

Explanatory Framework for Adequacy Discussions

Section I2: Gibraltar Adequacy Referential

Overview

This section demonstrates how Gibraltar's data protection framework meets the adequacy requirements set out in the EU GDPR and the adequacy referential adopted by the European Data Protection Board.

The Board's adequacy referential provides guidance to the European Commission for the assessment of the level of data protection in third countries by establishing the core data protection principles that must be present in order to ensure essential equivalence with the EU framework.

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Introduction

The European Data Protection Board's adequacy referential covers the following elements, important for an adequacy assessment, divided into four sections:

1. **The existence of basic content principles.** These refer to basic concepts or definitions; grounds for lawful and fair processing; a range of principles; transparency of processing; data subject rights of access, rectification, erasure, and the right to object to processing; and restrictions on onward transfers.
2. **The existence of additional content principles for specific processing.** These refer to specific safeguards for special categories of data ('sensitive data'); the ability to object freely to processing that is for direct marketing purposes; provisions around automated decision making and profiling.
3. **The existence of procedural and enforcement mechanisms.** These include a competent, independent supervisory authority; a system that secures a good level of compliance, e.g. through the existence of effective dissuasive sanctions; measures for accountability of data controllers and processors; the ability for data subjects to exercise their rights through appropriate redress mechanisms.
4. **Essential guarantees on national security and law enforcement access.** The guarantees are that the processing is based on clear, precise, and accessible rules; that necessity and proportionality are demonstrated; that there is independent oversight and effective remedies for data subjects whose rights have been infringed.

All these elements are reflected in Gibraltar's law.

In almost all respects relevant to the criteria for adequacy, Gibraltar's data protection legislation (the Gibraltar GDPR, the Gibraltar DPA 2004, and the amending no-deal SI 'The Data Protection, Privacy and Electronic Communications (Amendments etc.) EU Exit Regulations 2019') is identical to the EU GDPR and the United Kingdom's data protection framework.

To reduce duplication, **this section is a concise version of Section D**. For each of the relevant adequacy criteria, this section confirms where the Gibraltarian framework is identical to the EU GDPR and provides references. Areas where Gibraltarian legislation differs from the United Kingdom's Data Protection Act 2018 are set out in Section I1: Gibraltar's Legislative Framework and Annex on Alignment with the UK.

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PART I: BASIC CONTENT PRINCIPLES

Concepts

The EDPB referential outlines important data protection concepts that need to reflect and be consistent with the concepts enshrined in the European Data Protection Law.

All important data protection concepts and principles set out in the Gibraltar GDPR are **identical** to those in the EU GDPR. These are set out in the Gibraltar GDPR, and also in the DPA 2004. These include:

- Definition of personal data. This is set out in section 2(1) of the DPA 2004 and Article 4(1) of the Gibraltar GDPR.
- Definition of processing of personal data. This is set out in section 2(1) of the DPA 2004 and Article 4(2) of the Gibraltar GDPR.
- Definition of data controller. This is set out in section 2(1) of the DPA 2004 and Article 4(7) of the Gibraltar GDPR, with reference to further stipulations in section 8 of the DPA 2004.
- Definition of data processor. This is set out in section 2(1) of the DPA 2004 and Article 4(8) of the Gibraltar GDPR.
- Definition of recipient. This is set out in Article 4(9) of the Gibraltar GDPR, except that a reference to “*Union or Member State law*” is replaced with “*Gibraltar law*.”
- Concept of sensitive data and general prohibition of its processing. This is set out in sections 12 and 13 of the DPA 2004 and Article 9(1) of the Gibraltar GDPR.

Grounds for lawful and fair processing for legitimate purposes

The Gibraltar GDPR sets out the principles of lawful and fair processing for legitimate purposes:

- Article 5 of the Gibraltar GDPR is **identical** to Article 5 of the EU GDPR, setting out the principle that personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject.
- Article 6(1) of the Gibraltar GDPR sets out **identical grounds** for lawful and fair processing as Article 6(1) of the EU GDPR. These include, for example, the consent of the data subject, contractual necessity, or that the processing is necessary to comply with a legal obligation, necessary to protect the vital interests of a data subject/natural person, necessary to undertake a task in the public interest¹ or under

¹ Section 10 of the Gibraltar DPA 2004 specifies a non-exhaustive list of broad activities that constitute tasks carried out in the public interest or the exercise of official authority in Gibraltar in order to provide further detail on the meaning of the lawful base in Article 6(1)(e).

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official authority vested in the data controller, or necessary for the purposes of the legitimate interests of the controller or a third party and does not override the fundamental rights of the data subject.

The EDPB adequacy referential does not refer to conditions for consent. However, it is worth noting that Article 7 of the Gibraltar GDPR is **identical** to Article 7 of the EU GDPR. This includes the conditions which must be met for consent to be valid, how it should be presented, and the requirement that it should be as easy to withdraw consent as to give it.

Principles

The purpose limitation principle

The purpose limitation principle is set out in Article 5(1)(b) of the Gibraltar GDPR and is **identical** to Article 5(1)(b) of the EU GDPR.

The data quality and proportionality principle

Article 5(1)(d) of the Gibraltar GDPR requires that data be adequate and kept up to date. Where inaccurate, they must be erased or rectified without delay. This is **identical** to the equivalent EU GDPR Article.

The data minimisation principle

Data minimisation is also a key principle in the Gibraltar GDPR. Article 5(1)(c) of the Gibraltar GDPR is **identical** to the EU GDPR's equivalent article.

Data retention principle

Another principle of the Gibraltar GDPR that is **identical** to that in the EU GDPR is the storage limitation principle, sometimes also referred to as 'data retention'. This is set out in Article 5(1)(e) of the Gibraltar GDPR and requires that data is kept in a form which permits identification for no longer than is necessary.

The security and confidentiality principle

Security of personal data is an important feature in the Gibraltar data protection framework. Ensuring that data is processed in a manner that provides not only protection against unlawful processing but also against accidental loss, destruction or damage is another key principle of the Gibraltar GDPR. Article 5(1)(f) of the Gibraltar GDPR is **identical** to Article 5(1)(f) of the EU GDPR.

The transparency principle

Transparency of personal data processing is a cornerstone of the Gibraltar data protection framework, and the Gibraltar GDPR goes into considerable detail with regards to both the form and the content of information that should be provided to data subjects.

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Article 12 of the Gibraltar GDPR refers to the various articles that set out the rights of data subjects and obligations placed on controllers that relate to the transparency principle. It stipulates that the controller should provide data subjects with the information referred to in those articles. It is **identical** to Article 12 of the EU GDPR, except that references to “*supervisory authority*” are replaced with references to the “*Commissioner*” and the power delegated to the European Commission to determine standardised icons is instead delegated to the Gibraltar Regulatory Authority (GRA).

Article 13 of the Gibraltar GDPR is also a key part of the transparency principle. It requires controllers to provide data subjects with information about the collection and use of their personal data at the time they are obtained. It is **identical** to Article 13 of the EU GDPR, except that, again, references to “*supervisory authority*” are replaced with references to the “*Commissioner*”, and references to “*adequacy decisions made by the EU Commission*” are replaced with references to “*transfers based on adequacy regulations*” as set out in Article 45 of the Gibraltar GDPR.

Article 14 of the Gibraltar GDPR covers the requirement for information to be provided by controllers where personal data has not been obtained from the data subject. This is **identical** to the EU GDPR, except for the same minor changes made in Article 13 and replacing “*Union or Member State law*” with references to “*a provision of Gibraltar law*”.

Rights

Right of Access

Article 15 of the Gibraltar GDPR gives data subjects the right to obtain from controllers a copy of their personal data as well as other supplementary information. This is commonly referred to as a subject access request, and can be made either verbally or in writing. The article is **identical** to Article 15 of the EU GDPR, except for a reference to “*supervisory authority*” being replaced with a reference to the “*Commissioner*”.

Right to Rectification

In addition to the right of access, data subjects also have the right to obtain from a controller, the rectification of inaccurate personal data concerning themselves, and to have incomplete personal data completed. This is set out in Article 16 of the Gibraltar GDPR, which is **identical** to Article 16 of the EU GDPR.

Right of Erasure

Another key right that is enshrined in Article 17 of the Gibraltar GDPR is the right of erasure. This is **identical** to Article 17 of the EU GDPR, except for references to “*Union or Member State law*” which are replaced with “*under Gibraltar law*”.

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Right to Object

Data subjects also have the right to object to the processing of their personal data that is based on the “public interest” or “legitimate interests” lawful bases. This is set out in Article 21 of the Gibraltar GDPR which is **identical** to Article 21 of the EU GDPR, except for a reference to Directive 2002/58/EC (“ePrivacy”), which has been replaced with a reference to domestic law implementing this Directive.

Right to data portability

While it is not mentioned explicitly in the EDPB Referential, the right to data portability is set out in Article 20 of the Gibraltar GDPR. This is **identical** to its EU GDPR counterpart.

Restrictions to rights and other provisions

Under certain circumstances and for specified purposes, the scope of the obligations and rights in the Gibraltar GDPR can be restricted through legislative measures. This is set out in Article 23 of the Gibraltar GDPR, which is **identical** to Article 23 of the EU GDPR, except for reference to the Union or Member State or their laws.

Restrictions on onward transfers

The Gibraltar GDPR and the Gibraltar DPA 2004 govern the transfer of personal data to third countries and international organisations. Any such transfer of personal data shall take place only if the conditions laid down in Chapter V of the Gibraltar GDPR are complied with by the controller and processor. This includes onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation.

Adequacy regulations

Under the Gibraltar GDPR, the Government of Gibraltar follows adequacy regulations made by the United Kingdom. Under Article 45(1) of the Gibraltar GDPR, transfers to third countries or international organisations are permitted only if (a) they could be made from the UK under adequacy regulations made under the UK GDPR and Part 2 of the UK Data Protection Act 2018, or (b) they are to the UK.

Appropriate safeguards

In the absence of adequacy regulations, a controller or processor may transfer personal data to a third country or an international organisation. However, this is only possible if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

Article 46 of the Gibraltar GDPR sets out how these appropriate safeguards may be provided. It is identical to the EU GDPR counterpart, except that references to the

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“*supervisory authority*” have been replaced by references to the Commissioner; the reference to Article 45 of the EU GDPR has been replaced by a reference to transfers based on adequacy regulations as set out in Article 45 of the Gibraltar GDPR; and the powers to specify standard contractual clauses have been assigned to the Minister and the Commissioner instead of the EU Commission. Lastly, the references to the consistency mechanism under the EU GDPR and authorisations under Directive 95/46/EC have been removed.

Other means of transfer

Article 49 of the Gibraltar GDPR, which sets out the conditions for lawful transfers of personal data to a third country or an international organisation in the absence of adequacy regulations or appropriate safeguards, is identical to Article 49 of the EU GDPR, save that references to “*Union or Member State law*” have been replaced by references to Gibraltar law; references to “*supervisory authority*” have been replaced by references to the Commissioner and the reference to Article 45 of the EU GDPR has been replaced by a reference to transfers based on adequacy regulations, as set out in Article 45 of the Gibraltar GDPR.

Section 22(2) of the Gibraltar DPA 2004 and Article 49(5) of the Gibraltar GDPR contains an enabling power for the Minister to make regulations restricting transfers of personal data to third countries other than based on adequacy regulations where the Minister considers the restriction to be necessary for important reasons of public interests.

PART II: ADDITIONAL CONTENT PRINCIPLES FOR SPECIFIC PROCESSING

Direct marketing

The right to object can also be exercised where personal data is processed for direct marketing purposes. Once the data subject objects to processing for direct marketing purposes, the personal data can no longer be processed for those purposes. This is set out in Article 21(2) and (3) of the Gibraltar GDPR, which are **identical** to Article 21(2) and (3) of the EU GDPR.

Automated decision making and profiling

Under the Gibraltar GDPR, data subjects have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning the data subject or similarly significantly affects them. This is set out in Article 22 of the Gibraltar GDPR, which is **identical** to Article 22 of the EU GDPR, except for the replacement of references to Union or Member State law with references to Gibraltar law.

PART III: PROCEDURAL AND ENFORCEMENT MECHANISMS

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Competent supervisory authority; compliance; redress mechanisms

The GRA is Gibraltar's independent supervisory authority tasked with monitoring, ensuring, and enforcing compliance with data protection and privacy provisions in Gibraltar. It acts with complete independence and impartiality in the performance of its duties and in the exercise of its powers.

Gibraltar's data protection framework gives the GRA powers to enforce data protection law, defend data subjects' rights, and promote awareness of data protection. Data controllers and processors are answerable to the GRA, which investigates complaints and monitors general compliance with the Gibraltar GDPR and the Gibraltar DPA 2004. The GRA also has dissuasive powers, such as powers to impose monetary penalties for data protection breaches. These sanctions help to ensure that controllers and processors consider data protection matters and are compliant with the law.

Further information, amongst other things, on the GRA's powers and responsibilities as well as redress mechanisms for data subjects can be found in [Section I3](#) (The Role of the Gibraltar Regulatory Authority and Redress).

Accountability

The Gibraltar GDPR, supplemented by the Gibraltar DPA 2004, sets out various measures to ensure accountability of controllers and processors. These include:

- The Principle of Accountability: Article 5(2) of the Gibraltar GDPR requires controllers to be responsible for, and be able to demonstrate compliance with, Article 5(1), which lists principles relating to the processing of personal data. The requirement is **identical** to its EU GDPR counterpart.
- The designation of a data protection officer: Articles 37, 38 and 39 of the Gibraltar GDPR set out requirements regarding the designation of the data protection officer, and the data protection officer's position and tasks. The articles are **identical** to their EU GDPR counterparts, except for the replacement of references to "*Member State or Union law*" with references to Gibraltar law; and references to "*supervisory authority*" with references to "*Commissioner*".
- Records of processing activities: Article 30 of the Gibraltar GDPR sets out the requirement to maintain a record of processing activities. The article is **identical** to the EU GDPR, except for
 - The replacement of references to "*supervisory authority*" with references to "*Commissioner*".
 - The ability to provide, as appropriate, a general description of the security measures referred to in section 30(3) of the Gibraltar DPA 2004 rather than

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the technical and organisational security measures referred to in Article 32(1).

- Data protection impact assessments: Articles 35-36 of the Gibraltar GDPR set out the circumstances in which controllers are required to carry out a data protection impact assessment, as well as cases in which prior consultation with the GRA is necessary. These Articles are **identical** to their EU GDPR counterparts except for:
 - The removal of the reference to Member State or Union law and EU mechanisms, bodies or institutions;
 - The replacement of the term “*supervisory authority*” with “*the Commissioner*”.
 - An additional paragraph titled Article 36(4A), defining the term “*relevant authority*” that substituted the term “*member states*” in Article 36(4a) of the EU GDPR.
- Data protection by design and default: Article 25 of the Gibraltar GDPR imposes requirements on controllers to implement appropriate technical and organisational measures, such as pseudonymisation, to meet the data protection requirements of the Gibraltar GDPR and protect the rights of data subjects. It is **identical** to Article 25 of the EU GDPR.
- Breach notification: Articles 33 and 34 of the Gibraltar GDPR set out the requirements for controllers and processors to notify the Commissioner, and in certain high-risk circumstances data subjects, in the case of a personal data breach. These Articles are **identical** to the EU GDPR, except for the replacement of references to “*supervisory authority*” with “*the Commissioner*”.

PART IV: LAW ENFORCEMENT AND NATIONAL SECURITY PROCESSING

Gibraltar data protection legislation provides unprecedented independent oversight of the activities and conduct of Gibraltar’s **law enforcement** framework. The processing of personal data by law enforcement agencies is now governed by the Gibraltar DPA 2004.

Part III transposed Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (LED).

In substance terms, Part III of the Gibraltar DPA 2004 is broadly identical to Part III of the UK DPA 2018. The detailed explanations of the latter in Section F are also therefore applicable

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to Gibraltar. The only key differences are around oversight bodies and cross-cutting legislation. These are highlighted below.

The relevant law enforcement oversight bodies for Gibraltar are:

- **Gibraltar Regulatory Authority.** This is an independent body with responsibility for regulating information rights, communications, and cyber security. They are the supervisory authority in Gibraltar for the Gibraltar GDPR and the LED. This is further explained in Section I3.
- **Gibraltar Police Authority.** This is an independent body tasked with ensuring the Royal Gibraltar Police operates efficiently and effectively, providing information on police issues to the community, operating and supervising a procedure for handling complaints against police officers and generally for ensuring high standards of policing in Gibraltar.
- **The Public Service Ombudsman.** This is an independent body that investigates complaints by the general public about acts or omissions by public service providers, such as Government departments, agencies and authorities.

The relevant cross-cutting legislation for Gibraltar is:

- the Criminal Procedure And Evidence Act 2011 (PACE codes);
- Equal Opportunities Act 2006;
- the Gibraltar Constitution Order.

Information on national security processing will be forthcoming. Gibraltar is in the process of drafting its Investigatory Powers Bill. The draft Bill is likely to be a more streamlined version of the UK Act, reflecting Gibraltar's smaller size and narrower range of powers which are necessary for the Gibraltarian authorities.