

BUSINESS LICENSING

Changes to expect in the upcoming Fair Trading Bill 2020

Gibraltar Law Update

This is a digest that provides an overview of the upcoming changes to Gibraltar's business licensing regime in the form of the Fair Trading Bill 2020 that is not yet in force but may be in the near future.

INTRODUCTION

Gibraltar's business licensing and regulatory regime for trading businesses has seen considerable changes in the past 5-10 years. The most recent change will be seen in the anticipated [Fair Trading Bill 2020](#) that is expected to be considered by the Gibraltar Parliament in the coming weeks.

The Fair Trading Bill 2020 ("the Bill") proposes to bring changes to Gibraltar's business licensing regime by repealing the current Fair Trading Act 2015 and introducing its own changes. The Bill was published on the 29 October 2020 by way of Gazette.¹

This note sets out a brief and helpful analysis on the major changes that are being introduced by the Bill when compared to the current Fair Trading Act as well as a historical background to Gibraltar's trade and business licensing regimes over the past 10 years.

Whilst it is not yet known when the Bill will come into law and effect, the Gibraltar Parliament was set to meet on the 10 December and [did set the item as item 12 in its Parliamentary agenda](#). However, the Bill was not able to, at the earliest, be considered until Friday 11 December as, ordinarily, Bills cannot be considered until 6 weeks have passed from the date they were published in the Gibraltar Gazette, unless it is considered on an urgent basis which has not been declared to be the case.²

Given that the Bill could become law in the coming weeks in upcoming sessions of Parliament, it is appropriate for all businesses to consider whether they may need to be licensed under the upcoming regime and what might be required of them.

By way of general information, until a Bill is passed as an Act provisions in the Bill are referred to as 'clauses'. If a Bill becomes an Act, its clauses become sections of the Act.

A Short History and Background to the Fair Trading Bill 2020

The current business licensing regime that was introduced in 2015 differs quite considerably from that of the Trade Licensing regime under the Trade Licensing Act 1978. Before 2015, the Trade Licensing Act required that only certain specified businesses required a business licence in order to

¹ References to the Bill are references to the version of the Fair trading Bill 2020 [B. 18/20] published by the Gibraltar Gazette on the 29 October 2020 No.4775, unless otherwise stated.

² See section 35(3) of the Gibraltar Constitution Order 2006; standing order 25-37 of the [Gibraltar Parliament Rules and Orders](#)

trade in Gibraltar and these were limited largely to building contractors, caterers, electrical contractors and hairdressers. Following the introduction of the Fair Trading Act in 2015, it became a requirement for all businesses in Gibraltar to obtain a business licence unless they were, effectively, regulated under other Gibraltar legislation or subject to a few exceptions.

The Fair Trading Act 2015 (“the FTA”) was introduced to Parliament by the then Minister for Business and Employment who cited a few key objectives with the FTA when moving the FTA when it was then passing as a bill.³ Of these objectives, some of which are set out in the title of the FTA include: the setting up of the Office of Fair Trading (“OFT”) and related commission, encouraging businesses to comply with consumer law and improving trading practices; streamlining and simplifying the trade licensing regime; and establishing enforcement powers. Separate to the above, there were also ambitions to streamline Government services relating to form completion into a single point of contact to consider business licenses, town planning permits, environmental health permits and other registrations.

The introduction of the Bill follows reviews of the existing FTA by the OFT and the Government of Gibraltar. Given the considerable changes that were introduced by the FTA following the old Trade Licensing regime, there have been some teething issues with the FTA’s implementation and it appears that the Bill does look to address some of these issues.

To put the changes of Gibraltar’s business licensing regime to date into perspective, the old Trade Licensing Act was a mere 22 pages when compared with the FTA’s 60 pages and the Bill’s 80 pages (in its current form, excluding any possible guidance or policy documents). This could be said to mark a growth over the years in consumer protection oversight, enforcement powers, requirements and obligations of Gibraltar businesses.

Changes to Business Licensing

There are a number of changes between the FTA and the Bill. Given that there are a number of changes, this note seeks to set out the headline changes and also other relevant changes though please note that there are also some changes that are not covered by this note.

Licensing provisions and requirements

Business licensing provisions and requirements are somewhat considerable and can be summarised as follows. These provisions are also now contained in Part 4 of the Bill whereas they were previously contained in Part 9 of the FTA.

OFT is the public authority to issue licences

The OFT, under the Bill, will now be the authority that issues business licences. This is currently done by the Business Licensing Authority (“the BLA”). The BLA is comprised of a chairman, 6 other members appointed by Government, with members to be appointed with the consultation of the Gibraltar Chamber of Commerce, Gibraltar Trades Council and Gibraltar Federation of Small Businesses (“GFSB”).

Offence to carry on business without a licence

What is also a considerable introduction under the Bill is that it is an offence to carry on business without a licence (clause 24 of the Bill). This is not currently the case under the FTA, though there are arguably some other penalties and offences that may be relevant for unlicensed businesses or businesses without licences.

If you are a micro business with a low annual turnover, you may not need to be licensed, but you may need to be registered.

A person who is carrying on a business as a cottage industry, artisan or service provider with an annual turnover that doesn’t exceed a specific sum does not require a business licence. The specified sum for this amount is not yet public but is to be prescribed by regulation.

This change could bring a large number of smaller businesses to no longer require a business licence. This change is also particularly welcome as it may allow smaller businesses to reduce their overheads by working remotely and not have to comply with the premises requirement of licensed businesses.

³ See Gibraltar Parliament Hansard – Session Thursday 25 June 2015 at Line 185; Line 250-255; Line 355-400.

However, such businesses will likely still be required to be registered with the OFT as set out below.

New exceptions to carrying on business (not requiring a licence)

The exceptions to carry on business have been extended to include journalists or printing/distributing a printed newspaper (clause 25(1)(e)) and a 'body corporate providing services to other persons in the same group' (clause 25(1)(c)).

Premises must be suitable

Clause 27 provides that applicants 'must submit evidence that he will operate the business from premises that are appropriate for the carrying on of the business'. Clause 29(d) introduces a ground for the OFT to refuse a licence where the 'OFT is not satisfied [that the premises] are appropriate for the intended business'. This, it would appear, may look to address an issue that has arisen in the past with section 78(c) of the FTA. Under section 78(c) of the FTA, there was no definition of what was considered as 'appropriate' and this was highlighted in an appeal case that was dealt with by the Magistrates Court in Walkerfold Limited v Business Licensing Authority dated the 19 October 2016 where the Magistrate effectively held that the BLA were wrong to have refused an applicant's licence on the basis that the BLA considered the premises were not suitable. The Magistrate went on to describe that section 60(2) of the FTA offers no requirements, which applicants have to meet, or guidance as to what is appropriate.

The OFT shall also refuse a business licence where a person in the opinion of the OFT is not fit and proper to carry on the business; where a business that requires a licence, authorisation, registration or other approval from any other enactment has not been obtained by the person or in respect of the premises; or where in respect of premises which the OFT is aware where carrying the business in premises would breach a covenant, condition or restriction contained in the legal instrument or other terms under which the applicant holds or occupies the premises.

Further to the above, there are a number of new grounds upon which the OFT may refuse a licence under clause 28 of the Bill. These include:

- The OFT may refuse to grant a licence on the grounds that a business is a Specified Business and the OFT is not satisfied that the person has the necessary skill, competence, qualification or resources to carry on that business safely for consumers.

- The premises do not accord with the official address register held by Land Property Services;
- The applicant fails to provide to the satisfaction of the OFT any information required by the Bill.

A Specified Business is defined for the purposes of the above under the Bill as one or more of the following:

- The introduction or insertion by injection or by any other means of any substance into the body of a person;
- The tattooing of any part of a person's body;
- The application or administration to another person of any prescription only medicine;
- The provision of therapy;
- The infliction or carrying out of any process that involves the breaking of another person's skin;
- The provision of counselling, analysis or other therapy or services designed or intended to identify and or assist a person to understand, accept, overcome or recover or obtain relief from any form of mental condition, mental state, attitude, behaviour or other situation that derives in the mind of that person or any activity that could cause harm to a person's mental state; and
- Such other business or activity as the Minister may prescribe in regulations.

Should the OFT refuse an application or make a decision under Part 6 (in relation to enforcement powers) then the person may appeal to the Decision Making Committee ("DMC") if the decision was made by the Chief Executive of the OFT or where the decision was made by the DMC, may appeal to the Supreme Court.

Licensed and Registered Businesses

In the event where a person is carrying on business as a cottage industry, artisan or as a service provider with an annual turnover below the prescribed level, then that business will not need to be licensed. However, that business will need to register with the OFT in a prescribed manner and confirmations renewed annually.

Provisional and Temporary Licences

The ability to apply for a provisional licence where premises for a business will be, among other requirements, expected to be ready for use within 12 months from the date of provisional approval of the licence. Presently a similar provision exists for 'start-up' businesses under the FTA though provisional approvals under the Bill are more specific.

The Bill introduces the ability to approve what are described as 'temporary' licences where the business will be carried on for a period of not exceeding 14 days and involves 'one of a series of events' occurring during the limited period. It would be envisaged that this may apply to temporary contractors in building developments for example or other one-off specialist work of external businesses.

Application Process

From a reading of the Bill in its current form, it would appear that the Bill does try to address the length of time and certainty involved in the application process for applicants.

Currently, applicants under the FTA need to publish a notice of intention to apply in the Gibraltar Gazette and one local newspaper. It would appear that the Bill removes this requirement as now it is for the OFT to publish the notice of the application on the OFT's website in five working days of receipt of a full application in compliance with what the act would require. This would therefore remove the requirement to post a notice in the Gibraltar Gazette and Newspaper. The amount of time within which a person can file to object to a notice is now five working days under the Bill. The OFT shall thereafter 'consider applications promptly' but there is no specified period by when an application shall be approved or authorised.

OFT and DMC

Some of the most considerable changes in the Bill are in respect of the enforcement powers and procedure under the Bill. The DMC will be set up under the Bill as a statutory committee of the OFT

whose functions are to exercise on behalf of the OFT, the OFT's powers in respect of a specified decision (imposing an administrative penalty, compensation, revoking or suspending a licence, refusing to renew a licence or exercising a sanctioning power that prevents business being carried on) and to hear and consider appeals from any decision made by the OFT other than decisions made by the DMC on behalf of the OFT.

The DMC will be composed of a panel of not more than 8 persons who are appointed by the Minister where 4 of which must be lawyers, each of whom has not less than 10 years professional standing and is a barrister or solicitor of the Supreme Court of Gibraltar and one representative each of the Chamber of Commerce and the GFSB.

Sanctioning powers

The sanctioning powers of the OFT are set out in part 6 of the Bill and include a number of different powers, including:

- *An undertaking* – The OFT may request that a person provides them with an undertaking to do or not to do something.
- *Administrative penalties* – imposing a financial penalty to pay to the OFT within 28 days of the date on which the notice imposing it takes effect.
- *Cease and desist orders* – the OFT may issue a cease and desist order against a person to cease any conduct or desist from any repetition of that conduct.
- *Directions order* – the OFT may issue a directions order obliging the person to do something which in the reasonable opinion of the OFT that person is required to do to comply with the Act.
- *Compensation order* – the OFT may issue a compensation order against a person to pay a sum by way of compensation to any person adversely affected by a contravention or to pay a person for the supply of goods or services in circumstances or manner constituting a contravention.
- *Licence intervention order* – the OFT may issue a licence intervention order against a person to temporarily suspend a licence or revoke a licence.

- *Prohibition order* – The OFT may issue a prohibition order against a business to prohibit the business from carrying on the business specified in the order.

Investigatory powers

The Bill brings out more extensive investigatory powers of the OFT and/or its enforcement officers to inspect business premises and seize goods and/or documents. Currently under the FTA, a consumer protection officer is able to enter premises without a warrant when they have sufficient grounds under the FTA. The FTA requires that notice be given.

Under the Bill however, enforcement officers are able to enter premises without a warrant and without notice and are able to inspect goods or documents as well as seize goods or documents. These powers can be exercised where they 'reasonably suspect that there have been, or are likely to be, in respect of that business, a business practice or conduct which harms consumer interests'.

Complaints

The Bill provides for mechanisms where super-complaints may be made to the OFT and ordinary individual complaints.

The mechanism for individual complaints to be made are set out at clause 21 of the Bill and effectively allows consumers to complain about goods or services they have received or businesses who believe that goods or services being provided to consumers is or appears to be harming consumer interests.

Individual complaints under the Bill also must be considered by the OFT as soon as practicable which is not defined whereas under the FTA, ordinary complaints shall be considered within 120 days. What has changed is that businesses can make an individual complaint where they are effectively acting as a consumer and the services or goods received are not part of their main business.

In respect of super-complaints, these may be made by the relevant minister, a designated consumer body or the Chamber of Commerce, the GFSB or a representative body recognised by the minister. The OFT must respond to a Super-Complaint within 120 days after the day on which it receives all information.

Other Relevant Changes

Additional Obligations for Licensees

The Bill introduces a few new obligations for licensees and persons including the following:

- Persons who sell goods or services in connection with the raising of funds for philanthropic, charitable, cultural, sporting or educational purposes. Such persons do not require a licence, though will need to inform the OFT in writing prior to selling the goods or providing the services.
- A licence holder shall within 30 days of being convicted of an offence by or before any court in Gibraltar or elsewhere bring any such conviction to the attention of the OFT.
- In addition to needing to display a business licence at the premises of the business, which is an existing requirement under the FTA, a licensed business will also need to display its licence number on the home page of any website that it maintains.

Immunity from damages

Clause 17 of the Bill introduces a new clause of immunity for the OFT from any damages except where it can be shown to have been done in bad faith. This immunity also extends to any person who is a member, officer or delegate of the OFT or a member of the DMC.

Title of the Bill

The titles of the FTA and the Bill hold minor differences in respect that the scope of the FTA was to 'encourage businesses to comply with consumer law and improve their trading practices' whereas the Bill appears to be centred towards 'the protection of consumer interests and encouraging good business practices towards consumers'.

Transitional Provisions

Current holders of business licences or persons who are considering of applying for a business licence in the coming weeks may be concerned as to when the Bill may become law and what will happen to existing licences.

The Bill provides for transitional provisions under Part 9. More specifically, licences issued under the FTA (i.e. licences that are currently valid) will be deemed to be issued under the new act and will remain valid for the period in respect of which it was issued.

Other Considerations

Whilst not presently legislated for, it is also worth noting that the OFT have become, by way of Government procedure and practice, the authority who provide the procedural release and accept payment of tavern and hotel licences that are issued by the Magistrates Court under the Licensing and Fees Act.

We're here to help

Through helping a large number of businesses with their regulatory and licensing queries in Gibraltar, our commercial and licensing team are able to help understand your business' requirements to trade or provide services in Gibraltar.

As the Bill progresses, please feel free to contact a member of our experienced licensing team to help your business be compliant with the new business licensing regime.

CONTACTS

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