

# European Scrutiny Committee

House of Commons London SW1A 0AA

Tel (020) 7219 3292 Email [escom@parliament.uk](mailto:escom@parliament.uk) Website [www.parliament.uk/escom](http://www.parliament.uk/escom)

From: Sir William Cash CH MP

8 May 2024

David Rutley MP

Parliamentary Under Secretary of State (Americas, Caribbean and the Overseas Territories)

Foreign, Commonwealth & Development Office

King Charles Street

London SW1A 2AH

## **UK/EU Gibraltar negotiations**

Dear David

Thank you for appearing to give evidence on 1 May.

As we made clear during our session, we have serious concerns regarding the conduct and progress of the UK Government's negotiations with the European Union in respect of a trade and border deal for Gibraltar.

The unique cultural and constitutional status of Gibraltar within the UK family must be respected. At the same time, we are acutely aware of the importance of a deal for Gibraltar's future prosperity, especially one that provides for border fluidity. There is therefore a balance to be struck.

A deal must not, however, be pursued irrespective of the cost. Rather than being assured that you are negotiating a deal that strikes the right balance and, most importantly, respects UK sovereignty, we are concerned that you are allowing the pendulum to swing too far in the direction of the EU. I will be frank. Your evidence on the border, alignment with the Schengen *acquis*, and the airport speaks to a serious diminution of UK sovereignty.

In the interests of clarity, I have detailed our concerns below, set against your evidence in response to the questions asked by Committee Members. We ask that you consider these points carefully and do not continue along a track that is deleterious to the UK's vital national interests, the people and businesses of Gibraltar, and the Overseas Territories more generally.

## **The border and alignment with the Schengen *acquis***

### *Gibraltar/Spain border*

You were right to assert that the UK/Spain New Year's Eve agreement 'in principle' covered the Schengen border. However, the precise technical details of this aspect of the UK/EU deal remain to be negotiated. We see no good reason why the Schengen border should be moved from its current location to the airport.<sup>1</sup> The economic importance of Gibraltar to La Línea and the wider Campo is clear, as is evidenced by the flexible way in which the Schengen border has been administered by Spanish authorities since the UK's withdrawal from the EU. It escapes us as to why an arrangement cannot be reached which formalises how the border is currently operating, in the interests of the wider prosperity of the region and in cognisance of the low security risk posed by UK and Gibraltarian nationals to the Schengen Area.

### *Schengen checks, UK and Gibraltar nationals and military personnel*

If agreed as you outlined to us, allowing current Schengen checks to be administered by Frontex border guards at the airport would erode UK sovereignty to the point of meaninglessness. From your evidence, we suspect that the UK Government is prepared to concede an arrangement that will leave Gibraltar's frontier British in all but name.

We reject the assertion that a Schengen border at Gibraltar's airport would in any way be similar to the UK's juxtaposed border controls at Dover, Folkestone or St Pancras. This is for the simple fact that, as far as we are aware, the Government are not negotiating a similar arrangement with the EU for UK/Gibraltar border checks to be administered in La Línea. What you described is one way and will not be reciprocated by Spain. Furthermore, the juxtaposed arrangements relate to travel between the UK and a foreign territory, which is not the case in relation to Gibraltar, which is British sovereign territory.

The practical implications of this are seismic. You were unable to reassure us that UK nationals and Gibraltarians, wishing only to enter Gibraltar, would not have to undergo Schengen checks. You were also unable to rule out the possibility of UK and Gibraltarian nationals being refused entry to Gibraltar—a UK Overseas Territory—by Schengen (EU) border guards. More worrying still, you were unable to offer clarity on whether the same would be

---

<sup>1</sup> We recognise, as accepted by Mr David Jones on 1 May, that your proposals involve moving current border controls to the airport. Our strong belief is that a border without controls is not a border at all and your proposals for the airport will mean that it will become the site of Gibraltar's *de facto* border with the EU.

true for UK and allied NATO military personnel entering Gibraltar on deployment to UK military installations. It also appeared that you had not considered the potential implications of the EU's soon-to-be introduced 'Entry/Exit System' for a Schengen border at Gibraltar's airport, and were unable to exclude UK/Gibraltar nationals having their biometric information recorded and stored by the EU. This would be completely unacceptable.

As Gibraltar's Chief Minister, Hon Fabian Picardo KC MP, outlined to us some time ago, the idea of a 'Schengen shack' at the airport should be explored further. This could be located on the Spanish side of the airport, where Schengen checks would take place. All checks within the airport would remain Gibraltarian, with the border remaining in its current location. We intend to take this point up with Mr Picardo in evidence in the future.

It was also unclear whether time spent in Gibraltar by UK nationals would count towards the 90 in 180 days permitted for non-EU nationals in the Schengen Area (though evidence from your official, Robbie Bulloch, suggested that might well be the case). This is especially worrying for those in Gibraltar who hold certain Civil Registration cards and have faced problems crossing into Spain in recent years, for example, those with Blue ID cards.

#### *Dynamic alignment with EU laws and European Court of Justice oversight*

Your evidence on potential alignment with Schengen rules was equally worrying. The Schengen rulebook is diverse, covering laws from firearms and explosives to facilitating the pursuit of suspected criminals across national borders. You were unable to tell us which parts of the Schengen rulebook you were contemplating aligning with in respect of Gibraltar; whether your plans would include accepting EU rules on firearms, or whether the proposed arrangements would allow the 'hot pursuit' of suspected criminals by Spanish police into and around the Rock. There would be few things more illustrative of a sovereignty diminished than officers of the Guardia Civil entering Gibraltar as and when they please.

It was unclear from your evidence how alignment with EU/Schengen rules would be given effect to in Gibraltar or overseen. On the former point, urgent clarity is needed on whether Gibraltar would be expected to pass domestic implementing legislation to give effect to relevant Schengen rules. There is also the linked question of whether alignment would be 'dynamic', with EU rules applying in Gibraltar automatically updated as and when they are adopted in Brussels. On the latter point, we require clarification as to whether

Gibraltar's courts may be required to refer questions on the interpretation of EU laws to the European Court of Justice.

It was argued by Sammy Wilson that this situation would not be dissimilar to current arrangements under the Northern Ireland Protocol (NIP) (now the 'Windsor Framework'). This is correct, and it would be totally wrong if this arrangement were replicated for Gibraltar. There remain serious issues with the operation of the Windsor Framework, including the motorway of EU legislation that dynamically applies in Northern Ireland (NI) and the ability of the people of NI to stop its application. The Government should not agree to a 'Northern Ireland Protocol 2.0' for Gibraltar; its necessity has not—and cannot—be demonstrated by the EU. To our knowledge, there has not been any consultative engagement with the people and businesses who would be subject to a 'Gibraltar Protocol'. It would be unconscionable to foist a burdensome arrangement on them unsighted and without their understanding and acceptance of the likely legal and administrative complexity and significant time and resource involved in its operation.

### **The airport and UK defence and security interests**

It is deeply concerning that Gibraltar's airport is a live issue in negotiations. It is true that the airport is covered in the UK/Spain New Year's Eve agreement. However, this arrangement is not legally binding and solely of political value, with only passing reference made to the airport. We reiterate our concern that the question of the airport has been inserted into negotiations at the insistence of Spain and that the UK Government has not been sufficiently robust in removing it from the table.

Any role for Spain in the management of the airport or change to its status, no matter how seemingly small or innocuous, must be ruled out. The airport and the isthmus on which it sits are of significant strategic importance, and their future cannot be risked for an air service agreement covering a handful of commercial flights per year from Gibraltar to EU Member States.

The Rock has historically been a British military fortress and today the tri-service British Forces Gibraltar facilitate training and military operations in the region. Recent visits by HMS Queen Elizabeth, HMS Prince of Wales and HMS Audacious (a nuclear-powered hunter-killer submarine) illustrate its versatility and crucial position at the apex of the nation's and NATO's strategic defence. The Ministry of Defence and key NATO allies must be briefed on the detail of any deal, for example, Schengen border checks for military personnel, and what Spanish involvement in the direction of the

airport could mean for UK and NATO operations at RAF Gibraltar. Their concerns must be fully addressed and satisfied before you proceed to signature and ratification.

### **Trade and level playing field considerations**

On the trade aspects of the putative deal, we see no good reason why anything other than basic level playing field provisions should be agreed with the EU.

According to the European Commission's own figures, goods exports from Gibraltar to the EU in 2022 amounted to €182 million.<sup>2</sup> As a point of comparison, goods exports from the UK to the EU amounted to €216 billion.<sup>3</sup> Given the small size of Gibraltar's exports to the EU, an agreement incorporating the type and extent of environmental, social and labour standards provided for in the UK/EU Trade and Cooperation Agreement (TCA) cannot be justified. Exacting level playing field standards would serve only as a disadvantage to Gibraltar's EU exports market.

Of further concern is the governance architecture that would likely underpin the trade deal. Your evidence was not clear on this point, but it appears you are contemplating a system similar to that provided for under the TCA, with arbitration in the event of a dispute. We were unable during our session to explore the desirability of combining a free trade agreement, based on international trade law, with the border part of the deal which, we fear, will include alignment with EU law and oversight by the European Court of Justice. Expediency should not be pursued at the expense of legal certainty, and serious thought should be given to separate trade and border deals. There is precedence for this approach, and it was advocated by the European Commission during the UK's EU exit negotiations.

### **Next steps**

We advise you and your officials to stop and take stock after last week's evidence session and come back to us with clear red lines on the UK Government's Gibraltar negotiations. Serious consideration should be given to pausing negotiations so that the opinions of all interlocutors can be canvassed, including Members of this Committee and the House.

---

<sup>2</sup> European Commission, ['European Union, Trade in goods with Gibraltar'](#) (9 April 2023)

<sup>3</sup> European Commission. ['EU trade relations with the United Kingdom. Facts, figures and latest developments'](#) [accessed 8 May 2024]

It is worrying that negotiations have reach such an advanced stage without the Government having shared their direction of travel. Scrutiny improves Government decision-making. There is no deadline by which time a UK/EU agreement must be reached; it is far more important that a deal is concluded that commands the support of all of those it engages.

It is important that space is provided for open debate and public scrutiny of any deal, before it is agreed. However, Gibraltar negotiations have been shrouded in secrecy. Members in the Commons, those in Gibraltar's parliament, and people and businesses have been kept in the dark, and little information has been made public on the specifics of what is being negotiated. This is wholly unacceptable. Everyone it engages should have the opportunity to assess the deal before it is concluded; it should not be presented as a binary yes/no after the detail has been agreed. To do so would be to offer a *fait accompli*.

We await your prompt and detailed reply to this letter, but wish to say very clearly that a deal following the contours of that which you appeared to outline to us on 1 May would be bad for the UK politically, constitutionally and militarily, and should be ruled out immediately.

I am copying this letter to: the Prime Minister, Rt Hon Rishi Sunak MP, the Foreign Secretary, Rt Hon Lord Cameron; the Secretary of State for Defence, Rt Hon Grant Shapps MP; and the Chief Minister of Gibraltar, Hon Fabian Picardo KC MP.

With best wishes

**CHAIR**