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FREE MOVEMENT OF PERSONS IN THE AGREEMENT BETWEEN THE EU
AND THE UNITED KINGDOM IN RESPECT OF GIBRALTAR.
SPECIAL STATUS OF MILITARY PERSONNEL

Pablo Antonio Fernández Sánchez *

SUMMARY: 1. Introduction. – 2. Previous experience of the free movement of persons in Gibraltar. – 3. Border regulations after Brexit. – 4. Current law applicable to the *La Línea de la Concepción* border crossing. – 5. Gibraltar in the context of the European Union: the singular nature of border control. – 6. European rules applicable on a transitional basis at the *La Línea de la Concepción* border crossing. – 7. The general scope of the 2026 Agreement in respect of Gibraltar in relation to the free movement of persons. – 8. The specific scope of border controls for military personnel, their families, and guests of the British armed forces. – 9. Conclusions.

1. Introduction

On 3 February 2026, the General Secretariat of the Council of the European Union circulated among the Delegations of the Member States the document containing the proposal for a Council Decision concerning the signing, on behalf of the European Union, of the Agreement in respect of Gibraltar between the European Union and the United Kingdom¹.

The document was therefore subject to professional secrecy pursuant to Article 339 TFEU and Article 6(1) of the Council's Rules of Procedure.

I am working with the draft official English version of the document published by the Government of Gibraltar², currently circulating online and, consequently, without any guarantee of authenticity other than the correspondence between the English and Spanish

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¹https://www.exteriores.gob.es/es/PoliticaExterior/Documents/COM_2026_91_1_EN_annexe_propositio_n_cp_part1_v5.pdf.

² https://www.gibraltar.gov.gi/uploads/_PressOffice/Draft%20Treaty/UK-EU-Agreement-in-respect-of-Gibraltar.pdf.

texts. Nevertheless, it suffices for the purposes of making general observations, given the breadth and complexity of the Treaty.

I have been struck by the degree of secrecy surrounding the treaty's drafting process. On the one hand, such confidentiality is understandable insofar as it seeks to shield the negotiating teams from external pressure. On the other hand, however, it appears excessive within a democratic society, where citizens are entitled to know the fundamental outlines of ongoing negotiations.

I have also been surprised by both the length and the depth of the treaty. It contains 336 articles, together with a lengthy list of related instruments. In other words, it exceeds the United Nations Convention on the Law of the Sea (320 articles) and approaches the scale of the Treaty on the Functioning of the European Union (358 articles). This appears disproportionate in relation to the subject matter being regulated. However, when compared with the 1,200 pages of the 2021 EU-UK Trade and Cooperation Agreement (the Post-Brexit Treaty), comprising 782 articles in its main body and dozens of ancillary instruments, it might even be regarded as relatively modest.

It is true that the matters addressed are both complex and extraordinarily diverse, encompassing essential issues relating to Gibraltar's integration into the system of free movement existing within the European Union. This affects not only persons, which is the aspect most directly felt in the Campo de Gibraltar, but also goods, services, and capital.

Given that Gibraltar was excluded from the scope of application of the 2021 Trade and Cooperation Agreement and considering that current global circumstances favour arrangements in which security takes precedence, the present treaty places particular emphasis on security-related matters. From the outset, it affirms a commitment to democratic principles, the rule of law, human rights, the fight against the proliferation of weapons of mass destruction, and the fight against climate change, all of which are described as essential constituent elements of the Agreement in respect of Gibraltar.

The Agreement expressly recognises "the importance of global cooperation to address issues of shared interest" and specifically refers, within the Preamble itself, to the Commonwealth of Municipalities of the Campo de Gibraltar.

The aforementioned Preamble refers to the possibility of adopting supplementary agreements³ between the United Kingdom and Spain and, above all, to the need for cooperation in civil and criminal matters, as well as police and judicial cooperation. Several provisions in the main body of the text are devoted to these issues, particularly those governing relations with the European agencies EUROPOL and EUROJUST.

The Agreement further insists upon maintaining "high levels of protection in the areas of labour and social standards, the environment, the fight against climate change, and taxation", while also ensuring the smooth flow of land, maritime, and air transport. To that end, mechanisms are established concerning customs control and cooperation against fraud, tax evasion, and tax avoidance.

³ See the most important and foundational analytical text on the legal nature, status, and role of these agreements parallel to Union law: J. BAST, J. HEESSEN, *European Community, Supplementary Agreements between Member States*, in the *Max Planck Encyclopedia of Public International Law*, Oxford, 2010.

Likewise, the Agreement establishes coordination mechanisms regarding social security rights and guarantees concerning family rights for cross-border workers, all of which are comprehensively defined within the main body of the treaty.

It should be recalled that this Agreement is not governed by the 1969 Vienna Convention on the Law of Treaties, although the Convention is expressly cited within the Agreement itself. This is primarily because one of the Parties is an international organisation, namely the European Union, which in itself excludes the direct application of the Convention.

That said, this does not mean that the rules contained in the Vienna Convention are irrelevant to the Agreement in respect of Gibraltar, since most of those rules constitute customary international law, that is to say, practices accepted as law by the international community/by the Parties⁴. Consequently, the procedure followed in the drafting of the Agreement in respect of Gibraltar has expressly adhered to the framework established by the Vienna Convention on the Law of Treaties: the appointment and acceptance of negotiators, the negotiation process itself, the adoption of the text, its authentication, and, in due course, its ratification, deposit, registration, and entry into force.

I have stated that the Agreement in respect of Gibraltar constitutes an international treaty concluded between the European Union and the United Kingdom. This raises the question of its legal nature.

A reading of the text suggests that the Parties conceived it as an agreement solely between the European Union and the United Kingdom, without the participation of the Member States.

Nevertheless, even a cursory examination of the treaty indicates that it encroaches upon areas falling within the exclusive, and also shared, competences of the Member States.

Accordingly, its legal nature ought to be that of a mixed agreement, involving both the competent organs of the European Union and the constitutionally competent authorities of each Member State⁵.

At present, it remains unknown whether an action challenging the Agreement will be brought by the European Parliament or by a Member State, thereby compelling the intervention of the Court of Justice of the European Union, which would have jurisdiction to determine its legal nature.

⁴ For a leading article-by-article commentary explicitly detailing the customary status of each VCLT provision, see M.E. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, 2009.

⁵ For exploring the dual nature of these agreements and their standing in international law, see A. CIEŚLIŃSKI, *The Phenomenon of Mixed Agreements – between Public International and European Union Law*, in *Wroclaw Review of Law, Administration & Economics*, 2018, no. 2, pp. 429-446.

The Court of Justice of the European Union (CJEU) has established a robust framework of jurisprudence regarding its authority over international treaties. The case law in this regard is very extensive⁶, as well as the academic literature⁷.

The 336 articles and hundreds of pages comprising the Treaty, together with all its ancillary instruments, give rise to a vast range of possible commentary. However, the limitations of both time and space inherent in an introduction of this kind make it impossible to explore these matters in greater depth.

2. Previous experience of the free movement of persons in Gibraltar

When the United Kingdom acceded to what were then the European Communities⁸, provision was made for the possibility of applying Community rules to those European territories whose external relations were the responsibility of the Member States. Consequently, there was, in principle, nothing to prevent Gibraltar from being regarded as Community territory, with the result that the general regime governing the free movement of persons at that time became applicable. Gibraltar was not subject to any special regime, save for the provisions contained in the Law of Accession concerning the customs union⁹.

However, Gibraltarian residents were not initially recognised as European citizens. This paradoxical situation arose because the European Union deferred the concept of

⁶ The CJEU has systematically asserted its role as the ultimate guardian of the EU internal legal order when dealing with international treaties through several foundational cases: in case 181/73 *Haegeman v. Belgium*, it established that international agreements concluded by the EU form an “integral part of EU law” from the moment they enter into force, giving the CJEU jurisdiction to interpret them; in Opinion 1/91 (*EEA Agreement I*), the Court ruled that an international agreement cannot alter the allocation of responsibilities defined by the EU Treaties or undermine the autonomy of the EU legal system; in cases C-402/05 P and C-415/05 P, *Kadi v. Council*, the Court confirmed that international obligations (even UN Security Council Resolutions) cannot override the constitutional principles of the EU, including the protection of fundamental rights; in Opinion 2/13 (*Accession of the EU to the ECHR*), the CJEU blocked the EU’s accession to the European Convention on Human Rights, ruling that the proposed agreement failed to protect the specific characteristics and autonomy of EU law; in case C-284/16, *Achmea*, the Court held that investor-state arbitration clauses in intra-EU bilateral investment treaties are incompatible with EU law. It ruled they bypass the preliminary ruling mechanism of Article 267 TFEU, which is the institutional backbone for ensuring the uniform application of EU law; in Opinion 1/17 (*CETA*), the Court clarified that while extra-EU tribunals (like the CETA Investment Court System) are permissible, they cannot have the power to interpret internal EU law or bind EU institutions in their constitutional functions.

⁷ For the evolution of the CJEU’s jurisdiction over treaties, external competences, and the effects of international law inside the EU, see P. EECKHOUT, *EU External Relations Law*, Oxford, 2011; P. KOUTRAKOS, *EU International Relations Law*, London, 2015; C. CONTARTESE, *The Autonomy of the EU Legal Order in the CJEU’s Jurisprudence: A Conception in Motion*, in *European Constitutional Law Review*, 2017, no. 1, pp. 143-171; R. DUNBAR, *The Application of International Law in the Court of Justice of the European Union: Proportionality Rising*, in *German Law Journal*, 2021, no. 4, pp. 557-592.

⁸ Official Journal of the European Communities, 27 March 1972 (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11972B/TXT>).

⁹ For an overview of the legal regime concerning Gibraltar within the EU framework, see P.A. FERNÁNDEZ SÁNCHEZ, *El actual marco jurídico-comunitario de Gibraltar*, in *Comunidad Europea Aranzadi*, 2001, no. 6, pp. 37-41.

European citizenship to the domestic legislation governing nationality and citizenship, while the United Kingdom did not grant Gibraltarians full *status civitatis*.

That said, it must also be acknowledged that these contradictions generated little more than uncertainty within the border regime and did not, in practice, constitute insurmountable obstacles. The application of Community law in Gibraltar, for the purposes of the free movement of persons, was relatively uncontroversial, save for certain specific issues to which I shall later refer.

For the purposes of applying EU law in this context, it was not necessary to possess European citizenship. The relevant criterion was residence, and Gibraltarians satisfied that condition, albeit subject to limitations affecting the rights normally attached to European citizenship.

These restrictions prevented them, for example, from participating in elections to the European Parliament, although, as it is well known, the European Court of Human Rights subsequently ruled, in a different international legal framework, that the applicant Ms Matthews, a Gibraltar citizen, was entitled to participate in elections to the European Parliament¹⁰.

What did this status mean in practice? It meant that a Gibraltar resident could travel, invest, establish a temporary residence, receive healthcare and educational services, work, obtain social benefits, and exercise related rights throughout the territory of the European Union.

Subsequently, Spain, unlike the United Kingdom, became party to the Schengen Agreements, which were partially incorporated into European Community law through the Treaty of Amsterdam and are now fully integrated into the *acquis* of the European Union. This development placed Spain in a position of considerable advantage. Accordingly, Spain proposed:

1. To incorporate the more complex regulatory provisions into those areas of the Union, particularly within the former Third Pillar, in which Spain could exercise a “right of veto”.
2. To refine the wording of the Schengen *acquis* by introducing reservations concerning matters regarded as non-negotiable for the protection of Spanish interests, including issues relating to “competent authorities”, the recognition of documents issued by such “authorities”, visa harmonisation, the determination of external borders and police controls, territorial application, and related matters.

These proposals were made to establish safeguard clauses specifically concerning Gibraltar. Thereafter, Brexit arrived and radically transformed the entire situation.

¹⁰ European Court of Human Rights, judgment of 18 February 1999, *Matthews v. United Kingdom*, application no. 24833/94.

3. Border regulations after Brexit

On 28 February 2018, 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 was finally adopted, its official text subsequently being published in the Official Journal of the European Union on 19 February 2019¹¹. On 7 January 2019, the Council Decision concerning the signing of that Agreement was approved¹².

The underlying objective was to ensure an orderly withdrawal, provide reciprocal protection for citizens who had exercised their right to free movement prior to the date established in the Agreement, determine a transitional period, and establish a single financial settlement. In essence, the aim was to secure an overall balance of benefits, rights, and obligations for the Union and the United Kingdom.

Simultaneously with the Withdrawal Agreement, negotiations had been underway concerning a Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (23 March 2018)¹³. The intention was to negotiate an appropriate framework capable of establishing “economic and commercial cooperation, as well as cooperation in other areas, particularly the fight against terrorism and international crime, together with security, defence, and foreign policy”¹⁴. One limitation, however, was regarded as fundamental: “the four freedoms are indivisible and that participation in the Single Market on a sector-by-sector basis cannot amount to a form of ‘cherry-picking’, as this would undermine its integrity and proper functioning”¹⁵.

How would a disorderly withdrawal of the United Kingdom affect relations between Spain and Gibraltar?

It must be borne in mind that 90 per cent of Gibraltar’s financial business is conducted with the United Kingdom. Unlike the other thirteen British Overseas Territories, Gibraltar enjoyed free access to the British market, largely as a consequence of its relationship with the European Union. This, in principle, should not have changed.

The CJEU relied heavily on this economic reality to determine Gibraltar’s constitutional status within the EU legal order prior to Brexit¹⁶. In this sense, Azaria provides a precise analysis of how the CJEU used this specific financial trade metric to categorise the UK-Gibraltar relationship as a non-cross-border, internal situation¹⁷.

¹¹ <https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:12019W/TXT&from=ES>.

¹² <https://data.consilium.europa.eu/doc/document/XT-21106-2018-INIT/es/pdf>.

¹³ <https://www.consilium.europa.eu/media/33498/23-euco-art50-guidelines-es.pdf>.

¹⁴ *Ibid.*, para. 3.

¹⁵ *Ibid.*, para. 7.

¹⁶ Case C-591/15 (*The Queen, on the application of Gibraltar Betting and Gaming Association Limited v Commissioners for Her Majesty’s Revenue and Customs*), decided by the Grand Chamber of the Court of Justice of the European Union (CJEU) on June 13, 2017.

¹⁷ D. AZARIA, *The Status of Gibraltar in EU Law: An Analysis of Judgment in Case C-591/15*, in *Common Market Law Review*, 2018, no. 3, pp. 885-912. See, too, P. KOUTRAKOS, *The External Dimensions of Brexit and Special Territories*, in *European Foreign Affairs Review*, 2019, no. 2, pp. 115-134.

However, once the United Kingdom decided to leave the European Union, Gibraltar necessarily had to leave the system as well. The free movement of goods would cease to apply, notwithstanding the existing exclusions; the free movement of persons, including residence, establishment, employment, and the exercise of professional activities, would come to an end; the free movement of capital, including banking transactions, savings, and participation in public procurement, would likewise disappear; and finally, the free movement of services, including financial services, transport, new technologies, and energy-related activities, would also be terminated.

The resulting impoverishment would not merely be economic in nature, but would also affect quality of life, culture, leisure, and many other dimensions of daily existence for our fellow citizens living on the other side of the border fence.

In principle, owing to Gibraltar's status within the European Union, border controls, both in customs matters and in relation to the movement of persons, have continued to operate in substantially the same manner, albeit most likely in a reinforced form.

It is precisely in order to avoid adverse consequences, both for Gibraltarians and for those individuals residing in Spain, regardless of whether they are Spanish nationals, who cross the border daily for work purposes, as well as for matters relating to environmental cooperation, smuggling, police cooperation, and similar issues, that it has become necessary to establish a legal framework capable of addressing the specific problems arising from Brexit.

At Spain's request, the European Council accepted, from the very outset of negotiations with the United Kingdom, that in matters concerning Gibraltar, the European Union would not approve any measure without Spain's prior consent¹⁸. Regardless of the legal debate generated by the Final Interpretative Declaration in this respect, the legal reality clearly points in this direction¹⁹.

To that end, the two delegations, namely Spain and the United Kingdom, acting bilaterally, signed four Memoranda of Understanding (MoUs) aimed at regulating future relations between the United Kingdom and the European Union concerning border crossings in Gibraltar, as well as cross-border cooperation in matters relating to the movement of persons (citizens' rights), police and customs cooperation, environmental protection, and tobacco smuggling²⁰.

Those four MoUs constitute agreements which even establish international bodies, such as technical coordination committees, tasked with monitoring compliance with provisions relating to the rights of citizens and workers, while guaranteeing all corresponding social benefits; facilitating police and customs cooperation and the exchange of information; promoting enhanced environmental cooperation, particularly

¹⁸ Guideline 24 of the European Council's Brexit Negotiation Guidelines adopted on April 29, 2017.

¹⁹ J.I. SÁNCHEZ, *Gibraltar and Brexit: The Diplomatic and Legal Scenarios under Clause 24*, in *Spanish Yearbook of International Law*, 2018, no. 1, pp. 112-135; A. GARCÍA, *The Asymmetry of Brexit Negotiations: Spain's Consent and the Future Treaty over Gibraltar*, in *European Foreign Affairs Review*, 2020, no. 3, pp. 401-422.

²⁰ <https://www.gov.uk/government/publications/eu-exit-negotiations-gibraltar-memoranda-of-understanding>.

concerning air and water quality and habitat protection; organising the exchange of scientific data and the treatment in Spain of solid waste and construction waste originating from Gibraltar; and, finally, reducing the price differential of tobacco products between Gibraltar and Spain in order to minimise illegal trafficking and tobacco smuggling²¹.

As may readily be observed, the agreements concluded between the United Kingdom and Spain reveal, on the one hand, the principal border-related problems affecting Gibraltar and the Campo de Gibraltar and, on the other hand, a clear willingness to resolve such issues through bilateral means, albeit inevitably within the framework of European Union law, and beyond the political disputes concerning sovereignty and jurisdiction.

Naturally, these matters will remain the subject of debate in the years ahead, for Gibraltar will either remain European in orientation or it will not. It is exceedingly difficult for Gibraltar to maintain the standard of living enjoyed by its citizens outside the European environment and, should it wish to preserve that connection, it will require Spain's cooperation while simultaneously creating an external border vis-à-vis its own metropolitan state. Mutual understanding and reciprocal accommodation will therefore become unavoidable necessities. The question remains: how far have all parties truly been prepared to negotiate?

For many years, my own position has essentially been confined to two considerations: first, the exponential development of the Campo de Gibraltar, something which Spain is fully capable of supporting; and second, the need to ensure full compliance with international law and, for the time being, European Union law on the Rock, including the financial services directives, banking transparency directives, and numerous other legal instruments whose current non-compliance has enabled that profound aspiration for independence to persist, often at the expense of the Spanish tax system and the interests of the citizens of the Campo de Gibraltar.

4. Current law applicable to the *La Línea de la Concepción* border crossing

Of the four existing land border crossings in Spain²², one is that of *La Línea de la Concepción*²³.

This border crossing has deep historical roots. However, for the purposes of understanding the exclusive national competence involved in the establishment of border posts, it is sufficient to recall that it was closed on 8 June 1969 and reopened on 15 December 1982, from which time it has remained permanently open, save for minor exceptions.

²¹ A. DEL VALLE GÁLVEZ, *Gibraltar after Brexit: Looking for a New and Imaginative Model of Cross-Border Cooperation in the EU Framework*, in *Cuadernos de Gibraltar – Gibraltar Reports*, 2021, no. 4, pp. 15-38.

²² Until 2024, they were called “border posts”. Now the national designation complies with European rules.

²³ Royal Decree Law 1155/2024, of November 19, approving the Regulations of Organic Law 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration (*Boletín Oficial del Estado*, no. 280, of 20/11/2024).

In accordance with the current legal framework, what is now referred to as the *La Línea de la Concepción* border crossing point, formerly designated as a border post, is attached to the Local Police Station of the National Police in *La Línea de la Concepción* pursuant to Order INT/859/2023 of 21 July, which develops the organisational structure and functions of the central and territorial services of the Directorate-General of the Police²⁴.

In relation to the crossing of borders, in this case land border crossing, rules deriving from universal and regional international law coexist alongside rules of European Union law, all of which are binding upon Spain, together with domestic legal provisions, which must themselves conform to the binding international, regional, and European Union framework.

Without seeking to provide an exhaustive account, the relevant international rules primarily concern the international human rights treaties accepted by Spain, both at the universal and regional levels, through international agreements binding upon all public authorities, including border authorities. These obligations relate to matters such as asylum, refugee protection, statelessness, discrimination, and the protection of minors, including “the prevention of, and fight against, irregular immigration, the humanitarian assistance provided to persons arriving on the coasts, and the reception of those requiring international protection, with full respect for human rights, and, finally, the establishment of channels for regular migration”²⁵. Once such treaties have been concluded, ratified by Spain, and published in the *Boletín Oficial del Estado* (Official State Gazette), they become integrated into the Spanish legal order and serve as interpretative instruments for the fundamental rights and freedoms recognised under the Spanish Constitution (Article 10(2))²⁶.

With regard to European legal rules, Spain is likewise bound by provisions of varying legal nature, ranging from the Treaty of Lisbon and the entire body of primary law deriving therefrom – including the Charter of Fundamental Rights, which holds the same legal value – to legislative acts such as regulations, directives, and decisions.

Depending on the legal nature of each legal act, Spanish legislation must incorporate and, in any event, apply such provisions.

I must now focus specifically on *La Línea de la Concepción* border crossing.

²⁴ *Boletín Oficial del Estado*, nº 176 of 23 July 2023.

²⁵ Preamble to Royal Decree Law 1155/2024, of 19 November, approving the Regulations of Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration (BOE No. 280, of 20/11/2024).

²⁶ C. VILLÁN DURÁN, *The Impact of the United Nations Human Rights Treaties on the Domestic Level in Spain*, in C. HEYNS, F.J. VILJOEN, R. MURRAY (eds.), *The Impact of the United Nations Human Rights Treaties on the Domestic Level: Twenty Years On*, II ed., The Netherlands, 2024, pp. 1147-1224.

5. Gibraltar in the context of the European Union: the singular nature of border control

Irrespective of the existing international legal disputes between Spain and the United Kingdom concerning sovereignty over the Rock, the Isthmus, or the adjacent maritime waters, when Spain acceded to what were then the European Communities, it was required to accept the *acquis communautaire*, together with all the implications that this entailed for the free movement of persons, goods, services, and capital, subject to the particularities established in the 1973 Treaty of Accession of the United Kingdom and Northern Ireland to the European Communities, which constitutes primary law, in relation to Gibraltar²⁷.

The highly relevant issues concerning the free movement of goods, services and capital are not of direct relevance to the present work and, accordingly, I shall confine my analysis to the free movement of persons.

As is well known, on 28 February 2018, 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 was adopted; its official text was subsequently published in the Official Journal of the European Union on 19 February 2019²⁸. On 7 January 2019, the Council Decision concerning the signing of that Agreement was approved²⁹.

The intention was to guarantee an orderly withdrawal, provide reciprocal protection to citizens who had exercised their right to free movement prior to the date established in the Agreement, determine a transitional period, and establish a single financial settlement, ultimately seeking “an overall balance of benefits, rights and obligations for the Union and the United Kingdom”³⁰.

As already noted, simultaneously with this Withdrawal Agreement, negotiations had been underway concerning a Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (23 March 2018)³¹. The aim was to negotiate an appropriate framework capable of establishing “economic and commercial cooperation, as well as cooperation in other areas, particularly the fight against terrorism and international crime, together with security, defence, and foreign policy”³².

²⁷ S. WALL, *The official history of Britain and the European Community: Volume II: From rejection to referendum, 1963–1975*, London, 2012. For explaining how the initial structural framework of what would become the non-negotiable *acquis* was fiercely protected by the original six founding members during the preliminary negotiations, see N.P. LUDLOW, *Dealing with Britain: The Six and the first UK application to the EEC*, Cambridge, 2006.

²⁸ <https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:12019W/TXT&from=ES>.

²⁹ <https://data.consilium.europa.eu/doc/document/XT-21106-2018-INIT/es/pdf>.

³⁰ Council Decision (EU) 2020/135 of 30 January 2020 *regarding the conclusion 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*, Official Journal of the European Union (OJEU) No. 29, 31 January 2020.

³¹ <https://www.consilium.europa.eu/media/33498/23-euco-art50-guidelines-es.pdf>.

³² *Ibid.*, par. 3.

A fundamental limitation was clearly established: “the four freedoms are indivisible and participation in the Single Market on a sector-by-sector basis cannot amount to a form of ‘cherry-picking’, as this would undermine its integrity and proper functioning”³³.

Spain adopted Royal Decree Law 5/2019 of 1 March, establishing contingency measures in response to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union³⁴. These measures addressed numerous matters, including those relating to citizenship, police and judicial cooperation, economic activities, and transport.

Within this legal framework, the *Boletín Oficial del Estado* of 26 March 2019 published the *Resolution of 25 March 2019 of the Secretary of State for Migration*, by which the Agreement of the Council of Ministers of 22 March 2019 was made public. This Agreement approved the instructions determining the procedure, in the event of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union without the conclusion of the agreement provided for in Article 50 of the Treaty on European Union, for the documentation of United Kingdom nationals residing in Spain prior to the withdrawal date and their family members, as well as for the documentation of United Kingdom nationals who qualified as frontier workers prior to the withdrawal date³⁵.

In principle, owing to Gibraltar’s status within the European Union, border controls, both from a customs perspective and with regard to the movement of persons, have continued to operate in substantially the same manner, albeit in a reinforced form.

At Spain’s request, the European Council accepted, from the outset of negotiations with the United Kingdom, that in matters relating to Gibraltar, the European Union would not approve any measure that had not first been approved by Spain. Regardless of the legal debate generated by the Final Interpretative Declaration in this respect, the legal reality clearly points in that direction³⁶.

To that end, the two delegations, namely Spain and the United Kingdom, acting bilaterally, signed four Memoranda of Understanding (MoUs) intended to regulate future relations between the United Kingdom and the European Union concerning border crossings in Gibraltar, as well as cross-border cooperation in matters relating to citizens’ rights, police cooperation, environmental protection, and tobacco smuggling³⁷.

Pursuant to Spanish Law 25/2014 of 27 November on Treaties and Other International Agreements (*Boletín Oficial del Estado* No. 288 of 28 November 2014), Memoranda of Understanding are, technically speaking, “non-normative international

³³ *Ibid.*, para. 7.

³⁴ This Royal Decree Law is issued within the framework of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. It was published in the *Boletín oficial del Estado*, No. 53, of 2 March 2019, and was ratified by the Congress of Deputies on 3 April 2019 (BOE, No. 86, of 10 April 2019).

³⁵ *Boletín Oficial del Estado*, nº 73, of 26 March 2019, pp. 30527 y ss.

³⁶ A. LAZOWSKI, *The Withdrawal Agreement: Common and institutional provisions*, in F. FABBRINI (ed.), *The Law & Politics of Brexit*, Oxford, 2019, pp. 115-138; see, too, L. GARCÍA, *The Gibraltar Conundrum in the Brexit Negotiations: Sovereignty, Borders, and Treaties*, Oxford, 2020.

³⁷ <https://www.lamoncloa.gob.es/lang/en/brexit/gibraltar/paginas/agreements.aspx>.

agreements” and, under Article 43 thereof, “do not constitute a source of international obligations”.

This legal nature is designed to facilitate governance mechanisms concerning matters of interest to the parties. Consequently, those four MoUs establish international bodies, such as Technical Coordination Committees, tasked with monitoring compliance with provisions concerning, for example, citizens’ rights. However, their legal nature prevents them from being directly applicable within the domestic legal order. They are political agreements whose implementation would require domestic legislative measures.

Furthermore, the Memorandum of Understanding concerning citizens’ rights³⁸ does not establish any specific regime governing the crossing of the border post beyond provisions relating to frontier workers and, in any event, all the arrangements agreed during the transitional period have now lapsed, since the final deadline of that transitional period expired on 31 December 2020.

On that latter date, the parties concerned, namely the United Kingdom and Spain, once again reached an agreement through a legally non-binding Memorandum of Understanding, urging the European Union to initiate the procedure for the negotiation of a treaty addressing all matters necessary for the future legal relationship, although, to this day, no such treaty has yet been approved.

Consequently, at present, no agreement has yet been formally adopted between the European Union and the United Kingdom, authorised by Spain, regulating crossings at the Gibraltar border checkpoint. This places the border crossing within the scope of the general rules established by the Schengen Borders Code³⁹.

6. European rules applicable on a transitional basis at the *La Línea de la Concepción* border crossing

Spain has participated in the Schengen system since 1993, when it ratified the Agreement of Accession of the Kingdom of Spain to the Convention Implementing the Schengen Agreement (Instrument of Ratification of 23 July 1993)⁴⁰. From that moment onwards, Spain became part of an intergovernmental policy aimed at abolishing border controls between the States parties and allowing the free movement of persons among them.

The United Kingdom did not participate in this policy and, when the system was subsequently incorporated into EU law, a Protocol annexed to the Treaty of Lisbon

³⁸ M. GAPSÁ, *The Legal Status of Gibraltar after Brexit in Light of the Provisions of the Protocol on Gibraltar*, in *Polish Journal of Political Science*, 2022, no. 8, pp. 20-29.

³⁹ For reviewing the practical application of the original 2006 code, see E. GUILD, P. MINDERHOUD (eds.), *The First Decade of the Schengen Borders Code*, Leiden, 2016. See, too, P. MERTENS, S. SIVONEN, M. UNFRIED, J. SCHRAMMECKER, *The revised Schengen Borders Code – an ex-post evaluation in times of border controls: Effects of internal border controls across European cross-border regions*, Maastricht University: ITEM / Transfrontier Euro-Institut Network (TEIN), 2025.

⁴⁰ *Boletín Oficial del Estado*, núm. 81, de 5 de abril de 1994.

enabled the United Kingdom, among others, to exercise an *opt-out* mechanism, thereby remaining outside the Schengen framework⁴¹.

Consequently, border crossings between *La Línea de la Concepción* and Gibraltar continued to operate under the special regime applicable to the free movement of European citizens, who were subject only to verification of documents establishing their status as European citizens, while non-EU nationals remained subject to exhaustive controls.

Following Brexit, all United Kingdom nationals, including Gibraltar citizens, lost their status as European citizens and became third-country nationals. Accordingly, border controls must now be carried out with the degree of rigour required at an external border of the European Union for all individuals crossing that land border checkpoint.

The so-called Schengen Borders Code (Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024⁴² amending Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016) states that Member States are required to ensure high standards of management of their external borders, including through enhanced cooperation between border guards, police authorities, customs officials, and other relevant authorities. Article 6⁴³ of Regulation (EU) 2016/399 of the

⁴¹ R. ADLER-NISSEN, *On a field trip with the opt-outs: Exploring the notion of a differentiated European community*, in *Journal of European Public Policy*, 2011, no. 8, pp. 1092-1113.

⁴² OJEU L of 20 June 2024.

⁴³ “Entry conditions for third-country nationals 1. For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following: (a) they are in possession of a valid travel document entitling the holder to cross the border satisfying the following criteria: (i) its validity shall extend at least three months after the intended date of departure from the territory of the Member States. In a justified case of emergency, this obligation may be waived; (ii) it shall have been issued within the previous 10 years; (b) they are in possession of a valid visa, if required pursuant to Council Regulation (EC) No 539/2001 (25), except where they hold a valid residence permit or a valid long-stay visa; (c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully; (d) they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry; (e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States’ national data bases for the purposes of refusing entry on the same grounds. 2. For the purposes of implementing paragraph 1, the date of entry shall be considered as the first day of stay on the territory of the Member States and the date of exit shall be considered as the last day of stay on the territory of the Member States. Periods of stay authorised under a residence permit or a long-stay visa shall not be taken into account in the calculation of the duration of stay on the territory of the Member States. 3. A non-exhaustive list of supporting documents which the border guard may request from the third-country national in order to verify the fulfilment of the conditions set out in paragraph 1 (c) is included in Annex I. 4. Means of subsistence shall be assessed in accordance with the duration and the purpose of the stay and by reference to average prices in the Member State(s) concerned for board and lodging in budget accommodation, multiplied by the number of days stayed. Reference amounts set by the Member States shall be notified to the Commission in accordance with Article 39. The assessment of sufficient means of subsistence may be based on the cash, travellers’ cheques and credit cards in the third-country national’s possession. Declarations of sponsorship, where such declarations are provided for by national law and letters of guarantee from hosts, as defined by national law, where the third-country national is staying with a host, may also constitute evidence of sufficient means of subsistence. 5. By way of derogation from paragraph 1: (a) third-country nationals who do not fulfil all the conditions laid down in paragraph 1 but who hold a

European Parliament and of the Council of 9 March 2016⁴⁴ has not been amended by the new Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024⁴⁵.

The same applies to Article 11⁴⁶, which likewise remains unaltered and therefore continues to govern the effective control of third-country nationals.

Accordingly, all Member States bound by these provisions are under an equal obligation to exercise control at border crossing points falling within their jurisdiction.

residence permit or a long-stay visa shall be authorised to enter the territory of the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit or the long-stay visa, unless their names are on the national list of alerts of the Member State whose external borders they are seeking to cross and the alert is accompanied by instructions to refuse entry or transit; (b) third-country nationals who fulfil the conditions laid down in paragraph 1, except for that laid down in point (b), and who present themselves at the border may be authorised to enter the territory of the Member States, if a visa is issued at the border in accordance with Articles 35 and 36 of Regulation (EC) No 810/2009 of the European Parliament and of the Council (26). Member States shall compile statistics on visas issued at the border in accordance with Article 46 of Regulation (EC) No 810/2009 and Annex XII thereto. If it is not possible to affix a visa in the document, it shall, exceptionally, be affixed on a separate sheet inserted in the document. In such a case, the uniform format for forms for affixing the visa, laid down by Council Regulation (EC) No 333/2002 (27), shall be used; (c) third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. Where the third-country national concerned is the subject of an alert as referred to in paragraph 1(d), the Member State authorising him or her to enter its territory shall inform the other Member States accordingly”.

⁴⁴ OJEU, L 77 of 23 March 2016.

⁴⁵ Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024, *amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders*, OJEU, L 2024/1717, 20.6.2024.

⁴⁶ “Article 11. Stamping of the travel documents. 1. The travel documents of third-country nationals shall be systematically stamped on entry and exit. In particular an entry or exit stamp shall be affixed to: (a) the documents, bearing a valid visa, enabling third-country nationals to cross the border; (b) the documents enabling third-country nationals to whom a visa is issued at the border by a Member State to cross the border; (c) the documents enabling third-country nationals not subject to a visa requirement to cross the border. 2. The travel documents of nationals of third countries who are members of the family of a Union citizen to whom Directive 2004/38/EC applies, but who do not present the residence card provided for in that Directive, shall be stamped on entry and exit. The travel documents of nationals of third countries who are members of the family of nationals of third countries enjoying the right of free movement under Union law, but who do not present the residence card provided for in Directive 2004/38/EC, shall be stamped on entry and exit. 3. No entry or exit stamp shall be affixed: (a) to the travel documents of Heads of State and dignitaries whose arrival has been officially announced in advance through diplomatic channels; (b) to pilots’ licences or the certificates of aircraft crew members; (c) to the travel documents of seamen who are present within the territory of a Member State only when their ship puts in and in the area of the port of call; (d) to the travel documents of crew and passengers of cruise ships who are not subject to border checks in accordance with point 3.2.3 of Annex VI; (e) to documents enabling nationals of Andorra, Monaco and San Marino to cross the border; (f) to the travel documents of crews of passengers and goods trains on international connections; (g) to the travel documents of nationals of third countries who present a residence card provided for in Directive 2004/38/EC. Exceptionally, at the request of a third-country national, insertion of an entry or exit stamp may be dispensed with if insertion might cause serious difficulties for that person. In that case, entry or exit shall be recorded on a separate sheet indicating that person’s name and passport number. That sheet shall be given to the third-country national. The competent authorities of the Member States may keep statistics of such exceptional cases and may provide those statistics to the Commission. 4. The practical arrangements for stamping are set out in Annex IV. 5. Whenever possible, third-country nationals shall be informed of the border guard’s obligation to stamp their travel document on entry and exit, even where checks are relaxed in accordance with Article 9”.

This constitutes the legal basis for Spain's insistence upon maintaining border controls. It also explains the European Union's position in negotiations concerning the removal of the land border crossing point, while simultaneously reinforcing controls at the port and airport, the latter being an entirely separate matter, particularly in relation to the military base.

The competent authorities responsible for controlling crossings at these border points must, without exception, be Spanish.

7. The general scope of the 2026 Agreement in respect of Gibraltar in relation to the free movement of persons

The central objective of this Agreement⁴⁷ is the elimination of all physical barriers to border crossings (Article 28 of the Agreement in respect of Gibraltar), through the establishment of border crossing points at Gibraltar's airport and port (Article 29). Together with the provisions governing the free movement of goods and the creation of a customs union, the intention is to establish a common area of "shared prosperity" (Article 1).

The point of departure, established in Article 25 of the Agreement, is respect for "democracy, the rule of law and the protection of the fundamental rights and freedoms of individuals", with express reference being made to the Universal Declaration of Human Rights and the European Convention on Human Rights, to which all Member States of the European Union and the United Kingdom, including Gibraltar⁴⁸, are parties.

In this regard, concerning the protection of human rights and fundamental freedoms, the European Union and its Member States are subject to obligations of an even broader scope, since, as expressly stated in Article 25 of the Agreement itself, they are also bound by the Charter of Fundamental Rights of the European Union⁴⁹.

The key points of this Agreement concerning the free movement of persons relate to the removal of the physical border fence (the land border), which will mean that movement between Gibraltar and the Campo de Gibraltar will be fluid, without the traditional police and passport checks. Article 28 of the Agreement expressly states that "All physical barriers related to the circulation of persons between the Union and

⁴⁷ <https://assets.publishing.service.gov.uk/media/699f2ed3c497bac082bc76c1/UK-EU-draft-Agreement-in-respect-of-Gibraltar.pdf>.

⁴⁸ In fact, the United Kingdom was an original State party to the European Convention on Human Rights and was the first State to ratify it. However, due to its particular system of incorporating international treaties into its own legal order, it did not generate obligations for domestic purposes (although it did for international purposes, which is why the United Kingdom has been considered a major "client" of the European Court of Human Rights) until the adoption of the European Convention on Human Rights and the Human Rights Law 1998 (<https://www.legislation.gov.uk/ukpga/1998/42/contents>).

⁴⁹ The Charter of Fundamental Rights of the EU was proclaimed on 7 December 2000 and published in the Official Journal of the European Communities (OJEU) on 18 December 2000 (OJ C 364/01). As can be seen, it is published in section C and not in section L of the Official Journal. Finally, it was transposed on 12 December 2007, thus acquiring full legal validity.

Gibraltar shall be removed”. Although it refers to physical barriers, it must be understood as referring to all forms of barriers.

Although Gibraltar will not *de jure* form part of the Schengen Area, it will nevertheless be subject to Schengen rules and therefore integrated into it *de facto*⁵⁰. This requires the establishment of external border controls and, to that end, the Agreement establishes two control points, technically referred to as “border crossing points”, one at the airport and another at the port, both located in Gibraltar. These points will first be checked by the Gibraltar authorities and subsequently subject to a second control exercised by Spain, acting as the authority responsible before the European Union for the implementation of such controls. The corresponding border inspections will be carried out at those locations.

Despite this, the Agreement provides (Article 29) that: “border checks may be carried out at the airport border crossing point, if the volume of traffic flows through the port allows for an efficient, high and uniform level of control at the airport border crossing point. In this case, the United Kingdom in respect of Gibraltar, and the Kingdom of Spain shall ensure that passengers and crew members arriving at the port are escorted from the port to the airport border crossing point, for the purposes of undergoing the checks referred to in Articles 33(1) and (2). The modalities for the application of this derogation shall be set out in an administrative arrangement between the United Kingdom, in respect of Gibraltar, and the Kingdom of Spain”.

It is somewhat curious that the existence of two border crossing points has been agreed upon while, in practice, only one is likely to be used. I do not believe that this is attributable to considerations of either operational efficiency or even economic rationality; although, owing to the lack of transparency surrounding the negotiation process, I am not in a position to identify the political motivations which I nonetheless perceive.

Throughout this negotiation process, numerous issues relating to the free movement of persons required intense negotiation, such as determining which authorities would exercise, on behalf of the European Union, the border inspection functions for both entry into and exit from Gibraltar.

The United Kingdom was reluctant to entrust such control to Spain for political reasons, so as to avoid accepting the presence of Spanish National Police officers in what it regards as its territory, namely the Isthmus, where the airport is located, and the port, which was unequivocally ceded under the Treaty of Utrecht, the treaty by which Spain transferred Gibraltar to the United Kingdom, then the Kingdom of England.

The possibility of assigning this function to FRONTEX officers was considered, but the European Union ultimately required Spain to be designated as the responsible authority.

⁵⁰ The secondary legislation establishing the code of rules is Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 *establishing a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)* (OJEU L 77, 23.3.2016, p. 1).

In the Proposal for a Council Decision on the signing, on behalf of the Union, and on provisional application of the Agreement in respect of Gibraltar 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, the European Commission states as follows:

“Part Two provides for the removal of the current physical infrastructure between Gibraltar and Spain. It ensures that external border control (checks and surveillance) takes place at Gibraltar airport and port, including adjacent waters, under the responsibility of Spain who will apply the relevant EU rules and have the necessary powers to apply those rules with limited exceptions, in particular concerning coercive actions on the basis of alerts in the Schengen Information System, which will have to be agreed with the United Kingdom in certain cases”⁵¹.

Ultimately, as we have seen, the Agreement in respect of Gibraltar establishes Spain as the competent authority acting on behalf of the European Union.

This will require a supplementary agreement⁵² between the United Kingdom and Spain establishing the specific arrangements concerning police cooperation, including judicial cooperation, access to sensitive information, and related matters.

Naturally, as is the case at all external borders of the European Union, the temporary reintroduction of land border controls remains possible on grounds of public order, public health, or internal security (Article 30(2) of the Agreement in respect of Gibraltar).

Annex 7 establishes specific provisions concerning the infrastructure of the designated border crossing points at the airport and port. Under this Annex, Spain and the United Kingdom are required to ensure that:

“The infrastructure provided shall be appropriate to the volumes of traffic flows at these border crossing points and the need to ensure an efficient, high and uniform level of control at these border crossing points in accordance with the Schengen Borders Code”.

Separate lanes will necessarily have to exist for European Union citizens, probably for Gibraltar residents, and for other nationals, including British nationals, who must cross the external border as third-country nationals (Article 10 of the Schengen Borders Code and Annex III thereto).

Gibraltar’s port and airport must therefore possess the appropriate infrastructure to permit the separation of passenger flows and to prevent persons not authorised to enter Schengen territory from doing so, including the establishment of reserved zones and transit areas.

As may readily be observed, the Agreement imposes concrete obligations upon both the United Kingdom and Spain, which, in the Spanish case, will undoubtedly entail

⁵¹https://www.exteriores.gob.es/es/PoliticaExterior/Documents/COM_2026_91_1_EN_annexe_proposition_cp_part1_v5.pdf.

⁵² <https://dpej.rae.es/lema/convenio-complementario>. See, for example, A. DI MARCO, *The ambiguous complementarity of twins: Cooperation between the European Union and the Council of Europe*, in *Human Rights Law Review*, 2026, no. 1.

budgetary expenditure arising from a treaty that has not yet received the consent of the Spanish Parliament, as required under the Spanish Constitution.

As noted above, the regulation concerning border crossing points thus far refers primarily to land border crossings, since air and maritime borders are subject to distinct treatment under Annexes 6 and 7 of the Agreement.

The pilots of private flights, in order to avoid controls applicable to state aircraft such as military or governmental flights, together with the operators of cruise ships, recreational vessels, ferries, cargo ships, and similar means of transport, will be required to submit crew and passenger manifests.

With regard to the issuance and renewal of short-stay visas (Article 47 of the Agreement)⁵³ and residence permits in Gibraltar for third-country nationals, Spain will bear ultimate responsibility, and all Schengen rules must be complied with. Excluded from these requirements are family members of European Union citizens, regardless of their nationality⁵⁴, as well as nationals and family members of the Principality of Liechtenstein, the Kingdom of Norway, the Swiss Confederation, the Principality of Andorra, or the Republic of San Marino⁵⁵.

The Agreement also regulates in considerable detail applications for international protection and return procedures⁵⁶, together with the exchange of information and access to the databases of the Schengen Information System.

In relation to international protection, a dual framework is established in which both British and Spanish authorities may intervene, while similar access criteria are required on both sides (Article 63(6)).

It has been negotiated that the full provisional application of the Agreement will commence on 15 July 2026, thereby allowing the benefits of free movement to be fully experienced during the summer period.

Ultimately, the objective is the complete fluidity of movement for residents, frontier workers, tourists, European citizens, and all other persons concerned.

8. The specific scope of border controls for military personnel, their families, and guests of the British armed forces

Unsurprisingly, the Agreement addresses the legal and operational framework surrounding the United Kingdom's Forward Operating Base in Gibraltar. The United

⁵³ Regulations (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Visa Code (Visa Code) (OJ L 243, 15.9.2009, p. 1), and Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 establishing the list of third countries whose nationals are subject to the visa requirement for crossing Gibraltar are applicable to border crossings in Gibraltar. External borders and the list of third countries whose nationals are exempt from this obligation (OJ L 303, 28.11.2018, p. 39).

⁵⁴ Articles 2 and 3 of Directive 2004/38/EC.

⁵⁵ Article 12(b) of Annex 6.

⁵⁶ Chapter 2, Articles 53 et seq.

Kingdom's principal demand has been the safeguarding of its absolute control over its military installations and over the movement of its troops and their guests, which were to remain outside the control of Spain, and indeed outside the control of Brussels⁵⁷.

The operational sector of the Royal Air Force military base at Gibraltar Airport and that of the Naval Forward Operating Base are subject to special exceptions and protocols designed to avoid compromising the security of military installations, operations, and personnel.

However, the control regime designed under the Agreement in respect of Gibraltar creates gaps within the Schengen framework in which the movement of persons is effectively uncontrolled. The absence of control is difficult to understand, not only in relation to British military personnel, whose status might arguably have been negotiated more effectively, but also regarding family members, domestic staff and guests.

It is true that the final text of the Agreement specifies with precision that "guests" are not the private guests of military personnel, but rather members of invited armed forces of third countries (Article 38):

"1. On the conditions specified in paragraph 2 and subject to compliance with the formalities established in this Agreement relating to entry and exit of members of non-resident United Kingdom Forces or of visiting third-country forces, such persons shall be exempt from passport and visa regulations and the Schengen border checks in accordance with Article 33 at the Schengen border crossing points referred to in Article 29(1), but they shall not be considered as acquiring any right to permanent residence or domicile in the Schengen area".

Let us imagine an American, Canadian, or South Korean vessel arriving at the military base, whose personnel would thereby be granted freedom of movement throughout the territory of the European Union by virtue of being exempt from passport control and passport stamping requirements. In my view, relinquishing such control constitutes a legal irresponsibility.

There is, however, a legal safeguard consisting in the requirement that such individuals possess:

"(a) personal identity card issued by the Ministry of Defence of the United Kingdom or the Ministry of Defence of the visiting third-country force showing names, date of birth, rank and number (if any), service, and photograph;

(b) individual or collective movement order, in the Spanish and English languages, issued by the Ministry of Defence of the United Kingdom and certifying the status of the individual or group as a member or members of a non-resident United Kingdom Force or of a visiting third-country force and to the movement ordered" (Article 38(2)).

This is in line with what is established within the NATO framework.

⁵⁷ R. VASQUEZ, *Gibraltar Military Facilities and Gibexit*, in *Gibraltar Legal Analysis Series*, 2026, <https://gibnews.wordpress.com/2026/05/19/gibraltar-military-facilities-and-gibexit/>.

Indeed, there is a NATO Convention regarding the Status of Forces, dated 10 June 1951, namely the NATO Status of Forces Agreement (SOFA)⁵⁸, applicable to all NATO Member States, including the United Kingdom and Spain, which was subsequently extended to all States that have entered into a Partnership for Peace arrangement with NATO, signed in 1995⁵⁹.

Fundamentally, the legal obligations established under the 1951 NATO SOFA⁶⁰ were extended to the States participating in the Partnership for Peace, provided reciprocal obligations existed.

These legal precedents appear to have enabled the regulation of the exception applicable to British military personnel, their families, and members of invited armed forces, thereby placing them outside ordinary Schengen controls.

The paradox is evident. They enter the Schengen Area without any form of control, without passport stamping, and even without passports altogether, relying merely upon military identity cards. Pursuant to Article III (2) of the 1951 SOFA Agreement:

“The following documents only will be required in respect of members of a force. They must be presented on demand:

- a. personal identity card issued by the sending State showing names, date of birth, rank and number (if any), service, and photograph;
- b. individual or collective movement order, in the language of the sending State and in the English and French languages, issued by an appropriate agency of the sending State or of the North Atlantic Treaty Organization and certifying to the status of the individual or group as a member or members of a force and to the movement ordered. The receiving State may require a movement order to be countersigned by its appropriate representative”⁶¹.

Does this regulation genuinely correspond to the substance of the Agreement in respect of Gibraltar? Prima facie, it does not appear so. However extensively one may seek to interpret the provision, the assignment of British military personnel to Gibraltar can scarcely be regarded as a “NATO” assignment. Still less can Gibraltar itself be considered a “NATO force”, and this is even less persuasive in the case of family members and visitors. At the very least, there ought to exist a service order applicable not merely within domestic territory, but throughout any territory of the European Union.

⁵⁸ The United Kingdom ratified it on 13 May 1954 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/273311/9363.pdf); Spain acceded to it on 7 September 1987, *Boletín Oficial del Estado*, No. 217, of 10 September 1987 (<https://www.boe.es/buscar/doc.php?id=BOE-A-1987-21119>).

⁵⁹ Instrument of Ratification of the Convention between the States parties to the North Atlantic Treaty and the other States Participating in the Partnership for Peace Concerning the Status of their Forces and its Additional Protocol, done at Brussels on 19 June 1995, *Boletín Oficial del Estado*, No. 128, of 29 May 1998 (<https://www.boe.es/buscar/doc.php?id=BOE-A-1998-12448#:~:text=los%20Estados%20Partes%20del%20Tratado%20del%20Atl%C3%A1ntico,otros%20Estados%20Participantes%20en%20the%20Association%20for>).

⁶⁰ S. LAZAREFF, *Status of Military Forces under Current International Law*, Sijthoff, 1971.

⁶¹ As can be seen, the essence is the same as the requirements established in the Agreement in respect of Gibraltar.

The SOFA Agreement applies solely to personnel “assigned to NATO” or engaged in official missions. It does not permit British service personnel to cross into Spain for leisure or shopping purposes in *La Línea* without undergoing the same controls applicable to any other British national, namely those applicable to third-country nationals⁶².

It may be that the European Union has considered the civilian border to remain effectively sealed despite relinquishing control over military personnel, their families, and members of invited armed forces. Nevertheless, the regulatory objective leaves little room for doubt, as will now become apparent: there will inevitably be legal gaps requiring future amendments if genuine free movement of persons combined with absolute control of external borders is to be guaranteed.

Within the NATO framework under which the Agreement relating to the Status of Forces on mission was originally designed, military personnel, and only military personnel, are exempt from passport and visa requirements, although they must carry a military identity card accompanied by a Movement Order, whether individual or collective, which must be verified at the designated checkpoints. Consequently, it would make little sense for there to be no European control once such individuals cross into European territory, not merely to verify the authenticity of their identity but also the legitimacy of their mission.

As regards family members of military personnel, if they are nationals of Member States of the European Union, they will be subject to the regime governing the free movement of persons, through the corresponding passport control mechanisms. If they are third-country nationals, they may circulate, once duly identified, for up to three months without requiring short-stay visas for periods not exceeding ninety days.

No exceptional privilege should exist for guests, who must therefore comply fully with the standards established under the Schengen Borders Code.

The Agreement in respect of Gibraltar establishes an obligation upon the British authorities to provide Spain with information concerning individuals forming part of these military contingents, their family members, and invited forces. Indeed, Article 38(3) provides that:

“In respect of the entry and exit of non-resident United Kingdom Forces, of those residence permit holders who are entitled to the provision in Article 50(13) and 51(12), of visiting third-country forces and of the civilian component arriving and exiting aboard State aircraft or State vessels, the United Kingdom shall make information available to the Kingdom of Spain necessary for the identification of such persons. The identification of these persons upon arrival or departure shall take place by the Liaison Officers designated in accordance with an administrative arrangement between the Kingdom of Spain and the United Kingdom. Family members forming part of the household shall be directed to the border crossing points”.

⁶² For seeing a comparative look at how jurisdiction, environmental liabilities, and local labor laws intersect with stationed troops, read D. FLECK, (ed.), *The Handbook of the Law of Visiting Forces*, Oxford, 2001.

Since April 2026, the automated Entry/Exit System⁶³ has been in operation, although NATO military personnel remain exempt from the obligation to provide biometric data. Their family members and guests, however, most certainly are not. If a member of the military travels for personal holidays outside the scope of an official mission, that individual loses the privileges conferred under SOFA and must identify themselves using a civilian passport in the same manner as any other citizen.

In general terms, there exists an exemption from short-stay visas, up to ninety days, for all individuals travelling between European Union territory and Gibraltar, and vice versa, although a discretionary framework exists where irregularities are detected concerning residence exceeding 180 days or where regulated economic activities are carried out.

9. Conclusions

1. Prior to Brexit, the free movement of persons between Gibraltar and *La Línea* (Spain) was governed by the specific legal framework of the European Union, taking into account all the requirements applicable to the United Kingdom within the context of the EU.

2. Following Brexit, transitional measures were established, subsequently extended once the regulated transitional period had expired, and there now exists a degree of flexibility in the application of the strict regulatory controls, bordering at times upon illegality.

3. Following the conclusion of the Agreement in respect of Gibraltar between the European Union and the United Kingdom, the rules established therein will be subject to the general Schengen framework, albeit with certain particularities intended to facilitate a similarly flexible border-crossing regime.

4. The border regime following Brexit has required a redefinition of crossings at the Fence, shifting from the fluidity characteristic of the European Union framework to an external border control system of the European Union designed to prevent the economic collapse of the surrounding region.

5. The 2026 Agreement represents an innovative technical solution intended to guarantee the free movement of persons. Its general scope suggests the removal of physical controls at the Fence, relocating the external border to Gibraltar's port and airport, thereby placing Gibraltar in an unprecedented relationship with the Schengen Area.

⁶³ Regulation (EU) 2025/1534 of the European Parliament and of the Council of 18 July 2025 on temporary derogations from certain provisions of Regulations (EU) 2017/2226 and (EU) 2016/399 as regards the progressive start of operations of the Entry/Exit System, OJEU L, 2025/1534, 23.7.2025; Commission Implementing Decision (EU) 2025/1544 of 30 July 2025 determining the date from which the Entry/Exit System is to start operations pursuant to Regulation (EU) 2017/2226 of the European Parliament and of the Council OJEU L 2025/1544, 31.7.2025.

6. The regime governing free movement is not uniform across all categories of persons. Certain gaps remain which will need to be carefully examined in order to prevent legal loopholes in border crossings. At present, for example, Gibraltar residents who are neither citizens of the European Union nor nationals of the United Kingdom, including Gibraltarian citizens, are being treated not as third-country nationals, but merely as residents, despite the absence of any legal basis for such treatment.

7. Military personnel benefit from the privileges afforded to NATO military personnel. Nevertheless, they remain exempt from controls designed to verify both their identity and the specific nature of their mission, unlike other NATO military personnel operating within European Union territory.

8. Furthermore, the regulation concerning the family members of military personnel, together with domestic staff employed by them and members of invited armed forces, grants such individuals privileged status in a manner that is difficult to justify, given that military personnel do not, under any circumstances, enjoy an extension of their own rights to their family members, domestic staff, or invited armed forces of third countries. This situation will, in all likelihood, become the subject of renewed regulation should the treaty ultimately enter into force.

ABSTRACT: This article analyzes the legal framework governing the free movement of persons under the 2026 Agreement in respect of Gibraltar between the European Union and the United Kingdom. Following Brexit, the Agreement introduces an innovative border regime aimed at removing physical barriers at the land border (*La Línea*) and relocating the EU external border controls to Gibraltar's port and airport. This mechanism effectively integrates the territory into the Schengen Area *de facto*, placing the responsibility for border inspections on Spanish authorities. However, the study critically examines the specific and controversial derogations granted to British military personnel, their families, and visiting third-country forces. The author argues that by exempting these groups from standard Schengen passport checks – relying instead on a broad and questionable application of NATO SOFA principles – the Agreement creates significant legal loopholes. These unjustified privileges compromise the absolute control and integrity of the EU's external borders, inevitably requiring future regulatory amendments to close the existing security gaps.

KEYWORDS: Gibraltar – Free movement of persons – EU-UK Agreement – Military personnel – The singular nature of border control in Gibraltar.