is not on the list of Overseas Countries and Territories in Annex II TFEU).

In this regard, on 11 May 2018, the Andalusian Regional Government (through the General Secretariat for External Action of the Ministry of the Presidency, Local Administration and Democratic Memory) presented the draft statute and agreement of the EGTC to the Mayor of La Línea de la Concepción and representatives of the Cross-Border Group, as it is made up of the Andalusian Regional Government, the City Council of La Línea de la Concepción and the Cross-Border Group, without the participation of the Government of Gibraltar. However, although it was announced in February 2018 that it would immediately register this initiative formally (the application must be addressed to the Secretary of State for Public Administrations for the mandatory authorisation), the truth is that, to date, there is no evidence that this has happened. It is a viable initiative, which required the consent of Spain and the UK for its constitution, with Spain, the country where the EGTC's proposed registered office would be located, being responsible for the formal approval of its constituent convention.

However, the "Preliminary Agreement" of 31 December 2020 opens up, as we will see later, the possibility of a specific financial instrument for Gibraltar and the Campo de Gibraltar.

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

3. The October 2019 Withdrawal Agreement and cross-border cooperation with Gibraltar

The big question now, in this post-Brexit period, is the role of the EU and Spain following the UK's exit and Gibraltar's transition to a different international and European status.

The negotiation of the 2019 Withdrawal Agreement was a major turning point in relations between Spain and the UK with

regards to Gibraltar. Not just due to the acknowledgement that Spain has an essential role in the application of EU Law to Gibraltar (Clause 24 Safeguard of the European Council negotiating guidelines, 29th of April 2017); but also the express recognition made by the appropriate authorities (not just in Gibraltar, but also in the surrounding area) of the Spanish-British Memoranda of Understanding, such as in the Gibraltar Protocol adopted by the EU and the UK.

However, the only reference to Gibraltar in the first Withdrawal Agreement is found in article 3.1, which establishes its territorial scope, including, along with the UK, other territories such as Gibraltar (letter b), in so far as EU Law was applied in Gibraltar before the effective date of the Agreement (that being the 1st of February 2020). This article sets out the need to adopt a Gibraltar Protocol (in November 2018) that stipulates a safeguard clause for the legal positions of both states in relation to the sovereignty and jurisdiction of Gibraltar.

In the 2019 Withdrawal Agreement, the aim was to focus on cross-border cooperation with Gibraltar the management of the Gibraltar issue. The Brexit situation has highlighted flaws in the current cooperation with Campo de Gibraltar and the need to consider the interests of this region; especially to guarantee the rights of cross-border workers, whose protection has been taken up by the Spanish political powers.

For years, there has been a pressing need to tackle daily challenges and the most immediate conflictive issues through a *Modus Vivendi* with Spain; since the region and border municipality of La Línea face the consequences of the historical controversy on a daily basis.

With the framework of the 2018 Draft Withdrawal Agreement, whose protocol on Gibraltar has already received Spanish approval in separate Spanish-British negotiations, the Withdrawal Agreement currently in force contains the Gibraltar Protocol, which refers, as we have, to four Memoranda of Understanding on cross-border cooperation, notably: tobacco, the environment, customs and police cooperation. The Protocol also takes into account issues to be regulated at

a later date by the International Agreement on Taxation and the Protection of Financial Interests between the UK and the Kingdom of Spain regarding Gibraltar, agreed *ad referendum* in Madrid and London on the 4th of March 2019 and recently came into effect on the 4th of March 2021 following the ratification process carried out in both states.⁴

The Protocol on Gibraltar and the four memoranda which were previously signed in 2018 create an institutional system or format for cross-border cooperation with the most urgent themes to confront, so we can affirm that the necessary *Modus vivendi* with Gibraltar has been formed by EU law with the Withdrawal Agreement (and the Memoranda of Understanding). It is interesting to note that in primary European law (the Protocol is an integral part of the Withdrawal Agreement) the issues of cross-border cooperation related to Gibraltar were meticulously dealt with. Essential matters regarding cross-border cooperation in the region are therefore raised to the same level as primary law (like the subjects regulated in the Memoranda de Understanding and the Agreement concerning Taxation and protection of financial interests). An institutional framework is moreover set up to follow up these agreements.

The above has the powerful significance of protecting, through the international treaty, essential matters of cooperation with Gibraltar, thus giving the support and legal protection of the EU to the *Modus vivendi* previously agreed by Spain and the UK.

Furthermore, in the Withdrawal Agreement there are a series of ideas which should be highlighted with respect to Gibraltar and the role of the EU.

- Although it concerns different legal instruments (Protocol on the UK-EU Treaty, and Memoranda of Understanding between Spain and the UK), the combination forms an institutional legal framework that is coherent and consistent, thanks to institutional agreements and the mutual reference of content. The Memoranda of Understanding anticipate the Committees

and Work Groups; and the Memoranda of Understanding Groups send information to both the *Specialised Committee of Gibraltar* (for issues related to the application of the Protocol on Gibraltar), and UK-EU *Withdrawal Agreement Joint Committee*. To this we can add that the fiscal Treaty forestalls a Joint Coordination Committee.

- Citizens' rights are truly the best preserved, since this part of the Protocol would not be impacted by the 'hard Brexit.' This makes both legal and political sense, since the real day-to-day problem of great significance that may arise is that of the 'Fence' border crossing, since the influx of frontier workers who live in Spain is absolutely vital for Gibraltar and the region. However, the content of the Memoranda of Understanding and the committees of environment, fishing, political and customs cooperation, and tobacco, expire on the 31st December 2020, 'unless the parties agree otherwise.' But the logic of supporting an orderly withdrawal, and the unanimous desire to protect the rights of citizens and cross-border workers in the socioeconomic context of the region, calls for the maintenance of the Memoranda of Understanding even in the case of the Hard Brexit.
- The combination of the Agreement (Primary European Law) with Spanish-British *Soft Law* (The Memoranda of Understanding) is well adapted to the reality and interests of the parties involved. *Soft Law* has always been used in agreements between the UK and Spain on matters concerning Gibraltar, but this recognition by the EU is a novelty, caused by the Withdrawal Agreement, shaping the new format of cooperation for Gibraltar.

The EU's institutional and legal intervention in the controversy is expected. The intertwining and links between bilateral EU-UK and Spain-EU committees have shaped an authentic institutional system that deals with Gibraltar, alongside the participation and intervention of the EU.

⁴ Spanish Boletín Oficial-Official Journal (BOE), no. 62 de 13-3-2021.

4. The EU-UK future relationship treaty and the December 2020 ‘Preliminary agreement’ for a separate and future UK-EU Treaty on Gibraltar

The second Brexit agreement (concerning the future EU-UK relationship) from December 2020 has not yet been ratified, moreover, it does not address the status of Gibraltar in relation to the EU and EU law.⁵

With this in mind, a specific and separate EU-UK agreement on Gibraltar is anticipated. Henceforth, as of the effective date of the Second EU-UK Treaty on commerce and cooperation and the specific EU-UK treaty on Gibraltar; a long-term relationship based upon stability and continuity will be established between Gibraltar and the EU.

Of course, the terms agreed at the beginning of the Brexit negotiations require Spain and the UK to reach an agreement before the EU adopts any EU-UK agreement. This refers to the implementation of provisions agreed at the time of the first Agreement in November 2018; which affirms that a preliminary agreement between Spain and the UK is a prerequisite for any subsequent EU-UK agreement on the future relationship between Gibraltar and the EU. Hence the importance of the ‘Preliminary agreement’, signed on the 31st of December 2020, between Spain and the UK on Gibraltar, its new European status and its relationship with Spain.⁶

This informal document (Non-Paper) submitted to EU authorities in Brussels contains important agreements for the future. In summary, the following ideas from the ‘Preliminary agreement’ should be emphasised.

- The title (‘Preliminary agreement between Spain and the UK on Gibraltar and Brexit’) refers to several documents. This includes a Working Paper titled ‘Letters regarding a proposed framework for a UK-EU legal instrument setting out Gibraltar’s future with the EU.’⁷ This consists of a letter from the permanent representations (REPER) of Spain and the UK to the EU, dated the 31st of December 2020, which annexes a *Non-Paper* with 25 clauses and 3 appendices.
- Therefore, this Working Paper is the agreed framework for the future UK-EU Treaty on Gibraltar and must be accompanied by other Soft Law documents referred to in the Non-Paper.
- In terms of content, the Working Paper emphasises movement and travel across the border with Gibraltar, with a large number of articles and appendices dedicated to the movement of citizens and cross-border workers.
- In this context, the most striking aspect is the integration of Gibraltar into the Schengen Area, which has been interpreted as demolishing or removing the Fence at the border (“removing all physical barriers”) with Gibraltar, and the establishment of entry points to the Schengen Area at the port and airport. This will require joint action over the next four years by the FRONTEX agency and the Spanish state in its role as a Schengen state, responsible for settling any issues that may arise. Provisions for visas and residency permits as well.
- Other aspects which have been the subject of agreement in the Non-Paper, although they are emphasised less heavily, are those relating to transport, the environment, standard practices, data and mechanisms for financial cohesion, with an open clause for other aspects that may be included.

This ‘Preliminary agreement’ will be considered by the Commission for the negotiating mandate for the specific treaty on the future UK-EU relationship concerning Gibraltar; a negotiating mandate is yet to be adopted. The essential contents will feed into

⁵ It is stated in Part Seven of the Final Provisions, Article FINPROV1: This agreement shall not apply to Gibraltar, nor will it take effect in said territory.

⁶ Press conference by the foreign minister from 31/12/2020, ‘González Laya announces an agreement in principle with the UK on Gibraltar to tear down the Verja fence, *El Economista*, 21/12/2020. 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 an historic agreement’. The Agreement was published by the newspaper *El País* on 11/01/2021 and can be seen as Document VI of the 4 Cuadernos de Gibraltar/Gibraltar Reports, 2021.

⁷ Doc. Council WK 83/2021 INIT, de 5-1-2021.

the future specific UK-EU treaty on Gibraltar; which must incorporate the contents into its articles and obtain parliamentary approval before coming into effect, which is hoped to happen by June 2021.

The 'Preliminary agreement' demonstrates a clear willingness to permanently standardise stable and ordered cross-border cooperation between Spain, Gibraltar and the Campo de Gibraltar. Questions of sovereignty have been put to one side for the time being; which allows for the detailed regulation of ideal cooperation for a 'mutually prosperous future' on the Rock and in the surrounding region. Nevertheless, other issues related to sovereignty must, at some later stage, be addressed. Indeed, there seems to be negotiations with the UK for a military agreement on the Gibraltar base.

Part 2. Frontier workers: legal status and social protection

In the Colony of Gibraltar, it is estimated that there are currently between 7000 and 10000 Spanish frontier workers, mostly from the Municipality of Campo de Gibraltar. These people mostly dedicate themselves to jobs linked to hospitality, the home, care for dependent individuals and the construction and maintenance of repairs and refurbishments, noticing in recent years an increase in highly qualified professionals in the health sector, computer technicians and engineers, architects, etc. The importance of these workers is visible, furthermore, in their considerable impact on the economy of this region. It would therefore be appropriate to determine their legal status and the effects of the United Kingdom leaving the EU.

5. On the notion and characteristics of 'frontier workers'

The rules regarding the figure of the 'frontier worker', in both a general sense and related to the EU, present a series of very particular characteristics. This is due to a lack of precision or the debate over several essential aspects of its definition and scope.

In this way, we can identify the frontier worker as a person who, residing in a 'border area' of a State, gains employment in the territory of another State and returns to their place of residence either daily or weekly. From this definition we can take up to four constituent elements:

Firstly, the concept of a 'border area', constituting a strip of one state's territory that borders another state. Here we find our primary difficulty, as we will see that there is no unanimity when it comes to determining the extension of the so-called 'border zone.'

Secondly, it refers to a kind of employment. This must be understood as a salaried job:

for instance, a worker for a construction firm who travels to another country either daily or weekly to carry out their work. Therefore, self-employed workers, including liberal professionals (lawyer, economist, consultant, etc.) would not be considered ‘frontier workers’ but they would instead form part of the category of ‘provision of services.’

Thirdly, we encounter a territorial element. This is the necessity for there to be physical movement from one state to another; in other words, the crossing of an internationally recognised border. For example, a Spanish worker who travels to France every day or every week; or a Moroccan who enters Ceuta or Melilla with the same regularity.

Fourthly and finally, there is the temporal element: returning to your place of residence, daily or weekly. However, if the move across the border is permanent until the end of a specific job or an agreed period, we would not be dealing with a ‘frontier worker’, but instead a ‘posted worker.’

6. The regulation of the ‘frontier worker’ in the EU

In the EU, frontier workers are considered a category of workers and enjoy the freedoms of the domestic market. In this manner,

The frontier worker possesses the following rights.

- i) the right to enter another member state;
- ii) the right to remain with the objective of finding employment;

We can see a general lack of regulatory unity in the definitions of ‘border worker’ and ‘border zone’, depending on the political landscape we find ourselves in, and without considering the particularities of each case

iii) the right of residence during the whole period of work activity

iv) the right to stay in the state where they have carried out a salaried activity, once the activity is complete.

We should add to this, in matters of security, the principle of territoriality, in such a way that they would pay contributions in the state where the economic activity is carried out.

However, the European regulations are not very clear when it comes to the importance of the constituent elements of its definition.

In this way, within the scope of free movement for individuals, when applied to the frontier worker, it requires an address for a minimum period of three years.⁸ In matters of Social Security, the territorial element is omitted in the definition, limiting itself to the return to the state of residence every day or every week.⁹ In fiscal policy, however, the definition is restricted to indicating that the frontier worker will have to travel across the border during working days, without specifying if this movement must be on a daily or weekly basis.¹⁰ Finally, with regards to the concept of a ‘border zone’, it varies between, on the one hand, a zone ranging no further than 30km from the border (extendable to 50km) in matters of free movement,¹¹ and on the other hand, a zone which cannot exceed more than 15km in a straight line from the border state’s border, in fiscal matters.¹²

We can therefore see a general lack of regulatory unity in the definitions of ‘border worker’ and ‘border zone’, depending on the political

8 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ, L 158, 30-4-2004.

9 Regulation 2004/883/CE of the European Parliament and of the Council of 29-4-2004, on the coordination of social security systems, OJ, L 166, 30-4-2004.

10 Council Directive 2007/74/CE of the 20-12-2007, on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries, OJ, L 346, 29-12-2007.

11 Regulation 2006/1931/CE of the European Parliament and of the Council of 20-12-2006, laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, DO, L 405, 30-12-2006.

12 Council Regulation 2009/1186/CE of 16-11-2009, setting up a Community system of reliefs from customs duty, OJ, L 324, 10-12-2009.

landscape we find ourselves in, and without considering the particularities of each case, as would be the reality in the Campo de Gibraltar. Therefore, by strictly applying the regulations of the ‘border zone’, many municipalities in the Campo de Gibraltar would be excluded from the concept of a border worker. Let us consider, for example, a worker who resides in Jerez de la Frontera who travels every day to Gibraltar to carry out a work activity.

7. Spain and frontier workers in Gibraltar

The problems which arise from the case of frontier workers in Gibraltar is that the territorial element is not fulfilled. If we recall, the physical displacement of a worker from one state (state of residence) to another (receiving state) is necessary. But this does not occur in the case of Gibraltar, since the colony is not an independent state, but rather a non-autonomous territory whose international relations are driven by the UK. This reason, as well as the long-standing Spanish claim over Gibraltar, has made the recognition of the social rights for these workers difficult for Spanish authorities.

On the other hand, in Spanish law, the notion of a ‘frontier worker’ has been typically identified as a foreign worker who comes to Spain in order to carry out work. In this manner, the first reference that we can find is in the Organic Act 4/2000 on the rights and freedoms of foreigners in Spain, just like in its Development Regulation by Royal Decree 557/2011,¹³ which requires that these frontier workers rely on a document of certification which recognises them as such.

In order to find a rule that refers to Spanish workers in Gibraltar as ‘frontier workers’, albeit in an indirect and restricting way, we must resort to fiscal policy. In this way, in the redaction of the Additional Provision of the Organic Law of 6/2011,

¹³ Organic Law 4/2000, of the 11 January, regarding the rights and freedoms of foreign nationals living in Spain and their social integration, BOE, no. 10, the 12-1-2000, in particular art. 43; Royal Decree 557/2011, of the 20th April, approving the Regulation of the Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration, after the amendments made by the Organic Law 2/2009, Spanish Official Journal-Boletín Oficial (BOE), no. 103, 30-4-2011, in particular art. 182.

concerning the fight against contraband,¹⁴ VAT tax exemptions and excise duties for “frontier workers in the zone bordering Gibraltar...”, are reduced to 80 cigarettes, extending the border zone territory up to 15 kilometres in a straight line from the border with Gibraltar. This would include all municipalities whose areas, even if only partial, are found in said zone. We are therefore facing a rule that is restrictive towards frontier workers in the fight against the smuggling of tobacco, and which discriminates against them, on the matter of their residence in a border zone, with respect to other workers.¹⁵ Another issue would be to define, from a legal perspective, where exactly the ‘border zone with Gibraltar’ is found, thus showing us a clear discrepancy in interpretation between the British-Gibraltar and the Spanish authorities.

When it comes to crossing borders, we can find another reference to frontier workers. Indeed, through the Resolution of the 25th July 2014, in the Department of Customs and Excise Duties of the State Tax Administration Agency (known in Spain as the AEAT)¹⁶, it was intended to make the crossing easier for frontier workers residing in Gibraltar or a customs territory in the EU, provided that they do not have any goods to declare.¹⁷ In any case, it was necessary for them to be registered in the AEAT, with prior presentation of their identity documentation, work contract, and certificate of residence. In practice, this rule has been rather ineffective, not only because of the low percentage of workers registered in the AEAT, but also because there is no distinction being made between people who cross the ‘Fence’ – whether they are frontier workers or not – in the direction of Spain. This has therefore led to a clear failure of the ruling, on a national scale and for the EU.

¹⁴ Organic Law 6/2011, 30th June, which modifies the Organic Law of 12/1995, the 12th December, of repression of contraband, Official State Gazette, no. 156, 1-7-2011, amended by the Law of 17/2012, de 27th December, of General Budgets for the State for 2013, BOE, no. 312, 28-12-2012.

¹⁵ In fact, by strictly applying this rule, municipalities of the Campo de Gibraltar like Tarifa or Jimena de la Frontera would be exempt, according to the geographical demarcation.

¹⁶ Resolution of 25-7-2014, the Department of Customs and Excise Duties of the State Tax Administration Agency, in which the special case of the use of the red route in the traffic of passengers is regulated in the Administration of Customs and Excise Duties of the Línea de la Concepción for frontier workers, Official State Gazette, no. 183, 29-7-2014.

¹⁷ This facilitation is consistent with what is planned in the Annex VII in the Schengen Borders Code, about frontier workers. See EU Regulation 2016/399 of the European Parliament and the European Council, on the 9-3-2016, in which a community code of rules for people crossing borders is established (Schengen Borders Code) OJ, L 77, 23-4-2016.

8. Regulation of citizens' rights in the Withdrawal Agreement and the Memorandum of Understanding

As we have seen, the Withdrawal Agreement 1 establishes the same territorial application, both to Gibraltar (art 3.), and frontier workers (art. 10.1c). They will need to be registered via a governmental documental that will thus provide confirmation (art. 26). This duty to register was already expected in Spanish law, found specifically in the Organic Law 4/2000, and even more precisely in fiscal effects concerning Gibraltar, in the Resolution of July 2014 of the AEAT.

In particular, the Memorandum on citizens' rights (signed on the 29th November 2018, as well as the rest of the Memorandum of Understanding, which was activated at the moment when the Withdrawal Agreement came into force on the 1-2-2020) provides for the creation of a bilateral Coordination Committee aiming to guarantee the recognition of the rights of frontier workers living in the 'communities of municipalities in the Campo de Gibraltar', and the quarterly exchange of information between authorities, applying that which is established in the Withdrawal Agreement. The Coordination Committee will meet at least quarterly, and is made up of, on behalf of Spain, representatives from national, regional, and local government, on behalf of Britain, by representatives of the UK and Gibraltar. In short, it is hoped that the Committee will protect the interests of Spanish frontier workers in Gibraltar, as well as avoid grave damage to the socio-economic development of the area, having held meetings in February, July, and November of 2020 in order to guarantee the rights of frontier workers.

With this perspective, and in the hope of achieving a final agreement, Spanish, UK, and Gibraltarian authorities have agreed on a process in order to guarantee the rights of frontier workers from the 1st January 2021, applying – in essence – that which is planned in the Withdrawal Agreement. Therefore, the Gibraltarian authorities have

created a process of registering workers,¹⁸ as a control mechanism for securing the rights which have been, so far, recognised.

In the specific area of Social Security protection, one important aspect of the Withdrawal Agreement 1 is determined by the terms which will finally be laid down according to 'the coordination of Social Security in relation to workers residing in Spain and employed in Gibraltar, and residents of Gibraltar who are employed in Spain.' Moreover, this is in line with that which has been established in Article 1 of Protocol on Gibraltar which demands that relations between the UK and Spain must remain driven by cooperation, for securing the rights of citizens, especially of frontier workers who live in Gibraltar or Spain (and, in particular, in the municipalities in the community of the Campo de Gibraltar).

9. The Spain-UK 'Preliminary Agreement' and its impact on frontier workers in Gibraltar

In Treaty 2 of the EU-UK Future Relationship, nothing is said about frontier workers. For this reason, we must turn to the "Preliminary agreement between Spain and the UK on Gibraltar and on Brexit" of December 31, 2021, according to which, the Colony would become part of the Schengen area, which means recognising the elimination of any internal border between the territories. In practice, this implies freedom of entry and exit to and from the Colony from Spanish territory; in other words, the "Fence of Gibraltar" disappears as a border control point.

In this "Preliminary Agreement" there is an explicit reference to "frontier workers" in Annex 3. According to this, it is established that their definition will be as broad as possible, including both self-employed workers (the self-employed or freelancers) and salaried employees. On the other hand, the registration system already included in the Withdrawal Treaty 1, as well as in the Spanish legislation itself, will be maintained. From a labour point

¹⁸ <https://frontierworkers.egov.gi/>

of view, equal rights are guaranteed between frontier workers and the rest of the workers, eliminating any existing restrictions, as well as improving the labour quality and social protection of all these workers.

With regards to Social Security, the “Preliminary Agreement” establishes that a section will be included on the coordination of Social Security for those working in Gibraltar and residing in Spain, and vice versa. Thus, it states that the provisions included in this section could be similar to those of the EU-UK future relationship treaty, and will provide, as a minimum, the level of protection and rights for workers foreseen in the Withdrawal Agreement.

In this sense, it is useful to refer to the provisions of Annex 2 of the “Preliminary Agreement”, specifically, when proposing a future agreement on a social security system applicable to persons who, are nationals of an EU Member State, UK nationals, refugees, stateless persons or third country nationals, would be entitled to social security protection and rights in accordance with the provisions of the “Preliminary Agreement”. The first entitlement is for residents of Gibraltar who have taken up employment or self-employment in an EU Member State on or after 1 January 2021; the second is for those who have taken up employment or self-employment in Gibraltar on or after 1 January 2021; the third, for people in receipt of a benefit or pension linked to or deriving from the above activities (self-employed or employed, whether in an EU Member State or in Gibraltar); and the last, to protect the family members or survivors included in the above situations.

This Annex proposes a regulatory regime composed of the rules on social security coordination: Article 48 TFEU, Regulation 2004/883/EC, and Regulation 2009/987/EC.¹⁹ For third-country nationals, and their family members and survivors who meet the conditions of the Regulations, Regulation 1971/1408/EEC²⁰ and Regulation 2009/987/EC will apply to them respectively.

¹⁹ Regulation 2009/987/EC of the European Parliament and of the Council of 16-9-2009 adopting the rules implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30-10-2009.

²⁰ Council Regulation 1971/1408/EEC of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971.

An analysis of the “Preliminary agreement” shows that Regulation 2004/883/EC is intended to play a leading role (it should be noted that it is temporary, as it is intended to include measures of a transitional nature) in the coordination of Social Security systems in this transitional regime. Moreover, the same “Preliminary Agreement” allows for the provisions to be adapted to the amendments that will be made to it and to Regulation 2009/987/EC.

10. The February 2021 Law and its impact on Gibraltar

Having described the scope of application of the Withdrawal Treaty and the “Preliminary Agreement”, it is appropriate to turn to the last step taken to adapt the UK as a third State after the end of the transitional period, i.e., the draft Law of 5 February 2021.²¹

The need for its regulation is due to the need to protect the interests of citizens and economic operators who may be affected by the end of the transitional period, with the UK becoming a third state for all purposes, as well as to counteract the undesired effects of the end of the transitional period.

As will be seen, we will focus on the framework of social protection provided by this draft law, which shares the same objective of social protection as the Royal Decree-Law 38/2020.²²

One of the characteristic features of relations between the EU and the UK is that they are governed by the principle of reciprocity. The Preamble to the draft law warns that the maintenance over time of the legal situations

²¹ Draft Law adopting measures to adapt to the status of the United Kingdom of Great Britain and Northern Ireland as a third State following the end of the transitional period provided for in 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 of 31-1-2020, Boletín Oficial de las Cortes Generales, no. 41-1, of 5-2-2021.

²² Royal Decree-Law 38/2020, of 29 December, adopting adaptation measures adopting measures to adapt the United Kingdom of Great Britain and Northern Ireland to its status as a third State following the end of the transitional period provided for in 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, of 31-1-2020. 31-1-2020. BOE, no. 340, of 30-12-2020.

regulated therein is conditional on the granting of reciprocal treatment by the UK authorities. It also notes that reciprocity will be verified after the entry into force of this future regulation (Recital III). This follows from Article 3, which provides that the measures shall be suspended if the competent authorities do not grant reciprocal treatment to natural or legal persons of Spanish nationality in the UK or in Gibraltar in the areas concerned.

In this context, one important exception to the principle of reciprocity stands out. This concerns the maintenance of unemployment benefits for frontier workers who commute daily to work in Gibraltar and who reside in Spain. A specific measure has been included to maintain entitlement to unemployment benefit until 31 December 2022. This measure is applied without the requirement of reciprocity referred to above. This is justified by the special characteristics of border workers in the Campo de Gibraltar region, and also, it should be added, by the high unemployment rate that characterises this area. The aim is to ensure that frontier workers who are not covered by the Withdrawal Treaty 1 are not left unprotected when the Social Security Regulations cease to apply.

In relation to access to unemployment benefits, Article 10 of the draft Law establishes that periods credited in any EU Member State and in the British Social Security system, which have been completed up to 31 December 2020, are considered as periods of contribution for access to and calculation of unemployment or cessation of activity benefits. Moreover, this situation is subject to the principle of “residence” so characteristic of unemployment benefit, as it is required to maintain the right to reside in Spain (in accordance with the Social Security Coordination Regulations) and provided that contributions were last paid in Spain. However, the draft Law does not impose this requirement (that of having last paid contributions in Spain) on EU citizens who do not fall within the scope of application of the Withdrawal Treaty 1, and who commute to Gibraltar on a daily basis to carry out work, while maintaining their residence in Spain. Until 31 December 2022, these persons will be entitled to unemployment benefits for periods of insurance credited in Gibraltar, before and after the end of the transitional

period. However, for periods of insurance credited or carried out in Gibraltar after 1 January 2021, the corresponding British authorities will be required to reimburse the benefits paid by Spain, once an international instrument is agreed that establishes the necessary collaboration mechanisms for the reimbursement and granting of unemployment benefits to these workers.

Finally, we shall refer to the Single Transitional Provision contained in the draft Law, on the grounds of legal certainty. This provision covers recipients of unemployment benefits in Spain who have been authorised to move to the UK to carry out professional development or job-seeking activities in the UK or Gibraltar. It should be noted that they would have to be authorised to export this benefit before 1 January 2021. In this regard, the draft law provides that they will be able to continue receiving unemployment benefits for three months, provided that the British Employment Services guarantee the maintenance of these people’s registration until the end of the initially recognised entitlement.

11. Consequences of COVID-19 on frontier workers in Gibraltar

The terrible consequences of COVID-19 in 2020 have also had an impact on frontier workers and their crossing of the border through the fence. The state of alert initiated on 14 March 2020 in Spain has gone hand in hand with the closure of the Schengen area, as well as the movement of people between states. However, the crossing of border workers has been excluded from these restrictions, specifically with regard to Gibraltar.²³ The very confinement of Gibraltar decreed by its Prime Minister, on 22 March 2020, irremediably led to the temporary closure of numerous workplaces, with the consequent stoppage of the work of frontier workers. Once de-escalation began in mid-May 2020, these workers were guaranteed access to Gibraltar.

²³ Art. 1 of Order INT/270/2020, of 21 March, extending the criteria for the application of a temporary restriction on non-essential travel from third countries to the European Union and Schengen-associated countries for reasons of public order and public health due to the health crisis caused by COVID-19, Spanish Official Journal-Boletín Oficial (BOE), no. 79, 22-3-2020.

However, the new state of alarm decree in Spain after the festive period has gone hand in hand with the emergence of a new British strain, with a tremendous impact on the Colony and the arrival of the third wave of the pandemic. As a result, at the end of December 2020, the Spanish Ministry of the Interior decreed a restriction on entry into Spain from Gibraltar, except, among others, border crossers.²⁴ Likewise, the Gibraltarian government has adopted the general confinement of the Colony on 2 January 2021.²⁵ And immediately afterwards, the Government of the Junta de Andalucía decreed the perimeter closure of eight municipalities in the region,²⁶ affecting a total of 270,000 inhabitants in general and border workers in particular.

The lockdown has led to the temporary closure of numerous commercial and service establishments, with a significant impact on the situation of frontier workers, as happened in March 2020. We therefore note, in short, the need for specific protectionist measures for these workers, which should arise from appropriate cooperation between the authorities on both sides of the Fence.

Conclusions

Brexit has favourably altered the legal and institutional framework, as well as the future possibilities for cross-border cooperation between Gibraltar and the Campo de Gibraltar, if we take into account that the Protocol on Gibraltar and the Spanish-British Memorandums of Understanding provide for stable cross-border cooperation with Gibraltar under European law.

Significant progress has been made in the recognition of the Gibraltarian authorities as valid interlocutors. The search for solutions to the common problems of the populations living in the border area requires the recognition of the competent authorities (territorial and regional) on both sides of the fence/border as interlocutors. Therefore, dialogue with the Government of Gibraltar, the Junta de Andalucía and the Association of Municipalities de la Comarca del Campo de Gibraltar is essential, which is recognised by the MOUs with the creation of Technical Commissions or Coordination Committees, made up of the competent authorities.

In accordance with the EGTC Regulation (2013) and Royal Decree 23/2015, we understand that the creation of the EGTC Campo de Gibraltar/Gibraltar is viable within the framework of the Brexit negotiations between an EU Member State (Spain) and a third State (the UK), with the authorisation of Spain and the UK being necessary. However, it would be up to the Spanish State, in whose territory the establishment of its headquarters was foreseen, to approve its constituent convention, although the Andalusian Regional Government, as a participating entity of the EGTC, has not submitted the request for its creation to the Secretary of State for Public Administrations for its authorisation. However, the “Preliminary Agreement” (point 23) opens up the possibility of a specific financial instrument for Cohesion for Gibraltar and the Campo de Gibraltar.

In this way, Brexit has proved to be 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

²⁴ Order INT/1236/2020, of 22 December, establishing criteria for the temporary restriction of access by land to the Schengen area through the checkpoint of persons with the territory of Gibraltar for reasons of public health due to the health crisis caused by COVID-19, Spanish Official Journal-Boletín Oficial (BOE), no. 333, of 22-12-2020.

²⁵ Down Press Conference: Chief Minister’s Script - 2/2021, dated 2-1-2021.

²⁶ Specifically, Tarifa, Algeciras, Castellar de la Frontera, Jimena de la Frontera, San Martín del Tesorillo, San Roque, La Línea de la Concepción and Los Barrios. See, Presidential Decree 1/2021 of 2 January, BOJA extraordinary, no. 1 of 2-1-2021.

EU. Proof of this can be seen in relation to frontier workers, with a clear commitment to maintaining the rights of frontier workers in Gibraltar. On the other hand, with the enforcement of the Withdrawal Treaty and the subsequent express agreement on Gibraltar, a framework for cooperation between the parties is established through the registration and verification of European frontier workers in third countries and vice versa. All this would lead to the creation of a very interesting bilateral scenario in order to normalise relations in the area.

In the area of social security, the legislative steps that have been taken have sought to ensure an orderly withdrawal from the UK and to provide legal certainty for all those affected. In pursuit of this objective, one aim is to provide social protection for workers so that they can continue to exercise their rights under the legal system that had been in place. The measures are temporary and subject to the principle of reciprocity. The only exception to the principle of reciprocity concerns unemployment benefits. Thus, until more far-reaching multilateral or bilateral decisions are taken, the legislative impetus is to maintain the minimum level of protection that has been offered. This is done mainly by adapting Regulation 2004/883/EC, its implementing regulation, among other social security coordination instruments.

It is also commendable that the mobility of workers is encouraged, and the entitlement to unemployment benefits (exportability) for those who have chosen to go to the UK (or Gibraltar) to actively seek employment or to

improve their vocational training continues to be maintained, albeit on a temporary limited basis. If mobility and relations between the UK and the EU are to be further promoted, it is important to ensure that there continues to be increasingly close and effective coordination between unemployment insurance schemes and employment services in all countries. In this respect, it makes sense that such measures should be introduced in a scenario of worker mobility in order to further promote the movement of frontier workers in the Campo de Gibraltar region, and in particular their social protection rights.

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

Brexit has proved to be an opportunity to channel the necessary cross-border cooperation between Gibraltar and the Campo de Gibraltar, which will continue to be present with the exit of the UK from the EU will continue to be present with the UK's exit from the EU

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