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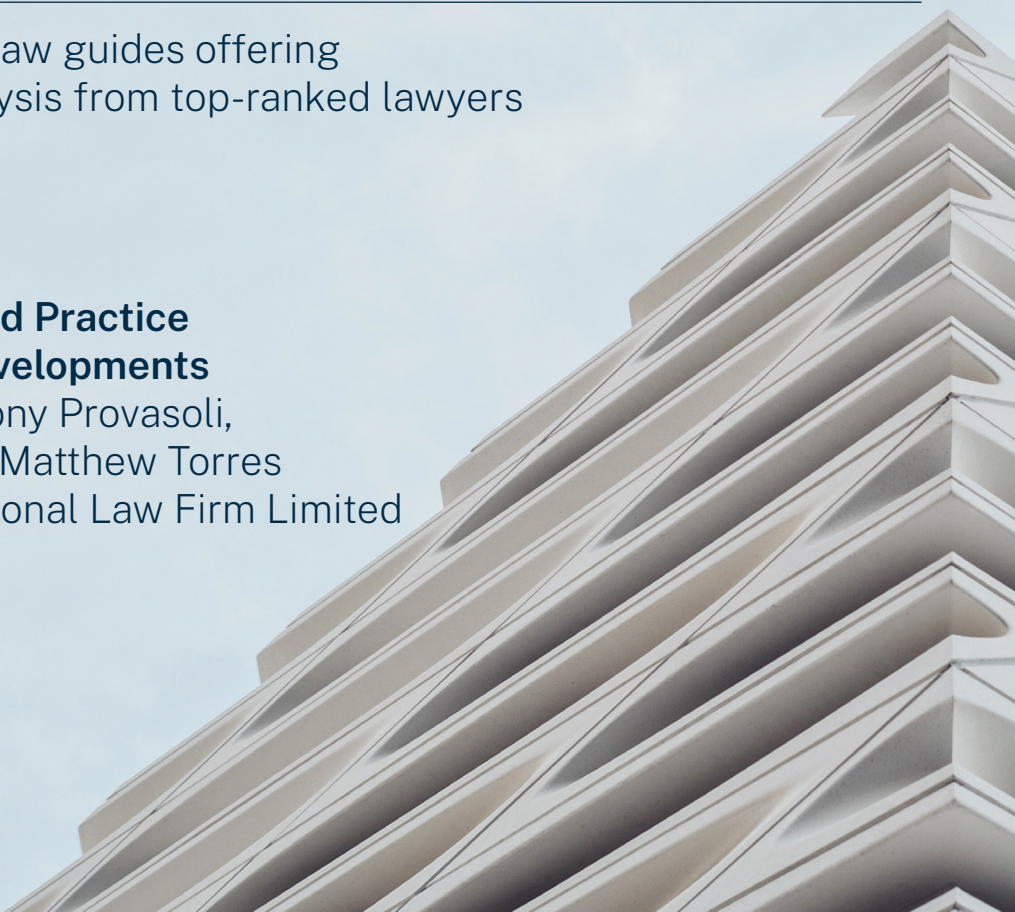
# Technology M&A 2024

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Definitive global law guides offering  
comparative analysis from top-ranked lawyers

**Gibraltar: Law and Practice  
& Trends and Developments**

Tim Garcia, Anthony Provasoli,  
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# GIBRALTAR



## Law and Practice

### Contributed by:

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Hassans International Law Firm Limited is a full-service law firm with offices in Gibraltar and Spain, offering services in corporate and commercial, financial services, fintech, litigation, funds, gaming, property, private client, tax, and shipping law (with the broader tech sector often featuring across a number of these). Through the firm's wholly owned fiduciary arm, Line Group, it also affords corporate and trust domiciliation, management, and directorship/trustee services. Consistently top-ranked market leaders in Gibraltar across all sectors for

many years now, the breadth and depth of the firm's expertise is unrivalled, as is the trust in its counsel of regulators and key decision-makers in the firm's jurisdiction (with Hassans' practitioners habitually relied on to help draft and develop legislation, as well as being prominently involved in numerous industry associations and practice groups). As such, the firm enjoys the continuing privilege of contributing to the shaping, maintenance, and advancement of the Gibraltar plc product.

## Authors



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# GIBRALTAR LAW AND PRACTICE

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## 1. Market Trends

### 1.1 Technology M&A Market

Given its size, Gibraltar does not have a stand-alone tech sector but rather tech actors are typically involved across a number of different areas where Gibraltar enjoys prominence wholly out of proportion to the country's size (notably in gaming [where many leading players in this industry are Gibraltar-headquartered or have substantial operations in Gibraltar], in insurance [with close to one in every four cars in the UK presently covered by Gibraltar insurers] and in fintech [where alternative models operate allowing for full licensing of companies using distributed ledger technology (DLT) involving the transmission or storage of value belonging to others, or a less onerous virtual asset service provider (VASP) registration for certain more peripheral activities that fall outside the scope of full licensing]). Gibraltar holding companies also often feature (typically as indirect targets) in M&A deals (including with a tech slant). Over the past 12 months, the tech M&A market (in line with general market trends across most sectors) has seen a number of consolidations, which has prompted a relatively high deal activity.

One specific trend is in relation to M&A activity involving companies that are “passporting” their services into the UK. In particular, banks and investment firms have been of interest for crypto projects looking to enter, or to continue offering their products in, the UK market. Under the new financial promotion rules in the UK, generally only “authorised persons” or firms that are registered with the UK FCA as a cryptoasset businesses can promote cryptoassets to customers in the UK. A Gibraltar financial services firm that has passported its services to the UK becomes an “authorised person” for the purposes of the financial promotion rules. It is this key point that

is driving M&A attention to Gibraltar firms particularly as only Gibraltar has retained passporting rights into the UK after Brexit.

### 1.2 Key Trends

There has been an influx of new tech-related operators in Gibraltar over the past 12 months, primarily in the following areas:

- gaming (in anticipation of a broadening of the scope of regulated activity under Gibraltar's new Gambling Act [anticipated to come into force during 2024], to cover software, marketing and a number of other supplementary services);
- payment rails using crypto/blockchain;
- “market-making” type activity (usually affording liquidity to exchanges);
- registrations/establishment of “over-the-counter” (OTC) exchange services (crypto for fiat and vice versa);
- new DLT full licensing applications/VASP registrations; and
- acquisitions of Gibraltar-licensed entities (including to the avail of access to the UK market given the “passportability” of certain activities between Gibraltar and the UK).

## 2. Establishing a New Company, Early-Stage Financing and Venture Capital Financing of a New Technology Company

### 2.1 Establishing a New Company

In the start-up market we see a variety of Gibraltar incorporations (taking advantage of the relative ease and speed [subject to AML/KYC requirements] to incorporate and organise a Gibraltar company, which can even be as quick as within 48 hours), as well as others that may have already been set up outside Gibraltar (and



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can be readily re-domiciled to Gibraltar using the country's broad and easy-to-navigate re-domiciliation regulations). Whilst in principle there are no minimum capital requirements, there may be circumstances (typically for licensed entities providing some level of custodianship for third parties) where these may come into play.

## 2.2 Type of Entity

This is typically fact-specific, but the most common type of entity used is a Gibraltar private company limited by shares (but with the whole spectrum of vehicles, including "foundations" [that can be set up for any purposes which are "capable of fulfilment" as long as they are not unlawful, immoral or contrary to public policy in Gibraltar, and which would include charitable or philanthropic purposes as well for any multitude of private, commercial arrangements], and most recently, as a result of updates to our law on Limited Partnerships, for the ability for Gibraltar Limited Partnerships to elect on whether or not to have separate legal personality, as well as the addition of protected cell limited partnerships, where the assets and liabilities as between limited partners can be segregated within different cells in the limited partnership).

## 2.3 Early-Stage Financing

This is often driven by circumstances, with all of the above typically featuring as sources of early-stage financing. A recent development, however, was the use by one of the firm's Gibraltar-licensed clients (following careful negotiation throughout with the firm's regulators) of crowdfunding using a UK crowdfunding platform.

## 2.4 Venture Capital

To the authors' knowledge there are no Gibraltar-based venture capital firms servicing the market, but many of the firm's clients (including in the tech sector) have access and regularly use ven-

ture capital (from the UK and further afield) to fund their activities (not only in relation to start-ups, but also in buyout scenarios of more established enterprises).

## 2.5 Venture Capital Documentation

There are no developed set standards for venture capital documentation given the absence of Gibraltar-based venture capital firms.

## 2.6 Change of Corporate Form or Migration

This can vary depending on the ultimate "end-goal" of the start-up concerned, but the authors have seen a number of non-Gibraltar companies redomicile to Gibraltar (often in order to bring themselves within scope of the jurisdiction's relevant regulatory regimes). Conversely, the authors have also seen some start-ups initially incorporate as Gibraltar companies and then re-domicile to another jurisdiction to allow for their listing on a relevant exchange as part of an IPO exit (and further noting that Gibraltar has a fledgling exchange of its own in the form of the Gibraltar Stock Exchange, which is currently under intended purchase, and which hopes to in due course bridge its use by both traditional fiat and crypto currencies).

## 3. Initial Public Offering (IPO) as a Liquidity Event

### 3.1 IPO v Sale

This can often depend on the sector and whether there are realistic pathways to "exit" (including prospective purchasers) identified at the outset. In practice the firm often see start-ups focusing all of their efforts on delivering growth without a clear consideration of exit strategy(ies). Invariably, it is preferable to at least give some level of consideration to this prior to structuring the

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business/entity, as in the alternative the firm has seen several clients “hamstrung” at this stage in light of earlier structuring decisions.

Crowdfunding has also become an interesting option for Gibraltar companies following the successful raise by a Gibraltar regulated company on a UK crowdfunding platform. This was the first raise of this type which has now paved the way for other companies to raise capital in this manner.

### 3.2 Choice of Listing

Given that Gibraltar only presently has a crypto exchange (which in itself is a recent addition), Gibraltar companies typically list either directly onto a foreign exchange or re-domicile to another jurisdiction prior to listing if there may be advantage in doing so.

### 3.3 Impact of the Choice of Listing on Future M&A Transactions

Since Gibraltar companies typically list on foreign exchanges, this is generally not applicable (in particular noting that our own domestic laws afford minority protection rights from “squeeze-out” by application of the test of the doctrine of unfair prejudice – notably, the typical way to seek to mitigate against such potential future restrictions is by building in suitable “tag-along” rights into a Gibraltar entity’s constitutional documents).

## 4. Sale as a Liquidity Event (Sale of a Privately Held Venture Capital-Financed Company)

### 4.1 Liquidity Event: Sale Process

Historically, Gibraltar companies have often not been the direct targets in these types of scenarios and as a result there is a scarcity of data

from which to draw conclusions, but in principle both an auction and a bilateral negotiation are possible and which is more likely may well be driven by particular facts and circumstances on a case-by-case basis.

### 4.2 Liquidity Event: Transaction Structure

The majority of instances the authors have come across have involved complete sales, but there have not been enough examples of this to date of which the authors are aware to be able to draw any definitive conclusions, although both options are in principle possible.

### 4.3 Liquidity Event: Form of Consideration

Most of the transactions the authors have seen have typically been outright sales for cash.

### 4.4 Liquidity Event: Certain Transaction Terms

Although it may depend on the nature of the deal and the parties involved, continuing application of representations and warranties post sale are often a typical feature and indemnification together with escrow/suspense payments as well as deferred consideration payments (sometimes contingent on earn-out requirements) are mechanisms employed in connection with this. More recently the authors have also seen insurance being used more widely in these situations (including to offer balancing protection to the sellers for consideration they may have already received).

## 5. Spin-Offs

### 5.1 Trends: Spin-Offs

Spin offs are possible, but the reality is that the majority of tech M&A in Gibraltar has thus far been in fields that are subject to regulation, and



therefore spin-offs leading to two or more enterprises with respective regulated activity may mean that the spun-off entity would essentially require a fresh licensing application, which may explain why this has not often materialised.

## 5.2 Tax Consequences

Provided there is no trading, intercompany interest (above a GBP100,000 per annum threshold) or royalty income attributable at a corporate level and that any gain is considered capital in nature (noting that there is no capital gains tax levied in Gibraltar) there should be no Gibraltar tax due or levied at the corporate level. Gibraltar taxation on the shareholders will generally depend on whether or not they are Gibraltar ordinarily resident individuals.

## 5.3 Spin-Off Followed by a Business Combination

There are generally no restrictions on a spin-off being followed by a business combination, noting that such a combination would typically be pursued by a Gibraltar Court-sanctioned merger (including in principle cross-border merger) or scheme of arrangement.

## 5.4 Timing and Tax Authority Ruling

There is generally no mandatory requirement for a tax ruling to precede and allow for a spin-off, although there may be circumstances in which that may be advisable and/or required (eg, in circumstances where the spin-off involves another jurisdiction which desires tax clearance prior to allowing for the commencement of operations in the new jurisdiction).

## 6. Acquisitions of Public (Exchange-Listed) Technology Companies

### 6.1 Stakebuilding

The comparatively fledgling nature of Gibraltar's M&A market generally (including in technology-related matters) means that pre-offer strategies (such as initial stake building) are not generally a feature of the Gibraltar space.

There are no material shareholding disclosure thresholds and filing obligations in Gibraltar in relation to private or public (non-listed) entities. For listed entities, however, and pursuant to the Disclosure of Interests in Shares Act 1998, all persons who acquire a notifiable interest in a listed company's share capital (with reporting obligations at 10, 25, 50 and 75% thresholds of aggregate nominal value) owe an obligation of disclosure to notify the relevant listed company. Furthermore, for regulated entities, a decision by any person to make a takeover bid (no matter the proposed ownership level) must be made public without delay and the person must inform the Gibraltar Financial Services Commission of the bid at the first reasonable opportunity.

Save in relation to Gibraltar regulated entities (where the regulator would typically require that information as part of their regulatory oversight), Gibraltar law does not otherwise generally require shareholders to disclose or make known the purpose of their acquisition and their intention regarding control of the target company.

### 6.2 Mandatory Offer

Unless stipulated in the articles of association (eg, by way of application of "tag along" or "drag along" rights), there are generally no Gibraltar law requirements to make a mandatory or compulsory offer, albeit noting that listed enti-

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ties will need to comply with any relevant stock exchange requirements (and noting that these may not be Gibraltar law driven given the country's nascent, limited stock exchange, only presently dealing with crypto, and that most Gibraltar public listed entities are listed outside Gibraltar).

Additionally, in respect of regulated entities (which can include a Gibraltar public listed entity), the Gibraltar Financial Services Commission must direct a buyer to make a mandatory offer if the buyer:

- acquires securities which when taken together with securities in which persons acting in concert with the buyer are interested, carry 30% or more of the voting rights of a company; or
- together with any person acting in concert with the buyer:
  - (a) is interested in securities to which the aggregate carry not less than 30% of the voting rights of a company but does not hold shares carrying more than 50% of those voting rights; and
  - (b) acquires an interest in any other securities which increases the percentage of securities carrying voting rights in which the buyer is interested.

## 6.3 Transaction Structures

Whilst we have seen some of these framed as sales pursuant to a Gibraltar Act of Parliament (including to facilitate novation of clients of the enterprise being purchased), this is more typically pursued by way of share purchase, transfer and related documentation.

## 6.4 Consideration and Minimum Price

Noting the paucity of information in this relatively nascent field for Gibraltar, in our experience transactions are often outright sales for

cash. Usually mergers involving retiring (or to otherwise differentiate between) shareholders may include a cash element, but will involve judicial oversight given that Gibraltar law mergers require Court sanction. If the activities of the business are regulated, then regulators will also have input/requirements of their own. In both cases, it is possible for a "fair price" to feature by way of protection of minority shareholders. Contingent value rights, insurance and other creative mechanisms may be possible, although latitude for these may be impacted where Court/regulatory oversight involved.

## 6.5 Common Conditions for a Takeover Offer/Tender Offer

Given Gibraltar not typically featuring as the primary "target" jurisdiction, there is little prescriptive Gibraltar law or express regulation in this field, but in exercising its broad powers, regulators would ordinarily impose/restrict the use of conditions similarly as would be expected in other jurisdictions (such as the UK) where such transactions are more prevalent (eg, including allowing for acceptance below 100%, prohibitions on offer-related arrangements, and post-offer restrictions).

## 6.6 Deal Documentation

The primary technique/legal means for acquiring a company (including a public listed one) in Gibraltar is through the acquisition of its issued share capital and which will ordinarily include entry into a form of share purchase or business combination agreement (with tailored representations, warranties and undertakings), together with a related instrument of transfer. The transfer of shares shall also require to be approved by board resolution of the target entity and the making of corresponding private and public updates to its register of members (which are types of undertakings that, subject to naviga-

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tion of our unlawful financial assistance provisions, the target entity can provide). The transfer may also require advance regulatory approval of the Gibraltar Financial Services Commission where a Gibraltar entity subject to its regulation is directly or indirectly involved or affected by the transfer. Whilst representations and warranties in public listed company scenarios may be less common, the authors have seen these feature, and sometimes with insurance cover in place.

## 6.7 Minimum Acceptance Conditions

Control thresholds in Gibraltar could arise in circumstances where certain turnover or share of supply tests are met or exceeded, but whilst acknowledging a scarcity of examples from which to seek to draw conclusions given such transactions not usually being Gibraltar target centric, typical tender offers in Gibraltar would expect to be at least 90% (given the ability to squeeze out minority shareholders described in 6.8 Squeeze-Out Mechanisms, and unless there are reasonable, explainable circumstances that may justify otherwise to the satisfaction of any court, regulator or other relevant body exercising oversight).

## 6.8 Squeeze-Out Mechanisms

Gibraltar statute provides that if a buyer has acquired not less than 90% of the shares to which the offer relates and not less than 90% of the voting rights carried by such shares, the buyer can squeeze out the minority shareholders and acquire their shares at a fair price, provided that it does so within three months of the end of the time allowed for acceptance of the bid. Alternatively, if the buyer holds not less than 90% of all shares in the company, which carry not less than 90% of the total voting rights in the company, minority shareholders can require the buyer to acquire their shares in the company at

a fair price within three months of the end of the time allowed for acceptance of the bid.

Further, after making a petition to the Gibraltar Court (by either a member of the target company and/or the relevant governmental minister in charge of such affairs) against unfair prejudice, the Court may order for the purchase of the shares of any members of the company by other members or by the company itself.

More generally, certain provisions may be included in the articles of association of the target company prescribing the manner in which to compulsorily acquire minority stakes.

## 6.9 Requirement to Have Certain Funds/ Financing to Launch a Takeover Offer

There is no express Gibraltar statutory prescription (in terms of requirements) and therefore no general limitation on the ability to imbue offers with conditionality (including regarding obtaining financing), subject to (where applicable) demands/expectations of a Gibraltar Court or Regulator (and which can be case specific).

## 6.10 Types of Deal Protection Measures

Save for the rules and regulations of the (typically non-Gibraltar) stock exchange where the entity may be listed, or such requirements of the Gibraltar regulator in circumstances where the enterprise is subject to Gibraltar regulatory oversight, there are generally no specific Gibraltar law provisions preventing a target company from seeking to negotiate and implement deal security measures (but this must be contextualised against the potentially highly persuasive application of common law in Gibraltar, which could accordingly feature in the absence of express, Gibraltar contrary provision). Traditional mechanisms and arrangements have included forms of cross-indemnities, break fee arrangements (in

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certain circumstances, and with limitations similar to those featuring per UK law) force-majeure clauses, non-solicitation provisions, insuring of representations, and warranties and undertakings.

## 6.11 Additional Governance Rights

This is invariably fact specific, but in certain circumstances (and within the general confines of “reasonableness” and not unfairly prejudicing remaining minority shareholders) it may be possible for additional governance rights to be afforded by way of amendments to a Gibraltar entity’s articles of association.

## 6.12 Irrevocable Commitments

In principle the relative lack of Gibraltar statutory prescription in these matters means that there is typically substantial flexibility in the types of mechanisms that can be employed in committing principal shareholders to tender or support a transaction, including but not limited to allowing for irrevocable commitments by shareholders (with or without opt-outs in given circumstances). The negotiation of these can take place at any stage and will be fact specific (and may depend on the relationships with and identities of shareholders), but typically would come at a stage where there is already substantive agreement between the primary deal-makers.

## 6.13 Securities Regulator’s or Stock Exchange Process

From a Gibraltar perspective this has not been substantively relevant to date as we only have the Gibraltar Stock Exchange presently only dealing in crypto, but Gibraltar companies would ordinarily be expected to comply with such external regulatory and/or stock exchange requirements to which they may be subject.

## 6.14 Timing of the Takeover Offer

Gibraltar’s antitrust regime involves voluntary disclosure (although can also feature in circumstances where the regulator employs its substantially broad powers, save that we are not aware of this having yet happened in practice). Accordingly, there are generally little (if any) restrictions in practice by way of timing of takeover offer limitations, save that in relation to a Gibraltar regulated entity, the time allowed by an offeror for accepting a bid must be not less than two weeks nor more than ten weeks from the date of publication of the offer document. An offeror may extend the period during which a bid will remain open for acceptance but only if (i) the offeror gives at least two weeks’ notice of the offeror’s intention of closing the bid; and (ii) doing so will not be contrary to an offeree company and must not be hindered in the conduct of its affairs by a bid for its securities for longer than is reasonable. The Gibraltar Financial Services Commission may grant a derogation from the period to allow the offeree company to call a general meeting of shareholders to consider the bid.

## 7. Overview of Regulatory Requirements

### 7.1 Regulations Applicable to a Technology Company

This depends on what the nature of the technology is and whether it involves Gibraltar regulated activity. For technology falling within the requirements of the (soon to be expanded to cover additional, ancillary services) Gambling Act, the relevant Regulator is the licensing authority presided over by the Gambling Commissioner – there are a variety of nuanced licences available depending on precise activity. In fintech, e-banking, insurance and other licensable activi-

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ties (and which may also include a tech aspect), the relevant regulator is the Gibraltar Financial Services Commission – what specific approvals may be required (and their period for obtention) can vary substantially depending on the particularities of each application, including the nature of the services to be afforded (eg, a VASP registration is in principle achievable in a matter of weeks, whereas fully-blown DLT licences for custodian or other services can ordinarily range between 6 and 12 months subject to particular facts and circumstances).

## 7.2 Primary Securities Market Regulators

There is not a Gibraltar securities regulator as such, but the Gibraltar Regulatory Authority is the designated Gibraltar Competition and Markets Authority for matters falling within the scope of Gibraltar's Competition Act. Additionally, if the matter involves Gibraltar-licensable activity, then the Gibraltar Financial Services Commission will have authority.

## 7.3 Restrictions on Foreign Investments

There are generally no Gibraltar law restrictions on foreign investments in Gibraltar, subject to compliance with any employment requirements of general application as well as any typical conditions of the Gibraltar Financial Services Commission for pursuing a prescribed regulated activity (which could require eg, physical presence or other requirements).

## 7.4 National Security Review/Export Control

There is no specific national security review of acquisitions in Gibraltar, although Gibraltar's Proceeds of Crime Act (together with other pertinent national security legislation, including but not limited to the Terrorism Act), bestows wide ranging powers on the relevant authorities to gather information and investigate potential

criminal conduct (including but not limited to money laundering, terrorist financing and proliferation financing), transacted or attempted to be transacted through relevant financial business (with corporate mergers and acquisitions being potentially within scope).

## 7.5 Antitrust Regulations

Gibraltar has various key pieces of antitrust legislation designed to, inter alia, protect both consumers, ensure the operation of fair and undistorted markets with regards to both goods and services, together with empowering statutory bodies to uphold and enforce each of the same. Notable pieces of legislation include:

- the Competition Act, which provides a general prohibition on agreements, transactions and decisions which may affect, prevent, restrict or distort trade and competition;
- the Financial Services Act (together with numerous applicable subsidiary legislation in the form of sector specific regulations), governing the provision of financial services in Gibraltar, and empowering the Gibraltar Financial Services Commission (as the financial services regulator) to uphold good business market practices and consumer protection; and
- the Fair Trading Act, which governs the operation of consumer markets and business trading practices and licensing requirements in Gibraltar, as regulated by the Office of Fair Trading as the business trading regulator in pursuance of the same.

## 7.6 Labour Law Regulations

Pursuant to the Employment Act (and per Gibraltar's pre-Brexit transposition [and continued application of the provisions] of the EU's Acquired Rights Directive 77/187/EC, which provides the European standard on labour and

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employment law matters), certain, extensive employee consultation and information provisions and other rights form part of the pertinent Gibraltar legislation. Notably, acquirers should be primarily mindful of provisions relating to the automatic transfer of any applicable employees by the seller which would form part of the applicable M&A transaction. Additionally, to the extent that a Gibraltar target company is regulated by the Gibraltar Financial Services Commission, additional requirements (including regarding regulated pension schemes) will also require attention/adherence.

## 7.7 Currency Control/Central Bank Approval

There are no such requirements or provisions in this jurisdiction.

## 8. Recent Legal Developments

### 8.1 Significant Court Decisions or Legal Developments

The most significant recent development in Gibraltar has been the coming into force of the Competition Act on 1 January 2021.

## 9. Due Diligence/Data Privacy

### 9.1 Technology Company Due Diligence

Whilst generally there is no express Gibraltar statutory prescription covering this, practically consideration should be given to general adherence with typical insider trading regimes (eg, the UK's, given that Gibraltar often draws on UK practice in instances where the country does not have express contrary provision in Gibraltar), with the primary aim being to seek to avoid information asymmetry that may operate in favour of

particular bidders and to the potential detriment of certain shareholders.

### 9.2 Data Privacy

The general data protection provisions operative under Gibraltar law (which essentially largely transpose and incorporate the EU General Data Protection Regulation [Regulation (EU) 2016/679] into our domestic provisions) are also those applicable in relation to data privacy restrictions regarding due diligence of a Gibraltar technology company.

## 10. Disclosure

### 10.1 Making a Bid Public

Whilst there is no general requirement to make a bid public, if the deal requires Court sanction (as, eg, a merger would) then the directors of each of the public merging companies must deliver, inter alia, a copy of the draft terms of merger to the Registrar of Companies in Gibraltar, who then publishes in the Gibraltar Gazette a notice at least one month before the date of any shareholder meeting of that company summoned for the purpose of approving the proposed arrangement. For regulated entities, a person must, without delay, make public, and at the first reasonable opportunity inform the Gibraltar Financial Services Commission, of any decision by that person to make a takeover bid. Where a bid has been made public, the boards of the offeree and offeror companies must inform the representatives of their respective employees or, where there are no such representatives, the employees themselves, of the fact.

### 10.2 Prospectus Requirements

Gibraltar prospectus requirements can feature in arrangements requiring Gibraltar Court sanction.



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More broadly, the type of disclosure required for the issuance of shares in a business combination with a Gibraltar element may depend on whether the entity is private/public, listed and/or regulated.

In all cases there shall require to be adherence to the requirements of the Register of Ultimate Beneficial Owners Regulations (being continuing obligations on UBOs with 25% or more voting/economic interests). There shall also be requisite filings at Companies House, Gibraltar regarding the incumbent legal shareholder(s) and any changes to a Gibraltar entity's share capital.

Public and listed entities may also see additional and ongoing disclosure obligations (eg, notification of changes to capital or board of directors' composition).

With listed entities, there may be additional disclosure requirements driven by the rules and regulations relating to the market/exchange on which they are listed and, in the case of Gibraltar regulated entities, where the issuance is pursuant to a takeover bid there is also an obligation regarding a decision by any person to make a takeover bid requiring to be made public without delay, as well as to inform the Gibraltar Financial Services Commission of the bid at the first reasonable opportunity.

Finally, save for the aforementioned, and while noting that there is no other express statutory prescription regarding the form of disclosures relating to an issuance of shares in a Gibraltar company, Gibraltar is a common law jurisdiction and, as such, dishonestly concealing any material fact or making a statement that is false or misleading with the intention of inducing, or being reckless as to whether doing so may induce another party to enter into an agreement

(including with respect to acquire/dispose of shares), amounts to a criminal offence.

### 10.3 Producing Financial Statements

In relation to public mergers or private schemes of arrangement (which require Gibraltar Court sanction), a directors' explanatory report shall be required which must set out the legal and economic grounds for the draft terms and specify any special valuation difficulties. In addition, a supplementary accounting statement may be required which must consist of a balance sheet dealing with the state of affairs of the company as at a date not more than three months before the draft terms were adopted by the directors and where the company would be required to prepare group accounts if that date were the last day of a financial year, a consolidated balance sheet dealing with the state of affairs of the company and the undertakings that would be included in such a consolidation. Both GAAP and IFRS are accepted in Gibraltar with IFRS being the most commonly used standard.

In relation to regulated entities, although, formal accounts are not technically required to be furnished within the offer documents, an offeror must prepare and make public in good time an offer document containing, inter alia, the consideration offered for each security or class of securities and, in the case of a mandatory bid, the method employed in determining it (with particulars of the way in which that consideration is to be paid), information concerning the financing for the bid and the future business of the offeree company and, in so far as it is affected by the bid, the offeror company. Accordingly, it is customary for accounts to be prepared in these circumstances in order to substantiate and address the offer document financial requirements set out above.

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## 10.4 Disclosure of Transaction Documents

In relation to public mergers or private schemes of arrangement (which require Gibraltar Court sanction), a draft of the proposed terms of the merger/scheme must be drawn up and adopted by the directors of the merging companies together with a directors' explanatory report, a supplementary accounting statement and an expert's report (the latter three may not be required in certain statutory prescribed circumstances). There may be further requirements under the relevant stock exchange where the entity is listed.

With respect to regulated entities, an offeror must prepare and make public in good time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid. An offer document must be communicated by the offeror to the Gibraltar Financial Services Commission before it is made public and when it is made public, must be communicated by the boards of the offeree and offeror companies to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.

## 11. Duties of Directors

### 11.1 Principal Directors' Duties

In both public and private M&A transactions, the company's board of directors are the key decision-making body. The directors must have regard to their fiduciary duties, and act in the best interests of the company as a whole (essentially considering all interested persons, including the company in itself, its shareholders and third-party creditors).

More generally, directors' duties are not generally codified in Gibraltar statute but by virtue of the common law's application in Gibraltar, directors' fiduciary duties could include:

- a duty to act in the best interests of the company as a whole;
- a duty to exercise a degree of skill and care that may be reasonably expected from them; and
- a duty to act for a proper purpose (typically as more particularly set out in the company's articles of association, which ordinarily impose certain specific duties to secure proper use of the powers bestowed upon directors).

### 11.2 Special or Ad Hoc Committees

This is permissible per Gibraltar law and in certain circumstances may well be strongly advisable, although the authors are not aware of this having historically been regularly used.

### 11.3 Board's Role

The board of directors are the key decision making body and are tasked with drafting the terms of the merger/scheme together with the directors' explanatory report and the supplementary accounting statement (for public mergers or private schemes of arrangement) and the offer documents (for regulated entities), all of which are the documents which govern the relevant takeover, and accordingly offers the opportunity for them to exercise their business judgment and substantiate the commercial reasons for the proposed transaction (which a Gibraltar Court may take into consideration in exercising its discretion).

Further, on the basis that the directors (in accordance with their fiduciary duties) must act in the best interest of the company as a whole (and so

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would typically be expected to take such steps as may be consonant with the same, and which shall be fact specific), in Gibraltar, directors are allowed to use defensive measures in a hostile takeover as long as they are not contrary to Gibraltar law and do not unduly frustrate an offer without justifiable grounds. As such, the “just say no” approach must be accompanied by a principled argument setting out a proper, defensible basis; eg, that the offer will be one that undervalues the target and its prospects and/or that the offer carries an insufficient premium for control, etc. In relation to regulated entities, there is an obligation on the board of directors to obtain prior authorisation of a general meeting of shareholders, in particular before taking any action, so their ability to “just say no” in these circumstances is further limited.

In any event, substantiating proper, reasonable grounds for decisions are typically the best form of defence/mitigation against shareholder challenge (litigious or otherwise).

## 11.4 Independent Outside Advice

In all M&A transactions, it is common for directors of the relevant entities to seek independent outside advice from corresponding professionals (typically lawyers, but can also include other professionals as circumstances may warrant) to advise on the relevant procedures, risks and assist with advice regarding potential forms of pursuance of the proposed combination and the drafting of the necessary documentation. For public mergers or private schemes of arrangement, there may be certain circumstances where an expert’s report is also required (typically in situations involving financial considerations, and in which case this is usually provided by an accountant or auditor – the authors would generally expect there to be a fairness opinion addressed in their report in some form).

## Trends and Developments

### Contributed by:

Tim Garcia, Anthony Provasoli, Aaron Payas and Matthew Torres

**Hassans International Law Firm Limited**

**Hassans International Law Firm Limited** is a full-service law firm with offices in Gibraltar and Spain, offering services in corporate and commercial, financial services, fintech, litigation, funds, gaming, property, private client, tax, and shipping law (with the broader tech sector often featuring across a number of these). Through the firm's wholly owned fiduciary arm, Line Group, it also affords corporate and trust domiciliation, management, and directorship/trustee services. Consistently top-ranked market leaders in Gibraltar across all sectors for

many years now, the breadth and depth of the firm's expertise is unrivalled, as is the trust in its counsel of regulators and key decision-makers in the firm's jurisdiction (with Hassans' practitioners habitually relied on to help draft and develop legislation, as well as being prominently involved in numerous industry associations and practice groups). As such, the firm enjoys the continuing privilege of contributing to the shaping, maintenance, and advancement of the Gibraltar plc product.

## Authors



**Tim Garcia** has been a partner at Hassans since 2014, and leads the team specialising in international cross-border corporate, commercial, and tax work. His clients (including a

number in the tech sector) are primarily “blue-chip” multinationals, major private equity houses, and substantial family offices. Tim's expertise includes M&A, corporate substance and governance, structuring, servicing and divestment of investments, re-domiciliations, relocations (and establishment by way of branch or otherwise) of businesses and individuals to Gibraltar, cross-border mergers, financing and restructuring transactions, employee stock options, liquidations (including as licensed voluntary liquidator), broader insolvency aspects, limited partnerships, and a whole range of general commercial transactions.



**Anthony Provasoli** leads the fintech team at Hassans, advising on cryptocurrency and blockchain-related work since 2014. He has advised and assisted the Gibraltar Financial

Services Commission in preparing the guidance notes for the DLT Regulations and often forms part of working groups that consult on certain legal and regulatory amendments in relation to these regulations. Anthony advises high-profile cryptocurrency businesses, DLT providers, and fintech firms looking to set up operations in Gibraltar and Europe, and also assists clients undertaking token sales from Gibraltar, and regularly advises investors and early stage start-ups on the structuring of their products and/or business proposition.

# GIBRALTAR TRENDS AND DEVELOPMENTS

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**Aaron Payas** is a partner and head of funds at Hassans. He leverages his unique background and formation to provide a holistic approach to his clients. Aaron obtained a degree in mathematics before converting to law, and subsequently becoming a CFA Charterholder. He leads his team with a focus on helping clients build in the new Web3 space which invariably involves financial services work. Marrying a traditional practice in financial services with industry-leading work, Aaron has been instrumental in many clients' achievements in the challenging DLT space.



**Matthew Torres** is a partner at Hassans who specialises in international cross-border corporate, commercial, and tax work. Matthew is highly experienced and specialises in company incorporations, corporate structuring and restructuring, repatriation of profits/capital/reserves, equity and debt financing transactions, re-domiciliations in and out of Gibraltar, cross-border mergers, M&A, joint ventures, corporate finance and security, financial assistance, corporate governance and organisation, corporate transaction project management, insolvency work, and the use, set up, organisation, and dissolution of Gibraltar Limited Partnerships. Matthew also advises on trade mark registrations in Gibraltar and, more recently, on cryptocurrency and blockchain-related work.

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## Improving Gibraltar's Finances Amongst Difficult Circumstances

### *Still feeling the effects of Brexit*

Gibraltar, an internationally compliant and well-regulated jurisdiction, stands at a crossroads. Having been fired out of the Brexit cannon against our better judgement (95.91% having voted in the 2016 European Union membership referendum to “Remain”), we are yet to land (having not been included in the UK–EU Trade and Co-operation Agreement). Given the particularities of our relationship and physical connection with the European mainland, bespoke arrangements are being pursued in their stead (by way of a treaty styled in the form of a Schengen Acquis, and aimed at delivering an area of shared prosperity in Gibraltar and the nearby Spanish hinterland).

At the time of writing, the understanding is that there is substantive agreement on said treaty, but its conclusion and roll-out hampered by the delicate accommodation of in some areas presumably diverging interests of the EU and the Governments of the United Kingdom, Gibraltar and Spain. The recent re-election of the GSLP/ Liberal administration in Gibraltar and of a PSOE coalition in Spain mean that the parties whom have been sat at the treaty negotiating table remain the same. The approximation of EU elections in June 2024 (at which one of the key negotiators shall be changed) should help focus minds on finding imminent resolution, and the hope of the successful conclusion of a mutually beneficial treaty therefore remains.

But Gibraltar has also been making contingency plans in case of there being no negotiated outcome to the treaty. As part of this, it is already enjoying the benefits of a unique single-common market with the UK on a number of financial services (reinforcing in parallel our continued

proximity to the UK). In addition, in line with the service ethos in which we are steeped (spanning ancient times of trade with seafarers, assistance to the British Garrison since 1704, and up to our dynamic finance centre offering), Gibraltar will continue to develop and realise solutions to a wider world undergoing a level of tax harmonisation under the OECD's Pillar 2 plans, and in the context of which the delivery of service shall be primordial. At a time when the tectonic plates that raised the steadfast promontory known as “The Rock” are figuratively moving again, Gibraltar will once more rise up to this challenge.

### *Financial strength*

Presently, the country's finance centre is a primary engine driving the nation's economy, being the largest contributor to gross domestic product. This sector also includes a wider services industry that is not directly related to financial services in the strict sense (including but not limited to fiduciary services), but many of the substantive, internationally facing operations run from Gibraltar are housed under a regulatory legislative landscape based (to varying degrees) on numerous financial services provisions.

Many of the market trends in Gibraltar's financial services industry stem from the jurisdiction's work in the distributed ledger technology (DLT) sector, which is regulated under the Financial Services Act 2019 (FS Act) and the DLT Regulations.

The FS Act and its subsidiary regulations set out the regulatory framework for Gibraltar's financial services, markets and fiduciary services regime, and the listing of securities, prospectuses and takeovers. The FS Act and its subsidiary regulations have been influenced by European Union policy and legislation and certain regulatory



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regimes regulated by the FS Act and its subsidiary regulations.

Since 1 January 2018, any firm carrying out by way of business, in or from within Gibraltar, the use of DLT for storing or transmitting value belonging to another, needs to be authorised by the GFSC as a DLT Provider. The Regulations apply to activities not subject to regulation under any other regulatory framework. Firms and activities that are subject to another regulatory framework will continue to be regulated under that framework.

The DLT Regulations complement the FS Act and set out, among other things, the application process for obtaining the relevant permission to carry out “DLT Provider’s business” (as defined in the DLT Regulations), the ongoing obligations of a “DLT Provider” (as defined in the DLT Regulations) and the regulatory principles that a DLT Provider must comply with. Exchanges, trading venues, e-wallets and/or other forms of cryptocurrency service platforms can be structured to operate differently, but if operators of such platforms are storing, transmitting or facilitating the transmission of cryptocurrencies or other virtual assets belonging to their customers, then it is likely that they will fall within the scope of the DLT Regulations.

The fact that we have had our DLT framework in place for six years means that businesses that operate in Gibraltar have legal, regulatory and tax certainty with respect to crypto. This attracts a lot of interest from the international crypto community which is looking for jurisdictions that are easy to do business in but are also well regulated.

This certainty has allowed Gibraltar to increase its crypto offering beyond just the DLT licence.

OTC desks and token issuers can register with the GFSC as virtual asset service providers (VASPs). This registration regime follows FATF recommendations on virtual assets and is focused on anti-money laundering compliance.

E-money, payment platforms and more traditional financial operations are also largely espoused within the financial services regulatory landscape and have also afforded numerous, considerable additions to the Gibraltar scene.

In addition, crypto funds have flourished in Gibraltar. There has been a marked increase in new fund registrations in the past five–six years, primarily driven by those with investment strategies involving crypto. These funds can be private and unregulated (no promotion and less than 50 investors), or authorised and regulated (limited to experienced investors) by the GFSC. Of recent note is the emergence of non-profit orphan entity crypto foundations, which are set up as “off-chain” support vehicles for decentralised protocols or decentralised autonomous organisations. These structures are innovative in nature but can be set up with confidence in Gibraltar given the clarity around the rules governing crypto within the jurisdiction.

### *The game of life*

Gibraltar also enjoys a prominence wholly disproportionate to its size in both the gaming industry (where many of the top multinational operators have their headquarters or, at the least, very considerable operations based in, and run from, Gibraltar, and with the imminent adoption of a new Gambling Act which is expected to extend regulatory reach to also cover peripheral activities such as gaming marketing affiliates, geared at further reinforcing the market-leading quality of, and protections and confidence in, the Gibraltar offering) as well as in

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insurance (with close to one in every four cars in the UK presently covered by Gibraltar insurers, and with plans already being pursued to similarly substantially service the UK health and travel insurance markets).

### *Tax and “passporting”*

A lot of the organisations in each of the areas in which Gibraltar is pre-eminent typically have a technological aspect to their activities. Accordingly, the Gibraltar tech sector encapsulates a broad range of practice areas.

With the global evolving tax landscape (including OECD Pillars 1 and 2) against a backdrop of tension between globalisation/nationalism and numerous political conflicts, as well as widespread tax hikes to curb inflation and by way of COVID-19 recovery, uncertainties to commercial enterprises as well as to individuals/families seeking to preserve their wealth presently abound. In this context, it is perhaps no surprise that there has been a flurry of global M&A activity, perhaps also partly in consequence of the availability of distressed or struggling businesses ripe for acquisition or merger, as well as the advantages of a cash-rich few who may have profited from consolidation and other opportunities that the pandemic and an inflationary world may have yielded them. This may explain why Gibraltar has seen a substantial increase in relocations of individuals and entities to it, as well as considerable local M&A activity within established players in the various sectors in which Gibraltar has a leading offering.

One specific trend in relation to M&A activity involves companies that are passporting their services into the UK. In particular, banks and investment firms have been of interest for crypto projects looking to enter or to continue offering their products in the UK market. Under the

new financial promotion rules in the UK, generally only “authorised persons” or firms that are registered with the UK FCA as cryptoasset businesses can promote cryptoassets to customers in the UK. A Gibraltar financial services firm that has passported its services to the UK becomes an “authorised person” for the purposes of the financial promotion rules. It is this key point that is driving M&A attention to Gibraltar firms particularly, as only Gibraltar has retained passporting rights into the UK after Brexit.

In echo to broader global consolidations and partnerships in recent times, Gibraltar has seen (and the firm has acted on) a number of M&A deals involving Gibraltar entities (either as a group company or, more latterly, as the primary objective). Whilst the general indirect acquisitions could arguably be a tangential result of geopolitical factors and international trade policies leading to cross-border deals and partnerships becoming increasingly significant as companies seek to expand their global footprint, the direct purchases of Gibraltar-licensed entities seemingly speak to the inherent value in their offering, as well as the accessibility they afford to Gibraltar and the wider, globalised world. As the industry matures and becomes more competitive, more and more companies are merging and acquiring each other. This is presumably driven by the need to scale, gain market share and access new technologies in order to expand their offerings. Further, some of the key M&A tech deals in Gibraltar in 2023 have highlighted the growing importance of customer engagement and loyalty in the tech domain. As businesses become more customer-centric, it is only natural that they look for ways to build deeper relationships. In the firm’s recent experience, “gamification” and loyalty programmes can be effective tools for achieving this goal.

# GIBRALTAR TRENDS AND DEVELOPMENTS

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## *Conclusion*

In summary, the variety of sectors in Gibraltar with a tech element are enjoying a recent M&A boom, arguably indicative of the wider good health and reputation of those industries and Gibraltar generally. Gibraltar's proven track record and current success in these areas despite continuing political uncertainty regarding its future relationship with the European Union is testament to the resilience and strength of the Gibraltar offering. Should a mutually beneficial treaty materialise in due course, however, growth could well be exponential, and no doubt the M&A tech sector will be one of its many beneficiaries.

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