

DIGITAL BUSINESS

Gibraltar



Digital Business

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Quick reference guide enabling side-by-side comparison of local insights into legal and regulatory framework; contracting on the internet; security, including security of payment; domain names; advertising; financial services; defamation; intellectual property; data protection; taxation; gambling; outsourcing; online publishing; dispute resolution; and recent trends.

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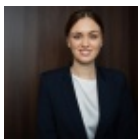
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LEGAL AND REGULATORY FRAMEWORK

Government approach

How would you describe the government's attitude and approach to digital content and services, digital transformation and doing business online?

The Government of Gibraltar is proactive and firmly committed to developing this space. It is keen to position Gibraltar as a leading hub for online and digital commerce (as evidenced by, for example, its pioneering approach to distributed ledger technology/blockchain legislation, and development and nurturing of the remote gambling industry).

Law stated - 11 August 2022

Legislation

What legislation governs digital content and services, digital transformation and the conduct of business online?

The following form the key body of law in this field:

- Consumer Rights on Contracts Regulations 2013;
- Unfair Terms in Consumer Contracts Act 1998;
- Consumer Protection;
- Unfair Trading Act 2008;
- Misleading and Comparative Advertising Act 2002;
- The Electronic Commerce Act 2001;
- Gambling Act 2005;
- Financial Services Act 2019;
- Communications (Personal Data and Privacy) Regulations 2006;
- Gibraltar General Data Protection Regulation and Data Protection Act 2004;
- Communications Act 2006; and
- Civil Contingencies Act 2007.

Law stated - 11 August 2022

Regulatory bodies

Which regulatory bodies are responsible for the regulation of digital content and services, e-commerce, data protection, internet access and telecommunications?

The following are the regulatory bodies responsible for this area:

- Gibraltar Regulatory Authority;
- Gibraltar Financial Services Commission;
- Business Licensing Authority;
- Office of Fair Trading; and
- Gambling Commissioner.

Law stated - 11 August 2022

Jurisdiction

What tests or rules are applied by the courts to determine the jurisdiction for online transactions or disputes in relation to digital businesses in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

The applicable rules and tests will differ depending on the domicile of the parties. Where the defendant is domiciled in an EU member state, the Gibraltar courts will apply Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments (Brussels Recast Regulations). This forms part of Gibraltar's retained EU law. The Brussels Recast Regulations state that parties can agree jurisdiction clauses in their private contracts and this will be upheld by the courts. However, should the party bringing proceedings or the defendant be a consumer, regardless of any exclusive jurisdiction clauses agreed between the parties, the consumer may bring proceedings in the courts of the place where he or she is domiciled. Should a legal entity bring a claim against a consumer, the proceedings must be brought in the courts where the consumer is domiciled. Other regimes that may be applied (depending on the domicile of the defendant) are (1) the Lugano Convention 2007, (2) the Hague Convention on Choice of Court Agreements 2005 on exclusive choice of courts agreements, and (3) the common law regime, all of which are likely to have a similar outcome to the EU regime as explained above. These rules have not yet been applied by the courts in relation to the metaverse.

Law stated - 11 August 2022

Establishing a business

What regulatory and procedural requirements govern the establishment of digital businesses and sale of digital content and services in your jurisdiction? To what extent do these requirements and procedures differ from those governing the establishment of brick-and-mortar businesses?

The regulatory and procedural requirements governing the establishment of digital businesses are found in the Companies Act 2014 and Fair Trading Act 2015. There are no differences between the requirements and procedures governing them and the establishment of brick-and-mortar businesses. The Consumer Rights on Contract Regulations 2013 and the Electronic Commerce Act 2001 provide rules and requirements for the sale of digital content in Gibraltar. These cover, for example, information that must be provided prior to concluding a distance contract, how distance contracts must be confirmed and cancellation periods.

Law stated - 11 August 2022

CONTRACTING ON THE INTERNET

Contract formation

Is it possible to form and conclude contracts digitally? If so, how are digital contracts formed and are there any exceptions for certain types of contract?

This is possible, however section 5(2) of the E-Commerce Act 2001 specifically prohibits contracts in connection with any of the following from being concluded through electronic means:

- conveyancing or transferring land or any interest in real property;
- rights of succession under a will or other testamentary instrument; and
- categories excluded by regulations made by the Minister.

Caution also needs to be taken when a signature needs to be witnessed. For example, it is not clear whether a document can be notarised via video conference.

Law stated - 11 August 2022

Applicable laws

Are there any particular laws that limit the choice of governing law, language of the contract or forum for disputes when entering into digital contracts? Do these distinguish between business-to-consumer and business-to-business contracts?

There are no laws that limit this.

Law stated - 11 August 2022

Electronic signatures

How does the law recognise or define digital or e-signatures? Must digital or e-signature providers be registered or licensed in your jurisdiction?

Section 8(2) of the Gibraltar Electronic Identification and Trust Services for Electronic Transactions Regulations 2017 define electronic signature as:

There is no requirement for digital or e-signature providers to be registered or licensed in Gibraltar; however, the EU Electronic Identification Regulation (eIDAS), which forms part of Gibraltar's retained EU law, sets out various types of electronic signatures. Qualified electronic signatures are said to have the equivalent legal effect as a handwritten signature. Article 3(12) of eIDAS defines a qualified electronic signature as an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signature. The qualified certificate must be issued by a verified, qualified trust service provider and their credentials must be recorded in a trusted list.

Law stated - 11 August 2022

Breach

Are any special forums for dispute resolution or remedies available for the breach of digital contracts?

None particular to Gibraltar, although parties are free to submit to their agreed choice of alternative dispute resolution, including online dispute resolution providers of their choice by mutual consent.

Law stated - 11 August 2022

FINANCIAL SERVICES

Regulation

Is the advertising or selling of financial services products to consumers or to businesses digitally or via the internet regulated? If so, by whom and how?

Yes, it is regulated by the Gibraltar Financial Services Commission (GFSC) pursuant to the Financial Services Act 2019 (FSA). The FSA restricts the circumstances in which it is possible for persons who are not authorised or exempt to advertise or otherwise encourage others to enter into agreements with persons carrying on regulated activities. For example, a person must not, in the course of business, communicate an invitation or inducement to enter or offer to enter into an agreement the making or performance of which by either party constitutes the carrying on of a regulated activity.

Law stated - 11 August 2022

Electronic money and digital assets

Are there any rules, restrictions or other relevant considerations regarding the issue of electronic money, digital assets or use of digital currencies?

Yes, the FSA sets out a general prohibition that no person may carry on a 'regulated activity' in or from Gibraltar, or purport to do so, unless the person is an authorised person or an exempt person. Issuing electronic money and using distributed ledger technology (DLT) for storage or transmission of value belonging to another, by way of business, are 'regulated activities'. The Proceeds of Crime Act 2015 (Relevant Financial Business) (Registration) Regulations 2021 prohibit certain businesses, that are not subject to supervision by a relevant supervisory authority, from:

- receiving proceeds in any form, whether on their own account or on behalf of another person, from the sale of tokenised digital assets involving the use of DLT or similar means of recording a digital representation of an asset; and
- exchanging, arranging or making arrangements with a view to exchange, by way of business, virtual assets for money, money for virtual assets or one virtual asset for another,

unless they are registered with the GFSC.

Other relevant pieces of legislation are:

- Financial Services (Electronic Money) Regulations 2020;
- Financial Services (Distributed Ledger Technology Providers) Regulations 2020;
- Proceeds of Crime Act 2015; and
- Proceeds of Crime Act 2015 (Transfer of Virtual Assets) Regulations 2021.

Law stated - 11 August 2022

Digital and crypto wallets

Are there any rules, restrictions or other relevant considerations regarding the provision or use of crypto wallets or other methods of digitally storing value?

Yes, the FSA prohibits persons from carrying on the 'regulated activity' of using DLT for storage or transmission of value belonging to another, by way of business, in or from Gibraltar, or purporting to do so, unless the person is an authorised

person or an exempt person. The Financial Services (Distributed Ledger Technology) Regulations 2020 set out the application process for obtaining the relevant permission to carry out a 'DLT Provider's business' (as defined in the DLT Regulations) and the regulatory principles that a DLT Provider must comply with. The Proceeds of Crime Act 2015 (Relevant Financial Business) (Registration) Regulations 2021 prohibit certain businesses, that are not subject to supervision by a relevant supervisory authority, from:

- receiving proceeds in any form, whether on their own account or on behalf of another person, from the sale of tokenised digital assets involving the use of DLT or similar means of recording a digital representation of an asset; and
- exchanging, arranging or making arrangements with a view to exchange, by way of business, virtual assets for money, money for virtual assets or one virtual asset for another,

unless they are registered with the GFSC.

Other relevant pieces of legislation are:

- Proceeds of Crime Act 2015; and
- Proceeds of Crime Act 2015 (Transfer of Virtual Assets) Regulations 2021.

Law stated - 11 August 2022

Electronic payment systems

How are electronic payment systems regulated in your jurisdiction? Is there a specific law regulating third-party access to digital information in bank accounts?

Electronic payment systems are regulated by the GFSC under the FSA and its subsidiary legislation, the Financial Services (Payment Services) Regulation 2020. Carrying on an activity that relates to payment services, by way of business, in or from Gibraltar, is a 'regulated activity' under the FSA. The Financial Services (Payment Services) Regulations 2020 regulate third-party access to payment accounts for information services.

Law stated - 11 August 2022

Online identity

Are there any rules, restrictions or other relevant considerations regarding the use of third parties to satisfy know-your-customer (KYC) or other anti-money laundering (AML) identification requirements?

Yes, the Proceeds of Crime Act 2015 (POCA) sets out rules to enable 'relevant financial businesses' to:

- rely on a person who falls within section 23(2) of POCA; or
- apply customer due diligence measures by means of an outsourcing service provider or agent, provided that the relevant person remains liable for any failure to apply such measures.

Law stated - 11 August 2022

DOMAIN NAMES AND URLS

Registration procedures

What procedures are in place to regulate the licensing of domain names or use of URLs? Is it possible to register a country-specific domain name without being a resident in the country? Are there any restrictions around the use of URLs to direct users to websites, online resources or metaverses?

There are no Gibraltar laws or regulations in place to regulate the licensing of domain names. However, Gibraltar's local provider of domain names reserves domain and subdomain names inclusive of '.gi', which is the country code top-level domain for exclusive use by Gibraltar-registered businesses and organisations, which may only use it for their own local services and purposes. There are no restrictions around the use of URLs to direct users to websites, online resources or metaverses.

Law stated - 11 August 2022

IP ownership

Can domain names or URLs be the subject of trademarks or copyright protection in your jurisdiction? Will ownership of a trademark or copyright assist in challenging a competitive use or registration of a similar domain name or URL?

Domain names or URLs may be capable of being the subject of a trademark, and will assist in challenging a competitive use or registration of a similar domain name or URL. However, copyright is unlikely to subsist in a URL or domain name.

Law stated - 11 August 2022

ADVERTISING

Regulation

What rules govern online advertising?

The Electronic Commerce Act 2001 regulates information society services, providing rules on advertising and selling goods and services online. The Consumer Protection (Unfair Trading) Act 2008 applies to all commercial practices that happen before (through advertising or marketing), during and after a transaction has taken place in respect of the purchase of goods or services in Gibraltar, and bans aggressive or misleading commercial practices – this includes breaching or omitting information and advertising rules relating to a number of EU directives. There are currently no self-regulatory codes that apply. In addition, the Misleading and Comparative Advertising Act 2002 will apply. Regulated activities, such as gaming and financial services, will each have their own advertising restrictions.

Law stated - 11 August 2022

Targeted advertising and online behavioural advertising

What rules govern targeted advertising and online behavioural advertising? Are any particular notices or consents required?

Targeted and behavioural advertising involve the processing of personal data. As such, the Gibraltar General Data Protection Regulation will apply. Similarly, the use of cookies or other tracking technologies is prohibited unless they conform to the Communications (Personal Data and Privacy Regulations) 2006.

Law stated - 11 August 2022

Misleading advertising

Are there rules against misleading online advertising?

Yes. This is covered by the Misleading and Comparative Advertising Act 2002, and by the Consumer Protection (Unfair Trading) Act 2008 which applies to business-to-consumer transactions. Essentially, advertising that provides false or untruthful information, deceives or is likely to cause the consumer to take a decision they would not otherwise have taken, is deemed to be a misleading practice and is not allowed. Under the Misleading and Comparative Advertising Act 2002 an advertiser can be required by a court to produce evidence of accuracy in respect of factual claims made.

Law stated - 11 August 2022

Restrictions

Are there any digital products or services that may not be advertised online?

See 'Regulation' above. However, any online advertising relating to illegal content, services or activity is unlawful; for example, under the Crimes Act 2011 it is an offence to advertise certain dangerous and indecent items.

Law stated - 11 August 2022

Hosting liability

**What is the liability of content providers and parties that merely host the content, such as ISPs?
Can any other parties be liable?**

There is no liability, assuming the host falls within the definition of intermediary service provider.

Law stated - 11 August 2022

Email marketing

What regulations and guidance apply to email, SMS and other distance marketing?

Direct marketing – namely, to individuals – must comply with the rules set out in the Communications (Personal Data and Privacy Regulations) 2006. The rules cover marketing via email, sms, fax and telephone.

Law stated - 11 August 2022

ONLINE PUBLISHING

Content liability

When would a digital platform or online content provider be liable for mistakes in information that it publishes online? Can it avoid liability? Is it required or advised to post any notices in this regard?

Under the Electronic Commerce Act 2001, an intermediary service provider will not be subject to criminal or civil liability in respect of information published, provided they are not the originator of the material, have no actual knowledge of the offending material, have not modified it and upon discovery the offending material is removed and authorities notified. Further, since English common law applies, the *Byrne v Dean* principle will also be followed.

Law stated - 11 August 2022

ISP liability

Are internet service providers (ISPs) liable for content displayed on their sites? How can ISPs limit or exclude liability?

No; see above – and provided that the ISP falls within the definition of an ‘intermediary service provider’.

Law stated - 11 August 2022

Shutdown and takedown

Can an online content provider or ISP shut down a web page containing defamatory material without court authorisation?

Yes. Section 9 of the Electronic Commerce Act 2001 obliges an intermediary service provider to remove such information as soon as possible after acquiring actual knowledge of its existence, to stop providing services in respect of that information as well as to notify the authorities with relevant facts, including where possible the identity of the individual behind it.

Law stated - 11 August 2022

INTELLECTUAL PROPERTY

Data and databases

Are data and databases protected by IP rights?

Yes. These are covered in the Intellectual Property (Copyright and Related Rights) Act 2005.

Law stated - 11 August 2022

Third-party links and content

Can a website, digital platform or other online content provider link to third-party websites or platforms without permission?

Hyperlinking to online content is a communication to the public. Therefore, if the content is protected by copyright, permission from the owner is usually required.

Law stated - 11 August 2022

Can a website, digital platform or other online content provider use third-party content, obtained via automated scraping or otherwise, without permission from the third-party content provider?

Where scraped data comprises copyrighted work, this can lead to infringement including a breach of database rights. In addition, where the scraped data contains personal data, there may also be issues in regard to the Gibraltar General Data Protection Regulation.

Law stated - 11 August 2022

Metaverse and online platforms

Are there any particular difficulties with establishing or defending copyright, database rights and trademarks on a metaverse from your jurisdiction?

Potential difficulties could be encountered when trying to enforce copyright in a decentralised environment; trademarks offer protection in the relevant territory of the registered mark, and it may be challenging to demonstrate that any infringement occurred in the relevant territory. UK case law would apply, which suggests the adoption of a targeted approach, namely, whether the use in the metaverse was targeted towards consumers in a real-world territory where the trademark is protected.

Law stated - 11 August 2022

Exhaustion of rights and first-sale doctrine

Does your jurisdiction recognise the concept of exhaustion of rights or the first-sale doctrine? If so, how does it apply to digital products? Can rights be exhausted by placing the digital product on a metaverse or other platform in another territory?

Yes, while the concept of exhaustion of rights exists under Gibraltar law, there would be challenges in applying this to digital assets following the ruling by the Court of Justice of the European Union in *Tom Kabinet* in December 2019.

Law stated - 11 August 2022

Administrative enforcement

Do the authorities have the power to carry out dawn raids and issue freezing injunctions in connection with IP infringement?

Yes. Under the Intellectual Property (Copyright and Related Rights) Act 2005 a magistrate may, on information given under oath by a constable, issue a warrant allowing entry and search of a premises using reasonable force to seize articles that evidence an offence. Injunctions can also be made against service providers where the service provider has actual knowledge of another person using their service to cause a copyright infringement.

Law stated - 11 August 2022

Civil remedies

What civil remedies are available to IP owners? Do they include search orders and freezing injunctions?

See preceding answer. In addition, the following remedies are available: interlocutory relief, injunctions, damages or profits on account, delivery up.

DATA PROTECTION AND PRIVACY**Definition of 'personal data'**

How does the law in your jurisdiction define 'personal data'? Are any other categories of personal data defined in the law? If so, what additional rules apply to the processing of such categories of personal data?

Personal data is any information relating to an identified or identifiable living individual. It also includes special categories of personal data that reveal racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and the processing of genetic data, biometric data (for identification purposes), data on health, sex life and sexual orientation as well as crime-related data.

Where special category data is processed in addition to a lawful basis under the Gibraltar General Data Protection Regulation (GDPR), a controller also needs a Gibraltar GDPR article 9 lawful basis.

In addition, controllers will usually require an appropriate policy document that sets out additional safeguards followed when processing special category data. While anonymised data is not personal data and therefore outside of the GDPR rules, pseudonymised data is considered personal data and therefore should be treated in the same way as personal data.

Law stated - 11 August 2022

Registration and appointment of data protection officer

Do parties involved in the processing of personal data have to register with any regulator to process personal data? Does the law prescribe the appointment of a data protection officer?

There is no need for organisations that process personal data to register with the Gibraltar data protection supervisory authority – the Gibraltar Regulatory Authority (GRA). However, where processing requires the appointment of a mandatory data protection officer, the data protection officer must be registered with the GRA.

Law stated - 11 August 2022

Extraterritorial issues

Can data protection laws and regulatory powers apply to organisations or individuals resident outside your jurisdiction? Is there a requirement for such an organisation or individual to appoint a representative in your jurisdiction?

The Gibraltar GDPR (which retained in Gibraltar law the EU GDPR following the end of the Brexit transition period on 31 December 2020, with some local modifications) applies to the processing of personal data in Gibraltar. It sits side by side with Gibraltar's Data Protection Act 2004 and provides local exemptions and derogations to the Gibraltar GDPR. It applies to organisations established in Gibraltar and has extraterritorial provisions that apply to organisations not established in Gibraltar but which satisfy either the 'goods and services' test (ie, they offer goods or services to Gibraltar) or the 'monitoring' test (ie, they monitor the behaviour of individuals in Gibraltar). Where organisations are not established in Gibraltar, but because of their processing activities the Gibraltar GDPR applies via its extra-territorial provisions, they need to appoint a Gibraltar representative under Gibraltar GDPR, article 27.

*Law stated - 11 August 2022***Bases for processing**

What are the commonly asserted reasons or bases for processing personal data and for exporting or transferring personal data to another jurisdiction?

Article 6 of the Gibraltar GDPR sets out the lawful bases available to controllers in order to process personal data. These include: consent, contractual necessity, compliance with a legal obligation, public interest reasons and legitimate interests of the data controller or third party. Note consent should be avoided in an employment context, and where legitimate interests are relied on a legitimate interests assessment is needed before processing begins. Transfer of personal data to third countries outside Gibraltar is prohibited unless the transfer complies with the Gibraltar GDPR, Chapter V safeguards. Transfers to the EEA or the UK are not considered third-country transfers requiring safeguards, as are transfers to countries which if made from the UK would be permissible. Typical acceptable safeguards are the use of EU model clauses. However, where a country has no adequacy, it is recommended to carry out a country-specific Transfer Impact Assessment to ensure the country in question adequately protects personal data.

*Law stated - 11 August 2022***Data export and data sovereignty**

Are there any rules, restrictions or other relevant considerations concerning the export or transfer of personal data to another jurisdiction? Are there any data sovereignty or national security rules which require data, data servers or databases to remain in your jurisdiction?

Following Brexit, the application of the Free Flow Non-Personal Data Regulation in Gibraltar was revoked and not replaced. While there are no general rules regarding specific data-localisation laws in Gibraltar, there is the possibility of sector-specific data localisation conditions being attached to Gibraltar licences conducting regulated business.

*Law stated - 11 August 2022***Sale of data to third parties**

May a party sell or transfer personal data to third parties, such as personal data about users of an online service or digital platform?

The sale or transfer of personal data to third parties is permissible, provided that the seller and buyer both comply with applicable data protection legislation and intellectual property rights relating to databases in the Intellectual Property (Copyright and Related Rights) Act 2005. Depending on the seller's title to the database, the transaction can proceed by way of outright sale or under licence. Breaches of the Gibraltar GDPR (eg, failing to have a lawful basis or to comply with transparency requirements) can lead to fines amounting to the higher of €20,000,000 or 4 per cent of global turnover for multinationals. Remedies for breach of database rights, including copyright, are interlocutory relief, injunctions, damages or profits on account, delivery up and criminal proceedings, among others.

*Law stated - 11 August 2022***Consumer redress**

What rights and remedies do individuals have in relation to the processing of their personal data? Are these rights limited to citizens or do they extend to foreign individuals?

Data subjects whose data has been processed in breach of the Gibraltar GDPR can complain to the GRA, being the data protection supervisory authority in Gibraltar. In addition, they have the right to bring a judicial action for damages through the Gibraltar courts. These rights are not limited to Gibraltar citizens and apply to any data subject the processing of whose personal data falls within the scope of the Gibraltar GDPR.

Law stated - 11 August 2022

DOCUMENT DIGITISATION AND RETENTION

Digitisation

Do the rules in your jurisdiction require any particular document or record types to be kept in original paper form and not converted solely to a digital representation?

No. However, Part III of the Electronic Commerce Act confirms that where there is a legal requirement to present or retain original documents, that requirement is met if a document is stored in electronic form provided that integrity and legibility assurances are met. In addition, where there is a statutory requirement to produce a document in paper form, that requirement is met if it is produced in electronic form.

Law stated - 11 August 2022

Retention

Do the rules in your jurisdiction stipulate a minimum or maximum period for which documents or other record types should be kept?

Gibraltar law does not have any uniform and comprehensive legislation on records retention. Generally, documents are retained until the risk of litigation passes (eg, six years under the Limitation Act 1960 for actions in respect of simple contracts or tort), unless they need to be kept for title reasons such as title deeds or to comply with statutory or regulatory retention requirements, in relation to, for example, company books and accounts, the Income Tax Act, pension schemes, the Financial Services Commission and the Proceeds of Crime Act 2015.

Law stated - 11 August 2022

DATA BREACH AND CYBERSECURITY

Security measures

What measures must companies take to guarantee the cybersecurity of data, communications, online transactions and payment information? Does any regulation or guidance provide for a particular level of cybersecurity or specific procedures to avoid data breaches? Are there any commonly used cybersecurity standards?

Article 32 of the Gibraltar General Data Protection Regulation (GDPR) sets out the standards required for security of processing personal data – a context-specific, risk-based approach. It requires organisations to implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk of processing, taking into

account state of the art, cost of implementation and the nature, scope, context and purpose of processing.

Similarly, the Civil Contingencies Act 2007 sets out security standards for essential services and digital service providers. Essential service providers need to take appropriate and proportionate measures to prevent and minimise impact of security incidents affecting their networks and information systems to ensure continuity of service appropriate to the risk posed, having regard to the state of the art available.

In addition, regulated businesses under the Financial Services Act 2015 are required to submit corporate governance arrangements, and this invariably requires cybersecurity measures to be included.

Law stated - 11 August 2022

Data breach notification

Does your jurisdiction have data breach notification laws that apply to digital business? If so, which regulators should be notified and under what conditions should affected individuals be notified?

There are mandatory data breach notification requirements regarding personal data under the Gibraltar GDPR. Where a breach poses a likely risk to individuals, organisations have up to 72 hours to notify the Gibraltar Regulatory Authority. In addition, if the breach is likely to pose a high risk to individuals, they need to be informed without delay. Under the Civil Contingencies Act 2007, where an organisation is designated as an essential service, mandatory notification requirements to local authorities exist regarding incidents that have a significant impact on continuity of the essential service. Similarly, digital service providers are required to make a mandatory breach notification to the authorities in the event of any incident having a substantial impact on the provision of services.

Law stated - 11 August 2022

Government interception

Are the authorities permitted lawful access to data? If so, what types of company are required to provide data to the authorities and under what circumstances?

There are no laws that allow bulk interception or acquisition of communications data. Applications must be made to the court by the attorney general, or on oath by a police officer, requesting a warrant specific to a particular offence. Similarly, regulators (such as the Information Commissioner, Gambling Commissioner and Gibraltar Financial Services Commission) have powers of entry and inspection on application to the court for a warrant.

Law stated - 11 August 2022

GAMING

Legality and regulation

Is it permissible to operate an online betting or gaming business from your jurisdiction? Is any regulatory consent or age, credit or other verification required?

It is only permissible to operate an online betting or gaming business from Gibraltar with an appropriate remote gambling licence issued by the Government of Gibraltar. Gibraltar is a highly regarded and well-established hub for remote gambling activity, with many of the industry's leading companies based and licensed there. Regulatory standards are high, with detailed provisions and requirements relating to player protection, underage gambling, safer

gambling, etc.

Law stated - 11 August 2022

Cross-border gaming

Is it permissible to advertise, or provide access to, an online betting or gaming business located in another jurisdiction or in a metaverse?

Gibraltar licences and regulates gambling on a point of supply basis. There is no restriction on external gambling companies providing gambling services or advertising to Gibraltar residents. It is not, however, permissible to provide access from Gibraltar to online betting or gaming services, to customers based in another jurisdiction (or in a metaverse), without a Gibraltar remote gambling licence.

Law stated - 11 August 2022

OUTSOURCING

Key legal issues

What key legal issues arise when outsourcing services to a provider either inside or outside your jurisdiction?

If dealing with personal data, the outsourcing agreement should conform to the Gibraltar General Data Protection Regulation (GDPR) requirements. In particular, where there is a controller-processor arrangement the outsourcing agreement must have in place article 28 processor clauses. If outsourcing to a jurisdiction outside Gibraltar, the controller needs to ensure compliance with Chapter V of the GDPR and third-country transfers. Typically, model contractual clauses are used. (Also, see the answer below for outsourcing in relation to regulated activities.)

Law stated - 11 August 2022

Sector-specific issues

Are there any particular digital business services that cannot be outsourced or that are subject to specific regulation?

Outsourcing restrictions apply in respect of 'material activities' of regulated entities, including digital financial services. If to an entity in a foreign jurisdiction, the outsourcing will only be allowed if the jurisdiction has at least equivalent regulation and supervision as Gibraltar. From a gambling regulatory perspective, functions and services can generally be outsourced but only with the prior approval of the gambling regulator.

Law stated - 11 August 2022

Contractual terms

Does the law require any particular terms to be included in outsourcing contracts?

Yes. See 'Key legal issues' above and article 28 of the Gibraltar GDPR for data protection requirements. As regards regulated activities, Gibraltar Financial Services Commission rules require outsourcing to be governed by a written contract incorporating specific terms.

Law stated - 11 August 2022

Employee rights

What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation? Do the rules apply to all employees in your jurisdiction?

Where the outsourcing falls within scope of the Transfer of Undertaking Rules, consultation rights exist as do compensation where consultation is not done properly or the employee(s) not transferred.

Law stated - 11 August 2022

ARTIFICIAL INTELLIGENCE AND MACHINE LEARNING

Rules and restrictions

Are there any rules, restrictions or other relevant considerations when seeking to develop or use artificial intelligence, machine learning, automated decision making or profiling? Are any particular notices of such use required? Are impact assessments recommended or required?

The Gibraltar General Data Protection Regulation (GDPR) sets out the rules relating to automated decision making or profiling. In addition to general compliance with GDPR principles, there are enhanced rights. For example, the right not to be subject to decisions based purely on automated processing if it produces a legal effect or significantly affects the individual. There is also an additional right to challenge any decision made and require human intervention in the decision-making process, and the right to object to such processing. There are also enhanced transparency rights requiring a meaningful explanation of the logic involved to be given to the individual before the processing begins. Because profiling is deemed to be high risk, it also triggers the need to carry out a data protection impact assessment before the activity takes place.

Law stated - 11 August 2022

IP rights

Are there any rules concerning intellectual property and artificial intelligence or machine learning? Can the training data sets and other data associated with artificial intelligence or machine learning be adequately protected by intellectual property rights? Are there particular laws, rules or guidance concerning the ownership of intellectual property created by artificial intelligence or machine learning systems?

Copyright is capable of subsisting in literary, dramatic, musical or artistic works that are artificial intelligence (AI) or computer generated. In regard to patents, Gibraltar operates a secondary registration regime based on UK certificates. Current UK case law means that only persons can apply for patents. However, were this to change so that AI-generated material can be the subject of UK patents, these could be extended to Gibraltar via the local registry.

Law stated - 11 August 2022

TAXATION

Online sales

Is the sale of digital products or online services subject to taxation in your jurisdiction? If so, on what basis?

It can be and will invariably turn on facts. The basis for taxation in Gibraltar for a company is (with some modifications) that a company must have income 'accrued in or derived from' Gibraltar. There is no need for a permanent establishment or taxable presence, merely that the income falls into the 'accrued and derived' category. There is no tax on capital gains, but non-taxability is dependent on our tax authorities considering a gain as capital in nature rather than trading income, including by reference to 'badges of trade' tests. Net (minus agreed deductible expenses) royalty income and inter-company interest income accrued to or received by (or both) a Gibraltar-registered company is subject to Gibraltar corporation tax (presently 12.5 per cent) irrespective of source (automatically deemed to have accrued in and be derived from Gibraltar). Inter-company interest income is subject to a de minimis £100,000 or equivalent per annum threshold. A business whose underlying activity that results in the income is such an activity that requires a licence and regulation under any law of Gibraltar, is also subject to corporation tax.

Law stated - 11 August 2022

Server placement

What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers, a platform or a metaverse within your jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

Potentially yes. See above for an overview of the basis of taxation in Gibraltar. Invariably it will turn on facts, including what and where the underlying business activity that generates the income is, what type of income is generated and whether the activity is licensed and licensable in Gibraltar.

Law stated - 11 August 2022

Electronic invoicing

Do the rules in your jurisdiction regulate the format or use of e-invoicing, either generally or for a specific market segment? Is there a requirement to provide copies of e-invoices to a tax authority or other agency?

Section 12 of the Consumer Rights on Contracts Regulations 2013 sets out all of the information that needs to be provided to consumers after the conclusion of distance contracts, where such information has not already been provided. This is not necessarily an e-invoice; however, the confirmation of the price of the goods or services must be included. There are no specific rules on providing e-invoices to a tax authority or other agency.

Law stated - 11 August 2022

DISPUTE RESOLUTION



LEXOLOGY

Getting The Deal Through

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www.lexology.com/gtdt

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Venues

Are there any specialist courts or other venues in your jurisdiction that deal with online/digital issues and disputes?

No.

Law stated - 11 August 2022

ADR

What alternative dispute resolution (ADR) methods are available for online/digital disputes? How common is ADR for online/digital disputes in your jurisdiction?

There is nothing specific to the online digital space, although access to online dispute resolution is possible for consumers.

Law stated - 11 August 2022

UPDATE AND TRENDS

Key trends and developments

Are there any emerging trends or hot topics in the regulation of digital content and services, digital transformation and doing business online in your jurisdiction? Is there any pending legislation that is likely to have consequences for digital transformation and doing business online?

There is significant interest in Gibraltar in non-fungible tokens, new forms of digital games (including those involving crypto/P2E features), esports and crypto currency payment solutions.

A Command Paper for a new Gambling Act has been published and is currently in the consultation phase. This will replace, update and modernise Gibraltar's legislative and regulatory framework for gambling.

Law stated - 11 August 2022

Jurisdictions

| | | |
|---|--------------------|---------------------------------------|
|  | Belgium | Astrea |
|  | Chile | Magliona Abogados |
|  | China | Buren NV |
|  | Cyprus | Antoniou McCollum & Co LLC |
|  | France | UGGC Avocats |
|  | Germany | SKW Schwarz |
|  | Gibraltar | Hassans |
|  | Hungary | VJT & Partners |
|  | India | AZB & Partners |
|  | Israel | Amar Reiter Jeanne Shochatovitch & Co |
|  | Italy | ICT Legal Consulting |
|  | Japan | Anderson Mōri & Tomotsune |
|  | Malaysia | Raja, Darryl & Loh |
|  | South Korea | Barun Law LLC |
|  | Taiwan | Lee and Li Attorneys at Law |
|  | Turkey | Boden Law |