



BRIEFING PAPER

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Brexit: Gibraltar update

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Summary

In the view of the EU27 there is still a significant gap in the draft Withdrawal Agreement in respect of Gibraltar because there is no bilateral agreement between the UK and Spain on the issues that arise from the departure of the UK and Gibraltar from the EU.

The Commission's revised draft WA of 19 March 2018 defines the territorial scope of the Agreement as including Gibraltar "to the extent that Union law was applicable to it before the date of entry into force of this Agreement" and a footnote recalls paragraphs 4 and 24 of the European Council guidelines of 29 April 2017 regarding Gibraltar. Article 4 of those guidelines set out the general principle that withdrawal should be orderly and minimally disruptive. Article 24 referred specifically to Gibraltar and stated:

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.

A new agreement applying to Gibraltar could take the form of a separate Protocol alongside the main Withdrawal Agreement, in the same way that there is a draft Protocol on Ireland, but there is as yet no "placeholder" for this in the Commission draft. Nor is there a proposal for a specialised committee to oversee arrangements relating to Gibraltar in the way that is proposed for the Cyprus sovereign bases and for Ireland (draft Article 158).

At the European Council meeting on 22/23 March 2018 the EU27 reiterated that final agreement on the Withdrawal Agreement is dependent on agreement between the UK and Spain relating to Gibraltar:

The European Council calls for intensified efforts on the remaining withdrawal issues as well as issues related to the territorial application of the Withdrawal Agreement, notably as regards Gibraltar, and reiterates that nothing is agreed until everything is agreed.

In her [statement](#) to the House of Commons following the March European Council meeting, the Prime Minister said:

We have also been working closely with the Government of Gibraltar to ensure that Gibraltar is covered by our EU negotiations on withdrawal, the implementation period and future relationship. I am pleased that the draft agreement published jointly last week correctly applies to Gibraltar, but we will continue to engage closely with the Government of Gibraltar and our European partners to resolve the particular challenges our EU withdrawal poses for Gibraltar and for Spain.

There has been concern that the Spanish Government might use the "veto" which it has been given by Article 24 of the EU27 negotiating guidelines as a lever to obtain concessions over the sovereignty of Gibraltar. The UK Government has made it clear that it will not discuss sovereignty, but is willing to hold constructive discussions with Spain on other issues affecting Gibraltar. The Spanish Foreign Minister has said that he does not want the Brexit negotiations to be held hostage over Gibraltar and he appears to have the support of the main opposition party in the Spanish parliament on this.

However, the Spanish Government has repeatedly expressed interest in obtaining joint control of Gibraltar's airport which is located on the isthmus that joins the Rock to the Spanish mainland. The Spanish Government regards the isthmus as not being covered by the Treaty of Utrecht by which the Rock was ceded to the British Crown in 1713.

There is concern that if the UK and Spain are unable to arrive at a bilateral agreement by the autumn of 2018, this could hold up the conclusion of the overall Withdrawal

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Agreement. The Chairman of the House of Lords Select Committee on the EU wrote to the Secretary of State for Exiting the EU, David Davis MP, on 28 March 2018 expressing concerns about the UK-Spain bilateral discussions and seeking reassurance that Gibraltar would be fully covered by the transitional arrangements for UK exit.

1. Background

Background information on Gibraltar's status within the EU and the outcome of the 2016 referendum was provided in Library Briefing Paper 7963 [Brexit and Gibraltar](#) in May 2017.

In brief, Gibraltar was ceded to the British Crown by the Spanish Crown in 1713 and has remained under British sovereignty since that time. Spain tried to recapture Gibraltar by military force in the eighteenth century and has maintained a political and diplomatic campaign to restore Gibraltar to Spanish sovereignty to the present day.

Gibraltar joined the EU in 1973 as an external European territory of the UK, and Spain became a full member of the EU in 1986. Gibraltar was exempted from the Customs Union and certain other provisions, but has otherwise enjoyed full access to the Single Market. Gibraltar did not join the Schengen group. The consequence of these arrangements has been that the freedoms of the Single Market generally apply at the Spain/Gibraltar border, but there are exemptions in place for certain goods and Spain is entitled to carry out customs checks and checks on people crossing.

Spain has never dropped its claim to sovereignty over Gibraltar and there have been periods in the recent past when Spanish governments tried to put pressure on the UK and Gibraltar by closing the border, slowing traffic at the border and carrying out incursions into Gibraltar's airspace and territorial waters. Such pressures have generally declined since Spain joined the EU but tensions remain over a variety of issues, including the status of Gibraltar's airport.

There have been suggestions from time to time that the UK and Spain might agree on a form of joint sovereignty over Gibraltar, but this was rejected by 98% of Gibraltarians voting in a referendum held in 2002.

Gibraltarians took part in the EU Referendum in 2016 and voted overwhelmingly (96%) to remain in the EU.

Gibraltar enjoys a high standard of living with a level of per capita GDP significantly higher than either the UK or Spain. Since the decline of employment in the naval dockyard the economy now rests mainly on financial services (including a large off-shore motor insurance sector), on-line gambling and tourism. The resident population is insufficient to meet employment requirements and an estimated 10,000 jobs are filled by workers who cross into Gibraltar daily from the Spanish mainland, the majority of them Spanish nationals.

2. A bespoke deal for Gibraltar?

Since shortly after the 2016 referendum on UK membership of the EU, in which the great majority of voters in Gibraltar voted to remain, questions have been raised as to whether Gibraltar should simply withdraw from EU membership on the same terms as the UK and as part of the same withdrawal agreement, or whether there could be a somewhat separate or “differentiated” deal for Gibraltar. In the latter case there would need to be a separate provision for Gibraltar, probably in the form of a Protocol attached to the Agreement.

When the House of Lords Select Committee on the EU took evidence on this issue in late 2016 and early 2017 different views were expressed on this. The [Hon Fabian Picardo](#), Chief Minister of Gibraltar, said:

It is not clear yet what position the United Kingdom is going to take as a whole in the negotiations. Therefore, we need to understand that it may be that the status that the United Kingdom seeks and attains in the context of the negotiations is perfect for the geopolitics of Gibraltar and therefore that there does not need to be any differentiation. But if we assume that the geography of Gibraltar and the socioeconomic functioning of our community are different from those of the United Kingdom, as of course they are, you can see why it may be necessary to have an aspect of the new agreement between the United Kingdom and the European Union apply in a different way to Gibraltar.

When asked in February 2017 about the possibility of a “differentiated” agreement, the PUS at DFxEU [Robin Walker](#) MP said “We are focusing on getting the best deal on market access for the whole of the UK and the family of territories on whose behalf we are negotiating.” However, in response to later questions he alluded to the need for effective arrangements at the Gibraltar-Spain border and continued “It is very important that the UK engages positively with Spain bilaterally and engages positively across the EU, but we have to make it clear in advance that a discussion about sovereignty is simply not on the cards.”

When the House of Lords Committee reported on [Brexit: Gibraltar](#) in March 2017 it concluded, among other things:

We agree with the Chief Minister of Gibraltar that Gibraltar and the UK should be considered, for the purposes of withdrawal negotiations, as a single State. Gibraltar is part of the EU, and its withdrawal is a matter for the UK and the EU collectively, not for a separate, bilateral negotiation between the UK and Spain. Aspects of the agreement on the future UK-EU relationship could nevertheless include specific bilateral arrangements between Spain and Gibraltar, for example in relation to local border traffic management.

The Committee also concluded:

It is essential that Spain, the UK and Gibraltar, once they lose the common forum provided by shared EU membership, redouble their efforts to find a structure through which open lines of communication can be maintained, promoting cooperation and

good relations. We call on the Government to give early thought to how such a structure might be established, and what, if any, role the EU might play in it. Agreement on this should be sought in tandem with Brexit negotiations.

Nervousness in London and Gibraltar about how Spain would approach a dialogue about the future of Gibraltar increased in April 2017 when the European Council adopted negotiating guidelines which in Article 24 referred specifically to Gibraltar and stated:

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.

This was widely interpreted as giving Spain a veto over arrangements for Gibraltar [see section 3 below].

In [correspondence](#) with the Chairman of the House of Lords EU Select Committee in January 2018, the Secretary of State for Exiting the EU, David Davis, referred to issues of concern to Gibraltar in the Brexit negotiations, such as the status of frontier workers, but placed them in the context of the status of frontier workers in general. His letter made no reference to bilateral discussions with Spain.

Similarly, in his [statement](#) in Brussels on 19 March 2018, following agreement on substantial elements of the draft Withdrawal Agreement, David Davis said:

Businesses need not delay investment decisions, or rush through contingency plans based on guesses about the future deal. Instead they now have certainty about the terms that will apply immediately after our withdrawal. Meaning that they can continue to operate and invest with confidence, as the design of our future partnership with the European Union becomes clear.

And this is true across the whole United Kingdom family — because the territorial scope of the Withdrawal Agreement makes clear it includes Gibraltar.

We continue with our positive dialogue with the Spanish on how we improve cooperation in the future.

The version of the draft Withdrawal Agreement published on 19 March, refers, like previous versions, to Gibraltar being within the scope of the agreement and alludes to Article 24 of the negotiating guidelines in a footnote, but includes no placeholder for a separate Gibraltar Protocol.

At the European Council (Article 50) meeting on 23 March 2018 the EU27 adopted guidelines for the next phase of negotiations regarding the withdrawal of the UK from the EU. The guidelines included the following statement in paragraph 1: “The European Council calls for intensified efforts on the remaining withdrawal issues as well as issues related to the territorial application of the Withdrawal Agreement, *notably as regards Gibraltar*, and reiterates that nothing is agreed until everything is agreed.” [emphasis added] The European Council also reiterated, in paragraph 2, that the previous guidelines adopted in April and December 2017 “continue to apply in full”.

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In her [statement](#) to the House of Commons following the European Council meeting of 22-23 March 2018, the Prime Minister said:

We have also been working closely with the Government of Gibraltar to ensure that Gibraltar is covered by our EU negotiations on withdrawal, the implementation period and future relationship. I am pleased that the draft agreement published jointly last week correctly applies to Gibraltar, but we will continue to engage closely with the Government of Gibraltar and our European partners to resolve the particular challenges our EU withdrawal poses for Gibraltar and for Spain.

The Leader of the Opposition asked:

Has the Prime Minister signed up to there being an Anglo-Spanish bilateral agreement on Gibraltar? Who will lead the negotiations for the Government?

The PM did not respond immediately, but to a later questioner she said:

We are obviously having discussions with the Government of Gibraltar, but discussions are also taking place to ensure that the challenges posed by the relationship between Gibraltar and Spain, including those concerning the airport, are overcome. Some good discussions have been held so far.

3. The “Spanish veto”

Article 24 of the European Council [guidelines](#) of 29 April 2017 is ambiguously worded and does not use the term “veto”:

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.

If the UK and Spain are able to arrive at a mutually satisfactory bilateral agreement regarding Gibraltar ahead of UK exit, then clearly there will be no question of a veto on the Withdrawal Agreement. If no such agreement is reached, then Article 24 could mean that the EU will insist that the Withdrawal Agreement does not apply to the territory of Gibraltar.¹ While the legal effects of this are uncertain, the language adopted at the European Council meeting of 23 March 2018 implies that the EU27 would not agree to conclude the deal in those circumstances. A Withdrawal Agreement that does not apply to Gibraltar is also likely to be unacceptable to the British Government.

Thus, while under TFEU Article 50 Spain has no veto over the Withdrawal Agreement (which has to be agreed by at least 20 of the 27 Member States, but not all) Spain may be in a position to delay agreement if it chooses to do so.

On 20 March 2018 the Spanish Foreign Minister, Alfonso Dastis, told the Joint EU Committee of his own Parliament that he is focusing on pragmatic cross-border issues and that, without compromising Spain’s long-term claim to sovereignty over Gibraltar, he did not want the Brexit negotiations as a whole to “be hostage to the question of Gibraltar”. Other speakers in the Committee session concentrated heavily on issues such as the impact of Brexit on Spanish citizens in the UK and UK-Spanish trade and investment. The spokesman for the Socialists (the largest opposition party) also commented that it would be unrealistic for Spain to use Brexit to resolve the Gibraltar sovereignty dispute.²

On the other hand there continue to be calls in the Spanish media for the Government to use the Brexit opportunity to negotiate some form of joint sovereignty. For example, *El País* published an opinion piece by two Spanish academics on 28 March 2018 suggesting that Gibraltar might be ruled jointly under the British and Spanish crowns, with a status somewhat akin to Andorra.³

Gibraltarian ministers have questioned whether a “Spanish veto” is legal and threaten to challenge its legality if exercised. The grounds for this are not explicit. It could be arguable that Article 50 of the TFEU gives no single Member state a veto on a Withdrawal Agreement; and/or that

¹ Article 24 is ambiguous. It could refer to new agreements negotiated after UK exit, or to the application of agreements already negotiated at the time of exit, including the Withdrawal Agreement.

² Quoted in *The Telegraph*, 20 March 2018. The full transcript of this session in Spanish is available [here](#)

³ El País, [Gibraltar, ciudad de las dos coronas](#), 28 March 2018

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“negotiating guidelines” are only guidelines and do not have binding force.

On the other hand, it could also be arguable that the EU27 are free to determine their negotiating strategy and that Article 24 has political rather than legal force.

Article 24 of the negotiating guidelines is drafted in such a way as to apply to any future agreement between the UK and the EU. It could mean, for example, that if the UK were to negotiate a special EU status for Gibraltar in the future, this could only come into force with the agreement of Spain. Since the negotiating guidelines will necessarily lapse once the current negotiations are concluded, Article 24 in itself could not be legally binding in the future, but it points to the likelihood that Spain will seek a future commitment of this nature in the Withdrawal Agreement, probably as part of a separate Protocol on Gibraltar.

4. Pragmatic discussions

While the British and Gibraltar governments have made it clear that sovereignty over Gibraltar is not for discussion, they have acknowledged that there are pragmatic issues that it would be mutually beneficial to discuss with Spain. Above all this refers to effective management of cross-border flows, and more generally to “co-operation”.

For Spain, the foreign minister Alfonso Dastis indicated the issues that he regarded as pragmatic in his response to the Joint EU Committee of the Cortes on 20 March 2018. These were: impacts on cross-border workers; joint use of the airport, including agreement on jurisdiction; curtailment of tobacco smuggling; fiscal transparency and anti-fraud measures; and local environmental issues.

The *Financial Times* reported on 26 February 2018 that it had been told by Alfonso Dastis that Spain wants a bilateral deal with the UK on these issues and that he would be prepared to accept representatives of Gibraltar itself in the UK delegation in future talks. Mr Dastis told the *FT* that he did not expect bilateral agreement with the UK in time for the March 2018 EU Summit, but the negotiation would have to be completed by the autumn of 2018.

According to the Spanish newspaper *El País* on 2 March 2018, there have been three “technical” meetings on Gibraltar between senior FCO and Spanish Foreign Ministry officials over the past year and the talks are said to be “on track”. It confirmed, however, that the Spanish side has reasserted that there must be bilateral agreement between the UK and Spain in accordance with Article 24 of the European Council guidelines before this can be incorporated in the Withdrawal Agreement.

UK ministers have declined to comment in detail on these discussions other than to offer general reassurance. In answer to an oral question about the Spanish “veto” on new arrangements for Gibraltar on 1 March, the Leader of the House (Andrea Leadsom) responded “I hope I can give my hon. Friend the assurance from the Dispatch Box that Gibraltar’s interests will be protected, as will every other part of the UK and our dependencies”.

The UK/Gibraltar Joint Ministerial Council (JMC) met in London on 7 March 2018. Following the meeting the UK Government released a statement concerning ongoing economic and other relationships between Gibraltar and the UK in the context of Brexit, but questions concerning discussions with Spain and Gibraltar’s future relationship with Spain and the EU were not addressed. In a parliamentary [written statement](#) of 12 March, however, Robin Walker (Parliamentary Undersecretary, DExEU) reiterated the outcomes of the JMC and added: “The UK remains committed to fully involving Gibraltar as we leave the EU. We will continue to work together through the JMC process to ensure we take account of Gibraltar’s priorities in our negotiations with the EU”.

Following the March European Council meeting, the Chairman of the House of Lords EU Select Committee, Lord Boswell, [wrote](#) on 28 March 2018 to DExEU minister David Davis seeking reassurance and clarification of the British Government's position on the pragmatic issues, including the airport and the border. He also asked for reassurance that Gibraltar would be fully covered by the Withdrawal Agreement and in particular the transitional arrangements.

4.1 The airport

Gibraltar's international airport handles 3-7 departures daily to the UK and Morocco. The airport has long been a bone of contention because Spain claims that it is built on land (the isthmus which joins Gibraltar to the mainland) which was not covered by the Treaty of Utrecht and therefore rightfully belongs to Spain.

In September 2006 the governments of Spain, the UK and Gibraltar signed the Cordoba Agreement, which included measures on issues such as border crossings and access for flights. It also committed the parties to a tripartite forum for regular talks. In November 2006, the Spanish airline Iberia announced that it would start flights from Madrid to Gibraltar, marking the first Spanish airline to fly to Gibraltar since 1979.

Talks were suspended however when the centre-right Popular Party (PP) Government led by Mariano Rajoy withdrew from the talks on taking office in December 2011, and since that time the Spanish government has been unwilling to include the Gibraltar airport in EU air liberalisation measures, while other EU proposals have been delayed or blocked.

In October 2015, before the EU referendum, the then Europe Minister David Lidington set out the Government's approach in a [debate](#) in Westminster Hall:

as the House will know, there has been a long-running battle at EU level about whether Gibraltar should be included in EU aviation legislation. It is the Government's view that the treaties of the EU are absolutely clear that, for the purposes of aviation policy, Gibraltar and Gibraltar airport are part of the EU. Therefore, it would not only be a political move but a breach of the European treaties themselves if there were to be any measure that purported to exclude Gibraltar from the ambit of such legislation. We will continue to oppose any further attempts by Spain to have Gibraltar excluded from EU aviation legislation. In the past 12 months, we have seen such attempts repeatedly, and they have all failed. We have delivered a very clear message that the treaties require that aviation measures must be applied to Gibraltar, and we shall continue to lobby both the Transport Commissioner and other EU member states to try to ensure that that principle is upheld.

This position depended on the Government's view that Gibraltar and Gibraltar airport "are part of the EU". Brexit clearly changes this perspective. According to a *Financial Times* report on 12 February 2017:

While Spain has made positive overtures to London since the Brexit vote and warned Europe against seeking a punitive deal, it has also signalled it would block UK access to the EU's single

aviation market unless the terms exclude Gibraltar's international airport.

On 12 March 2018 a Lords Parliamentary Question about the reported interest of Spain in negotiating joint management of the Gibraltar airport was answered by Lord Ahmad on behalf of the Government in the following terms: "The UK and Gibraltar continue to support the 2006 Cordoba Agreement on Gibraltar Airport which already provides for its enhanced use to benefit communities in both Gibraltar and Spain. We believe that a thriving Gibraltar airport can help deliver shared prosperity for the wider region".

4.2 The border crossing

The British Government's view of issues at the Spain/Gibraltar border was set out by the then Europe Minister David Lidington in October 2015 as follows:

one should expect passport checks and other proportionate checks at the Spain-Gibraltar border, but those should be no more and no less burdensome than the kind of checks that would be carried out on any other non-Schengen European border.

He referred to politically motivated tactics in the past on the part of Spain to create artificial delays at the border, but commented that the position had improved following inspections by EU Commission officials and improvements to the infrastructure on the Spanish side of the border.

In his recent comments on bilateral issues, the Spanish Foreign Minister has repeatedly emphasised the priority he places on the rights of those who cross the Gibraltar border regularly in order to work and said that there was a mutual interest in maintaining smooth cross-border flows after Brexit.

4.3 Smuggling and other crimes

Both the UK and Gibraltar governments have previously welcomed co-operation with Spain to crack down on crimes, such as drug and tobacco smuggling. Before the EU referendum, on 15 October 2015, David Lidington set out the Government's approach during a [debate](#) in Westminster Hall:

Spain has now agreed to our proposal of 28 August to step up law enforcement co-operation to fight against organised crime. We worked in close consultation with the Government of Gibraltar to achieve this agreement and all three Governments—Spain, Gibraltar and the UK—have an interest in tackling criminal activity in this area of the Mediterranean, and we all know that the agreement will be truly effective only if we can work together. Although the unacceptable incursions have continued, it is also a fact that, at the same time, there have been occasions in recent months when Gibraltar and Spanish authorities have worked together to bring criminals to justice, and I warmly welcome that.

4.4 Taxation

Taxation issues fall into two distinct categories. Spain has concerns about the ability of Gibraltar to set its own local tax rates, which could be seen as attracting business to the Rock rather than to the neighbouring parts of Spain; and also about tax fraud and transparency.

Corporation tax stands at 10% in Gibraltar, except for utility companies which are subject to a 20% rate. Corporation tax is 35% in Spain.

Before the EU Referendum David Lidington set out the British Government's position in the [following terms](#):

It is also wrong for Spain to continue to level accusations at Gibraltar about its tax regime. Spain does so despite the fact that Gibraltar has received the same OECD rating on tax as Germany, the United States and the United Kingdom. Furthermore, Gibraltar has already achieved exchange of tax information relationships with more than 75 other jurisdictions, including—paradoxically—the Kingdom of Spain itself.

Our Government have worked closely with the Government of Gibraltar to push for the removal of Gibraltar from the few outdated tax blacklists on which the territory still appears. Together, we have successfully managed to get Gibraltar removed from lists in Italy, Bulgaria and other countries, and we will continue that work apace.

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