[2021 Gib LR 682]

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

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Reed, Lord Lloyd-Jones, Lord Sales, Lord Hamblen and Lord Leggatt): November 29th, 2021

[2021] UKPC 31

Telecommunications and Broadcasting—communications providers—competition—Gibraltar Regulatory Authority does not have power under Access Directive (2002/19/EC), art. 5 to compel Gibtelecom to provide access for provider of public communications network services to Gibtelecom's physical infrastructure at data centre

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

Gibtelecom was wholly owned by the Government of Gibraltar. It was an authorized operator of a public electronic communications network and an electronic communications services provider in Gibraltar. Its wholly owned subsidiary operated a data centre in Gibraltar which housed computer servers, arranged on racks. The servers were owned by third parties, who rented space on the racks. The servers in the data centre were connected to the outside world by means of electronic communications services. Those services were provided by Gibtelecom and another company ("Sapphire") which had contracted with Gibtelecom to be allowed access to the data centre to place its own servers in a carrier room, which could then be connected though the data centre's internal cabling to the appropriate customer servers.

Gibtelecom had been designated as having significant market power 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 Gibtelecom including that it should meet reasonable requests for access to, and use of, specific network elements and associated facilities.

The respondent ("Gibfibre") had built a fibre optic system in Gibraltar. Like Gibtelecom, it was a provider of public electronic communications network services and operated a public communications network. Gibfibre

wished to provide its electronic communications services to potential customers whose servers and related equipment were hosted at the data centre. It asked Gibtelecom for access to the data centre on like terms to those afforded to Sapphire. That involved (i) having access to the data centre via certain ducts which were used by Gibtelecom as part of its network; (ii) placing Gibfibre's own server in the data centre; and (iii) connecting that server to the customers' servers, so as to provide electronic communications services directly to those customers over its own network. Gibtelecom refused the request for commercial reasons.

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

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. 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 Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, 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 significant market power, 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."

"Access" was defined in art. 2(a). The types of access set out were broad and non-exhaustive.

Gibfibre considered the GRA to have misunderstood the scope of its powers and appealed against the GRA's decision. Butler, J. upheld the GRA's submission that it had no power to assist Gibfibre in the manner sought.

The Court of Appeal allowed Gibfibre's appeal (in a decision reported at 2019 Gib LR 92). The court held that the GRA had power to require the requested access to be granted under art. 5 of the Access Directive. The court held that under art. 5(1) there was a general power to ensure adequate access and that access covered all the matters set out in the definition in art. 2(a) of the Access Directive. The court held that this included access to facilities other than "network elements and associated facilities," including "physical infrastructure" such as the data centre, and that the requested access involved "the making available of facilities . . . for the purpose of providing electronic communications."

Three issues arose on the GRA's appeal:

Issue 1: Did art. 5 of the Access Directive endow the GRA with a general, freestanding power to require access (as defined in art. 2(a) of the Access Directive) to be granted for the purpose of the attainment of any of the objectives set out in art. 8 of the Framework Directive, or were the powers of the GRA to direct the grant of access under art. 5 limited to the purposes/ circumstances listed in paras. (a), (ab) and (b) of art. 5?

Issue 2: Did art. 5 of the Access Directive endow the GRA with the power to require an operator to allow access to physical infrastructure even where the relevant infrastructure could not be described as being part of the operator's own electronic communications network or its associated facilities?

Issue 3: Was the telecommunications market known as Market 4 (wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location) a market in which Gibtelecom had been found by the GRA to have significant market power, engaged by, and thus a relevant market for the purposes of the requested access? In short, did the requested access engage Market 4?

Held, allowing the appeal:

(1) The majority of the Board (Lord Hamblen, with whom Lord Reed, Lord Lloyd-Jones and Lord Leggatt agreed) concluded that the appeal should be allowed on Issue 2. For the following reasons, the majority of the Board was satisfied that art. 5 did not endow the GRA with the power to require Gibtelecom to allow access to physical infrastructure where the relevant

infrastructure could not be described as being part of Gibtelecom's own electronic communications network or its associated facilities.

First, an article such as art. 1 of the Access Directive was of fundamental importance, seeking to define the ambit of the Access Directive. Article 1(1) stated that the Access Directive regulated "access to . . . electronic communications networks and associated facilities." Article 1(2) stated that the Access Directive "establishes rights and obligations" in relation to "access to [operators'] networks or associated facilities." This was stated to be the scope of the Access Directive. Whilst the definition of "access" in art. 2 was widely drawn, it could not enlarge the scope of the Access Directive itself.

Secondly, "operator" was defined in art. 2 as meaning "an undertaking providing or authorised to provide a public communications network or an associated facility . . ." The operators' "networks" referred to in art. 1(2), in relation to which rights and obligations of access were established by the Access Directive must therefore mean public communications networks. "Public communications network" was defined in art. 2(d) of the Framework Directive as "an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points." "Network termination point" was defined in art. 2(da) of the Framework Directive as meaning "the physical point at which a subscriber is provided with access to a public communications network . . ." The network termination point therefore marked the boundary of a public communications network, beyond which would lie private networks and telecommunications terminal equipment, which were not subject to regulation under the common regulatory framework. The network termination point marked the regulatory boundary of the common regulatory framework. The customer servers located on the data centre's racks lay beyond the network termination point. The requested access therefore fell outside the scope of the Access Directive not only because it did not seek access to an electronic communications network or associated facility but also because it did not seek access to a public communications network or associated facility but rather to a private network and to telecommunications terminal equipment which lay beyond the network termination point.

Thirdly, the main focus of the Framework Directive and the Access Directive was the *ex ante* regulation of undertakings which had significant market power. It was also recognized that there should not be over-regulation of markets where one or more undertakings had significant market power and so the obligations set out in arts. 9–13 of the Access Directive (*i.e.* transparency, non-discrimination, accounting separation, access and price control) were described as "maximum obligations." It would therefore be very surprising if there was a general power under art. 5 to impose obligations of access on an operator which did not have significant market power which went beyond the "maximum obligations" which might be imposed on an operator with such market power under art. 12, one of the range of obligations which represented the most intrusive

part of the regulatory scheme. That, however, was the consequence of the Court of Appeal's decision. Although it was held that there was no power to require the requested access on an operator with significant market power under art. 12, it was held that there was a power to do so under art. 5 regardless of whether or not that operator had significant market power. If, on the other hand, any general power to require access under art. 5 was limited, in accordance with the scope of the Access Directive, to access to the requested operator's electronic communications network or associated facilities, there would be no inconsistency with art. 12, and rights to and obligations of access would be treated consistently and harmoniously across the Access Directive as a whole.

Fourthly, the Court of Appeal recognized that it would be "curious" if an operator with significant market power was subject to less rigorous regulation than one without such power but considered that this inconsistency was avoided if the general power which they held to be available under art. 5 could be imposed on both types of operator. Obligations of access which went beyond those set out in art. 12 could not, however, be imposed on operators with significant market power without the prior approval and authorization of the Commission (art. 8(3)). On the Court of Appeal's own findings in relation to Market 4, this was a case in which Gibtelecom had significant market power in the relevant market. The general power under art. 5 which the Court of Appeal held could be exercised against Gibtelecom ignored, was inconsistent with and subverted the important requirement of prior Commission approval and authorization under art. 8(3).

Fifthly, as held by the courts below in relation to art. 12, elements (ii) and (iii) of the requested access did not involve access to any element of Gibtelecom's electronic communications network or any associated facility thereof. As the GRA put it, far from seeking to access Gibtelecom's network, Gibfibre was seeking to bypass it altogether by connecting its own network directly to the hosted customers' servers. It was effectively a request to Gibtelecom for it to grant access to its premises in order that Gibfibre could access the servers of third parties. The logic of Gibfibre's argument was that Gibtelecom could be required to grant access to its premises even if no part of its electronic communications network was housed there. That strayed far beyond the scope and aim of the Access Directive.

Sixthly, although it might be said that having the power to require the GRA to grant access to the data centre would promote competition in the provision of electronic communication networks and services, the Framework Directive and the Access Directive were concerned with promoting competition in markets which required *ex ante* regulation. If it were the case that Gibtelecom's behaviour was anti-competitive or that it was abusing its dominant position, that could be addressed by *ex post* regulation under competition law. The mere fact that there might be such behaviour did not require or justify a power of intervention under the Access Directive. The fact that on Gibfibre's case access might be required to a building in which the operator had no electronic communications

network or services highlighted that the underlying market which was being targeted was the hosting services market, not the electronic communications market. The hosting services market was a functionally separate market which was not subject to regulation under the common regulatory framework.

Seventhly, the Board had not been referred to any case in which it had been held that there was a power to require access which went beyond the access obligations which might be imposed on an operator with significant market power under art. 12.

Eighthly, there was support in the commentaries for the obligation of access being limited to access to networks and associated facilities.

Finally, it was to be observed that the general power under art. 5 which the Court of Appeal found to exist was not only unconstrained by the stated scope and aim of the Access Directive but was of remarkable width. It was a power that could seemingly be exercised in relation to all electronic communications service providers, for all purposes and by all and any means, provided only that the access sought came within the very broad definition in art. 2(a) and the obligation and condition imposed promoted competition and met the requirements of art. 5(2). It was difficult to see how this was consistent with the carefully structured and balanced regime for operators with significant market power set out in arts. 8–13 and the recognized need to avoid over-regulation (paras. 33–58).

(2) It was not necessary for the Board to address Issue 1 or Issue 3 (para. 57).

(3) Lord Sales agreed with the result and with a large part of the reasoning of the majority but considered there was more force in the Court of Appeal's judgment than might appear from the majority's judgment. It was arguable that the scope of the Access Directive might be wider than simply being concerned with access to public communication networks. However, taken overall, the textual indicators in the Access Directive led to the conclusion that its scope was limited to access to electronic communications networks belonging to operators. In the present case, the critical part of Gibfibre's request was to gain access to the data centre where the end-users' servers were located, but the data centre was not such a network nor an associated facility in the requisite sense (para. 70).

Cases cited:

(1) *British Telecommunications plc* v. *Telefónica O2 UK Ltd*., [2014] UKSC 42; [2014] 4 All E.R. 907; [2014] Bus. L.R. 765, referred to.

(2) *Commission* v. *Poland*, Case C-227/07; June 10th, 2008; [2008] ECR I-08403, referred to.

(3) *TDC A/S* v. *Teleklagenævnet*, Case C-556/12; June 19th, 2014; ECLI:EU:C:2014:2009, referred to.

(4) *TeliaSonera Finland Oyj*, Case C-192/08; November 12th, 2009; [2009] ECR I-10717, referred to.

Legislation construed:

Council Directive (2002/19/EC) of March 7th, 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), recital (1): The relevant terms of this recital are set out at para. 25.
recital (2a): The relevant terms of this recital are set out at para. 30.
recital (3): The relevant terms of this recital are set out at para. 30.
recital (14): The relevant terms of this recital are set out at para. 47.
art. 1: The relevant terms of this article are set out at para. 26.
art. 2(a): The relevant terms of this paragraph are set out at para. 19.
art. 2(c): The relevant terms of this paragraph are set out at para. 37.
art. 5: The relevant terms of this article are set out at para. 17.
art. 8(3): The relevant terms of this paragraph are set out at para. 12.
art. 12: The relevant terms of this article are set out at para. 13.

Council Directive (2002/21/EC) of March 7th, 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), recital (8): The relevant terms of this recital are set out at para. 41.
recital (27): The relevant terms of this recital are set out at para. 46.
art. 2(a): The relevant terms of this paragraph are set out at para. 61.
art. 2(c): The relevant terms of this paragraph are set out at para. 61.
art. 2(d): The relevant terms of this paragraph are set out at para. 38.
art. 2(da): The relevant terms of this paragraph are set out at para. 39.
art. 2(e): The relevant terms of this paragraph are set out at para. 14.
art. 8: The relevant terms of this article are set out at para. 18.

Directive 1999/5/EC of March 9th, 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity, art. 2(b): The relevant terms of this paragraph are set out at para. 41.

Directive 2002/22/EC of March 7th, 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), recital (6): The relevant terms of this recital are set out at para. 42.

P. Caruana, *Q.C.* and *C. Allan* (instructed by Peter Caruana & Co.) for the appellant;
J. Segan, *Q.C.* and *G. Molyneaux* (instructed by Maddox Legal Ltd.) for the respondent;
R. Palmer, *Q.C.* and *M. Levy* (instructed by Hassans International) for the intervener.

1 **LORD HAMBLEN (with whom LORD REED, LORD LLOYD-JONES and LORD LEGGATT agree):**

Introduction

The appellant, the Gibraltar Regulatory Authority ("the GRA"), is the regulator of the telecommunications industry in Gibraltar. It is the appointed national regulatory authority in accordance with the Communications Act 2006 ("the Act") which transposes into Gibraltar law the provisions of Framework Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services ("the Framework Directive").

2 The respondent, Gibfibre Ltd. ("Gibfibre"), is an authorized operator of a public electronic communications network in Gibraltar and a provider of electronic communications services, having built its own fibre optic system.

3 The intervener, Gibtelecom Ltd. ("Gibtelecom"), is also an authorized operator of a public electronic communications network and an electronic communications services provider in Gibraltar. It was formerly the state monopoly provider of telecoms services in Gibraltar. It is wholly owned by the government of Gibraltar.

4 As well as its activities as an electronic communications network operator and service provider, Gibtelecom's wholly owned subsidiary, Rockolo Ltd., also operates a data centre at Mount Pleasant in Gibraltar ("the data centre"). A data centre is a building which houses computer servers, arranged on racks. The servers are owned by third parties who have rented space on the racks. The data centre provider is responsible for providing a highly secure, climate-controlled environment, providing electrical power to the servers, including backup power systems, and for monitoring relevant systems. The creation of a data centre requires a significant capital investment.

5 The servers in a data centre are connected to the outside world by means of electronic communications services. At Mount Pleasant, those services are provided by Gibtelecom itself, as well as by Sapphire Networks Ltd. ("Sapphire"). Sapphire has contracted with Gibtelecom to be allowed access to the data centre to place its own servers in a dedicated carrier room, which can then be connected through the data centre's internal cabling to the appropriate customer servers.

6 Gibfibre wished to provide its electronic communications services to potential customers whose servers and related equipment were hosted at the data centre. For that purpose, Gibfibre asked Gibtelecom for access to the data centre on like terms as those afforded to Sapphire. This involved (i) having access to the data centre via certain ducts which are used by

Gibtelecom as part of its network, (ii) placing Gibfibre's own server in the data centre, and (iii) connecting that server to the customers' servers, so as to provide electronic communications services directly to those customers over its own network, without connecting via Gibtelecom's network (save for the use of the ducts) ("the requested access").

7 Gibtelecom refused Gibfibre's request, initially denying that the ducts had the requisite capacity, but later conceding that its true reasons were purely commercial. In consequence, in or around November 2015, Gibfibre sought the GRA's assistance and intervention, as the national regulatory authority. Based on information provided to it by Gibfibre and investigations carried out by the GRA itself, the GRA engaged with Gibtelecom in a bilateral regulatory enforcement process in respect of Gibtelecom's refusal to grant the requested access. After extensive and detailed exchanges with Gibtelecom and consideration of the matter by the GRA in the light of counsel's advice, the GRA (having initially taken a different view) concluded that it did not have the legal powers to require Gibtelecom to grant Gibfibre the requested access. This was because it considered that the request was not for access to or interconnection of public electronic communications networks or public electronic communications services or associated facilities thereof, as explained in the GRA's decision letter dated February 16th, 2017 ("the decision").

8 Gibfibre appealed the decision to the Supreme Court of Gibraltar under the appeal provisions in the Act. The appeal came before Butler, J. who dismissed it in a judgment dated November 30th, 2018 on the following grounds: (i) the GRA did not have power to order the requested access under art. 12 of Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities ("the Access Directive") as the data centre was not part of Gibtelecom's communications network or its associated facilities; and (ii) the GRA did not have power to order the requested access under art. 5 of the Access Directive on the ground that access could only be required under art. 5 for one of the purposes specified in paras. (a), (ab) and (b) of art. 5, which were not engaged by the requested access. He further held, rejecting the GRA's argument to the contrary, that the telecommunications market known as "Market 4" was not limited to the local loop, and was capable of being engaged by the requested access.

9 Gibfibre appealed the decision of Butler, J. to the Court of Appeal and the GRA cross-appealed on the Market 4 issue. In a judgment dated April 26th, 2019 (reported at 2019 Gib LR 92), the Court of Appeal (Sir Maurice Kay, P., Sir Patrick Elias, J.A. and Sir Colin Rimer, J.A.) dismissed the appeal on ground (i), allowed the appeal on ground (ii), and dismissed the cross-appeal. With the permission of the Court of Appeal, the GRA appeals to the Board against the decision to allow the appeal on ground (ii) and the

dismissal of its cross-appeal. There is no cross-appeal by Gibfibre against the Court of Appeal's dismissal of its appeal on ground (i).

The legal framework

10 The EU has adopted a common regulatory framework for the regulation of telecommunications throughout the EU. There are five Directives, all issued on March 7th, 2002, which lay down the relevant legal rules. The appeal concerns two of those Directives, the Framework Directive and the Access Directive. These have been implemented in Gibraltar through the Act and the Communication (Access) Regulations 2006. The parties agree that Gibraltar law has properly implemented EU law and the case has been argued below and before the Board by reference to EU law. Since the date of the decision, the five Directives have been replaced by a single Directive, Directive (EU) 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code, known as "EECC." The appeal, however, falls to be decided by reference to the law prevailing at the date of the decision.

11 As explained in the judgment of Sir Patrick Elias, J.A., with whose judgment the rest of the court agreed (2019 Gib LR 92, at para. 6):

> "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* . . . ([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.'"

12 Under the Framework Directive and the Access Directive, the *ex ante* regulation of undertakings which have significant market power is carried out under the following regime:

(i) The EU Commission identifies (by formal recommendations) "markets" (*i.e.*, sectors, activities, products and services within the telecommunications industry) which, by virtue of the application of EU competition principles, are apt for *ex ante* regulation.

(ii) In respect of these "markets," national regulatory authorities, such as the GRA, are required to intervene to impose obligations on undertakings only where the markets are considered (in that country) not to be effectively competitive as a result of such undertakings being in a position of dominance. This requires the national regulatory authority to assess their telecommunications "markets" (as identified by the EU Commission) in their country for competitiveness and, if found not to be, to impose conditions and obligations on any operator with significant market power within them.

(iii) Article 16 of the Framework Directive establishes the procedure known as the "market analysis procedure" whereby the national regulatory authority is empowered to assess the "market" and to establish whether any "operator" within it exercises significant market power. Articles 7 and 8 of the Access Directive require the national regulatory authority to impose at least one of the specific conditions/obligations contained in arts. 9–13 of the Access Directive on operators with significant market power.

(iv) Articles 9–13 of the Access Directive concern different obligations which may be imposed on an operator which has been designated as having significant market power: namely, transparency (art. 9); non-discrimination (art. 10); accounting separation (art. 11); access to, and use of, specific network facilities (art. 12); and price control and cost accounting (art. 13). As Lord Sumption observed in *British Telecommunications plc* v. *Telefónica O2 UK Ltd.* (1) ([2014] UKSC 42, at para. 9), arts. 9–13 "represent the most intrusive parts of the regulatory scheme."

(v) Under art. 8(3) of the Access Directive, national regulatory authorities are not to impose the obligations set out in arts. 9–13 on operators that have not been designated as having significant market power, although this is stated to be "without prejudice to . . . the provisions of Articles 5(1), 5(2) and 6." Article 8(3) further provides that "in exceptional circumstances, when a national regulatory authority intends to impose on operators with significant market power other obligations for access or interconnection than those set out in Articles 9 to 13," it shall submit a

request to the Commission which will decide whether or not to authorize the taking of such measures.

13 In the present case, Gibfibre contended that the GRA had the power to order Gibtelecom to provide the requested access under both art. 12 and art. 5 of the Access Directive. It contended that the art. 12 power arose because Gibtelecom had been designated as having significant market power in a relevant market, namely Market 4—"Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location in Gibraltar." Although the GRA disputed that this was a relevant market for the purpose of the requested access, the courts below held otherwise. Article 12 concerns obligations of access and provides:

"*Article 12*

Obligations of access to, and use of, specific network facilities

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."

14 The power to impose an obligation under art. 12 therefore only arises in respect of a request "for access to, and use of, specific network elements and associated facilities." "Associated facilities" are facilities which enable or support the provision of services via the network or which have the potential to do so. The phrase is defined in art. 2(e) of the Framework Directive (which definitions apply to the Access Directive under art. 2 thereof) 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 that 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 . . ."

15 Both the judge and the Court of Appeal held that elements (ii) and (iii) of the requested access, namely placing Gibfibre's own server in the data centre, and connecting that server to the customers' servers, were not a request "for access to, and use of, specific network elements and associated

facilities." As Sir Patrick Elias, J.A. explained (2019 Gib LR 92, at paras. 39–40):

> "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."

16 This finding is not challenged and so it is not in dispute that there is no power to require that the requested access be granted under art. 12 and that elements (ii) and (iii) of Gibfibre's request do not involve a request "for access to, and use of, specific network elements and associated facilities."

17 The Court of Appeal held, however, reversing the decision of the judge, that the GRA nevertheless had power to require the requested access to be granted under art. 5. This provides:

> "*Article 5*
>
> **Powers and responsibilities of the national regulatory authorities with regard to access and interconnection**
>
> 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 interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, 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.

2. Obligations and conditions imposed in accordance with paragraph 1 shall be objective, transparent, proportionate and non-discriminatory, and shall be implemented in accordance with the procedures referred to in Articles 6, 7 and 7a of Directive 2002/21/EC (Framework Directive).

3. With regard to access and interconnection referred to in paragraph 1, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified in order to secure the policy objectives of Article 8 of Directive 2002/21/EC (Framework Directive), in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC (Framework Directive)."

18 Article 5(1) refers to the objectives set out in art. 8 of the Framework Directive, which provides:

"*Article 8*

Policy objectives and regulatory principles

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 . . . 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 . . .

3. The national regulatory authorities shall contribute to the development of the internal market by *inter alia* . . .

4. The national regulatory authorities shall promote the interests of the citizens of the European Union by *inter alia*:

(a) ensuring all citizens have access to a universal service specified in Directive 2002/22/EC (Universal Service Directive) . . .”

19 The Court of Appeal held that under art. 5(1) there is a general power “to ensure . . . ‘adequate access . . .’” (2019 Gib LR 92, at para. 18) and that access covers all the matters set out in the definition in art. 2(a) of the Access Directive which provides that—

“‘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. *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 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; access to virtual network services . . .” [Emphasis added.]

20 The Court of Appeal held (2019 Gib LR 92, at para. 50) that this embraces access to facilities other than “network elements and associated facilities,” including “physical infrastructure” such as the data centre, and that the requested access did involve “the making available of facilities . . .

for the purpose of providing electronic communications." There was accordingly power to order the requested access under art. 5.

The issues

21 The issues arising from the grounds of appeal are:

Issue 1: Does art. 5 of the Access Directive endow the GRA with a general, freestanding power to require access (as defined in art. 2(a) of the Access Directive) to be granted for the purpose of the attainment of any of the objectives set out in art. 8 of the Framework Directive, or are the powers of the GRA to direct the grant of access under art. 5 limited to the purposes/ circumstance listed in paras. (a), (ab) and (b) of art. 5?

Issue 2: Does art. 5 of the Access Directive endow the GRA with the power to require an operator to allow access to physical infrastructure even where the relevant infrastructure could not be described as being part of the operator's own electronic communications network or its associated facilities?

Issue 3: Is the telecommunications market known as "Market 4" ("wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location"), a market in which Gibtelecom has been found by the GRA to have significant market power, engaged by, and thus a relevant market for, the purposes of the requested access? In short, does the requested access engage Market 4?

Issue 2

22 The Board proposes to address Issue 2 first. It is a logically prior issue to Issue 1 and it is also the ground of appeal principally relied upon by Gibtelecom.

23 The case of the GRA and Gibtelecom is that art. 5 cannot and does not endow the GRA with the power to require an operator to allow access to physical infrastructure where the relevant infrastructure could not be described as being part of Gibtelecom's own electronic communications network or its associated facilities as that would be outwith the scope of the Access Directive.

24 The title of the Access Directive is that it is a directive "on access to, and interconnection of, electronic communications networks and associated facilities."

25 Recital (1) of the Access Directive provides that:

> "The provisions of this Directive *apply to those networks that are used for the provision of publicly available electronic communications services.* This Directive covers access and interconnection arrangements between service suppliers. *Non-public networks do not have obligations*

under this Directive except where, in benefiting from access to public networks, they may be subject to conditions laid down by Member States." [Emphasis added.]

26 Article 1 of the Access Directive defines the scope of the Access Directive as follows:

"*Article 1*

Scope and aim

1. Within the framework set out in Directive 2002/21/EC (Framework Directive), this Directive harmonises the way in which Member States regulate *access to, and interconnection of, electronic communications networks and associated facilities*. The aim is to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits.

2. This Directive establishes rights and obligations *for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities*. It sets out objectives for national regulatory authorities with regard to access and interconnection, and lays down procedures to ensure that obligations imposed by national regulatory authorities are reviewed and, where appropriate, withdrawn once the desired objectives have been achieved. Access in this Directive does not refer to access by end-users." [Emphasis added.]

27 The GRA and Gibtelecom contend that the scope of the Access Directive is accordingly limited to regulation of access to electronic communications networks and associated facilities. In so far as art. 5 confers a power which goes beyond the purposes/circumstance listed in paras. (a), (ab) and (b) of art. 5 (Issue 1), it cannot extend beyond the scope of the Access Directive itself.

28 In the present case, in deciding that there is no power to require access under art. 12, the Court of Appeal held that elements (ii) and (iii) of the requested access were not a request for access to any element of Gibtelecom's electronic communications network ("specific network elements") or its associated facilities. In the light of this unchallenged finding, it is contended that the requested access falls outside the scope of the Access Directive.

29 Gibfibre supports the reasoning and decision of the Court of Appeal on this issue. In particular, it is submitted that the case of the GRA and Gibtelecom is inconsistent with both the wording and the purpose of the relevant provisions.

30 It is said to be inconsistent with the wording of the relevant provisions because the definition of "access" in art. 2(a) of the Access Directive makes clear that "access to network elements and associated facilities" is just one example of access within the meaning of the Access Directive, another of which is "access to physical infrastructure including buildings, ducts and masts." Moreover, recital (3) of the Access Directive emphasizes the importance of the definition of "access," explaining that as "the term 'access' has a wide range of meanings . . . it is therefore necessary to define precisely how that term is used in this Directive . . ."

31 It is said to be inconsistent with the purpose of the relevant provisions because the purpose of the common regulatory framework, as set out in art. 8(2) of the Framework Directive, is to ensure that all reasonable measures are taken to ensure that there is no distortion of competition in the provision of electronic communications services for the benefit of end users.

32 Gibfibre points out that the case of the GRA and Gibtelecom means that unless physical infrastructure forms part of its network or an associated facility, then the GRA has no power to intervene. It is submitted that that would put a substantial proportion of the market for electronic communications services in Gibraltar beyond the reach of the regulatory framework in a manner inconsistent with both the wording and the purpose of the common regulatory framework and the Access Directive.

33 After careful consideration of the competing arguments, which have been persuasively presented by counsel for all parties, the majority of the Board has reached the clear conclusion that the appeal should be allowed on Issue 2. There are several reasons for so concluding.

34 First, an article, such as art. 1 of the Access Directive, which defines the scope of a Directive is of fundamental importance. Whilst a definitions article, such as art. 2, is important for the proper application of a Directive, it does not seek to define its ambit, as art. 1 does.

35 Article 1(1) states that the Access Directive regulates "access to . . . electronic communications networks and associated facilities." Article 1(2) states that the Access Directive "establishes rights and obligations" in relation to "access to [operators'] networks or associated facilities." This is stated to be the "scope" of the Access Directive, consistent with its long title.

36 Whilst the definition of "access" in art. 2 is widely drawn, it does not determine the rights and obligations of operators to request/grant access. It determines what needs to be given, but not the obligation to give it or the circumstances in which it needs to be given. In so far as art. 5 confers a general power to grant access, consistently with the defined scope of the Access Directive, that means "access" to the "electronic communications networks and associated facilities" of the requested operator. It does not mean access to a building or other physical infrastructure that is neither of

those things, as the Court of Appeal has held elements (ii) and (iii) of the requested access to be. However broad the definition of "access" may be, it cannot enlarge the scope of the Access Directive itself.

37 Secondly, "operator" is defined in art. 2 of the Access Directive as meaning "an undertaking providing or authorised to provide a public communications network or an associated facility . . ." The operators' "networks" referred to in art. 1(2), in relation to which rights and obligations of access are established by the Access Directive, must therefore mean public communications networks. This is consistent with recital (1) of the Access Directive which states in terms that it applies to "networks that are used for the provision of publicly available electronic communications services" and that "non-public networks do not have obligations under this Directive." It is also consistent with the "rights and obligations for undertakings" in relation to interconnection set out in art. 4, which apply in terms to "operators of public communications networks."

38 "Public communications network" is defined in art. 2(d) of the Framework Directive as meaning—

> "an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points."

39 "Network termination point" is defined in art. 2(da) of the Framework Directive as meaning—

> "the physical point at which a subscriber is provided with access to a public communications network; in the case of networks involving switching or routing, the NTP is identified by means of a specific network address, which may be linked to a subscriber number or name."

40 The network termination point therefore marks the boundary of a public communications network. Beyond that boundary will lie private networks and telecommunications terminal equipment, which are not subject to regulation under the common regulatory framework.

41 At the material time, telecommunications terminal equipment was subject to regulation under Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity. Article 2(b) of that Directive defines telecommunications terminal equipment as being—

> "[A] product enabling communication or a relevant component thereof which is intended to be connected directly or indirectly by any means whatsoever to interfaces of public telecommunications networks

> (that is to say, telecommunications networks used wholly or partly for the provision of publicly available telecommunications services)."

A server would be an example of such equipment, as would other network connected user machines or devices, such as a desktop computer or a laptop. Recital (8) of the Framework Directive provides in terms that it "does not cover equipment within the scope of Directive 1999/5/EC."

42 That the network termination point marks the regulatory boundary of the common regulatory framework is confirmed by recital (6) of Directive 2002/22/EC (the Universal Service Directive), one of the five Directives of March 7th, 2002 which set out the common regulatory framework. It provides:

> "The network termination point represents a boundary for regulatory purposes between the regulatory framework for electronic communication networks and services and the regulation of telecommunication terminal equipment."

Recital (19) of the EECC is in the same terms.

43 The customer servers located on the data centre's racks lie beyond the network termination point, as the Court of Appeal held (2019 Gib LR 92, at para. 39). They therefore form no part of any public electronic communications network and lie outside the regulatory boundary of the common regulatory framework. As the Court of Appeal stated (*ibid.*): "the hosted servers are not themselves part of the network."

44 The domestic equivalent of a server would be a personal desktop computer which is connected to a router and a modem (now usually combined in one machine) which is in turn connected to a telephone wall terminal where it joins a public communications network. That is where the network termination point would be. The personal computer is not itself part of the network.

45 The requested access therefore falls outside the scope of the Access Directive not only because it does not seek access to an electronic communications network or associated facility but also because it does not seek access to a public communications network or associated facility, but rather to a private network and to telecommunications terminal equipment which lie beyond the network termination point, the regulatory boundary of the common regulatory framework.

46 Thirdly, the main focus of the Framework Directive and the Access Directive is the *ex ante* regulation of undertakings which have significant market power. As explained in recital (27) of the Framework Directive:

> "It is essential that *ex ante* regulatory obligations should only be imposed where there is not effective competition, *i.e.* in markets

> where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem."

47 At the same time, it is recognized that there should not be over-regulation of markets where one or more undertakings has significant market power and so the obligations set out in arts. 9–13 of the Access Directive are described in the recitals as "maximum obligations." As stated in recital (14):

> "Directive 97/33/EC laid down a range of obligations to be imposed on undertakings with significant market power, namely transparency, non-discrimination, accounting separation, access, and price control including cost orientation. This range of possible obligations should be maintained but, in addition, they should be established as a set of maximum obligations that can be applied to undertakings, in order to avoid over-regulation."

48 Against that background, it would be very surprising if there was a general power under art. 5 to impose obligations of access on an operator which did not have significant market power which went beyond the "maximum obligations" which may be imposed on an operator with such market power under art. 12, one of the range of obligations which represents the most "intrusive" part of the regulatory scheme. That, however, is the consequence of the Court of Appeal's decision. Although it was held that there was no power to require the requested access on an operator with significant market power under art. 12, it was held that there was a power to do so under art. 5 regardless of whether or not that operator had significant market power. If, on the other hand, any general power to require access under art. 5 is limited, in accordance with the scope of the Access Directive, to access to the requested operator's electronic communications network or associated facilities then there is no inconsistency with art. 12, and rights to and obligations of access are treated consistently and harmoniously across the Access Directive as a whole.

49 Fourthly, the Court of Appeal recognized that it would be "curious" if an operator with significant market power was subject to "less rigorous regulation" than one without such power but considered that this inconsistency was avoided if the general power which they held to be available under art. 5 could be imposed on both types of operator (2019 Gib LR 92, at para. 45). Obligations of access which go beyond those set out in art. 12 cannot, however, be imposed on operators with significant market power without the prior approval and authorization of the Commission, as stated in art. 8(3). On the Court of Appeal's own findings in relation to Market 4, this is a case in which Gibtelecom has significant market power in the relevant market. The general power under art. 5 which the Court of Appeal held could be exercised against Gibtelecom in the

present case accordingly ignores, is inconsistent with and subverts the important requirement of prior Commission approval and authorization under art. 8(3).

50 Fifthly, as held by the courts below in relation to art. 12, elements (ii) and (iii) of the requested access do not involve access to any element of Gibtelecom's electronic communications network or any associated facility thereof. As the GRA put it, far from seeking to access Gibtelecom's network, Gibfibre is seeking to bypass it altogether by connecting its own network directly to the hosted customers' servers. As the judge stated (Supreme Ct., November 30th, 2018, at para. 71, *per* Butler, J.), "it is effectively a request to [Gibtelecom] for it to grant access to its premises in order that [Gibfibre] can access the servers of third parties." The logic of Gibfibre's argument, as was accepted before the courts below, is that Gibtelecom could be required to grant access to its premises even if no part of its electronic communications network was housed there. If, for example, the only electronic communications services at the data centre were those provided by Sapphire, on Gibfibre's case Gibtelecom could still be required to grant access simply because it was the owner of the building. The same would seemingly apply to any building or physical infrastructure which happened to be owned or controlled by a public communications network operator, and to anything within it regardless of whether it plays a role in the provision of that network. This strays far beyond the scope and aim of the Access Directive.

51 Sixthly, although it may be said that having the power to require the GRA to grant access to the data centre will promote competition in the provision of electronic communication networks and services, the Framework Directive and the Access Directive are concerned with promoting competition in markets which require *ex ante* regulation. If it be the case that Gibtelecom's behaviour is anti-competitive or that it is abusing its dominant position then that is a matter which can be addressed by *ex post* regulation under competition law. The mere fact that there may be such behaviour does not require or justify a power of intervention under the Access Directive.

52 The fact that on Gibfibre's case access may be required to a building in which the operator has no electronic communications network or services highlights that the underlying market which is being targeted is the hosting services market rather than the electronic communications market. As the judge observed in his judgment (*ibid.*, at para. 83):

> "Hosting facilities do not involve conveyance of signals. They are not Electronic Communications Networks or Services. They do not provide IT equipment for customers . . . the hosting services market . . . is not an electronic communications market."

The hosting services market is a functionally separate market and one which is not subject to regulation under the common regulatory framework.

53 Seventhly, we have not been referred to any case in which it has been held that there is a power to require access which goes beyond the access obligations which may be imposed on an operator with significant market power under art. 12.

54 Eighthly, there is support in the commentaries for the obligation of access being limited to access to networks and associated facilities. For example, Garzaniti, *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation*, 3rd ed., at paras. 1–229 – 1–230 (2010), states:

> "In particular the Access Directive provides a regulatory framework containing the general principles relating to the provision of *access to*, and interconnection of, *networks* for the provision of electronic communications services. It harmonises the conditions for open and efficient *access to*, and use of, *electronic communications networks and services* at the wholesale level. The Access Directive establishes rights and obligations for undertakings granting or seeking interconnection and/or *access to their networks or associated facilities*."
>
> "The definition of 'access' refers to the making available of all relevant facilities and/or services *of a network* to the requesting undertaking for the purposes of providing electronic communications services, as defined under the Framework Directive." [Emphasis added.]

Similarly, Nihoul and Rodford, *EU Electronic Communications Law*, 2nd ed., at para. 3.31 (2011), states:

> "**Access to physical infrastructure**. First, access must be granted to *networks or network elements*. This entails access to physical elements of infrastructure. As an example, providers or operators may ask for access to ducts in which lines and wires are placed. They may also obtain access to masts used for the transmission of communications over fixed or mobile networks. Another example is access to buildings *where this is required to connect with the network.* [Emphasis added.]

55 Finally, it is to be observed that the general power under art. 5 which the Court of Appeal found to exist is not only unconstrained by the stated scope and aim of the Access Directive but is of remarkable width. It is an "anything and everything" or omnibus power that can seemingly be exercised in relation to all electronic communications service providers, for all purposes and by all and any means, provided only that the access

sought comes within the very broad definition in art. 2(a), and the obligation and condition imposed promotes competition and meets the requirements of art. 5(2) (objective, transparent, proportionate and non-discriminatory and implemented in accordance with the procedures referred to in the Framework Directive). It is difficult to see how this is consistent with the carefully structured and balanced regime for operators with significant market power set out in arts. 8–13, and the recognized need to avoid over-regulation. Indeed, as the judge observed, if art. 5 is as broad as Gibfibre contends there is force in the submission that there would no real need for the detailed regime governing operators with significant market power.

56 For all these reasons, the majority of the Board is satisfied that art. 5 does not endow the GRA with the power to require Gibtelecom to allow access to physical infrastructure where the relevant infrastructure could not be described as being part of Gibtelecom's own electronic communications network or its associated facilities. Lord Sales reaches the same conclusion for the reasons which he gives. The Board would therefore allow the appeal on Issue 2.

57 In these circumstances, it is not necessary for the Board to address Issue 1 or Issue 3 (which is in any event academic as the Court of Appeal held that there was no power to require access under art. 12 even though access was being sought in the relevant market). The abstention of the Board should not, however, be interpreted as an endorsement of the Court of Appeal's conclusion on either issue.

Conclusion

58 The Board will humbly advise Her Majesty that the appeal should be allowed.

59 **LORD SALES:** I agree with the result and with a large part of the reasoning of the majority. I write separately in order to register that I think there is more force in the judgment of the Court of Appeal than might appear from the majority's judgment. I use the same abbreviations as Lord Hamblen.

60 I have not found the Framework Directive and the Access Directive to be drafted with perspicuous clarity. They are part of a complex legislative regime (of which we were only taken to part) in relation to a very complex market. It seems to me that there are competing indications in the Directives as to the true scope of the Access Directive. I will explain my reservations shortly.

61 The title, recital (1), and art. 1(1) (defining the scope and aim) of the Access Directive all make explicit reference to that Directive extending to

access to, and interconnection of, "electronic communications networks" and associated facilities. It is not limited to "public communications networks," which the relevant definitions in arts. 2(a) and (d) of the Framework Directive make clear is a subset of electronic communications networks:

> "'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed . . .
>
> 'public communications network' means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points."

In relevant part, art. 2(c) of the Framework Directive defines an "electronic communications service" to mean "a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks."

62 Whereas a public communications network is defined by reference to network termination points or NTPs, electronic communications networks are not. It seems to me, therefore, that it is arguable that the scope of the Access Directive may be wider than simply being concerned with access to public communication networks and that it may not be correct to say that it has no application to anything beyond the NTPs of such networks. If it had been intended that the Access Directive should only apply in relation to public communication networks, one might have expected that to be the concept referred to in the title, recital (1) and art. 1(1). Recital (1) states positively that the provisions of the Directive apply to electronic communications networks "that are used for the provision of publicly available electronic communications services," which appears to cover the networks and the services operated by both Gibfibre and Gibtelecom and hence could be taken to indicate that it extends to regulation of matters affecting access to the services provided by the former as well as the latter. Gibfibre wishes to provide its services to the public, including the end-users in the data centre. In that regard, it might be argued that there is significance in the fact that the reference is to electronic communications *services*, as distinct from the defined concept of a public communications network. The recital also states that "[n]on-public networks do not have obligations under this Directive except where, in benefiting from access to public networks, they may be subject to conditions laid down by member

states," but "public network" is not a defined term and a "non-public network" could be a reference to a purely private intranet network operated by, say, a workplace or a university. Also, even if the arrangement within the data centre is to be regarded as a non-public network, it seems to me that Gibtelecom provides an electronic communications service (as defined) within the data centre (and Gibfibre wishes to do the same in competition with it) and it is arguable that the fact that the data centre benefits from access to the public network operated by Gibtelecom, which is necessary in order for the data centre and the electronic communications service provided there to have any commercial point, means that it is within the scope of the Directive.

63 Although an "operator" is defined by reference to a public communications network, it does not seem to me that this is a determinative indicator as to the scope of the Access Directive. An operator to whom the Directive applies does have to provide a public communications network, but this does not necessarily mean that the Directive may not extend to matters beyond that public communications network which impact on the policy objectives of this legislation. The *ex ante* form of regulation in the common regulatory framework to promote competition was adopted because experience showed that standard *ex post* regulation was not sufficient to address competitive advantages enjoyed by former state monopoly providers of telecommunication services such as Gibtelecom, deriving from their knowledge of the market and their historic preferential access to customers: see point 31 in the opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v. *Poland* (2). On one view, the creation of the data centre in this case could be seen as a product of this in terms of affording Gibtelecom an income stream to enable it to invest in the centre and putting it in a good position to persuade clients to locate their servers there in order to make it a viable commercial proposition.

64 It is common ground that Gibfibre operates an electronic communications network, and it is arguable that the Access Directive governs issues regarding access to that network where this may promote the policy objectives identified in art. 1(1), namely, "[w]ithin the framework set out in [the Framework Directive]," so as to govern "the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits." Article 8 of the Framework Directive, headed "Policy objectives and regulatory principles," is in wide terms. Article 8(2) provides that NRAs—

> "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 . . . 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 . . .”

These policy objectives are extensive and far reaching. It is possible that they could be taken to cover the situation which arises in this case, where Gibfibre wishes to have access to the end-users’ servers in the data centre in order to compete with Gibtelecom and Sapphire in providing electronic communications services to those end-users. If Gibfibre had such access, it would remove a restriction of competition in the electronic communications sector and would provide consumer benefits for those end-users, since Gibfibre could then compete more effectively on price.

65 Recital (3) to the Access Directive states, “[t]he term ‘access’ has a wide range of meanings, and it is therefore necessary to define precisely how that term is used in this Directive . . .” This seems to give special emphasis to the definition of “access” in art. 2(a) of the Directive, set out at para. 19 above. The opening part of that definition would appear to cover the present case, in which Gibfibre wishes Gibtelecom to make available facilities and/or services (*i.e.*, access to the data centre) “for the purpose of providing electronic communications services” (*i.e.*, by Gibfibre to end-user customers). The detailed list of matters in the second part of the definition also covers the present case, in that Gibfibre is seeking “access to physical infrastructure including buildings [and] ducts” for that purpose. As the Court of Appeal pointed out, if the definition of “access” was limited to access to a public communications system, this part of the definition would be otiose, since the opening item on the list (“access to network elements and associated facilities”) already covers that. It is also arguable that, in light of the fact that the definition of “access” is supposed to be precise, its meaning should not be restricted by implication from other, extraneous indicators of the scope of the Directive.

66 The structure of the Access Directive could be taken to support a narrow view of its ambit. Article 8 regulates the imposition of obligations of the type set out in arts. 9–13 in relation to operators which have been designated as having significant market power, and art. 12 is framed in terms of obligations of access to, and use of, specific network elements and associated facilities. The main part of Gibfibre’s request for access to the data centre would fall outside this even if Gibtelecom had been designated as having relevant significant market power. Further, art. 8(3) appears to make a particular point of saying that national regulatory authorities “shall not impose the obligations set out in arts. 9 to 13” on operators which have not been designated as having significant market power. Also, the last paragraph in art. 8(3) indicates that in the case of an operator with significant market power it is only in exceptional circumstances and with

the authorization of the Commission that a national regulatory authority may impose obligations for access or interconnection which go beyond the set of obligations identified in arts. 9–13, so it seems difficult to see why a national regulatory authority should have the power to impose an obligation of the kind requested by Gibfibre in respect of an operator without significant market power without any need to seek authorization from the Commission.

67 On the other hand, art. 8(3) is stated to be without prejudice to art. 5(1) and the case law of the Court of Justice of the European Union shows that a purposive approach has been taken in relation to the interpretation of that provision to give it an expansive meaning in order to promote the wide policy aims set out in the Framework Directive and the Access Directive: see, *e.g.*, *TeliaSonera Finland Oyj* (4) (Case C-192/08, at para. 58) and *TDC A/S* v. *Teleklagenævnet* (3) (Case C-556/12, at para. 41); and in the latter case a similar purposive approach was taken to the interpretation of the definition of "access" in art. 2(a) of the Access Directive (*ibid.*, at paras. 34–37). It can also be said that the final paragraph of art. 8(3) of the Access Directive presupposes that a national regulatory authority has power to impose obligations on an operator with significant market power which are more extensive than those set out in arts. 9 to 13, and it is arguable that this could indicate that a national regulatory authority likewise has a power under art. 5(1) to do this in relation to an operator which does not have significant market power in a relevant market.

68 For the reasons given above, in the legal context as it stood prior to Brexit, I do not think that it could have been said that the proper interpretation of the Access Directive regarding its scope was *acte clair*. The result would have been a reference to the Court of Justice of the European Union. In the proceedings before that court, the European Commission would have appeared to make submissions. The Court of Justice would thus have had the benefit of submissions regarding the policy aims of the common regulatory framework from the body which understands in detail the nature of the markets sought to be regulated, which had formulated the policy to be given effect in the relevant interlocking Directives which comprise that framework, which had drafted them as proposals to be put to the European Parliament and the Council and which continues to have an important role in the implementation of the framework regime (see arts. 7, 15, 17 and 19 of the Framework Directive and art. 8(3) of the Access Directive). The domestic court would then have applied the law as interpreted by the Court of Justice to the case at hand.

69 We are now not subject to any obligation to make a reference to the Court of Justice and do not have the power to do so. The Board must make its own decision regarding the meaning and effect of the Access Directive without further input from the Commission. We have to determine the case

on the basis of the materials available to us. Whilst I think it is possible that the Court of Justice might reach a different view from us regarding the meaning and effect of the Directive, I have no confidence that it would be likely to do so.

70 I consider that taken overall the textual indicators in the Access Directive lead to the conclusion that its scope is limited to access to electronic communications networks belonging to operators. The definition of "electronic communications network" in art. 2(a) of the Framework Directive does not specify who operates such a network and so could be taken to cover in general terms access by customers to a network such as that run by Gibfibre; however, it seems to me, in line with the judgment of Lord Hamblen, that the title is more naturally to be read in the context of the Directive as a whole as focusing on the creation of obligations to be imposed to gain access to electronic communications networks. In this case, the critical part of Gibfibre's request is to gain access to the data centre where the end-users' servers are located, but the data centre is not such a network nor an associated facility in the requisite sense. In my view, this is the important feature of this case. Although there is scope for argument on the issue, like Lord Hamblen, I think that recital (1) and art. 1(1) of the Access Directive point in the same direction. Although recital (3) of the Access Directive could be said to give a special degree of emphasis to the terms of the definition of "access" in art. 2(a) of that Directive, and that definition tends to support Gibfibre's argument, it would be unusual to say that a definition provision should be taken to determine the overall scope of a legal instrument, particularly in circumstances where it contains an express provision (here, art. 1 of the Directive) to delimit its "scope and aim."

Appeal allowed.