

# A ‘Frictionless’ Border for Gibraltar: Stumbling Blocks and Solutions Following Brexit

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*Gibraltar is a British Overseas Territory of around 6 square kilometers, inhabited by 30,000 people. Despite its size, it is an important issue within Brexit negotiations. In Gibraltar, 96% of the voters voted to ‘remain’ within the European Union (‘EU’), but are now set to leave when the EU and the United Kingdom (‘UK’) reach a withdrawal agreement. This article examines the question of what stumbling blocks will arise for Gibraltar following Brexit, and which solutions could be considered in order for Gibraltar to have a ‘frictionless’ border with the EU. As Gibraltar’s economy concentrates on the services sector, where not only Gibraltarians but also a lot of Spanish and other EU nationals work, the free movement of services and persons are of particular importance. This article analyses their trade-related consequences, and then focuses on two models that can provide some insight on the future relationship between the EU and the UK, with special consideration for Gibraltar: (1) the ‘reverse Greenland-model’, and (2) the Norwegian model. It concludes that there will definitely be some stumbling blocks on the way, but that the softer the Brexit, the less friction there will be on the border.*

## 1 INTRODUCTION

On 29 March 2017, United Kingdom’s Prime Minister Theresa May triggered Article 50 of the Treaty on European Union<sup>1</sup> (‘TEU’) concerning the withdrawal of Member States from the European Union.<sup>2</sup> In accordance with Article 50 (2), May notified the European Council (‘EC’) and thereby paved the way for an agreement between the EU and the UK.<sup>3</sup> This agreement has to take into account the future relationship between the two actors, and this future relationship has caused a lot of consternation since the

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<sup>1</sup> Consolidated version of the Treaty on European Union [2008] OJ 115/01 (‘TEU’).

<sup>2</sup> Letter from the UK Prime Minister to the President of the European Council Donald Tusk (29 Mar. 2017), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604079/Prime\\_Ministers\\_letter\\_to\\_European\\_Council\\_President\\_Donald\\_Tusk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf) (accessed 4 May 2018).

<sup>3</sup> TEU Art. 50 (2): ‘The Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its *future relationship* with the Union. That agreement shall be negotiated in accordance with Art. 281 (3) TFEU. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining consent of the European Parliament’, emphasis added.

majority of the British population voted for leaving the EU. The United Kingdom was not so ‘united’ when it came to the EU referendum: some parts were strongly in favour of remaining, while other parts preferred to leave, resulting in a slight majority for departure from the EU.<sup>4</sup> In this regard, it is interesting to focus on one part of the British territory where there was almost unanimity (96%) to ‘remain’ within the EU: Gibraltar.<sup>5</sup> It seems as if such a high percentage does not matter though, as Gibraltar has to leave the EU when the UK does. This article examines the question of what stumbling blocks will arise for Gibraltar following Brexit, and which solutions can be considered as options in order for Gibraltar to have a ‘frictionless’ border with the EU. In this regard, the second section will briefly address the position of Gibraltar as a British Overseas Territory, then turn to its position within the EU in the third section. Then, the fourth section will address the trade-related consequences of Brexit for Gibraltar in particular. These trade-related consequences mainly concern the free movement of services and the border crossing of workers. Besides EU Law, this article takes account of the General Agreement on Trade in Services<sup>6</sup> (‘GATS’). The fifth section focuses on examples serving as models for the EU’s relationship with the UK, considering the position of Gibraltar in particular: (1) the ‘reverse Greenland-model’, and (2) the Norwegian model. The conclusion in the sixth section will answer the main research question.

## 2 GIBRALTAR AS A BRITISH OVERSEAS TERRITORY

Gibraltar is a small peninsula of 5 kilometers long and 1.2 kilometers wide, with 30,000 inhabitants and Spain as its only land-connected neighbour.<sup>7</sup> On its south side, it overlooks the fourteen kilometers-wide Strait of Gibraltar, making the territory situated at a ‘strategic location at the western entrance to the Mediterranean’.<sup>8</sup> Because of this location, a sovereignty dispute between the UK and Spain has been going on for around three hundred years, despite the fact that Spain ceded Gibraltar to the UK under the 1713 Treaty of Utrecht.<sup>9</sup> There have been several referenda on this

<sup>4</sup> See [http://www.bbc.com/news/politics/eu\\_referendum/results](http://www.bbc.com/news/politics/eu_referendum/results) for an overview of the referendum results per part of the UK (accessed 4 May 2018).

<sup>5</sup> Adam Withnall, *EU Referendum: Gibraltar Backs Remain in First Result of the Night* (*The Independent*, 23 June 2016) <https://www.independent.co.uk/news/uk/politics/eu-referendum-results-live-gibraltar-result/latest-remain-brexit-turnout-a7098626.html> (accessed 4 May 2018).

<sup>6</sup> General Agreement on Trade in Services (adopted 15 Apr. 1994, entered into force 1 Jan. 1995) 1869 UNTS 183 (‘GATS’).

<sup>7</sup> Vincente Rodriguez, ‘Gibraltar’ *Encyclopaedia Britannica*, <https://www.britannica.com/place/Gibraltar> (accessed 4 May 2018).

<sup>8</sup> *The British Army – Deployments Gibraltar: The British Army in Gibraltar*, <https://www.army.mod.uk/deployments/gibraltar/> (accessed 4 May 2018).

<sup>9</sup> Peter Gold, *Sovereignty Negotiations and Gibraltar’s Military Facilities: How Two ‘Red-Line’ Issues Became Three*, 15(2) *Dipl. & Statecraft* 375, 375–384 (2004); Ben Johnson, *The History of Gibraltar, Historic UK*, <https://www.historic-uk.com/HistoryMagazine/DestinationsUK/History-of-Gibraltar/> (accessed 4 May 2018).

sovereignty issue of which the outcomes have left 'no doubt that Gibraltarians can be relied upon to come out in great numbers to celebrate their British identity and loyalty'.<sup>10</sup> In 1967, the question was posed whether Gibraltarians would join Spain or remain with the UK: 12,762 people voted for the UK against forty-four for Spanish sovereignty.<sup>11</sup> In 2002, partially the same question was proposed in a referendum on the issue of joint sovereignty between the UK and Spain. Again, almost 99% of the voters rejected the idea.<sup>12</sup> Hence, this small Overseas Territory has a strong connection with the UK and a real British identity. Her Majesty the Queen appoints a Governor serving as Her Majesty's Representative, who is responsible for Gibraltar's day-to-day operations. His special responsibilities are laid down in the 2006 Gibraltar Constitution<sup>13</sup> and consist of (1) external affairs, (2) defense, (3) internal security, and (4) certain functions in relation to public offices.<sup>14</sup> The government and parliament 'are responsible for the transposition and implementation of EU laws, which amount to about 70% of all Gibraltar's legislation'.<sup>15</sup> By means of the Constitution, Gibraltar's own competences and autonomy have increased over the years. However, as it is still a British Overseas Territory, 'Gibraltar is now set to leave the EU along with the UK when Brexit negotiations are concluded'.<sup>16</sup> At least for now the UK is still part of the EU, so the same accounts for Gibraltar.

### 3 GIBRALTAR AS PART OF THE EU

Together with the UK, Gibraltar joined the European Economic Community in 1973.<sup>17</sup> Under Article 52 (1) of the TEU, the EU Treaties apply to the EU Member States. By virtue of Articles 52 (3) TEU and 355 (3) of the Treaty on the Functioning of the European Union<sup>18</sup> ('TFEU'), the 'provisions of the Treaties shall apply to the

<sup>10</sup> Admin, *Bordering on Britishness: What Does It Really Mean to be Gibraltarian?* (New Statesman, 24 June 2014), <https://www.newstatesman.com/gibraltar/newstatesman-gibraltar/2014/06/bordering-britishness-what-does-it-really-mean-be/> (accessed 4 May 2018).

<sup>11</sup> Vaughne Miller, *Gibraltar* [1995] Research Paper 95/80 Internal Affairs and Defense Section, 5.

<sup>12</sup> Mark Oliver, Sally Bolton, Jon Dennis & Matthew Tempest, *Foreign Policy: Gibraltar* (*The Guardian*, 4 Aug. 2004), <https://www.theguardian.com/world/2004/aug/04/qanda.foreignpolicy> (accessed 4 May 2018).

<sup>13</sup> *Constitution of Gibraltar* [2006], <http://www.gibraltarlaws.gov.gi/constitution.php> (accessed 4 May 2018).

<sup>14</sup> *Ibid.*, Art. 47 (1).

<sup>15</sup> HL Deb 1 Mar. 2017, 13th Report of Session 2016–2017, Paper 116 on 'Brexit: Gibraltar' para. 5, <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/116/11602.htm> (accessed 7 May 2018).

<sup>16</sup> *Ibid.*, para. 1.

<sup>17</sup> Documents concerning the accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland [1972] OJ L73 ('Act of Accession').

<sup>18</sup> Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ 115/01 ('TFEU').

European territories for whose external relations a Member State is responsible'. The Declaration by the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland, annexed to the TFEU, specifically mentions Gibraltar as a territory where the EU Treaties apply.<sup>19</sup> Consequently, EU law in principle applies to Gibraltar but there are some exceptions. For example, Gibraltar does not participate in the UK delegation to the EC,<sup>20</sup> but it does share a constituency in the European Parliament with South-West England. This became effective only after a British citizen residing in Gibraltar went to the European Court of Human Rights ('ECtHR'). In this case, *Matthews v. UK*,<sup>21</sup> the Court held that a lack of elections for the European Parliament violated Article 3 of the First Protocol to the European Convention on Human Rights ('ECHR') because it denied 'the very essence of the applicant's right to vote'.<sup>22</sup> Following this case, Gibraltarians were allowed to vote for the European Parliament as British citizens. As British citizens,<sup>23</sup> they were also allowed to vote in the Brexit referendum of 23 June 2016.<sup>24</sup>

Another exception from the application of EU law is the exclusion of several pieces of legislation, despite the UK being responsible for Gibraltar's external relations under Article 355 (3) of the TFEU. In this regard, the European customs territory,<sup>25</sup> common agricultural policy<sup>26</sup> and common system of value added taxes ('VAT')<sup>27</sup> do not apply to Gibraltar. Of the four freedoms of the European single

<sup>19</sup> *Ibid.*, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon (signed on 13 Dec. 2007) para. 55.

<sup>20</sup> Directorate-General for Internal Policies, *The Impact of the United Kingdom's Withdrawal from the European Union on Scotland, Wales and Gibraltar: In-depth Analysis for the AFPO Committee* [2017] 21, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/583118/IPOL\\_IDA%282017%29583118\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/583118/IPOL_IDA%282017%29583118_EN.pdf) (accessed 6 May 2018).

<sup>21</sup> *Matthews v. United Kingdom* App. No. 248833/94 (18 Feb. 1999).

<sup>22</sup> *Ibid.*, para. 65.

<sup>23</sup> UK Government – *Citizenship and Living in the UK: Types of British Nationality* <https://www.gov.uk/types-of-british-nationality/british-overseas-territories-citizen/> (accessed 4 May 2018).

<sup>24</sup> David Allen Green, *Brexit and Gibraltar* (*Financial Times*, 6 Mar. 2017) <https://www.ft.com/content/66eccc22a-82a3-3695-a1e8-38d6cfde9fd3> (accessed 7 May 2018).

<sup>25</sup> Council Regulation No. 952/2013 of 9 Oct. 2013 laying down the Union Customs Code [2013] OJ L269 ('Customs Code'), Art. 4 (1). This provision explicitly lists all territories of Member States that are covered by the Customs Code. For the UK, it comprises 'the territory of the United Kingdom of Great Britain and Northern Ireland and of the Channel Islands and the Isle of Man'. Hence, the omission of Gibraltar here must mean that it is not included in the European customs territory.

<sup>26</sup> Act of Accession [1972] Art. 28. Art. 28 excludes Gibraltar for 'acts of the institutions of the Community relating to the products in Annex II to the EEC Treaty and the products subject, on importation into the Community, to specific rules as a result of the implementation of the common agricultural policy, as well as the acts on the harmonization of legislation of Member States concerning turnover taxes ... unless the Council, acting unanimously on a proposal from the Commission, provides otherwise'.

<sup>27</sup> I.e. Directive 2008/118/EC of 16 Dec. 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC [2008] OJ L9, which concerns VAT or excise duties for energy, alcohol and manufactured tobacco excludes Gibraltar as well. Art. 6 (2) (d) reads that 'goods originating in or intended for the Isle of Man are treated as movements originating in or intended for the United Kingdom'. Just as with the Customs Code, the omission of Gibraltar must mean that it is not included in the VAT or excise duty system. Furthermore, the European Commission's website

market, all but the free movement of goods are applicable to this British Overseas Territory. The case *Commission v. UK (Gibraltar)*<sup>28</sup> offers an explanation in this regard. There, the Court of Justice of the European Union ('CJEU') held that products originating in Gibraltar neither fell in the category of (1) the prohibition of customs duties and charges having an equivalent effect,<sup>29</sup> nor in (2) the prohibition on quantitative restrictions between Member States.<sup>30</sup> Thereby, these products 'are not covered by the Treaty rules on free movement of goods and, in particular, those prohibiting quantitative restrictions between Member States'.<sup>31</sup> As Gibraltar does enjoy free movement of persons, services and capital under Article 26 of the TFEU, there will be implications in these areas if the EU does not include the UK anymore. This article chooses to focus on persons and services, and will therefore now assess the trade-related consequences for Gibraltar following Brexit.

#### 4 TRADE-RELATED CONSEQUENCES FOR GIBRALTAR FOLLOWING BREXIT

There are several options for the UK and the EU in their negotiations concerning their future relationship. The two outcomes are either a 'hard' or a 'soft' Brexit.<sup>32</sup> On the one hand, a 'hard' Brexit means that the UK would leave the single market and customs union.<sup>33</sup> It would give 'Britain full control over its borders, making new trade deals and applying laws within its own territory'.<sup>34</sup> With regard to trade, the UK would fall back on trade rules negotiated under the auspices of the World Trade Organization ('WTO').<sup>35</sup> On the other hand, a 'soft' Brexit would keep the relationship with the EU and its Member States 'as close as possible to existing arrangements'.<sup>36</sup> In this case, the UK would keep access to the single market.<sup>37</sup> While the EU Customs Code does not apply to Gibraltar, the free movement of services and persons is of particular

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gives an overview of where the EU rules regulating customs, VAT and excise duties. In Table II, it is given that the EU Treaties apply to Gibraltar while customs rules, VAT and excise duties do not. [https://ec.europa.eu/taxation\\_customs/business/vat/eu-vat-rules-topic/territorial-status-eu-countries-certain-territories\\_en](https://ec.europa.eu/taxation_customs/business/vat/eu-vat-rules-topic/territorial-status-eu-countries-certain-territories_en) (accessed 9 Aug. 2018).

<sup>28</sup> Case C-30 *Commission v. United Kingdom (Gibraltar)* [2003] ECR I-9481.

<sup>29</sup> TFEU Art. 30.

<sup>30</sup> *Ibid.*, Arts 34–37.

<sup>31</sup> *Commission v. United Kingdom (Gibraltar)* [2003] para. 58.

<sup>32</sup> Anand Menon & Brigid Fowler, *Hard or Soft? The Politics of Brexit*, 238(1) *Nat'l Inst. Econ. Rev.* 4–12 (2016).

<sup>33</sup> Alexandra Sims, *What is the Difference Between Hard and Soft Brexit? Everything You Need to Know* (*The Independent*, 3 Oct. 2016), <https://www.independent.co.uk/news/uk/politics/brexit-hard-soft-what-is-the-difference-uk-eu-single-market-freedom-movement-theresa-may-a7342591.html> (accessed 7 May 2018).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

importance for Gibraltar's future. These two freedoms are closely connected because of Gibraltar's geographical position next to Spain, and are the biggest stumbling blocks for a 'frictionless' border after Brexit becomes definitive.

#### 4.1 FREE MOVEMENT OF SERVICES

In recent decades, Gibraltar transformed from an economy dependent on the UK into 'a much higher gross-value-added economy and has become incredibly resilient' which is because it is now mainly a services sector.<sup>38</sup> As most of Gibraltar's territory consists of a major rock, 'The Rock', its 'natural features preclude all possibility of agriculture or major industrial production'.<sup>39</sup> Therefore, it completely relies on imports and has developed into a services sector mainly enshrining financial services and online gaming.<sup>40</sup> Under the GATS, these services fall under 'cross-border-supply',<sup>41</sup> which is defined as 'the supply of a service from the territory of one Member into the territory of another Member' in Article I (2) (a). Based on Article XX (1) of the GATS, each WTO Member sets out its specific commitments in a Schedule, providing for the conditions and degree of market access. Hence, the UK is part of the EU's Schedule of Commitments but there are multiple entries applying only to individual EU Member States.<sup>42</sup> Within the EU, EU legislation safeguards the single market in services.<sup>43</sup>

The perspective of Brexit raises concerns in Gibraltar as financial services and online gaming account for 40% of Gibraltar's Gross Domestic Product ('GDP').<sup>44</sup> The most significant economic relationship of Gibraltar is with the rest of the UK, so these two services mainly depend upon the British market.<sup>45</sup> Therefore, the Gibraltar government is seeking to 'develop a broader, "bespoke" arrangement to improve access to the UK market in services before withdrawal from the European Union'.<sup>46</sup> Such an agreement is of particular importance in case of a

<sup>38</sup> *HL Select Committee on the European Union – Uncorrected Oral Evidence: Brexit: Gibraltar* (24 Jan. 2017) Q12, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee-brex-it-gibraltar/oral/46200.html> (accessed 7 May 2018) ('GLT0001').

<sup>39</sup> *Government of Gibraltar – Geography*, <https://www.gibraltar.gov.gi/new/geography> (accessed 4 May 2018).

<sup>40</sup> Directorate-General for Internal Policies, *supra* n. 20.

<sup>41</sup> For supply outside of the UK, as Art. I (2) (a) refers to 'one Member ... into ... any other Member', requiring two distinct WTO Members.

<sup>42</sup> European Communities and their Member States ... Schedules of Specific Commitments [1994] GATS/SC/31.

<sup>43</sup> TFEU Art. 26 and Part Three, Title IV.

<sup>44</sup> Directorate-General for Internal Policies, *supra* n. 20.

<sup>45</sup> *Ibid.*, at 21–22.

<sup>46</sup> *Supplementary Written Evidence – Government of Gibraltar (GLT0001)* (13 Dec. 2016) under D, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/brex-it-gibraltar/written/45032.html> (accessed 7 May 2018).

'no-deal' Brexit, i.e. the situation in which the EU and the UK cannot come to a final agreement. The relationship between them will then be governed by WTO rules.

With regard to services, this means relying on the WTO Schedules under the GATS, of which a difficulty is that these Schedules first have to make a distinction between EU-27 and UK commitments.<sup>47</sup> Some authors regard this 'fallback option' as the least preferred, for example because they are of the opinion that EU legislation has made much more progress towards liberalizing trade in comparison to the WTO rules.<sup>48</sup> Hence, the WTO option would lead to reduced market access to EU-27 markets for UK service suppliers.<sup>49</sup> Therefore, a 'soft' Brexit, wherein the UK and thus Gibraltar remain within the single market – or an equivalent form – would be preferred from a services viewpoint. In Gibraltar, the free movement of services is also tied to the free movement of persons: frontier workers hold a third of all jobs in the financial sector and 60% of the jobs in the online gaming sector.<sup>50</sup>

#### 4.2 FREE MOVEMENT OF PERSONS

The free movement of persons is of particular importance as many people live in Spain while being employed in Gibraltar.<sup>51</sup> Reasons are the high rate of unemployment and low incomes in Andalusia,<sup>52</sup> but also the increasing prices for apartments in Gibraltar.<sup>53</sup> Therefore, free movement of persons is essential for Gibraltar's economy meaning that a (relatively) open land border with Spain is necessary.<sup>54</sup> Of approximately 26,000 people working in Gibraltar, 12,000 cross the border on a daily basis: 7,000 Spanish people and around 5,000 other EU nationals.<sup>55</sup>

<sup>47</sup> Peter Ungphakorn, *If the EU and UK Fall Back on WTO Commitments What Does This Mean for Services?* (Trade Beta Blog, 12 Apr. 2017), <https://tradebetablog.wordpress.com/2017/04/12/eu-uk-wto-services/> (accessed 16 May 2018).

<sup>48</sup> Swati Dhingra & Thomas Sampson, *Life After Brexit: What Are the UK's Options Outside the European Union?* Ctr. Econ. Performance 7, 1–12 (2016).

<sup>49</sup> *Ibid.*

<sup>50</sup> GLT0001 [2016] paras 16–17.

<sup>51</sup> Charles Gomez, *Don't Prejudice Thousands of Gibraltar Jobs by Using Border as 'Choke Point'* (The Olive Press, 23 Jan. 2017), <http://www.theolivepress.es/spain-news/2017/01/23/dont-prejudice-thousands-gibraltar-jobs-using-border-choke-point/> (accessed 4 May 2018).

<sup>52</sup> Directorate-General for Internal Policies, *supra* n. 20, at 22.

<sup>53</sup> Lisa Prevost, *House Hunting in Gibraltar* (The New York Times, 18 Apr. 2018), <https://www.nytimes.com/2018/04/18/realestate/house-hunting-in-gibraltar.html> (accessed 18 May 2018).

<sup>54</sup> George Macquisten, *The Shape of Gibraltar in the Aftermath of Brexit* 4 (The Bruges Group Publications 2017); Directorate-General for Internal Policies, *supra* n. 20, at 22.

<sup>55</sup> William Chislett, *Why Spain Would Like a 'Soft' Brexit for the UK* (Gibraltar Chronicle, 17 Apr. 2017), <http://chronicle.gi/2017/04/why-spain-would-like-a-soft-brexite-for-the-uk/> (accessed 7 May 2018).

However, the border has always been ‘relatively hard’ due to the fact that the UK does not participate in the Schengen Area<sup>56</sup> and the European customs territory excludes Gibraltar.<sup>57</sup>

As the borders within the Schengen Area are only existent on maps,<sup>58</sup> the Spain–Gibraltar border is external and leads to border controls and passport checks.<sup>59</sup> However, the current identity controls ‘rarely involve more than a cursory glance at travel documents, ensuring fluidity at peak times’.<sup>60</sup> Only non-EU citizens are usually subject to stricter border controls.<sup>61</sup> However, in September 2017, the European Commission announced measures to strengthen the borders of the Schengen Area.<sup>62</sup> This brought back memories of August 2013, when endless queues at the border resulted in motorists waiting up to five hours.<sup>63</sup> Because of both UK and Spanish EU Membership, the fact that neither the UK nor Gibraltar is part of the Schengen Area has never been a major problem.<sup>64</sup> However, people fear that extensive border controls will become the norm rather than the exception following Brexit.<sup>65</sup>

According to the Chief Minister of Gibraltar, Fabian Picardo, ‘it would be possible for the border to function effectively after Brexit, but this has to depend on the “good will and good faith” between Gibraltar and Spain’.<sup>66</sup> A proposed solution for this issue is the conclusion of a bilateral agreement between the UK and Spain to allow workers to inhabit and be employed in both territories, which could also work

<sup>56</sup> In 1985, Belgium, the Netherlands, Luxembourg, France and Germany signed the Schengen Agreement. This Agreement was supplemented by the Schengen Convention (Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [1995] OJ L239 (‘Schengen Acquis’). Since 1999, the Schengen Acquis is part of EU legislation. Twenty-two of the EU-28 participate in the Schengen Area. For our purposes, it is important that the United Kingdom maintains its own border controls instead of being part of the Schengen Area. Consequently, Gibraltar is not included in this area either.

<sup>57</sup> Customs Code [2013] Art. 4 (1) (fn. 25).

<sup>58</sup> *Schengen Area Countries List*, <https://www.schengenvisainfo.com/schengen-visa-countries-list/> (accessed 4 May 2018).

<sup>59</sup> Macquisten, *supra* n. 54, at 5.

<sup>60</sup> Brian Reyes, *Schengen Changes Will Bring Tighter Border Controls (Gibraltar Chronicle)*, 11 Jan. 2017, <http://chronicle.gi/2017/01/schengen-changes-will-bring-tighter-border-controls/> (accessed 4 May 2018).

<sup>61</sup> Macquisten, *supra* n. 54, at 5.

<sup>62</sup> European Commission Press Release, *State of the Union 2017: Preserving and Strengthening Schengen to Improve Security and Safeguard Europe’s Freedoms* (27 Sept. 2017), [http://europa.eu/rapid/press-release\\_IP-17-3407\\_en.htm](http://europa.eu/rapid/press-release_IP-17-3407_en.htm) (accessed 7 May 2018).

<sup>63</sup> Fiona Govan, *Five Hour Queues to Enter Gibraltar as Spain Tightens the Noose (The Telegraph)*, 13 Aug. 2013, <https://www.telegraph.co.uk/news/worldnews/europe/gibraltar/10240027/Five-hour-queues-to-enter-Gibraltar-as-Spain-tightens-the-noose.html> (accessed 7 May 2018).

<sup>64</sup> Macquisten, *supra* n. 54, at 5.

<sup>65</sup> *Ibid.*

<sup>66</sup> HL [2017] para. 49.

in the issue regarding cross border movement between the UK and Ireland.<sup>67</sup> The only difficulty is that such an agreement should be extended to non-Spanish citizens (the 5,000 other EU nationals).<sup>68</sup>

In any instance, the Parties do not have to start from scratch. Regulation EC/1931/2006, the 'Local Border Traffic Regulation',<sup>69</sup> can provide for the basis of such a bilateral agreement. This Regulation permits European Member States to establish regimes on local border traffic management with neighbouring (third) States outside the EU and are an exception to the Schengen Area,<sup>70</sup> subject to European Commission approval.<sup>71</sup> In this Regulation, 'persons enjoying the Community right of free movement' means (1) EU citizens, and (2) nationals of third countries who under Agreements between the Community and those third countries enjoy rights to free movement.<sup>72</sup> The first subparagraph hence safeguards the situation of the 5,000 other EU nationals that cross the border on a daily basis.

This option is preferable to the WTO option. Under the GATS, the provision of free movement is not the same as under EU law. Article I (2) (d) of the GATS permits the 'presence of natural persons', consisting of persons of one WTO Member that enter the territory of another Member to supply a service,<sup>73</sup> provided that the service in question is liberalized under the Schedule of Specific Commitments.<sup>74</sup> However, the 'Annex on Movement of Natural Persons Supplying Services under the Agreement',<sup>75</sup> specifies that the GATS does not apply to 'natural persons seeking access to the employment market of a Member' or 'measures regarding citizenship, residence or employment on a permanent basis'.<sup>76</sup> The General Agreement on Tariffs and Trade<sup>77</sup> ('GATT') provides another possibility in its Article on the establishment of customs territories. Article XXIV:3 (a) allows border arrangements by stating that 'the provisions of the GATT shall not be construed to prevent advantages accorded by any Contracting Party to adjacent countries in order to facilitate frontier traffic'. In principle, this provision refers to the movement of goods,

<sup>67</sup> Directorate-General for Internal Policies, *supra* n. 20, at 22.

<sup>68</sup> *Ibid.*

<sup>69</sup> Regulation (EC) No. 1931/2006 of the European Parliament and of the Council of 20 Dec. 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention [2006] OJ L405/1 ('Local Border Traffic Regulation').

<sup>70</sup> *Ibid.*, Art. 1 (2).

<sup>71</sup> *Ibid.*, Art. 13 (2).

<sup>72</sup> *Ibid.*, Art. 3 (4) (i) and (ii).

<sup>73</sup> For the purposes of the GATS, Art. I (3) (b) defines 'services' as 'including any service in any sector except services supplied in the exercise of governmental authority'. A service is considered to be supplied in the exercise of governmental authority when 'it is supplied neither on a commercial basis, nor in competition with one or more service suppliers' (GATS Art. I (3) (c)).

<sup>74</sup> GATS Art. XX (1).

<sup>75</sup> GATS Annex I.

<sup>76</sup> *Ibid.*, para. 2.

<sup>77</sup> General Agreement on Tariffs and Trade (adopted 15 Apr. 1994, entered into force 1 Jan. 1995) 1867 UNTS 187, 33 ILM 1153 ('GATT').

but it could allow for a bilateral agreement whereby trade would be liberalized between the EU and Gibraltar only.

As it is of mutual interest to ‘maintain as free-flowing a frontier as possible following Brexit’,<sup>78</sup> the next section focuses on examples serving as potential models for the EU’s relationship with the UK.

## 5 POTENTIAL MODELS FOR THE EU AND UK’S FUTURE RELATIONSHIP

The future relationship between the EU and UK for Gibraltar will largely depend on Spain. The EC Guidelines of 29 April 2017 read in relevant part: ‘After the United Kingdom leaves the Union, no agreement between the EU and United Kingdom may apply to the territory of Gibraltar without the agreement between the Kingdom of Spain and the United Kingdom’.<sup>79</sup> In March 2018, the EC reaffirmed Spain’s veto on the matter by stating that ‘notably as regards Gibraltar ... nothing is agreed until everything is agreed’.<sup>80</sup> Therefore, possible future scenarios for Gibraltar depend on Spanish consent.<sup>81</sup> This is implied in the phrase ‘After the UK leaves the Union’ in the Council Guidelines, which would mean that a possible agreement on Gibraltar can only be part of the future relationship-agreement, and can be agreed upon after the formal separation. Hence, as the shape of the future relationship is yet to be determined, we can only hypothetically assess what options take due account of Gibraltar’s situation, considering that 96% of its voters voted to remain part of the EU. A first option is the so-called ‘reverse Greenland-model’, and the Norwegian model provides for the second option.

### 5.1 THE ‘REVERSE GREENLAND-MODEL’

Greenland provides the only example where part of a Member State’s territory left the EU<sup>82</sup> while Denmark stayed represented in Brussels.<sup>83</sup> Although Greenland’s

<sup>78</sup> HL, *supra* n. 66, para. 70.

<sup>79</sup> European Council (Art. 50) Guidelines for Brexit Negotiations (29 Apr. 2017) para. 24, <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexite-guidelines/pdf> (accessed 8 May 2018).

<sup>80</sup> Adam Payne, *The EU Gives Spain a Brexit Deal Veto over Gibraltar in Leaked Guidelines* (Business Insider, 22 Mar. 2018), <https://www.businessinsider.nl/leaked-guidelines-spain-brexite-deal-veto-gibraltar-north-ern-ireland-2018-3/?international=true&r=US> (accessed 8 May 2018).

<sup>81</sup> Alejandro del Valle Gálvez, *Gibraltar and the ‘Brexit’ – New Scenarios within a Historic Dispute. A Proposal* (Verfassungsblog, 17 Apr. 2017), [www.verfassungsblog.de/gibraltar-and-the-brexite-new-scenarios-wit-hin-a-historic-dispute-a-proposal](http://www.verfassungsblog.de/gibraltar-and-the-brexite-new-scenarios-wit-hin-a-historic-dispute-a-proposal) (accessed 8 May 2018).

<sup>82</sup> Then: European Communities.

<sup>83</sup> Maria Fletcher & Rebecca Zahn, *What Options Are Available to Scotland to Remain Within the EU Given the Brexit Referendum Result?*, *Edinburgh L. Rev.* 99, 98–103 (2017).

inhabitants had already voted 'no' for an EU Membership in 1972, they were nevertheless obliged to become part because of Denmark.<sup>84</sup> Ten years later, a referendum led to its departure from the EU when 52% voted in favour of leaving.<sup>85</sup> The question now arises whether this model would be suited for Gibraltar. Fletcher and Zahn take this model into account as a possible solution for Scotland and conclude that 'the UK situation is materially different from the Danish one'.<sup>86</sup> Greenland is namely 'for almost all internal affairs a self-governing territory, with Danish responsibility limited essentially to foreign affairs, monetary policy, citizenship and defense' whereas Scotland is a part of the UK with far less autonomy.<sup>87</sup>

If we apply this model to Gibraltar, it is possible to conclude that the 'reverse Greenland-model' is more suitable for this territory than for Scotland. As previously mentioned, Gibraltar has over the years increased its own competences and the Governor is responsible for the day-to-day operations of the territory. Only 'the overall responsibility of Her Majesty's Government in the United Kingdom' for external affairs and defense<sup>88</sup> limits the special responsibilities that the Governor has by virtue of the Gibraltarian Constitution.<sup>89</sup>

When comparing the responsibilities of Denmark regarding Greenland to the existing relationship between the UK and Gibraltar, the following appears. Danish responsibility is limited to foreign affairs, citizenship and defense; which is the same compared to the UK (taking into account that there is limited competence of the Gibraltarian Governor to exercise defense and external affairs based on Article 47 (1) of the Gibraltarian Constitution). Furthermore, Gibraltar has its own monetary policy: it sets its own taxes and controls its own budget,<sup>90</sup> and has its own currency.<sup>91</sup> Moreover, there are examples of States where the EU Treaties and secondary EU law apply only to certain parts of the territory.<sup>92</sup> The UK already does so by virtue of Article 355 of the TFEU. Article 355 (2) concerns special arrangements for

<sup>84</sup> Maïa de la Baume, *Greenland's Exit Warning to Britain* (Politico, 22 June 2016), <https://www.politico.eu/article/greenland-exit-warning-to-britain-brexit-eu-referendum-europe-vote-news-denmark> (accessed 8 May 2018).

<sup>85</sup> *Ibid.*

<sup>86</sup> Fletcher & Zahn, *supra* n. 83, at 100.

<sup>87</sup> *Ibid.*

<sup>88</sup> Constitution of Gibraltar [2006] Art. 47 (4).

<sup>89</sup> *Ibid.*, Art. 47 (1). These special responsibilities are in (1) external affairs, (2) defense, (3) internal security, and (4) certain functions in relation to public offices.

<sup>90</sup> Peter Howitt, David Borge, John Pauley & Sheena Subherwal Patel, *Virtual Currencies in Gibraltar* (Lexology, 16 Oct. 2017), <https://www.lexology.com/library/detail.aspx?g=269e21b6-1b89-4f3c-a114-895f913ad233> (accessed 8 May 2018).

<sup>91</sup> This is the Gibraltar Pound, although it is linked to the British Pound.

<sup>92</sup> Leonard Besselink, *Beyond Notification: How to Leave the European Union without Using Article 50 TEU* (UK Constitutional Law, 30 June 2016), <https://ukconstitutionallaw.org/2016/06/30/leonard-besselink-beyond-notification-how-to-leave-the-european-union-without-using-article-50-teu/> (accessed 8 May 2018).

association for overseas countries and territories listed in Annex II to the TFEU.<sup>93</sup> This means that the twelve<sup>94</sup> listed territories are not directly subject to EU law, but have an associate status the purpose of which is ‘to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole’.<sup>95</sup> The Netherlands provides for another example, where EU law is only applicable to the part of the Kingdom situated on the European continent and not to the territories of the Kingdom located in the Caribbean.<sup>96</sup> The islands of Aruba, Curacao, Sint Maarten, Bonaire, Saba and Sint Eustatius are non-EU territory although the inhabitants are EU citizens.<sup>97</sup>

The UK White Paper on the Future Relationship released on 12 July 2018 states that ‘the UK will be seeking specific arrangements for Gibraltar’.<sup>98</sup> These ‘arrangements should take account of the significant and mutually beneficial economic ties between these economies and EU Member States, including their overseas countries and territories’.<sup>99</sup> A ‘reverse Greenland-model’ should then comprise a connection of Gibraltar to the EU by means of UK–EU agreements that have a very limited application in the UK. However, this is not ideal and there are downsides to the ‘reverse Greenland-model’. Greenland voted in 1982 to leave the EU, but it took three years and over a hundred meetings before negotiations were completed.<sup>100</sup> The negotiations concerning Brexit should not be underestimated, and the above-mentioned bilateral agreement cannot be drafted overnight.

Beyond the issue of the Spanish veto,<sup>101</sup> Raitio and Raulus argue that the ‘reverse Greenland-model’ is politically unrealistic – provided that it would legally work – based on the constitutional system of the UK: ‘it would be unforeseeable that the UK’s participation in an important organization like the EU would be led from’ Gibraltar ‘and not from London or Westminster’.<sup>102</sup> In addition, the

<sup>93</sup> Annex II concerns ‘Overseas countries and territories to which the provisions of Part Four [Association of the Overseas Countries and Territories] of the TFEU apply’. Based on Art. 198 of the TFEU, ‘the Member States agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the UK’.

<sup>94</sup> TFEU Annex II. These territories are Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands and Bermuda.

<sup>95</sup> TFEU Art. 198.

<sup>96</sup> *Ibid.*

<sup>97</sup> Kamerstukken I 1997/1998, 25 807 (‘Parliamentary Papers of the Dutch Lower House’).

<sup>98</sup> UK Government, *The Future Relationship Between the United Kingdom and the European Union* para. 8 (2018), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/725288/The\\_future\\_relationship\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_European\\_Union.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf) (accessed 10 Aug. 2018).

<sup>99</sup> *Ibid.*

<sup>100</sup> De la Baume, *supra* n. 84.

<sup>101</sup> EC Guidelines [2017] para. 24; Payne, *supra* n. 80.

<sup>102</sup> Juha Raitio & Helena Raulus, *The UK Referendum and the Move Towards Brexit*, 24(1) Maastricht J. Eur. & Comp. L. 42, 25–42 (2017).

problem of voting within the EU institutions arises: would it be acceptable for a State the size of the UK to be 'represented' by a territory that only has 30,000 inhabitants, even when sharing such representation with other UK territories where the majority voted 'remain'? Probably not. Actually, the institutions might not even be that important for Gibraltar, as its main concern appears to be the free movement of services and persons.<sup>103</sup> Might the Norwegian model be a better alternative?

## 5.2 THE NORWEGIAN MODEL

Norway voted not to join the European Communities in 1994, but had a fallback in the form of the European Economic Area ('EEA'). Nowadays, the EEA comprises the EU and three other non-EU Member States: Norway, Liechtenstein and Iceland.<sup>104</sup> The EEA Agreement extends the application of the single market to EU Member States and these three Members of the European Free Trade Association ('EFTA').<sup>105</sup> Hence, Norway is fully integrated in the single market by means of its EEA Membership. The Norwegian model in 'European integration without EU Membership shows that it is easier to agree on policy than on politics and institutions'.<sup>106</sup> Therefore, if the UK were to adopt the Norwegian model, the concerns of Gibraltar would be safeguarded regarding its free movement of services and persons. However, it is not likely that the UK will embrace the Norwegian model, as it is the closest model of EU integration – from which it wants to depart completely according to the UK's 'red lines'.<sup>107</sup> Nevertheless, Norwegian Prime Minister Solberg has called upon London to reconsider the Norwegian model despite its political deficit.<sup>108</sup> Also, the House of Lords has voted in favour of keeping

<sup>103</sup> Sam Jones, *Brexit: Gibraltar Keeps Calm but is Ready to Play Hardball* (*The Guardian*, 5 Apr. 2018), <https://www.theguardian.com/world/2018/apr/05/brexit-gibraltar-keeps-calm-but-is-ready-to-play-hardball> (accessed 8 May 2018).

<sup>104</sup> *EFTA – European Economic Area (EEA)/Relations with the EU*, <http://www.efta.int/eea> (accessed 8 May 2018).

<sup>105</sup> Agreement on the European Economic Area [1994] OJ L1 ('EEA Agreement' Arts 1 and 2 (a), (b) and (c)).

<sup>106</sup> Nick Sitter & Ulf Sverdrup, *Surviving Brexit: Twelve Lessons from Norway* Norwegian Inst. Int'l Aff. Pol'y Brief 1, 11 (2017).

<sup>107</sup> Paul Waugh, *Hard Brexit Explained in One 'Killer Graphic' – How the EU Ridiculed Theresa May's 'Red Lines'*, *The Huffington Post* (20 Dec. 2017) [https://www.huffingtonpost.co.uk/entry/michel-bar-nier-killer-graphic-brexit-theresa-mays-red-lines-on-bespoke-model\\_uk\\_5a39497ce4b0fc99878f2058?guccounter=1&guce\\_referrer\\_us=aHR0cHM6Ly93d3cuZ29vZ2xlLm5sLw&guce\\_referrer\\_cs=FRp\\_dWL1TSaOylNtAXs07Q](https://www.huffingtonpost.co.uk/entry/michel-bar-nier-killer-graphic-brexit-theresa-mays-red-lines-on-bespoke-model_uk_5a39497ce4b0fc99878f2058?guccounter=1&guce_referrer_us=aHR0cHM6Ly93d3cuZ29vZ2xlLm5sLw&guce_referrer_cs=FRp_dWL1TSaOylNtAXs07Q) (accessed 16 Aug.). The UK's red lines are (1) no ECJ jurisdiction, (2) no free movement, (3) no substantial financial contribution, (4) regulatory autonomy, and (5) independent trade policy.

<sup>108</sup> Richard Milne, *Oslo Thaws on UK Joining EEA After Brexit* (*Financial Times*, 13 May 2018), <https://www.ft.com/content/fda3fa32-538a-11e8-b3ee-41e0209208ec> (accessed 10 Aug. 2018).

the UK in the single market, which will put some pressure on the UK to reconsider this model.<sup>109</sup>

A disadvantage of this model is that it ensures participation in the single market but leaves out the institutional aspects. For example, Norway has the economic advantages of being in the single market but is not in the room where the laws governing this market are adopted.<sup>110</sup> Another disadvantage is that if the UK sticks to its 'red lines' and does not consider the Norwegian model, Gibraltar cannot join the EFTA in its own name. Article 56 (1) of the EFTA Convention<sup>111</sup> namely reads that 'any State may accede to this Convention'. To become a party, Gibraltar would have to drop its British ties and either become a sovereign State itself or let the Spanish flag wave on the Rock, something that the Chief Minister of Gibraltar has ruled out.<sup>112</sup> In his words, 'Gibraltar will never be Spanish in whole, in part or at all'.<sup>113</sup>

## 6 CONCLUSION

This article has set out the current relationship between Gibraltar and the UK, and with the EU, and hypothetically examined the future relationship. Even if 96% of the voters in Gibraltar do not want to leave the EU, this small peninsula may have a difficult time after Brexit negotiations have concluded. Gibraltar's economy has improved as a consequence of its reorientation towards a service economy, which is mainly based on financial services and online gaming. Although its main economic relationship is with the rest of the UK, it also has a trade relationship with the EU-27. Both proposed models, the 'reverse Greenland-model' and the Norwegian model, would probably permit the continuation of these services as if the Brexit referendum had never taken place. However, as shown, both models have implications. In case a 'bespoke' arrangement for the agreement on trade relations as a whole is unacceptable for the EU, the result would be that the EU position 'destroys' the Gibraltar economic model as it now functions, and only tourism would remain as a source of income. The Spanish veto will probably go against such an outcome unless the EU provides for improved compensation in the new seven-year budget cycle. In conclusion, if the EU wants to keep the economic situation as it is, some 'bespoke' arrangement is necessary to safeguard Gibraltar's interests in the free movement of services and persons. Otherwise, in case of an EU intention to change the current economic situation, the 'bespoke' solution has to be provided for in the long-term

<sup>109</sup> Henry Mance, *Lord Rebellion Backs Keeping UK in Single Market After Brexit* (*Financial Times*, 8 May 2018), <https://www.ft.com/content/3d9495b4-5301-11e8-b3ee-41e0209208ec> (accessed 10 Aug. 2018).

<sup>110</sup> Sitter & Sverdrup, *supra* n. 106.

<sup>111</sup> European Free Trade Association Convention (adopted 4 Jan. 1960, entered into force 3 May 1960).

<sup>112</sup> Jones, *supra* n. 103.

<sup>113</sup> *Ibid.*

EU budget. At the moment of writing, the negotiations on Brexit are still taking place. Therefore, how frictionless the border between Gibraltar and the EU will become remains to be seen. Before that, there will certainly be some stumbling blocks on the way, but at least we know that the 'softer' the Brexit for Gibraltar, the less friction there will be on the border.