

Explanatory Framework for Adequacy Discussions

Section I1: Gibraltar's Legislative Framework and Alignment with the UK

Overview

This section briefly sets out the key pieces of Gibraltar's legislative framework, and their relationship to one another.

Section I1: Gibraltar Legislative Framework and Alignment with UK

Introduction

On 25 May 2018, the **EU's General Data Protection Regulation** (EU GDPR) began to apply in the UK. The EU GDPR applied to "general" data processing that is within the scope of EU law.

Although it was a directly applicable EU regulation, domestic legislation was required to supplement the provisions of the EU GDPR, e.g. clarifying certain terms for domestic purposes, exercising a number of restrictions permitted by the EU GDPR, as well as implementing the separate Law Enforcement Directive (LED).

This was achieved via amendments to the **Data Protection Act 2004** (referred to in this document as the Gibraltar DPA 2004), which is similar to the UK Data Protection Act 2018 (referred to here as the UK DPA 2018).

The **Gibraltar Regulatory Authority Act 2000 (GRA Act 2000)** is another key piece of data protection legislation.

As part of preparations for EU exit, Her Majesty's Government of Gibraltar (HMGoG) enacted the following pieces of legislation:

- The **European Union (Withdrawal) Act 2019 ("EUWA")** incorporates directly applicable EU legislation into Gibraltar law, by converting EU law into Gibraltar domestic legislation. This includes the EU GDPR. Under the EUWA, Ministers have powers to create subsidiary legislation, including temporary powers to correct laws that would prevent or remedy any deficiencies in retained EU law that result from the Gibraltar's withdrawal from the EU.
- The **Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 (known as "the Gibraltar DPPEC Regulations")** exercise this power. They amend the EU GDPR, as incorporated into domestic law through EUWA; the Gibraltar DPA 2004; and other data protection legislation, so that Gibraltar's data protection framework continues to be operable in a domestic context. Key changes are:
 - The renaming of the EU GDPR as the "**Gibraltar GDPR**"¹;
 - Replacement of EU terminology, such as "Member State", "Union law", and "supervisory authority", with Gibraltar domestic equivalents;
 - Repatriation of certain powers from the EU bodies to the Minister or the Gibraltar Regulatory Authority (GRA); and
 - Recognition by Gibraltar of adequacy regulations made by the UK.

¹ The Gibraltar GDPR also covers certain general processing activities that were outside the scope of EU law

Section I1: Gibraltar Legislative Framework and Alignment with UK

Gibraltar's **main post-exit data protection legislation** therefore consists of:

1. the Gibraltar GDPR, as incorporated under EUWA and amended by the Gibraltar DPPEC Regulations;
2. the Gibraltar DPA 2004;
3. the GRA Act 2000.

The structure of the Gibraltar GDPR and the Gibraltar DPA 2004 are outlined below. The GRA Act 2000 is explained in [Section I3](#).

The Gibraltar GDPR

The Gibraltar GDPR follows the structure of the EU GDPR but with Chapter VII (Cooperation and Consistency) and Chapter X (Delegated and Implementing Acts) removed. Some chapters within the Gibraltar GDPR are supplemented by the Gibraltar DPA 2004. The chapters are as follows:

Chapter I - General provisions

The first chapter of the Gibraltar GDPR covers general provisions. This includes provisions such as subject-matter and objectives, material scope and definitions of the main concepts and terms.

Chapter II - Principles

The second chapter of the Gibraltar GDPR outlines the key principles, legal bases, and conditions for consent for personal data processing. In addition, the chapter focuses on sensitive personal data and the rules surrounding their processing.

Chapter III - Rights of the data subject

Chapter III covers the various 'data subject rights' that the Gibraltar GDPR affords individuals whose data is processed. These include such rights as the right to information, right of access to personal data, the right to restrict processing, the right to object, the right to erasure and other rights.

Chapter IV - Controller and processor

Chapter IV focuses on the roles of the controller and the processor, including their responsibilities and obligations such as record keeping, ensuring the security of processing, the designation of a data protection officer, and the need for codes of conduct.

Section I1: Gibraltar Legislative Framework and Alignment with UK

Chapter V - Transfers of personal data to third countries or international organisations

Chapter V governs the transfer of personal data to third countries or international organisations. It sets out Gibraltar's international transfer mechanisms, such as allowing for the transfer of personal data to the UK and to third countries or international organisations which are the subject of adequacy regulations made by the UK, standard data protection clauses, and specific circumstances. It also provides a basis for cooperation between the Commissioner and data protection authorities in other jurisdictions.

Chapter VI - The Commissioner

Chapter VI sets out the responsibility of the Commissioner for monitoring the application of the Gibraltar GDPR, as well as their duties and powers. These include, among others, monitoring and enforcement, informing controllers and processor of their obligations, raising public awareness, and conducting investigations on behalf of data subjects.

Chapter VIII - Remedies, liability and penalties

Chapter VIII sets out the various rights, procedures and conditions for remedies, liability, and penalties. Rights include the right to lodge a complaint with the Commissioner, the right to an effective judicial remedy against the Commissioner, the right to an effective judicial remedy against a controller or processor, and the right to compensation and liability. Additionally, it stipulates fines and the conditions under which they might be levied.

Chapter IX - Provisions relating to specific processing situations

Chapter IX focuses on the specific types of processing that require special rules, safeguards and/or exemptions. These include, but are not limited to, processing and the freedom of expression such as for journalistic, academic, artistic or literary purposes, public access to official documents, and processing for national security and defence.

Chapter XI- Final provisions

Chapter XI sets out final provisions and clarifies how the Gibraltar GDPR interacts with other pieces of legislation, for example the Communications Act 2006, which concerns the processing of personal data and the protection of privacy in the electronic communications sector.

Section D (Adequacy Referential) provides detail on the key elements of the Gibraltar GDPR (as supplemented by the Gibraltar DPA 2004 below) in comparison with the benchmarks set in the European Data Protection Board's Adequacy Referential.

The Gibraltar Data Protection Act 2004

The Gibraltar DPA 2004 is split into six parts. Some sections within the Gibraltar DPA 2004 are supplemented by provision in the Schedules.

Section I1: Gibraltar Legislative Framework and Alignment with UK

Part I - General

This Part sets out the definitions of terms used in the Gibraltar DPA 2004. It provides an overview of the Gibraltar DPA 2004, notes that any notification that may be done in writing includes by electronic means, and allows appropriate individuals to act on behalf of data subjects who are children or who otherwise lack capacity.

Part II - General Processing

This Part covers the general processing of personal data under the Gibraltar GDPR. It sets out the lawfulness of processing under the Gibraltar GDPR and makes provision for specific processing situations.

Part III - Law Enforcement Processing

Part III provides a bespoke framework for law enforcement processing, tailored to the needs of the police, prosecutors and others (referred to in the Gibraltar DPA 2004 as “competent authorities”).

Part V - The Commissioner

Part V sets out the role of the GRA as Gibraltar’s independent supervisory authority. It details the GRA’s functions and duties, including powers as per Article 58(1) and (2) of the Gibraltar GDPR, which is the equivalent of the EU GDPR version. It also provides information about the international responsibilities of the GRA.

Part VI - Enforcement

Part VI sets out the enforcement regime for breaches of the Gibraltar DPA 2004 and the Gibraltar GDPR. The Commissioner has the power to issue assessment notices, enforcement notices, information notices and penalty notices.

Part VII – Supplementary and Final Provision

Part VII sets out additional provisions, for example, giving the Minister the power to make additional regulations for compliance with data protection legislation, including the Gibraltar GDPR.

Schedules 1 to 18

The Schedules support specific sections in the Act, e.g. Schedule 1 makes provisions about processing of sensitive data under section 12 of the Gibraltar DPA 2004. These are:

- Schedule 1: This Schedule specifies the conditions and associated safeguards for processing sensitive data;
- Schedules 2 and 3: These Schedules provide for restrictions on data subject rights and other provisions;

Section I1: Gibraltar Legislative Framework and Alignment with UK

- Schedule 4: Repealed;
- Schedule 5: This Schedule sets out the processes for reviews and appeals of decisions taken concerning applications for accreditation as a certification authority;
- Schedule 6: Repealed;
- Schedule 7: This Schedule sets out a list of competent authorities for the purposes of Part III of the Gibraltar DPA 2004 (Law Enforcement Processing);
- Schedule 8: This Schedule sets out the conditions for sensitive processing under Part III of the Gibraltar DPA 2004, including processing for judicial and statutory purposes, to protect individuals' vital interests, safeguard children and individuals at risk, personal data in the public domain, legal claims and judicial acts, prevention of fraud, and archiving;
- Schedules 9 to 11: Repealed;
- Schedule 12: This Schedule makes provisions about the Commissioner and extends the powers delegated to the GRA under the GRA Act;
- Schedule 13: This Schedule sets out further functions of the Commissioner;
- Schedule 14: This Schedule sets out how the Commissioner will cooperate with foreign designated authorities for the purposes of compliance with the Council of Europe's Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data;
- Schedule 15: This Schedule makes provision in respect of the Commissioner's powers of entry and inspection;
- Schedule 16: This Schedule makes further provisions in relation to administrative penalties;
- Schedule 17: This Schedule explains the meaning of "relevant records" for the purposes of the offence in Section 186 of the Gibraltar DPA 2004;
- Schedule 18: This Schedule provides for consequential amendments to the Gibraltar GDPR and Gibraltar DPA 2004 in regards to Gibraltar's exit from the European Union.

Section I1: Gibraltar Legislative Framework and Alignment with UK

The Gibraltar DPA 2004 is similar to the UK DPA 2018 with minor differences based on domestic needs. **Annex A** sets out the differences between the UK DPA 2018 and Gibraltar DPA 2004.

ANNEX A - ALIGNMENT WITH THE UK

Differences Between the Gibraltar DPA 2004 and the UK DPA 2018

The Gibraltar DPA 2004 and UK DPA 2018 are similar, with minor differences based on domestic considerations. The following is an analysis of the key differences between the Gibraltar DPA 2004 and the UK DPA 2018:

Further provisions around guidance, reviews, and codes of conduct

There is no requirement in the EU GDPR to produce guidance, reviews, or codes of conduct in relation to specific sectors. Both the UK and Gibraltar have gone further than the EU GDPR by enacting provisions on these matters in slightly different ways:

- **Code of practice for journalism:** Section 124 of the UK DPA 2018 requires the ICO to prepare, publish, and review a code of practice containing guidance as to the processing of personal data for the purposes of journalism. Section 132A of the Gibraltar DPA 2004 gives the GRA discretion to produce a data protection and journalism code of practice;
- **Media sector guidance and review:** Sections 177 to 179 of the UK DPA 2018 require the ICO to:
 - publish guidance informing individuals of the steps they can take if they believe the media is not complying with data protection legislation (Section 177);
 - periodically review and report on the compliance of the media sector generally with data protection legislation (Section 178 with detail on the review period in Schedule 17);
 - review the effectiveness of the media's dispute resolution mechanisms in relation to breaches or alleged breaches of data protection law (Section 179).

The Gibraltar DPA 2004 gives the GRA the power to produce guidance for individuals about challenging the media sector (at Section 181A) but does not contain the other requirements outlined above;

- **Complaints on behalf of data subjects:** Sections 189 and 190 of the UK DPA 2018 require the UK Secretary of State to review the operation of provisions relating to non-profit organisations exercising remedies on behalf of data subjects. These sections are almost fully replicated by Section 191 of the Gibraltar DPA 2004, save that the Gibraltarian legislation gives the Minister a discretion, rather than a duty to review;

Section I1: Gibraltar Legislative Framework and Alignment with UK

- **Guidance for Government Processing:** Sections 191 to 194 of the UK DPA 2018 make provision for the UK Secretary of State to issue statutory guidance (a “Framework for Data Processing by Government”) about the processing of personal data by government. Sections 191A to 191C of the Gibraltar DPA 2004 mirrors the UK DPA 2018, but has different procedural requirements.

Differences in relation to scope of the legislation

The UK DPA 2018 contains provisions regulating manual, unstructured processing, while the Gibraltar DPA 2004 does not:

- **Sections 21, 24 and 25 of the UK DPA 2018** make provisions for the manual, unstructured processing of personal data. Similarly to the EU GDPR, the Gibraltar DPA 2004 only applies to the manual processing of personal data only where it is in a filing system;
- **Part 4 of the UK DPA 2018** regulates the processing of personal data by, or on behalf of, UK intelligence agencies with further detail in Schedules 9-11 to the UK DPA 2018. This is not replicated in the Gibraltar DPA, as Gibraltar has no intelligence agencies;
- **Disclosure to the Commissioner:** Section 131 of the UK DPA 2018 provides that all disclosures to the ICO of information necessary for the discharge of its functions are lawful, save where such disclosures are prohibited under the UK IPA 2016. Section 139 of the Gibraltar DPA 2004 has almost the same effect: it provides that all disclosures to the GRA of information necessary or expedient for the discharge of its functions are lawful, save where legislation restricts the disclosure of information kept for the purposes of safeguarding the security of Gibraltar.

Differences in arrangements for the regulator

There are a number of small differences between the set up of the UK’s regulator, the ICO and Gibraltar’s data protection regulator, the GRA. These differences do not affect Gibraltar’s level of protection for personal data. These are:

- **Assessment notices:** Section 147(6) of the UK DPA 2018 prevents the ICO from serving an assessment notice on bodies dealing with national security as specified under the UK’s Freedom of Information Act 2000 or the Office for Standards in Education, Children’s Services and Skills when acting in certain capacities. No equivalent exception is contained in the Gibraltar DPA 2004;
- **Regulatory set-up:** Schedule 12 to the UK DPA 2018 sets out further provisions for the set up of the ICO, such as the appointment procedure for the Commissioner;

Section I1: Gibraltar Legislative Framework and Alignment with UK

pay; staffing; and accounting matters. While Schedule 12 to the Gibraltar DPA 2004 contains provisions relating to the GRA's functions, the GRA Act 2000 sets out matters relating to eligibility, appointment, pay and so forth.

Differences in relation to data subject rights

There are some restrictions on data subject rights in Schedules 2-4 to the UK DPA 2018 that are not replicated, or are only partially replicated, in the Gibraltar DPA 2004 as set out below:

- **Paragraph 4** of Schedule 2 of the UK DPA 2018 is not replicated in the Gibraltar DPA 2004;
- **Paragraphs 9 (functions of the Bank of England), 11 (regulatory functions of certain other persons), and 15 (Crown honours, dignities, and appointments)** of Schedule 2 of the UK DPA 2018 (Exemptions etc from the GDPR) are not replicated in the Gibraltar DPA 2004 because Gibraltar does not have equivalents of these bodies or processes;
- Schedule 3 of the Gibraltar 2004 (Exemptions etc from the GDPR: health, social work, education, and child abuse data) which is equivalent to **Schedule 3** of the UK DPA 2018, does not contain provisions about or references to Northern Ireland and Scotland;
- Similarly, **Schedule 4** of the UK DPA 2018 (Exemptions etc from the GDPR: disclosure prohibited or restricted by an enactment) does not have an equivalent in the Gibraltar DPA 2004. This is because Gibraltar has no equivalent of these enactments.

There is also one instance where the Gibraltar DPA 2004 creates a restriction that is not in the UK DPA 2018: paragraph 21 of Schedule 2 restricts data subject rights in relation to personal data processed in connection with Gibraltar trusts. [Annex B](#) sets this out in more detail.

Differences in interpretative aids

There are some additional interpretative provisions in the UK DPA 2018 that are not replicated in the Gibraltar DPA 2004. These do not affect the level of data protection in Gibraltar. These differences are:

- **Sections 204 and 205 of the UK DPA 2018**: These sections of the UK DPA 2018 provide further definitions to aid interpretation. These are not replicated in the Gibraltar DPA 2004;

Section I1: Gibraltar Legislative Framework and Alignment with UK

- **Section 206 of the UK DPA 2018**: This provides an index of defined expressions. This is not replicated in the Gibraltar DPA 2004.

Differences in procedural arrangements and terminology

There are also some differences in the procedures and terminology used in both Acts that do not affect the level of protection provided by Gibraltar:

- **Competent authorities**: Schedule 7, to both the UK DPA 2018 and the Gibraltar DPA 2004, sets out a list of competent authorities for the purposes of Part III (Law Enforcement Processing). The competent authorities listed differ between the Gibraltar and UK Acts;
- **Recordable offences**: Section 199 of the UK DPA 2018 relates to recordable offences. Gibraltar does not have an equivalent of the UK's National Police Records (Recordable Offences) Regulations 2000, and so there is no reference to such Regulations;
- **Minor and consequential amendments and transitional provisions**: The Gibraltar DPA 2004 does not have equivalents of Schedules 19 (Minor and consequential amendments) and 20 (Transitional provisions etc) to the UK DPA 2018 as these concern UK domestic legislative matters only. Gibraltar made its own consequential amendments through amending regulations.

Other key miscellaneous differences

There are also a number of sections in the Gibraltar DPA 2004 that differ partially from their equivalents in UK legislation or have no equivalent in the latter due to differing domestic considerations. They in no way affect the overall level of protection of personal data in Gibraltar. These sections are as follows:

- **Section 4 of the Gibraltar DPA 2004**: This states that any communication or notification which may be done in writing may also be done by electronic means;
- **Section 5 of the Gibraltar DPA 2004**: This section is entitled "Acting for another". It allows parents or guardians to enforce the data subject rights of children or individuals who lack mental capacity. This section has been included as an added safeguard to ensure that data subject rights of vulnerable individuals are protected;
- **Section 10 of the Gibraltar DPA 2004**: This sets out a non-exhaustive list of what processing necessary for the performance of a task in the public interest, or in the exercise of the controller's official authority, includes. It follows Section 8 of the UK DPA 2018, except the latter also includes processing necessary for an activity that supports or promotes democratic engagement.

Section I1: Gibraltar Legislative Framework and Alignment with UK

- **Section 14 of the Gibraltar DPA 2004**: This section is entitled “Right to protection of personal data”. It confirms that data subjects have the right to the protection of their personal data in accordance with the GDPR;

- **Section 18 of the Gibraltar DPA 2004**: This section sets out in detail the obligations of data controllers and rights of data subjects in relation to subject access requests, in particular:
 - Requiring data subjects to provide such information as the controller may reasonably require to confirm their identity and locate the relevant information;
 - Permitting controllers to refuse to disclose information about a data subject to a third party unless the data subject has consented to the disclosure;
 - Allowing data controllers to refuse to respond to a data subject access request in cases where repeated requests have been made, which have already been dealt with, and a reasonable interval has not elapsed between the data subjects’ previous and current request. In determining whether a reasonable interval of time has elapsed, the data controller must have regard for a number of considerations, namely the nature of the data, the purpose for which the data are processed, and the frequency with which the data are altered;
 - Creating an offence of forcing a job applicant to make a subject access request as a potential route to finding out more information about them;
 - Providing reassurance about how the provision works in a practical context and safeguards such as the offence provision.

- **Section 138 of the Gibraltar DPA 2004**: This section requires the GRA to establish and maintain a public register of data protection officers. This goes beyond the requirements of the EU GDPR and is aimed at ensuring transparency and facilitating the exercise of data subject rights.

ANNEX B - TRUST RESTRICTION

Part 4 of Schedule 2 of the Gibraltar DPA 2004: Paragraph 21: Trust Restriction

This provision is designed to balance the importance of privacy to Gibraltar’s trusts industry against data protection rights. It restricts a limited range of data subject rights and transparency requirements to ensure that data protection law is compatible with the continued operation of the trusts industry in Gibraltar.

The importance of privacy to Gibraltar’s trusts industry can be illustrated in the context of family trusts, where the personal data of a discretionary beneficiary might be processed in circumstances where the person setting up the trust (the “settlor”) does not want the beneficiary to become aware that they are being considered for potential benefits which may not ultimately be awarded. A requirement to send a privacy notice to the discretionary beneficiary would alert them to the existence of the trust, and may inhibit the effective operation of the trust.

Similarly, pursuant to a data subject access request, trustees could be required to disclose information to a beneficiary provided by the settlor to assist them in the proper administration of the trust, or information about the value of the trust, which could prove detrimental to family relationships and prevent the trustees operating the trust effectively.

The exemption disapplies the following provisions of the Gibraltar GDPR:

Article Number	Description
13	Information to be provided where personal data are collected from the data subject.
14	Information to be provided where personal data have not been obtained from the data subject.
15	Right of access by the data subject.
5	Principles relating to the processing of personal data (but only in so far as they correspond to Articles 13, 14 and 15 in this context)

This provision is subject to limitations and safeguards, ensuring it is necessary and proportionate. The scope is tightly limited to a narrow range of situations. As a consequence, these provisions of the Gibraltar GDPR are disapplied in respect of personal

Section I1: Gibraltar Legislative Framework and Alignment with UK

data processed in connection with a Gibraltar trust only to the extent that the application of the provisions would be likely to result in the disclosure of a document that:

- (a) discloses the existence of a trust, in circumstances where one or more of the beneficiaries are not aware of the existence of the trust;
- (b) discloses a trustee's deliberations as to the manner in which the trustee has exercised a power or discretion or performed a duty conferred or imposed upon the trustee;
- (c) discloses the reason for any particular exercise of such power or discretion, or performance of duty referred to in subparagraph (b), or the material upon which such reason shall or might have been based;
- (d) relates to the exercise, or proposed exercise, of such power or discretion, or the performance or proposed performance of such duty, referred to in subparagraph (b);
or
- (e) relates to or forms part of the accounts of the trust, and a trustee is satisfied that it is in the interests of one or more of the beneficiaries, or the beneficiaries as a whole, to restrict the listed Gibraltar GDPR provisions.