[2019 Gib LR 92]

GIBFIBRE LIMITED (trading as GIBFIBRESPEED) v. GIBRALTAR REGULATORY AUTHORITY

COURT OF APPEAL (Kay, P., Elias and Rimer, JJ.A.): April 26th, 2019

Telecommunications and Broadcasting—communications providers—competition—Gibraltar Regulatory Authority has power under Access Directive (2002/19/EC), art. 5 to compel Gibtel to provide access for provider of public communications network services to Gibtel's data centre to enable it to provide services to potential customers

The appellant sought access to a data centre owned or controlled by Gibtelecom Ltd.

Gibtelecom Ltd. ("Gibtel") was a telecommunications company owned by the Government of Gibraltar. It played a dominant role in the telecoms industry in Gibraltar. It owned or controlled a data centre where it hosted third party computer servers. It provided racks, electricity supplies and climate control, and kept servers in a secure environment. Gibtel had been designated as having significant market power ("SMP") in a number of markets, including Market 4 (the wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location (the data centre) in Gibraltar). The Gibraltar Regulatory Authority ("the GRA") had imposed certain obligations on Gibtel including that it should meet reasonable requests for access to, and use of, specific network elements and associated facilities.

The appellant had built a fibre optic system in Gibraltar. Like Gibtel, it was a provider of public communications network services and operated a public communications network. The appellant asked Gibtel to enter into an agreement to give it access to the data centre to enable it to connect directly via fibrelink with the servers of potential customers on an "end-to-end" connectivity basis, and thereby provide those customers with its electronic communications services. Gibtel already had such an agreement with another company. Gibtel refused to negotiate with the appellant for commercial reasons.

The appellant sought the assistance of the GRA, which was initially sympathetic to the application and assumed it had the requisite powers to assist the appellant. It initiated regulatory enforcement proceedings against Gibtel. Gibtel argued that the GRA was exceeding its powers in seeking to compel it to permit the access sought. On reconsideration, the GRA concluded that Gibtel was correct that there was no lawful basis on

which it could compel access of the kind sought by the appellant. It gave its reasons for its conclusion in a letter to the appellant, which constituted the decision letter in this appeal.

The appellant considered the GRA to have misunderstood the scope of its powers and appealed against the decision pursuant to s.91(7) of the Communications Act 2006. Butler, J. upheld the GRA's submission that it had no power to assist the appellant in the manner sought. The appellant appealed against that decision. Gibtel chose to take no part in the proceedings and the GRA therefore had to defend its decision whilst claiming to be neutral as to the outcome.

The EU had adopted a common regulatory framework for telecommunications. The present case was concerned with the Framework Directive which set out the framework for electronic communication networks and services, and the Access Directive, which concerned access to and interconnection of communications networks and associated facilities. The Access Directive identified circumstances where, absent agreement, the regulatory authority might use its powers to compel an operator to allow access to its network and other facilities to a potential rival. Domestic law in Gibraltar had implemented the Directives via the Communications Act 2006 and the Communication (Access) Regulations 2006. Article 8 of the Framework Directive provided *inter alia* that "the national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services . . ."

Article 5 of the Access Directive provided so far as material:

> "1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of [the Framework Directive], encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, efficient investment and innovation, and gives the maximum benefit to end-users.
>
> In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:
>
> (a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;
>
> (ab) in justified cases and to the extent that is necessary, obligations on undertakings that control access to end-users to make their services interoperable;
>
> (b) to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State, obligations on operators to provide access to the other facilities referred to in Annex I, Part II on fair, reasonable and non-discriminatory terms."

Article 12 of the Access Directive, which only applied when the requested party had SMP provided so far as material:

"1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, *inter alia* in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.

Operators may be required *inter alia*:

(a) to give third parties access to specified network elements and/or facilities, including access to network elements which are not active and/or unbundled access to the local loop, to, *inter alia*, allow carrier selection and/or pre-selection and/or subscriber line resale offers;

(b) to negotiate in good faith with undertakings requesting access . . ."

"Access" was defined in art. 2(a). The types of access set out were very broad and not exhaustive.

The appellant sought an order that the GRA's decision that it was not empowered to act should be treated as a nullity and that the GRA should reconsider its request in the light of the court's findings. The appellant submitted that (a) the GRA had power to take action to compel access under both art. 5 and the obligation imposed by the GRA under art. 12; and (b) the GRA was wrong that it could not lawfully consider the request.

The GRA submitted *inter alia* that (a) the access request did not fall within the scope of the designated market in which Gibtel had SMP and therefore the access obligation imposed on Gibtel was not triggered; (b) Gibtel's ducts were associated facilities because they were used by Gibtel for its own network and therefore could in principle be used by the appellant, but the appellant's placing its server onto the data rack and connecting it to other servers also using the rack could not properly be described as elements of the network or associated facilities; and (c) the only purposes for which access could be given under art. 5 were the three purposes specifically identified in paras. (a), (ab) and (b), and that the appellant's request did not fall within those paragraphs.

Held, allowing the appeal:

(1) In relation to art. 12, the power to compel access was not conferred by the duty arising under art. 12, notwithstanding that Gibtel had SMP, because the particular nature of the access sought did not fall within the scope of the duty which the GRA imposed when it designated Gibtel as having SMP in the relevant market. The appellant's access request had three elements: (1) to have access to the data centre and to use certain ducts which were used by Gibtel as part of its network; (2) to place its server onto the data rack; and (3) to connect its server to other servers also

using the rack. It was accepted that the ducts were associated facilities because they were used by Gibtel for its own network and therefore could in principle be used by the appellant. But that alone would offer nothing of value to the appellant. Access in respect of elements (2) and (3) could not, however, be considered to be access to the network. Access to the data centre itself was not access to an element of the network. Similarly, the third party servers were not part of the network. The relevant network must be the network of Gibtel itself, as the operator against which access was sought. Nor were elements (2) and (3) of the request considered to be associated facilities. To fall into that category they would have to enable and/or support the provision of services via the network, or have the potential to do so. The question was whether as a matter of fact a service or facility supported or enabled the network to operate. The data centre did not fall into that category. Nor would hosting the appellant's server or linking it to other host servers have the potential to support the network or enable it to operate (paras. 36–43).

(2) As there was no power to order access under art. 12, the court considered whether the power arose under art. 5. In respect of art. 5, the appellant relied on two kinds of access: (1) access to elements of the network or associated facilities; and (2) access to physical infrastructure, including buildings, ducts and masts. As explained in relation to art. 12, the appellant's access request did not fall within the scope of elements of the network or associated facilities. Those concepts did not have a different meaning in art. 5 from that in art. 12. There was, however, power under art. 5, when read with the definition of access in art. 2, for the GRA to require access to physical infrastructure, including buildings and masts. The data centre could properly be described as "physical infrastructure." The appellant placing its server in the data centre constituted giving it access to the centre, given that access meant "making available facilities . . . for the purpose of providing electronic communications services." Moreover, given that the concept of "access" was capable of including a positive requirement, it was capable of extending to allowing the appellant to access other servers. This was particularly so as the best interests of end-users was an important objective of the legislation. The court rejected the submission that the only purposes for which access could be given under art. 5 were the three purposes identified in paras. (a), (ab) and (b), which was inconsistent with normal interpretation (paras. 44–50).

(3) The GRA therefore had the power to impose access in favour of the appellant on the narrow basis that in principle there was a power under art. 5 to require an operator to allow access to physical infrastructure even where the relevant infrastructure could not be described as facilities associated with the network or elements of it. Contrary to its understanding of its own powers, the GRA did in principle have an art. 5 power to grant access to the appellant in order to enable it to place its server on the data centre and communicate with other servers, provided it thought it a proper exercise of its power. It was not for the court to say whether it

would be appropriate to require such access. The decision letter would be quashed to the extent that it denied that the GRA had the power to direct Gibtel to grant the access sought. The GRA would be ordered to reconsider whether it would be appropriate to order such access in accordance with the principles set out in this judgment and the relevant law (para. 51).

Cases cited:

(1) *British Telecommunications plc* v. *Office of Communications*, [2012] EWCA Civ 1051, *dicta* of Etherton, L.J. considered.

(2) *Commission for the European Communities* v. *Republic of Poland* E.C.J., Case C-227/07, considered.

(3) *KPN BV* v. *Autoriteit Consument en Markt*, E.C.J., Case C-85/14, April 16th, 2015, referred to.

(4) *TDC A/S* v. *Teleklagenaevnet*, E.C.J., Case C-556/12, January 16th, 2014, referred to.

Legislation construed:

Communications Act 2006 (L.N. 2006/071), s.2(1): The relevant terms of this sub-section are set out at para. 25.

s.91(4): "The Supreme Court determining an appeal . . . may:

. . .

(b) quash the decision and may refer the matter to the Minister or the Authority, as the case may be, with a direction to reconsider it and adopt a decision in accordance with the findings of the Supreme Court."

s.91(7): "The bringing of an appeal under this section shall not operate to suspend the effect of the decision appealed against unless the Supreme Court grants interim measures."

Council Directive (2002/19/EC) of March 7th, 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), art. 2(a): The relevant terms of this paragraph are set out at para. 16 and para. 45.

art. 2(e): The relevant terms of this paragraph are set out at para. 27.

art. 5: The relevant terms of this article are set out at para. 9.

art. 8: The relevant terms of this article are set out at para. 11.

art. 12: The relevant terms of this article are set out at para. 14.

Council Directive (2002/21/EC) of March 7th, 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), art. 8: The relevant terms of this article are set out at para. 5.

art. 16: "2. Where a national regulatory authority is required under Articles 16, 17, 18 or 19 of Directive 2002/22/EC (Universal Service Directive), or Articles 7 or 8 of Directive 2002/19/EC (Access Directive) to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis

of its market analysis referred to in paragraph 1 of this Article whether a relevant market is effectively competitive."

A. Maclean, *Q.C.* and *C. Gomez* for the appellant;
P. Caruana, *Q.C.* and *C. Allan* for the respondent.

1 **ELIAS, J.A.:** Gibtelecom Ltd. ("Gibtel") is a telecommunications company owned by the Government of Gibraltar. It plays a dominant role in the telecoms industry in Gibraltar. It owns or controls a data centre at Mount Pleasant where it hosts third party computer servers under what are known as "rack space rental" agreements. It provides racks, electricity supplies and climate control, and keeps the servers in a secure environment. GibFibre Ltd., which trades as GibFibreSpeed ("GFS"), has built a fibre optic system in Gibraltar. Like Gibtel, it is a provider of public communications network services and operates a public communications network. GFS requested Gibtel to enter into an agreement to afford it access to the data centre so as to enable GFS to connect directly via fibrelink with the servers of potential customers on an "end-to-end" connectivity basis, and thereby provide those customers with its electronic communications services. Gibtel had already entered into an arrangement of this nature with Sapphire Networks in what are termed "hosting" and "encroachment" agreements, and essentially GFS sought a like deal. Gibtel refused to negotiate access with GFS, at first denying that it had the requisite capacity, but later conceding that the true reason was purely commercial.

2 GFS sought the assistance of the Gibraltar Regulatory Authority ("GRA"). It wanted it to exercise certain statutory powers conferred upon GRA to compel Gibtel to enter into the agreement and allow access, or at least to enter into negotiations in good faith. Initially, GRA was sympathetic to the application and assumed that it did have the requisite powers to assist GFS. After conducting certain investigations, and following attempts to persuade Gibtel to provide access, it initiated regulatory enforcement proceedings against Gibtel. By a letter dated June 14th, 2016, GRA directed Gibtel to allow GFS to access the data centre by June 21st and threatened further action if Gibtel did not do so. Gibtel continued to decline to do so and sent formal and detailed representations on July 8th, 2016 stating why, in its view, GRA was exceeding its powers in seeking to compel Gibtel to permit the access sought. GRA reconsidered the scope of its powers in the light of Gibtel's submissions and, after taking counsel's advice, it concluded that Gibtel was correct in asserting that there was no lawful basis on which it could compel access of the kind sought by GFS. It gave its reasons for reaching that conclusion in a letter sent to GFS on February 16th, 2017. That constitutes the decision letter in this appeal. On the same day it also sent a letter to Gibtel responding in detail to the wide-ranging submissions which Gibtel had made in its letter of July 8th.

Whilst GRA conceded that Gibtel was right to say that GRA did not have the relevant power, it rejected a number of the points raised by Gibtel in the July 8th letter.

3 GFS took the view that GRA had misunderstood the scope of its powers and appealed against that decision pursuant to s.91(7) of the Communications Act 2006. This allows an appeal on both fact and law, although this appeal is purely an appeal on law. The case below was heard by Butler, J. who upheld GRA's submission that it was not empowered in law to assist GFS in the manner sought. GFS now appeals against that decision with leave of the judge. Curiously, Gibtel has chosen to take no part in the proceedings despite its obvious interest in the outcome. As a consequence, GRA has had the invidious task of defending its own decision whilst claiming to be neutral as to the outcome. Indeed it has lodged a cross-appeal on a point which I discuss below.

The statutory framework

4 The EU has adopted a Common Regulatory Framework for telecommunications throughout the EU. There are five Directives which lay down the essential legal rules. We are concerned with two of them, the Framework Directive (Directive 2002/21/EC), which sets the framework for electronic communication networks and services, and the Access Directive (Directive 2002/19/EC) on access to, and interconnection of, communications networks and associated facilities. Both of these Directives have been modified in various ways since first promulgated. Domestic law in Gibraltar has implemented these Directives via the Communications Act 2006 and the Communication (Access) Regulations 2006. Both parties agree that Gibraltar law has properly implemented EU law. Both below and in argument before us the case was advanced by reference to EU rather than domestic law and I will adopt the same approach in this judgment.

5 Article 8 of the Framework Directive provides, so far as is material, as follows:

> "1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.
>
> . . .
>
> 2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

(a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;

(c) encouraging efficient investment in infrastructure, and promoting innovation; and

(d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources."

6 Some regulations of markets are *ex post* and some are *ex ante*. The former include, for example, competition rules designed to ensure fair and efficient competition and the imposition of penalties for those acting in breach of the rules. But that is not enough to ensure effective competition in areas where a dominant operator hinders access to the market for potential competitors. The reason was explained by Etherton, L.J. in *British Telecommunications plc* v. *Office of Communications* (1) ([2012] EWCA Civ 1051, at paras. 8–9):

"8. EU authorities have long recognised that in certain sectors of the economy reliance upon the application and enforcement of competition rules after the event (*ex post* regulation) may be insufficient to stimulate effective competition. That is particularly true of sectors, such as telecommunications and postal services, which were historically dominated by state-owned monopolies. In such sectors the historical incumbent, or other dominant undertaking, may possess such advantages that it is necessary to impose specific rules controlling its behaviour on a particular market in advance (*ex ante* regulation).

9. The EU has therefore put in place regulatory frameworks for such sectors which allow the Member States' national regulatory authority ('the NRA') to impose in certain circumstances specific *ex ante* obligations on undertakings which are in a dominant position (that is, which have significant market power ('SMP')) in particular markets, with the aim of stimulating competition more effectively than would be achieved by the mere *ex post* application of competition rules."

7 An important element in *ex ante* regulation is the need to secure the ability of potential competitors to gain access to the market. In the telecoms industry this sometimes requires conferring rights (at an appropriate price) to enable operators to have access to existing networks and other facilities, such as ducts and masts. Without the ability to share existing infrastructure, potential competitors could be prevented from entering the market, not least because of the significant costs involved. The Access Directive identifies circumstances where, absent agreement,

the regulatory authority may use its powers to compel an operator to allow access to its network and other facilities to a potential rival.

8 There are three provisions of the Access Directive which are in issue in this case, namely arts. 5, 8 and 12 (these are reflected in regs. 6, 9 and 13 of the domestic Access Regulations 2006). Articles 5 and 12 identify circumstances where the regulatory authorities have the power ultimately to compel an operator to grant access to its facilities and the GFS contends that both are the source of power in this case. However, as art. 8 makes clear, art. 12 only applies where the requested party has significant market power ("SMP") in a particular market. Article 16 of the Framework Directive provides that national regulatory authorities must carry out an assessment of the relevant markets and, by art. 16.4, where an authority concludes that a market is not significantly competitive it *must* identify operators who (alone or jointly) have an SMP in that market and *must* impose upon them specific regulatory obligations.

9 Article 5, which is entitled "Powers and responsibilities of the national regulatory authorities with regard to access and interconnection" is, so far as is material, as follows:

> "1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, efficient investment and innovation, and gives the maximum benefit to end-users.
>
> In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:
>
> (a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;
>
> (ab) in justified cases and to the extent that is necessary, obligations on undertakings that control access to end-users to make their services interoperable;
>
> (b) to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State, obligations on operators to provide access to the other facilities referred to in Annex I, Part II on fair, reasonable and non-discriminatory terms."

10 Article 5.3 establishes that with regard to access and interconnection, member states must ensure that the regulatory authority may act on its own initiative. It also specifies that the regulatory authority must comply with the procedures referred to in arts. 6, 7, 20 and 21 of the Framework Directive. These include obligations to consult interested parties before any duty is imposed, and also adopting provisions to resolve disputes between the parties which may be triggered at the request of either party.

11 Article 8 is concerned, *inter alia*, with imposing certain obligations, including access obligations, on operators who have SMP:

> "1. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 9 to 13a.
>
> 2. Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), national regulatory authorities shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate.
>
> 3. Without prejudice to:
>
> —the provisions of Articles 5(1) and 6,
>
> . . .
>
> national regulatory authorities shall not impose the obligations set out in Articles 9 to 13 on operators that have not been designated in accordance with paragraph 2."

12 Article 16 of the Framework Directive lays down the market analysis procedure which a regulatory authority must adopt in order to determine whether a market is effectively competitive or not. If, having analysed the state of competition in a market, it is found to be competitive, no specific regulatory obligations may be imposed pursuant to arts. 9–13 of the Access Directive but, if it is not, appropriate regulatory obligations *must* be imposed upon such operators as the authority identifies as having SMP in that market: see arts. 16.3 and 16.4 of the Framework Directive. As art. 8.2 of the Access Directive makes clear, the relevant regulatory obligations which may be imposed are limited to those specified in arts. 9–13 (save in exceptional cases where the Commission approves the imposition of other obligations: see art. 8.3 of the Access Directive). These are obligations of transparency (art. 9); obligations of non-discrimination (art. 10); obligations of accounting separation (art. 11); obligation of access to, and use of, specific network facilities (art. 12); and price control and accounting obligations (art. 13). By art. 8.4 of the Access Directive, any obligations imposed must be proportionate and justified and can only be imposed after

relevant consultation in accordance with arts. 6 and 7 of the Framework Directive.

13 Article 8.3 states that these obligations can normally only be imposed upon operators with SMP but that is "without prejudice" to certain other provisions which also deal with access requirements and these include art. 5. The phrase "without prejudice" to these provisions means "except under [these] provisions": see the judgment of the European Court in *KPN BV* v. *Autoriteit Consument en Markt* (3) (at para. 42). It follows, therefore, that those very same obligations can, in principle, be imposed pursuant to art. 5 on operators who do not have SMP.

14 The relevant SMP obligations in issue here are the access requirements which a regulatory authority is empowered to impose by art. 12. These are as follows:

> "1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, *inter alia* in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.
>
> Operators may be required *inter alia*:
>
> (a) to give third parties access to specified network elements and/or facilities, including access to network elements which are not active and/or unbundled access to the local loop, to, inter alia, allow carrier selection and/or pre-selection and/or subscriber line resale offers;
>
> (b) to negotiate in good faith with undertakings requesting access . . ."

15 There is no right of access under art. 12; it is not automatically imposed once an operator is found to have SMP. It is for the regulatory authority to determine whether it is appropriate and proportionate, and art. 12.2 sets out a range of non-exhaustive considerations which the authority must consider before obliging an operator to grant access. Article 12.1 also stipulates that the regulatory authority may attach to any access obligation conditions covering fairness, reasonableness and timeliness. Article 8 envisages that obligations imposed by GRA pursuant to regs. 9–13 may be amended or withdrawn but this can only be done if the appropriate market analysis is carried out first: see art. 16.2 of the Framework Directive. If, therefore, relevant access obligations are in force, the operator upon whom they have been imposed has a duty to comply with them until and unless they are withdrawn or modified

following a fresh market appraisal. An important feature in this case is that a relevant access duty has been imposed on Gibtel pursuant to reg. 12.

16 The concept of "access" is critical to this appeal. It is defined in art. 2(a) as follows:

> "(a) 'access' means the making available of facilities and/or services to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services, including when they are used for the delivery of information society services or broadcast content services. It covers inter alia: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop); access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems; access to information systems or databases for pre-ordering, provisioning, ordering, maintaining and repair requests, and billing; access to number translation or systems offering equivalent functionality; access to fixed and mobile networks, in particular for roaming; access to conditional access systems for digital television services and access to virtual network services . . ."

17 The types of access envisaged are very broad, and as the European Court of Justice pointed out in *TDC A/S* v. *Teleklagenaevnet* (4) (at para. 32), they are not exhaustive. In addition, as that case makes clear, the making available of facilities is not simply a passive operation; it might in an appropriate case require the requested operator to make positive adjustments to its systems or networks to enable access or interconnection to occur. (In that case it was envisaged that it could even include fixing a drop cable between the distribution frame of an access network and the network termination point at the end-user's premises.)

18 As Sir Peter Caruana, Q.C., counsel for the GRA, has emphasized, art. 2 provides the definition of "access" but it does not identify when the duty to make provision for access arises, nor what the scope of that duty might be. In my view, there is a potentially important distinction between the scope of arts. 5 and 12 in this regard. Article 5 confers a power on the GRA to take steps to ensure, in an appropriate case, that there is "adequate access and interconnection." This does not limit the kind of access which might, in an appropriate case, be imposed. It would in principle allow the GRA to require any of the different types of access falling within the scope of the definition in art. 2, although the GRA would of course have to exercise its powers responsibly and in a manner which would promote the objectives identified in art. 5.1. By contrast, the access obligation which

can be imposed pursuant to art. 12 is limited to "specific network elements and associated facilities." It therefore catches only one particular kind of "access" described in art. 2. If any other form of access is to be imposed on an operator with SMP, it has to be under some other statutory power, such as art. 5 of the Access Directive.

The relationship between arts. 5 and 12

19 As the discussion above indicates, there are a number of differences between arts. 5 and 12. First, art. 12 only enables access obligations to be imposed on operators who have been designated as having SMP following a relevant market analysis, whereas art. 5 may involve imposing access burdens on operators who do not have such dominant power. Secondly, any obligation arising under art. 12 is not imposed on an *ad hoc* basis; it arises by virtue of having been imposed by the relevant regulatory authority in order to promote certain competitive objectives where the relevant market has been assessed as anti-competitive. A claimant is not directly relying upon art. 12 but rather upon the obligation imposed by the GRA on the SMP operator in pursuance of that article; and the duty placed on the operator—in this case to grant reasonable requests for access—persists until withdrawn or amended following a further market review. By contrast, a duty imposed by art. 5 is fact specific and results from a specific decision made in the particular circumstances of the case. It was for this reason that, in *Commission for the European Communities* v. *Republic of Poland* (2), the Court of Justice held that it was unlawful to create a legislative obligation for all operators of public telecommunication network services to have to conduct negotiations on the conclusion of an access agreement with any other undertaking or body who requests it. Article 4 of the Access Directive requires interconnection on appropriate terms where both undertakings are operators of public telecommunications services, but the Polish law was wider than this and gave access to the network to any undertaking, whether an operator of public services communications or not. The court held that this legislation failed to allow the regulatory authority to take account of the specific context before intervening; access was required without any prior evaluation of the degree of effective competition in the market or the weighing up of relevant considerations (paras. 35–44). Thirdly, a duty arising out of art. 12 can only require access to network elements and associated facilities, whereas a duty imposed by virtue of art. 5 may require other forms of access falling within art. 2.

20 There was some debate before us about whether the art. 5 and art. 12 routes were distinct and wholly independent or not. The interrelationship is somewhat problematic but I do not think that it creates any particular difficulties in the circumstances of this case. A duty arising under art. 12 is in place and that imposes a general obligation on Gibtel to provide access

to operators who reasonably request access to elements of the network or associated facilities. It would make no sense for the GRA to determine that the same duty arises by virtue of art. 5, or for it to be asked to do so. The relevance of art. 5, in my judgment, is that it might justify the imposition of an access duty in circumstances where there is no equivalent access duty in place pursuant to art. 12. This might be either because the operator against whom the duty is sought to be imposed does not exercise SMP in the relevant market, or because the nature of the access sought does not fall within the scope of the access which may be imposed under art. 12. Potentially both these situations arise here, for reasons I will explain below.

The appellant's submissions

21 The appellant alleges that the power for GRA to take action to compel access arises both under art. 5 and the obligation imposed by the GRA under art. 12. The GRA rejected both these submissions, as did the judge on appeal. Mr. Maclean, Q.C., counsel for GFS, submits that they were wrong and that, properly analysed, the power arises independently under both provisions. It is important to note the limited nature of the claim at this stage: Mr. Maclean accepts that before any direction to require access can be made, the relevant procedural provisions would have to be complied with, and the GRA would have to be satisfied that it was appropriate to require the access. Mr. Maclean accepts that it might in principle be a proper exercise of its power for the GRA to refuse the particular application under either or both of those articles. His point is simply that the GRA does nevertheless have the power and is therefore obliged to engage with the application and to determine, in accordance with the applicable statutory provisions, whether to accede to it and lend its support to GFS or not. The error of the GRA, he submits, was that it disabled itself from considering GFS's request on the grounds that it could not lawfully assist GFS even if it would otherwise have thought it proper to do so. The remedy he seeks, pursuant to s.91(4) of the 2006 Act, is that the GRA's decision that it is not empowered to act should be treated as a nullity, and that the GRA should reconsider GFS's request for assistance in the light of the findings of the court.

22 The significance of this is that at points in his judgment below (see, for example, paras. 65 and 97), Butler, J. had taken the view that the GRA could not impose new obligations on Gibtel without first complying with the obligations mandated in the Framework Directive. He rightly observed in para. 65 that, had those steps been taken, the GRA might have decided not to impose any obligations on Gibtel at all. He concluded that if this were so, it would mean that the GRA did not have power to require Gibtel to grant the access requested. I agree that the GRA could not properly impose access if it thought that the relevant conditions had not been

satisfied. But I agree with Mr. Maclean that this misunderstands the nature of GFS's complaint. It is not that the GRA did not impose upon Gibtel the obligation of access when it ought to have done so; rather, it is that the GRA has taken the view that it has no power in law to require Gibtel to do so, even if this would help achieve the objectives set out in art. 8 of the Framework Directive. If the GRA were to conclude, after proper consideration, that it would not be appropriate or in accordance with the objectives of the legislation to impose any access duty on Gibtel, that would not be denying itself the power to consider the request from GFS. It would be exercising its power, albeit in a manner unfavourable to GFS. I do not, therefore, accept that the uncertain outcome of the access request should of itself disqualify GFS from obtaining the relief which it seeks. As Mr. Maclean submitted, the judge was conflating the existence of the power and the circumstances in which it could be exercised.

23 The appellants contend that the power arises both under art. 12 and art. 5. (Before the judge below certain other provisions were relied upon, but they are no longer being pursued in this appeal.) Logically it is sensible to consider the access duty imposed by art. 12 first. If that applies, it is not necessary to have regard to the fact sensitive circumstances where a duty under art. 5 may be imposed.

Article 12

24 In order for art. 12 to be engaged, the operator with respect to whom the access request is made must be an operator which, by virtue of art. 8, has been designated as having SMP on a specific market. It is not disputed that Gibtel has been so designated, following the necessary analysis and compliance with the relevant procedural obligations, by a decision dated August 11th, 2008. Indeed, it has been designated as having SMP in a number of markets, although the relevant one for the purposes of this appeal is known as Market 4 which is the "Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location in Gibraltar." The fixed location is the Mount Pleasant premises. Having made the relevant designation, the GRA laid down certain obligations on Gibtel which are designed to open up and render more efficient the market in question. With respect to this market, the GRA has imposed obligations of transparency which involve making available unbundled services and publicizing the terms and conditions on which they will be offered; a duty of non-discrimination, which forbids Gibtel unduly discriminating between customers in the provision of its services; an obligation to account separately for its services; and an obligation to meet access requests. More specifically, this last duty requires that "Gibtel shall meet reasonable requests for access to, and use of, specific network elements and associated facilities, as described in regulation 13 (Article 12)." There is also a duty to respond to the requests

in a fair and timely way, and a right for either party to refer to the GRA within a set time any question as to whether the request for access is reasonable. If the request is reasonable and Gibtel refuses to allow access, the GRA will have to take measures to enforce access. This is what it originally sought to do before being persuaded that it was powerless to enforce the particular access sought by GFS.

25 The request for access which Gibtel is obliged to grant (subject to the request being reasonable) is limited to access to specific network elements and associated facilities. There is a definition of "associated facilities" in the Framework Directive, and the Access Directive provides in terms, in art. 2, that definitions provided in the former Directive shall apply to the latter. "Associated facilities" are defined as follows:

> "'associated facilities' means those associated services, physical infrastructures and other facilities or elements associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via the network and/or service or have the potential to do so, and include, inter alia, buildings or entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes, and cabinets . . ."

26 The critical question, therefore, so far as the duty pursuant to art. 12 is concerned (although it is relevant to any art. 5 duty also), is whether the access request by GFS involves access to elements of the network, or associated facilities. But there is a second and logically prior issue, namely whether the access request relates to the relevant market in which Gibtel has SMP. The GRA asserts that since the justification for exercising art. 12 powers is that the operator has SMP in the relevant market, any obligations arising out of it can only be imposed in relation to that market. Sir Peter submits that the access request does not fall within the scope of the designated market and therefore the access obligation imposed on Gibtel as the operator exercising SMP in that market is not triggered. This argument was rejected by the judge and is the subject of a cross-appeal. I turn to that issue.

The cross-appeal: is access being sought in the relevant market?

27 In essence the cross-appeal raises the issue whether the access duty which the GRA imposed pursuant to art. 12 is properly engaged. The submission is that if one focuses in particular upon the way in which this market has been identified over time, it is clear that in substance it is concerned only with what is termed the "local loop." This is defined in art. 2(e) of the Access Directive as "the physical circuit connecting the network termination point to a distribution frame or equivalent facility in the fixed public electronic communications network." In more colloquial

terms, this means the part of the network which links a particular customer's premises (and is therefore local to that customer) to the edge of the telecommunications service provider's network.

28 Sir Peter submits (and Mr. Maclean concedes) that GFS is not seeking any access to the local loop; the data centre has no connection with it. This is a surprising argument for GRA to run in this appeal because in its letter to Gibtel, sent on the same day as it sent the decision letter to GFS, the GRA rejected a submission which Gibtel had made precisely to this effect.

29 In order to understand the nature of this argument, it is necessary briefly to explain the way in which relevant markets which have to be assessed to determine whether or not they are competitive are identified. The basic structure is that the Commission identifies relevant product and service markets within the electronic communications networks which may be appropriate for *ex ante* regulation. It does so by Recommendations, and the regulatory authorities must take into account these Recommendations: see art. 15 of the Framework Directive. Article 15.3 provides that regulatory authorities can define markets which differ from those recommended but only after complying with a particular procedure. Having identified the relevant market, it is then for the local regulator to determine whether it is competitive and, if not, who is the operator or operators exercising SMP.

30 By a Recommendation dated February 11th, 2003, the Commission identified some 18 markets which national regulatory authorities were recommended to analyse in order to determine whether they were subject to operators exercising SMP. Market 11 was described as follows: "wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services." In 2007, in a new Recommendation dated December 17th, 2007, the Commission recast the definitions and significantly reduced their number. Market 11 in the new incarnation became Market 4 which was defined as follows: "Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location." It was in respect of this market, in the context of the particular circumstances in Gibraltar, that Gibtel was designated as an operator exercising SMP.

31 Sir Peter submitted that the change in the nomenclature of the relevant market from the original Market 11 to the current Market 4 did not entail any difference in substance. The focus was still on the local loop and therefore the access sought by GFS did not relate to the relevant market at all. He referred to a report produced in 2013 by a consulting and research company which pithily characterized Market 4 as "local loop unbundling." Later in the same report, the authors note that the market was redefined to take account of changing technology and in particular the fact

that metallic loops, as referred to in the 2003 definition, had become outdated and that cable and fibre were replacing them. Sir Peter submits that this shows that there was no change in substance.

32 In its decision notice on August 11th, 2008, GRA dealt with the change in market description. It said this:

> "The authority notes that the publication of the second edition of the recommendation has resulted in the relevant market for unbundled access (shared or fully), the emphasis is on 'wholesale (physical) network infrastructure' (sic). By this is meant access to elements such as the copper loop by, for example, installing a DSLAM (digital subscriber line multiplexer) in a local exchange. The emphasis on physical access in the current relevant market recommendation does not materially impact upon the Authority's findings.
>
> Gibtel has 100% of the potential market for the supply of wholesale unbundled access . . ."

33 I read this as saying that although access to the loop would certainly be part of the market in question, it does not define it. Markets develop over time, and the fact that Market 4 in its earlier incarnation as Market 11 placed a particular (but even then not exclusive) focus on loops and sub-loops does not mean that it should be so construed now. That may be an important element in Market 4, but it is not the only element. Furthermore, in defining what the scope of the relevant market means, I would not readily interfere with GRA's understanding of what it understood the scope of the market to be, given that it is the expert body in this field.

34 Even if I am wrong about that, I very much doubt whether it is open to GRA to take this point now. It was GRA itself which laid down an obligation on Gibtel to meet reasonable requests for access to specific network elements and associated facilities at Mount Pleasant. There was no challenge to the imposition of this obligation by Gibtel at the time and unless and until it is set aside, Gibtel has a duty to comply with it and GRA has a duty to give effect to it. If the application is for access to the network or associated facilities, Gibtel could not in my view be heard to say that not all access requests of that nature properly engage the market in which it has SMP. The language of the obligation is clear; GRA took the view in 2008 that this access requirement was justified in order to ensure effective competition in this market based at Mount Pleasant. It did not qualify the obligation in any way. It is bizarre that GRA, which imposed the obligation, should now be contending otherwise and suggesting that the duty to allow access, expressed in unambiguous terms, should be treated as implicitly limited only to certain access requests, thereby permitting Gibtel to take issue in each case whether the obligation falls within the scope of the relevant market or not.

35 I would add that if GRA were right on this point, it would mean that Gibtel did not have SMP in the relevant market. But that would not defeat the appeal because it would leave open the question whether GFS could seek to require Gibtel, even as an operator without SMP in the relevant market, to allow access pursuant to art. 5. Mr. Maclean concedes that GFS would be likely to find it more difficult to persuade GRA that it should have access pursuant to art. 5 than it would if it could rely upon the access obligation imposed by virtue of art. 12 because of Gibtel's SMP; but that is not relevant to the question whether the power to assist GFS exists.

Was access to elements of the network or associated facilities?

36 It is pertinent to note that GFS is not seeking access to the network itself; it is common ground that it would be entitled to such access by virtue of art. 4. This confers a right on an operator of a public communications network to interconnect with the network of another such operator on terms and conditions specified by the regulatory authority. If GFS had chosen that route, it could then undoubtedly link with the other servers on the data centre. But it has chosen, no doubt for commercial reasons, to eschew that path. What it has sought is to be allowed access to the data centre on essentially the same terms as Sapphire. As Sir Peter pithily characterized it in argument, "GFS wants under the guise of access rights to be able reach clients directly without paying the sums fixed by GRA for network providers." Even if that is an accurate summary of the position, it is not relevant to the question whether GRA has the powers which GFS contends that it does, although the fact that GFS has interconnection rights with Gibtel's network may be relevant to the question whether any power which GRA may have should be exercised in GFS's favour.

37 Both counsel accepted that one can unpack three elements in this access request: first, GFS wishes to have access into Mount Pleasant and to use certain ducts which are used by Gibtel as part of its network; secondly, it wishes to place its server onto the data rack; thirdly, it then wishes to connect its server to other servers also using the rack.

38 Sir Peter accepted that the ducts are associated facilities because they are used by Gibtel for its own network and therefore can in principle be used by GFS. But on their own, and without being allowed to encroach onto Gibtel's data centre, that offers nothing of value to GFS. Sir Peter denied that either the second or third elements could properly be described either as elements of the network or associated facilities. GRA had accepted this analysis, and the judge held that it was right to do so.

39 As to the question whether the access was to elements of the network, in essence the analysis below was that the data centre itself does not have the attributes of a public communications network or a public electronic communications network, and therefore seeking access to the

centre is not seeking access to any element of the network itself. Similarly, the third party servers are not part of the network. The relevant network must be the network of Gibtel itself, as the operator against whom access is sought, and third party servers are plainly not elements in its network. This is further supported by the fact that there is a definition of "network termination point" in art. 2(1) of the Communications Act 2006 which provides that a network terminates at "the physical point at which a subscriber is provided with access to a public electronic communications network." So the hosted servers are not themselves part of the network. Mr. Maclean did not seriously challenge that conclusion and in my view it is correct.

40 That leaves the question whether elements two and three can be considered to be associated facilities. To fall into that category they have to enable and/or support the provision of services via the network, or have the potential to do so. Does the data centre fall into that category? Contrary to the submissions of Mr. Maclean, I do not think that it does, again essentially for the reasons adopted by the GRA and the judge below. The data centre itself does not support or enable the provision of Gibtel's own services. It may make them more profitable by attracting servers who will use its (or Sapphire's) services, but the network itself would operate without it.

41 Sir Peter submitted that in order to support or enable the provision of Gibtel's services, the relevant infrastructure or facility had to be *necessary* to its operation so that if the service could be provided without it—as Gibtel's service clearly could without the data centre—that infrastructure would not constitute associated facilities. I do not accept that the concept is that narrow. It seems to me that ultimately the question is whether as a matter of fact a service or facility does or does not support or enable the network to operate. It may be, for example, that ducts are used by a particular operator even though they are not strictly necessary in the sense that the operator could still provide the service without using them, perhaps by using fewer ducts in a different way. These ducts would still, in my view, be supporting or enabling the service actually provided to operate. But even adopting that broader analysis of the concept, in my view it does not embrace either allowing GFS's server to be placed on the rack, or linking its server with other servers hosted there. As Butler, J. observed, and Mr. Maclean was constrained to accept, the logic of Mr. Maclean's case is that the data centre could be an associated facility even if it were located in another building altogether. Yet it is difficult to see how it could then sensibly be said to be either supporting or enabling the provision of services via the network.

42 Mr. Maclean argued that even if the data centre was not currently supporting or enabling the network to operate, that did not determine this question since it was enough under the relevant definition of "associated

facilities" that the facilities have the potential to do so. The concept of having the potential to do so is not an easy one and it might give rise to difficult cases. It could not in my judgment include any building owned by an operator simply on the basis that it could be the location for ducts or lines in the future. That would be too nebulous. On the other hand, if the ducts were available to support a network but are not currently in use, they would in my view clearly fall within the terms of this concept. But whatever problems may arise in other cases, I do not see how either hosting GFS's server or linking it to other host servers has even the potential to support the network or enable it to operate. They simply fall outside those categories altogether.

43 It follows that in my view the power to compel access is not conferred by the duty arising under art. 12, notwithstanding that Gibtel has SMP, because the particular nature of the access sought does not fall within the scope of the duty which GRA imposed when it designated Gibtel as having SMP in the relevant market.

Article 5

44 I turn now to the question whether the power to order access arises under art. 5. This only matters if the power is lacking under art. 12, as indeed I have found that it is. So far as art. 5 is concerned, GFS is relying upon two kinds of access. The first is access to elements of the network or associated facilities. For reasons I have already explained in relation to the art. 12 submission, in my view GFS's particular access request does not fall within the scope of those concepts. There is no basis for saying that they have a different meaning in art. 5 from that in art. 12, and Mr. Maclean did not suggest the contrary. So even if, contrary to my view, Gibtel does not have SMP with respect to the relevant market, it could not succeed in this argument.

45 However, the second submission is that the power to order access arises by another route, namely the power under art. 5, when read with the definition of access in art. 2, for the GRA to require "access to physical infrastructure, including buildings, ducts and masts." Mr. Maclean submits that GFS can bring itself within this access category. The judge below seems to have taken the view that if Gibtel has SMP it cannot be subject to art. 5 access requirements because this would allow art. 5 to be used to subvert the strict procedural requirements of art. 12. I see the force of that where the access in question is to elements of the network and associated facilities because it then replicates the access obligation which can be imposed under art. 12. But where the access sought is of a kind which cannot be imposed under art. 12, I cannot see why an SMP operator should not be subject to the same requirement as a non-SMP operator. Indeed, it would be curious if its SMP status meant that it was subject to less rigorous regulation than a non-SMP undertaking. If it is appropriate to

require adequate access to promote sustainable competition under art. 5, and that access cannot be imposed pursuant to art. 12, I see no reason why in principle it should not be imposed notwithstanding that the operator has SMP in the relevant market.

46 In my judgment the data centre can properly be described as "physical infrastructure." A point which has caused me concern is whether GFS placing its server in the data centre constitutes giving it access to the centre, but I think that it does, given that access means "making available facilities . . . for the purpose of providing electronic communications services." Moreover, given that the concept of "access" is capable of including a positive requirement (see para. 17 above), I believe that it is capable of extending to allowing GFS to access other servers. This is particularly so given that the best interests of end-users is an important objective of the legislation.

47 Even on the assumption that Gibtel could be subject to an access requirement of this nature under art. 5, Sir Peter seeks to defeat GFS's argument in two ways. First, he submits that the only purposes for which access can be given under art. 5 are the three purposes specifically identified in paras. (a), (ab) and (b), and it is now common ground (although it was not below) that GFS's request does not fall within any of those heads. This argument was accepted by Butler, J. Secondly, he says that in any event the reference to "physical infrastructure" in the definition of "Access" is not intending to refer to infrastructure which is independent of the network but only infrastructure which is associated with it. On this analysis, the separate reference in art. 2 to "physical infrastructure" is redundant, and Sir Peter does not shrink from so submitting.

48 I am not persuaded by either of these arguments. As to the former, art. 5 in terms states that national regulatory authorities shall encourage and "where appropriate ensure . . . adequate access and interconnection" on undertakings which control access to facilities in circumstances where denying that access may inhibit efficiency and sustainable competition and may fail to give the maximum benefit to end users. It then states that "In particular, without prejudice to measures that may be taken regarding undertakings with significant market power . . .", regulatory authorities may be able to impose access requirements in the three specific situations spelt out in paras. (a), (ab) and (b). On any normal interpretation of this language, I do not see how these situations which are stated in terms to be "in particular" can be read as exhausting the purposes for which the duty can be imposed.

49 In support of his construction, Sir Peter relied heavily upon Commission guidelines on market analysis and the assessment of significant market power. At para. 111, having referred to the obligations which may

be imposed pursuant to arts. 9 to 13 of the Access Regulations, the guidelines say:

> "Under the regulatory framework, these obligations should only be imposed on undertakings which have been designated as having SMP in a relevant market, except in certain defined cases listed in Section 4.3."

Section 4.3 states that "exceptionally, similar obligations may be imposed on operators other than those that have been designated as having SMP" and then it lists a number of examples including obligations arising under arts. 5 and 6 of the Access Directive. It describes the obligations in art. 5 as "obligations covering, inter alia, access to . . ." and then it summarizes the three sets of circumstances set out in art. 5.1. Sir Peter submits that this shows that the three circumstances are to be treated as exhaustive. I do not agree; in my view the phrase "inter alia" clearly indicates otherwise. Cases relied upon by Sir Peter, such as *KPN BV* v. *Autoriteit Consument en Markt (ACM)* (3), which simply refer without dissent to para. 111, take matters no further. The Commission was plainly not, in my judgment, saying or intending to say that the three sets of circumstances were exhaustive of the circumstances when an access obligation could be imposed under art. 5. If this had been the intention, art. 5 could have said so unambiguously. In my judgment, art. 5 is plainly intended to have broader reach where that can properly be justified on competition grounds.

50 As to the argument that the concept of "physical infrastructure" in the definition of access adds nothing to the infrastructure which is inherent in the concept of associated facilities, it would if correct mean that this reference served no purpose in the definition. There would be no reason to refer, as a separate kind of access, to "access to physical infrastructure" at all. By contrast if one allows the concept of infrastructure to include infrastructure which does not fall within the concept of associated facilities, this gives the concept some independent function within the definition. Sir Peter relied upon a footnote in a book by Laurent Garzaniti, entitled *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation*, 3rd ed., at para. 1.230 (2010), in which the author expressed the view that the reference to infrastructure was superfluous because it was already embraced within the concept of associated facilities. But the author gave no authority or rationale for that observation, and I respectfully disagree with it. Given that the concept of "access" is defined so broadly, it would be surprising if it did not include access to physical infrastructure which is distinct from the network or its associated facilities, since there may be cases where this is necessary to achieve the efficient competition and benefit to end-users which art. 5 seeks to promote.

Conclusion

51 It follows that in my view GRA has the power to impose access in favour of GFS but only on the narrow basis that in principle there is a power under art. 5 (but not art. 12) to require an operator to allow access to physical infrastructure even where the relevant infrastructure could not be described as facilities associated with the network or elements of it. Whether it would be appropriate to require such access, particularly where access to Gibtel's network at Mount Pleasant can be obtained using the power conferred by art. 4, is not for this court to say. All that I have decided is that in my judgment, and contrary to its understanding of its own powers, the GRA did in principle have an art. 5 power to grant access to GFS in order to enable it to place its server on the data centre and communicate with other servers, provided it thought it a proper exercise of its power. I would therefore uphold the appeal and, if my Lords agree and in accordance with s.91(4) of the Communication Act, I would quash the decision letter to the extent that it denies that GRA has the power to direct Gibtel to grant access in the manner sought by GFS and I would direct GRA to reconsider whether it would be appropriate to order such access in accordance with the principles explained in this judgment and the relevant law.

52 **RIMER, J.A.,** I agree.

53 **KAY, P.,** I also agree.

Appeal allowed.