



The so called “Brexit” will have substantial political and legal consequences that need to be assessed. There has been a lot of discussion on what the future UK-EU trade relationship might look like.

This article focuses on the possible impact of Brexit on the lotteries and gambling industry, and in particular the special position of Gibraltar. **Gibraltar, as a self-governing British overseas territory, is not an individual member of the European Union and will have to follow the UK in its decision to leave the Union—even though Gibraltar voted on June 23 by 96% to remain in the Union. Gibraltar became a European hub of online gambling when the 2005 Gambling Act came into force.** Today, online gaming is a dominant sector in Gibraltar’s economy—an economy built around financial services and the port that needs the European Union and access to its internal market.

In the Portuguese Santa Casa case of 2009, the

Brexit further, we will be discussing what this Brexit means in terms of procedure.

The UK referendum set Brexit in motion. Next step is the application of Article 50 of the Lisbon Treaty (TEU), the action in which the EU Commission is formally informed of the intention of the member state to leave the EU. Theresa May has indicated her intention for Article 50 to be executed before April of 2017. This Article sets out the procedure to be followed by an EU country which wants to leave the Union voluntary. Before 2007 there was no provision in the Treaty that provided this possibility for the Member States. The drafters of the Treaty did not think it possible a Member State would want to leave the Union.

Article 50 TEU now states that “any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.” The procedure requires from the Member State that it shall notify its intention to leave the Union to the European Council. After this notification, the Union shall negotiate and conclude an agreement with the leaving Member State which establishes legal grounds for a future relationship with the EU. The agreement needs a qualified majority of Member States and consent of the European Parliament to be concluded. Article 50, paragraph 3 indicates a time period of two years to conclude those new arrangements which runs from the date of the notification. The procedure has never been used since its introduction in 2009.

Procedurally, after the referendum on Brexit, the real application of Article 50 has not yet been triggered. Although the outcome of the referendum is not legally binding for the UK government, it is most likely that the UK will give effect to the vote in favor of a “leave.” But, given the complexity of the issues at stake, it could still take years before the real decision to leave the European Union becomes effective.

European leaders are already putting pressure on the UK government to make a decision as quickly as possible. In her first responses, UK’s Prime Minister Theresa May asked the European leaders to have time to prepare the negotiations, while always emphasizing her commitment to take Britain out of the EU. On 2 October 2016, Theresa May made the plan for Brexit a bit clearer when she announced that Article 50 would be triggered by the end of March 2017. She also made reference to a forthcoming ‘Great Repeal Bill,’ based on the idea that this law will, on the day following secession, retain all relevant EU legislation as sovereign UK law unchanged in the first instance.

# The Impact of BREXIT on Gambling: The Gibraltar Gambling Case

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European Court explicitly denied application of the mutual recognition principle for gaming services for companies established in Gibraltar trying to enter the Portuguese market. This means that an operator gaming license in one EU Member State (e.g. Gibraltar), does not automatically mean the operator is permitted to provide services under the same licence in another EU Member State. Of course, an EU Member state can only restrict access to its market to the extent that its gambling policy complies with the European Courts’ case law which requires policy to be aimed at protecting consumers by channeling the gaming desire.

If the UK leaves the European Union, UK based gambling companies will no longer be able to question restrictive national measures under European law. It is even not guaranteed that UK based operators, including Gibraltar, will have any market access to EU states.

Before elaborating on possible consequences of



Even if from the UK's side the plans are not clear yet, the European leaders seem to have found an agreement on how they want to deal with Brexit. They propose a three-step model of (i) withdrawal, (ii) transition and then a (iii) "new relationship." The European leaders also hold on to their position that the UK will never be able to "cherry-pick" the good aspects of EU membership.

On behalf of the EU, the formal negotiating will be led by Europe's chief negotiator Michel Barnier. A draft proposal for a detailed set of "Guidelines" that were published at the beginning of December 2016 by the EU seem to have sidelined the European Parliament in these negotiations. They significantly reduced the role of the Parliament to an advisory role with only the possibility to "exchange views" before each meeting.

The United Kingdom consists of four countries: England, Scotland, Wales and Northern Ireland. The Isle of Man and the Bailiwicks of Jersey and Guernsey are the three Crown dependencies that are not part of the United Kingdom. These are independently administered jurisdictions. Internationally, the Crown dependencies are recognized as "territories for which the United Kingdom is responsible" but they remain self-governing possessions of the Crown. The three Crown dependencies are consequently also not a part of the European Union but fall within the EU's customs union.

Gibraltar is one of the fourteen overseas territories of the United Kingdom and falls under its jurisdiction and sovereignty. Inhabitants of Gibraltar fall under full British citizenship. There is self-government through an elected parliament—the executive authority in Gibraltar is vested in the Governor, who is the Queen's representative. Some powers remain under responsibility of the UK's Government, such as defence and foreign relations.

When it comes to lotteries & gambling jurisdictions in the UK, the UK white-listed six regulatory jurisdictions on its territory for online gambling: the UK itself through the UK Gambling Commission (UKGC), the Isle of Man, Alderney, Jersey, Guernsey and Gibraltar. These jurisdictions have their own sets of regulations. Both Gibraltar and the Isle of Man form "hubs" for online gambling due to a more favorable tax regime.

The economy of Gibraltar is built around tourism, online gambling, financial services and shipping. For this reason, Gibraltar needs access to the EU's internal market. They voted on June 23 by 96% to remain in the European Union. Gibraltar's Chief Minister Fabian Picardo, confirmed that Brexit is an existential threat to Gibraltar's service-based economy.

Only one precedent of a country leaving the Union can be looked at: Greenland.

As one of Denmark's overseas territories, Greenland left the EU in 1985 after two years of negotiation. This decision followed a referendum held in 1982 where 52% voted in favor to leave the Union. Article 50 TEU, nor any other statement of a formal procedure for leaving the Union, existed at the time. Greenland was part of an EU Member State and left the European Union, while Denmark remained in the European Union.

Gibraltar, as overseas territory of the UK could use the example of Greenland in a 'reversed way.'

However, the case of Greenland is still different from Gibraltar's situation today. At the time Denmark joined the EEC in 1973, Greenland did as well. One year before, Greenland had shown its opposition towards this accession in a referendum where the vote was 70% against joining the EEC. They had to follow the decision of the Danish population, who voted by 63% in favor of joining the EEC. Following their expressed opposition, the debate continued even after accession. In 1979 Greenland received "Home Rule," whereby the influence of the Danish state in Greenland decreased. A Greenlandic Parliament was established and Greenland gained sovereignty in areas such as education, health, fisheries and the environment. At the time of leaving the EU in 1985, Greenland had gained more autonomy in its relationship with Denmark than Gibraltar has with the UK today.

In 1999, the *Matthews v United Kingdom* case of the European Court on Human Rights clarified the position of Gibraltar towards the UK. Gibraltar is a dependent territory of the UK. It forms part of Her Majesty the Queen's Dominions, but is not a part of the UK. Executive authority in Gibraltar is vested in the Governor, who is the Queen's representative. The Chief Minister and the Government of Gibraltar are responsible to the Gibraltar electorate via general elections to the House of Assembly which is the domestic legislature in Gibraltar. The EU Treaties are certain extent, applicable to Gibraltar by virtue of a provision in the Treaty which provides that they apply to the European territories for whose external relations a Member State is responsible.

In *Matthews*, the issue raised whether the UK could be held responsible for the lack of elections to the European Parliament in Gibraltar. The Court recalled that it is uncontested that legislation emanating from the legislative process of the European Union affects the population of Gibraltar in the same way as legislation which enters the domestic legal order exclusively via the House of Assembly in the UK. The UK government tried to defend that the absence of elections in Gibraltar in 1994 did not give rise to a violation but instead fell within the State's margin of appreciation. The UK here tried to escape its obligation towards Gibraltar by saying they have a margin of appreciation. Even if it is a dependent territory of the UK, the UK saw Gibraltar as a "separate part" of their country.

Also in *Spain v United Kingdom* of 2004, the UK expressed its view on Gibraltar. This time the European Court of Justice of the EU accepted that the UK differentiated the organization of the elections for the European Parliament in Gibraltar from the UK. The UK undertook a Declaration in 2002 to 'ensure that the necessary changes are made to enable the Gibraltar electorate to vote in elections to the European Parliament as part of and on the same terms as the electorate of an existing UK constituency.' The Court followed the UK government in its view that 'on the same terms' cannot be understood as meaning

that the UK legislation would apply without adaptation to the Gibraltar electorate by its assimilation to the electorate of the UK constituency with which it would be combined.

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Two other pending cases in which the Court did not rule yet, could have an influence in this negotiation process of Gibraltar.

The first case is Gibraltar Betting and Gaming Association Ltd. And the Queen (C-591/15). The hearing will take place on October 4 of 2016. The issue in this case concerns a new tax regime introduced in the United Kingdom—due from December 1 of 2014. Some taxes are no longer due according to the place of supply but according to the place of consumption. Every participation to remote gambling in the UK will be taxed, irrespective of the place of establishment of the gaming provider. The applicant in this case is the Gibraltar Betting and Gaming Association, an association whose members are mainly providers of games of chance that are established in Gibraltar. They offer their services to customers in the UK.

The question referred to the CJEU asks whether Gibraltar and the UK must be considered to be part of one Member State. Consequently, European law would not apply and the issue is a purely internal situation. Other questions are whether Gibraltar has the constitutional status of an autonomous region as regards the UK, whether it is a third country/territory or whether there is another qualification for their relationship possible.

During the written procedure, the applicant argued that Gibraltar has the constitutional status of an autonomous region regards the UK and that Article 56 TFEU applies.

The defendants, Commissioners for Her Majesty's Revenue and Customs and Her Majesty's Treasury, supported by the EC, Belgium and Portugal, argue that Gibraltar is not a Member State on itself. Gibraltar must be considered as a part of one and the same Member State, the United Kingdom. Therefore this tax issue is a purely internal situation on which the free

movement provisions do not apply. In its opinion, delivered on 19/01/2017, the Advocate General of the CJEU stated also that Gibraltar is part of one and the same Member State, the United Kingdom.

The outcome of this case will be of particular concern for Gibraltar's situation. If the Court rules that Gibraltar is part of one and the same Member State for which European law does not apply, Gibraltar will have more difficulties to negotiate a "special deal" with Brussels in order to stay in the European Union. On the contrary, if the Court would rule that Gibraltar must be considered as an autonomous region, they could use this judgment to find a way to split off from the UK.

The second case, *Fisher v Commissioners for Her Majesty's Revenue and Customs* (C-192/16) is a more recent case where there has only been a request for a preliminary ruling. The dispute also concerns whether free movement between the UK and Gibraltar is restricted by a national measure. The applicants resided in the UK but delegated the activities of their UK based gambling company to a company based in Gibraltar. They UK ordered them to pay income taxation, saying they wanted to avoid taxation in the UK by delegating these activities. This income tax should not have been paid if the transfer had not intended tax avoidance. The applicants contend this measure by arguing it violates European law.

Since Gibraltar really needs the EU, they will probably try to negotiate a kind of "special deal" with Brussels. Their economy depends too much on the EU's internal market and they could use the case law discussed above to try to split off from the UK if the UK decides to leave the Union. But arguing this will not be so easy, since they are still dependent territory from the UK. This is where their position differs from Greenland's position.

A Brexit will most likely also have an impact on the way the UK will or will not continue to participate in the follow up of the European Commission's communication "Towards a comprehensive European framework for online gambling" from 2012. One of the issues will be whether the agreement of November 2015 between the gambling regulatory authorities of the EEA Member States which tries to enhance administrative cooperation will continue to apply.

It will be important to follow the ongoing and future negotiations between the UK and the European Union with regards market access for the lotteries & gambling industry.

A future-oriented business approach that focuses on the broader benefits to society will serve Lottery well with the broadest set of stakeholders. This is so important when it comes to preserving the public confidence and support for Lottery (along with improving the strategic legal position) as the respected and trusted brand for the 21st century. ■