[2023 Gib LR 266]

GIBTELECOM LIMITED v. GIBRALTAR REGULATORY AUTHORITY and GIBFIBRE LIMITED

SUPREME COURT (Restano, J.): April 14th, 2023

2023/GSC/017

Telecommunications and Broadcasting—communications providers—competition—Gibraltar Regulatory Authority erred in requiring Gibtelecom Ltd. to provide leased line to access data centre to provider of public communications network services—data centre not part of public communications network but private facility—request not within ambit of Access Directive (2002/19/EC)

Gibtelecom appealed against a decision of the Gibraltar Regulatory Authority.

Gibfibre Ltd. sought access to a data centre operated by Gibtelecom Ltd.'s wholly owned subsidiary, Rockolo Ltd., by means of a wholesale terminating segment of a leased line ("WLL"). The data centre hosted several customer servers for customers and connectivity services were provided there by Gibtelecom and another company. Gibtelecom refused the request on the basis that it fell outside the scope of the regulatory regime and that Gibfibre was not entitled to request a leased line to the data centre. Gibfibre complained that the arrangements were anti-competitive.

The Guernsey Regulatory Authority ("the GRA") decided that Gibtelecom was required to provide a leased line to Gibfibre for this purpose ("the decision"). In the decision, the GRA referred to its decision in 2008 that Gibtelecom had significant market power ("SMP") in the WLL market. The GRA reached its decision by reference to the following two questions: (i) whether Gibtelecom's obligation to grant a WLL extended as far as providing a WLL from a point outside the data centre (tp which Gibfibre was able to connect) to a point on Gibtelecom's network within the data centre; and (ii) if so, whether Gibtelecom's obligation to provide Gibfibre with a WLL to a point within the data centre extended to those parts of the data centre under the control of Rockolo, namely but not limited to the provision of a cross-connect service ("CCS") by virtue of the fact that Rockolo was wholly owned by Gibtelecom and/or, as the case may be, that it formed a single economic unit with Gibtelecom. The GRA answered the first question in the affirmative on the basis that Gibtelecom's network extended as far as the data centre, and that it could request a CCS from Rockolo. The GRA also answered the second question in the affirmative

and stated that Rockolo should be treated as the same legal entity as Gibtelecom under EU competition law. The GRA concluded that the obligations extended as far as to oblige Gibtelecom to provide a WLL to Gibfibre from a point outside the data centre to a point within the data centre which formed part of Gibtelecom's network, or was capable of forming part of Gibtelecom's network, including to the extent that such a point was under the control or ownership of Rockolo, or was Rockolo's responsibility to provide. The GRA therefore reasoned that because Gibtelecom could connect to the data servers in the data centre with a CCS provided by Rockolo that CCS formed part of Gibtelecom's network and Gibtelecom had to provide a WLL to Gibfibre all the way to the customer servers in the data centre.

The EU had adopted the Common Regulatory Framework ("CRF") for the regulation of telecommunications, with five directives laying down relevant legal rules. The directives included the Framework Directive 2002/21/EC and the Access Directive 2002/19/EC. The Access Directive was to harmonize the way in which Member States regulated access to, and interconnection of, electronic communications networks and associated facilities. Article 12 of the Access Directive, which only applied where 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."

The present action was Gibfibre's second attempt to gain access to the servers at the data centre, albeit by a different route. Gibfibre had previously requested permission to access the data centre by routing its own fibre cables through ducts. The GRA had refused that request and Gibfibre challenged that decision, culminating in an appeal to the Privy Council in which Gibfibre was unsuccessful and failed to obtain access to the data centre (reported at 2021 Gib LR 682). The Privy Council's judgment referred to the fact that "access" as understood in the Access Directive meant access to the "electronic communications networks and associated facilities" of the requested operator as defined in the Access Directive, and it did not mean access to a building or other physical infrastructure that was neither of those things. Further, it referred to the definition of "operator" in art. 2 of the Access Directive, namely "an undertaking providing or authorized to provide a public communications network or an associated facility." A "public communications network" was 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."

The Privy Council therefore made it clear that the requested access to the data centre was not to a "public" electronic communications network, and that the access sought lay on the other side of the network termination point ("NTP") beyond which the network was private. This demarcation was important because it identified where Gibtelecom's public network which led to the data centre ended, and where the private network which operated within it started. The Privy Council then said that the customer servers located on the data centre's racks lay beyond the network termination point and therefore formed no part of any public electronic communications network. 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, the regulatory boundary of the common regulatory framework.

In the present action, Gibtelecom appealed against the GRA's decision on the grounds that (1) the GRA erred in fact and law in concluding that Gibtelecom could be required to provide Gibfibre with access to customer servers located in the data centre by means of a WLL pursuant to its SMP obligations. The GRA failed to understand that the purchase of a WLL did not confer rights of access to end-user premises, least of all to the data servers themselves, which did not form part of the "electronic communications network" as defined under the Common Regulatory Framework adopted by the EU for the regulation of telecommunications; and (2) the GRA erred in fact and law in determining that it was relevant that Rockolo was a wholly owned subsidiary of Gibtelecom because even if the data centre was run by Gibtelecom itself, it was under no obligation to provide such access to it. This had already been decided by the Privy Council in the appeal arising from the previous request for access.

Gibtelecom submitted that the GRA had overreached its powers and that the appeal should be allowed for the following reasons: (a) the GRA's failure to recognize that there had to be an end-user for a leased line, and the data centre was private property where a private network was operated; (b) the GRA's resolution of a competition complaint with an inappropriate intervention which was not envisaged by the Access Directive; (c) the GRA's failure to distinguish between public and private networks. In particular, the GRA's failure to take account of NTP where Gibtelecom's public network ended and that the customer services in the data centre lay beyond that point and fell outside the scope of the GRA's regulatory regime; (d) the GRA's error in saying in the course of the appeal that the NTP should be located in the servers in the data centre, which was neither a technically sound proposition nor in keeping with the applicable guidance; (e) the GRA's error in relying on interconnection rights which were concerned with end-to-end connectivity between public networks,

and therefore not relevant in this case; and (f) the GRA's misplaced reliance on the fact that Rockolo was a wholly owned subsidiary of Gibtelecom, a fact which was irrelevant to the access request.

The GRA submitted that (a) Gibtelecom's designation in 2008 as having SMP in a relevant market, namely WLL, gave rise to art. 12 obligations to provide access to and use of specific network facilities; (b) as Gibtelecom and Rockolo should be treated as a single undertaking, this meant that Gibfibre could access the network in the data centre; (c) it was its responsibility to say where the NTP should be located and its view was that the NTP should be located at the customers' computer servers on the racks in the data centre, which was in accordance with the GRA's Decision Notice 02/09 ("the NTP decision"); (d) even if Gibtelecom's network did not extend to the customer computer servers themselves, the GRA had the power to require Gibtelecom under art. 12 of the Access Directive to adapt its network by extending it to reach those servers following the decision in *TDC A/S* v. *TeleKlagenaevnet* (Case C-556/12); (e) Gibtelecom was effectively engaging in anti-competitive "vertical leveraging" because it had SMP in the WLL market, and also operated the retail market for the supply of electronic communications services at the data centre; (f) accordingly, access remedies under art. 12 of the Access Directive were appropriate; and (g) Gibfibre was able to rely on interconnection rights to enable it to locate its equipment within the data centre, as confirmed in the Court of Appeal decision (2019 Gib LR 92).

Held, allowing the appeal:

(1) The decision was based on material errors of law and fact such that it could not stand. The further arguments relied on by the GRA at the hearing were also flawed and did not justify the decision. Gibtelecom had been designated by the GRA as having SMP in WLL in 2008, which imposed access obligations on it, however the market analysis resulting in that designation was required to be repeated every three years, with a possible extension to six years, as provided in art. 16 of the Framework Directive. Gibtelecom's designation as having SMP was therefore out of date. The reasoning of the Privy Council in its decision, including as to where the NTP boundary lay in the data centre dividing the public from the private network, applied as much to this case as it did to the previous one. This made it clear that the data servers lay beyond the NTP, a conclusion now further supported by the evidence provided at the appeal hearing. The data centre did not form part of a public communications network. There was clearly a limit to the number of customers the data centre could host because there was only limited space available on the racks at that facility. The GRA failed to consider the critical question whether Gibfibre's request came within the ambit of the Access Directive, which in turn required a distinction to be drawn between a public and a private network. Instead, the GRA wrongly concluded that it was Rockolo's status as a wholly owned subsidiary of Gibtelecom which automatically entitled Gibfibre to access to the data centre. The GRA's misguided approach was highlighted

during the hearing when it said that in its view, the operator of a public network such as Gibtelecom could never operate a private network without being required to provide access to other operators such as Gibfibre, and that this was the price it had to pay because it had SMP. This was clearly wrong as a matter of principle. The GRA sought to get around this by saying that because it had the responsibility of determining where the NTP should be located, it could determine that the NTP should be in the computer servers themselves. There was no reference to this in the decision. In any event, there were various flaws in this submission. First, the argument was based on the servers in the data centre being the end-users, as defined in the regulatory scheme. This was clearly not correct and failed to take into account the divide between the public service provided by Gibtelecom and Rockolo's private network. When that was properly taken into account, it was clear that the end-user in this case was Rockolo, more specifically the point at which Gibtelecom's public network reached Rockolo's suite at the data centre, which then connected the public network to the CCS. By saying that the NTP was located in or around the data servers themselves, the GRA disregarded the purpose of the NTP which was to demarcate the public network from the data centre which was a private closed user group. Further, the fact that the GRA could determine where the NTP should be located did not mean that it had carte blanche and that it could disregard guidance from the Body of European Regulators for Electronic Communications ("BEREC") which stated that any encroachment of the NTP into the private domain should be minimized. The general principle adopted by BEREC, to which the utmost regard should be had, was that an end-user's site should only be considered to be part of the public network if there was an objective technological necessity for that to be the case. There was no reason advanced by the GRA why such an exceptional course might be appropriate in this case. The NTP decision did not assist the GRA either as it did not consider the position of data centres. The NTP decision did not suggest that the NTP should be pushed into a private network which was the effect of the GRA's position. The GRA also said that it had the power to require Gibtelecom to adapt its network by extending it to reach the servers following the decision in *TDC A/S* v. *TeleKlagenaevnet* (Case C-556/12). This was another new argument not referred to in the decision and again it was misconceived. *TDC* was not concerned with extending the network beyond the NTP and pushing it back into a private network. The principle established by that decision was that the Access Directive should be interpreted in a way which was consistent with its purpose. Requiring Gibtelecom to provide a terminating segment of leased line to access a private network was not, however, an application of this principle nor was it concerned with promoting the aims of the Access Directive. In fact, it was outside the scope of the Access Directive altogether. The other argument relied on by the GRA, again not referred to in the decision, was that Gibtelecom's ultimate ownership of the data centre meant that it was engaged in anti-competitive vertical leveraging. This was postulated on Gibtelecom operating both a wholesale market and a vertically

related retail market, namely the supply of electronic communications services hosted in the data centre, and because it had SMP on the upstream. The GRA also said that terminating segments of leased lines had been specifically identified as a form of "competitive bottleneck" and that access remedies under art. 12 of the Access Directive were appropriate for this sort of anti-competitive behaviour. The evidence of Gibtelecom's expert was that there was no vertically related market in this case as Gibtelecom's WLL and the data centre were separate markets. The GRA's reliance on vertical leveraging did not bring Gibtelecom within the scope of the *ex ante* regulatory regime. Finally, the GRA argued that Gibtelecom was required to provide Gibfibre with access to the data centre by means of co-location as provided for in art. 12(1)(f) of the Access Directive. Co-location concerned interconnection between public networks, and this was not the basis on which Gibfibre requested access to the data centre, nor did the GRA make reference to this in the decision. As arts. 1 and 2 of the Access Directive made clear, access and interconnection were separate concepts. Article 4 of the Access Directive which dealt with interconnection referred to communication providers agreeing terms between them for the purpose of providing publicly available electronic communications services to ensure interoperability of services. Interconnection was therefore concerned with the point where two public networks met where there were rights of co-location. Although this was clearly not the case here, Gibfibre argued that co-location could take place at either end of a leased line and, on that basis, sought to argue that this could provide them with a connection to the data servers in the data centre at the end of that line. However, art. 4 was not concerned with allowing connections to private networks which was what Gibfibre want to achieve, and this was not a case about interoperability of public telecommunications services. Article 4 did not provide a proper basis for the decision to stand either. The appeal would therefore be allowed and the decision would be quashed. The matter would be remitted to the GRA for reconsideration (para. 66; paras. 72–82; paras. 85–92; paras. 96–97).

(2) This did not mean that anti-competitive behaviour within a facility such as the data centre could not be addressed, only that this was the wrong way to go about it. A claim had been issued in the Supreme Court by Gibfibre against Gibtelecom and Rockolo alleging breaches of abuse of dominant position in respect of the data centre. In that claim, Gibfibre sought an injunction requiring access to the data centre and damages. Whether such anti-competitive behaviour existed was a matter which had yet to be determined in those proceedings, but that claim provided the correct route for Gibfibre's complaint to be determined (paras. 94–95).

Cases cited:

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

(2) *Carterfone Device*, *In re* (1968), 13 F.C.C.2d 420, referred to.

(3) *Everything Everywhere Ltd.* v. *Competition Commn.*, [2013] EWCA Civ 154; [2013] 3 WLUK 112, referred to.
(4) *Fjarskipti hf.* v. *Icelandic Post & Telecom Administration* (Case E-6/16), ECJ, December 22nd, 2016, referred to.
(5) *TDC A/S* v. *TeleKlagenaevnet* (Case C-556/12), ECJ, June 19th, 2014, distinguished.

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. 17.
art. 1: The relevant terms of this article are set out at para. 18.
art. 2: The relevant terms of this article are set out at para. 20.
art. 12: The relevant terms of this article are set out at para. 22.

Council Directive (2002/21/EC) of March 7th, 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), art. 2: The relevant terms of this article are set out at para. 19.

R. Palmer, *K.C.* with *M. Levy* and *S. Marrache* (instructed by Hassans) for the appellant;
P. Caruana, *K.C.* with *C. Allan* (instructed by Peter Caruana & Co.) for the first respondent;
The second respondent did not appear and was not represented.

1 **RESTANO, J.:**

Introduction

The central point in this appeal is whether Gibtelecom Ltd. ("Gibtelecom") can be required by the Gibraltar Regulatory Authority ("GRA") to provide Gibfibre Ltd. ("Gibfibre") with a leased line to access a data centre at Mount Pleasant ("the data centre") operated by its wholly owned subsidiary, Rockolo Ltd. ("Rockolo"). In a decision dated July 16th, 2019 ("the decision"), the GRA decided that Gibtelecom was required to provide a leased line to Gibfibre Ltd. for this purpose, and this is an appeal against that decision.

2 The data centre hosts several customer servers for customers, including many major online gaming and gambling companies, and connectivity services are provided there by Gibtelecom and Sapphire Networks ("Sapphire"). Gibfibre's complaint, which led to the decision, is that these arrangements are anti-competitive, and it says that it should also be allowed to provide connectivity services to the customers at the data centre.

The decision

3 This is not the first attempt by Gibfibre to try and gain access to the servers at the data centre. It previously requested permission to access the data centre by another means, namely by routing its own fibre cables through ducts. This request was refused by the GRA and that decision was challenged by Gibfibre. This culminated in an appeal to the Privy Council in which Gibfibre was unsuccessful, and which resulted in it failing to obtain access to the data centre (reported at 2021 Gib LR 682). This is therefore Gibfibre's second attempt to achieve the same end, albeit by a different route as the request on this occasion is for access to the data centre servers from its communication system by means of a wholesale terminating segment of a leased line ("WLL").

4 Gibtelecom refused this second request by Gibfibre on the basis that it came outside the scope of the relevant regulatory regime, and that Gibfibre was not entitled to request a leased line to the data centre. The matter was then referred to the GRA for a resolution of this dispute. The scope of the dispute was described in the following way in an email from Gibfibre's representative to the GRA dated March 6th, 2019:

> "Just to be clear, what we want is a leased line connected at one end to the rack of a person who is a customer of the Rockolo data centre, then at the other end to a location we choose on our communications system, probably at 40 Cornwall's Lane.
>
> To put it another way, what we require is a leased line provider pursuant to the RLLO regime with Edge A on a data centre customer's rack at the Mount Pleasant/Rockolo data centres and Edge B on a practicable location where there can be interconnection with our system . . ."

5 In the decision, the GRA referred to its decision dated August 11th, 2008 where the GRA found that Gibtelecom had significant market power ("SMP") in the WLL market. It also referred to the fact that Gibtelecom had said that it could in principle provide a WLL to a location at the Mount Pleasant area. It then stated that the crux of the dispute was whether Gibtelecom's obligations as the undertaking in Gibraltar with SMP extended to Rockolo. The GRA then went on to reach its decision by reference to the following two questions:

(1) Whether Gibtelecom's obligation to grant a WLL extended as far as providing a WLL from a point outside the data centre (at which Gibfibre is able to connect to), to a point on Gibtelecom's network within the data centre.

(2) If so, whether Gibtelecom's obligation to provide Gibfibre with a WLL to a point within the data centre extends to those parts of the data centre under the control of Rockolo, namely but not limited to, the

provision of a cross-connect service ("CCS"), by virtue of the fact that Rockolo is wholly owned by Gibtelecom, and/or, as the case may be, that it forms a single economic unit with Gibtelecom.

6 The GRA answered the first question in the affirmative on the basis that Gibtelecom's network extended as far as the data centre, and that it could request a CCS from Rockolo. Further, it stated:

> "The GRA finds it difficult to accept that a request for a CCS from Gibtelecom is capable of being refused by Rockolo, for the reasons that Gibtelecom wishes to provide a WLL to its competitor as it is required to do so under the [SMP] Obligations. To assert this would mean that in fact, Gibtelecom are unable to offer services to hosted entities without Rockolo's consent which would nullify Gibtelecom's reason for being present in the Data Centre. In other words, if Gibtelecom, by the fact that it is present at the Data Centre is able to request that a CCS is provided by Rockolo for the purposes of connecting a hosted entity, it must therefore be able to request it for the consequent purpose of forming what will be the physicality for the provision of a WLL to Gibfibre. The fact would remain that under such a set-up, although the equipment required to form the connection can arguably be deemed to belong to Rockolo, the effect is such that Gibtelecom's network extends through said equipment."

7 The GRA also answered the second question in the affirmative, and stated that Rockolo should be treated as the same legal entity as Gibtelecom under EU competition law. The GRA then concluded as follows:

> "THE OBLIGATIONS EXTEND AS FAR AS TO OBLIGE GIBTELECOM TO PROVIDE A WHOLESALE LEASED LINE TO GIBFIBRE FROM A POINT OUTSIDE OF THE DATA CENTRE TO A POINT WITHIN THE DATA CENTRE WHICH FORMS PART OF GIBTELECOM'S NETWORK, OR IS CAPABLE OF FORMING PART OF GIBTELECOM'S NETWORK, INCLUDING TO THE EXTENT THAT SUCH A POINT IS UNDER THE CONTROL OR OWNERSHIP OF ROCKOLO, OR IS ROCKOLO'S RESPONSIBILITY TO PROVIDE. IN DOING SO, THE GRA COULD HIGHLIGHT THAT GIBTELECOM IS THEREFORE UNDER AN OBLIGATION TO GRANT GIBFIBRE THE RELIEF SOUGHT AS PER 2.2. ABOVE."

8 The GRA therefore reasoned that because Gibtelecom could connect to the data servers in the data centre with a CCS provided by Rockolo, that CCS formed part of Gibtelecom's network and Gibtelecom had to provide a WLL to Gibfibre all the way to the customer servers in the data centre.

The appeal

9 This appeal is brought as an appeal under the Communications Act 2006 ("the Act"). Under s.91(2) of the Act, an appeal against a decision of the GRA lies to this court, on any one or more of the following grounds:

(a) that a material error as to the facts has been made;

(b) that there was a material procedural error;

(c) that a material error of law has been made;

(d) that there was some other material illegality.

10 The focus of this appeal, therefore, is whether the GRA got its decision materially wrong. It is worth making the point that it is not enough to identify some error in the reasoning which the GRA adopted when making its decision. An appeal can only succeed if the decision cannot stand in the light of the error: see *Everything Everywhere Ltd.* v. *Competition Commn.* (3) ([2013] EWCA Civ 154, at para. 24).

11 The further point worth making about the appeal is that it engages the merits, and that it is not limited to a judicial review or to an appeal on points of law. This reflects the requirements of art. 4 of the Framework Directive 2002/21/EC so that the "merits of the case are duly taken into account and that there is an effective appeal mechanism." Thus, GibFibre was added as a respondent, and Dudley, C.J. granted the parties permission to rely on fresh evidence for the purposes of the appeal.

12 Gibtelecom's grounds of appeal are set out in its memorandum of appeal dated June 10th, 2020 which comprises three grounds of appeal. The parties, however, agreed to proceed with the first two grounds of appeal first which, in broad terms, are as follows:

(1) That the GRA erred in fact and law in concluding that Gibtelecom could be required to provide Gibfibre with access to customer servers located in the data centre by means of a WLL pursuant to its SMP obligations. This is because the GRA failed to understand that the purchase of a WLL does not confer rights of access to end-user premises, least of all to the data servers themselves, which does not form part of the "electronic communications network" as defined under the Common Regulatory Framework ("CRF") adopted by the EU for the regulation of telecommunications throughout the EU.

(2) That the GRA erred in fact and law in determining that it was of relevance that Rockolo was a wholly owned subsidiary of Gibtelecom because even if the data centre was run by Gibtelecom itself, it was under no obligation to provide such access to it. This was already decided by the Privy Council in the appeal arising from the previous request for access.

The legislative scheme

13 The EU adopted the CRF for the regulation of telecommunications throughout the EU, with five directives laying down relevant legal rules which were issued in 2002. The objective of this scheme is to ensure end-to-end connectivity on a common basis throughout the EU, without distortions arising from anti-competitive behaviour or restrictions arising from national law or practices. The aim of these directives is the progressive liberalization of the European telecommunications market which had previously been dominated by state-controlled monopolies: see *British Telecomms. plc* v. *Telefónica O2 UK* (1) ([2014] UKSC 42, at paras. 4–5).

14 These directives include the Framework Directive 2002/21/EC (implemented with the passing of the Act) and four specific directives. One such specific directive of relevance to this appeal is the Access Directive 2002/19/EC (implemented with the passing of the Communication (Access) Regulations 2006 ("the Regulations")). Although these directives have now been replaced with a single directive, namely Directive (EU) 2018/1972 establishing the European Electronic Communications Code, it was agreed that this appeal falls to be determined by reference to the law as it stood at the date of the decision, and that those developments are not therefore relevant.

15 Before turning to the directives, the following two general points about this scheme should be noted. First, the distinction between *ex ante* and *ex post* regulation. In broad terms, *ex ante* regulation controls the behaviour in advance of telecommunications operators which have been assessed as having SMP by a "National Regulatory Authority" ("NRA"), here the GRA. This involves the NRA intervening and imposing on these dominant operators, obligations, and conditions as appropriate. *Ex post* regulation is concerned with the application and enforcement of competition rules after the event such as the imposition of penalties, or the bringing of claims for anti-competitive behaviour. The redress for some types of anti-competitive behaviour is limited to *ex post* regulation. The other point to note is that NRAs must actively participate in, contribute to, and support The Body of European Regulators for Electronic Communications (BEREC). NRAs must also take utmost account of opinions and common positions adopted by BEREC when adopting their own decisions for their national markets: see art. 3(3a)–(3c) of the Framework Directive.

16 Turning to the Access Directive, this harmonizes the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities. Insofar as is material for the purposes of this appeal, the Access Directive (and similarly the Regulations) provides as follows:

17 Recital 1 of the Access Directive states 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."

18 Article 1 of the Access Directive defines the scope and aim of that directive as follows:

> "**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."

19 Article 2 of the Access Directive provides that the definitions set out in art. 2 of the Framework Directive apply to the Access Directive, including the following:

> "(a) '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 . . .

(d) 'public communications network' means an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services . . .

(da) 'network termination point (NTP)' means 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 . . .

(e) 'associated facilities' means those facilities 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. It includes conditional access systems and electronic programme guides . . .

(n) 'end-user' means a user not providing public communications networks or publicly available electronic communications services."

20 Article 2 of the Access Directive applies some further definitions, including the following:

"(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. 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;

(b) 'interconnection' means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators;

(c) 'operator' means an undertaking providing or authorised to provide a public communications network or an associated facility . . ."

21 Article 8 of the Access Directive provides that where an operator is designated as having SMP on a specific market as a result of a market analysis NRAs shall impose the obligations set out in arts. 9–13 of the Access Directive as appropriate. This designation is required to be repeated every three years, with a possible extension to six years under art. 16 of the Framework Directive.

22 The SMP access obligation under art. 12 of the Access Directive provides as follows:

"**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."

23 The obligation to provide access, along with the other obligations set out in the Access Directive have been described as the most intrusive parts of the regulatory scheme: see *BT* v. *Telefónica* (1) (*ibid.*, at para. 9).

The Privy Council decision

24 As stated above, the request for access which gives rise to this appeal is not the first time this matter has come before the courts. Previously, the GRA had refused a request for access to the data centre. In that case, Gibfibre argued that the GRA had the power to order Gibtelecom to provide access under art. 12 but in relation to another market in which Gibtelecom had also been designated as having SMP, namely "Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location in Gibraltar," or "Market 4." Further, it argued that this power also arose under art. 5 of the Access Directive.

25 The Supreme Court and the Court of Appeal held that the power to provide access under art. 12 did not arise because the data centre did not form part of Gibtelecom's public communications network, nor were they associated facilities. The Court of Appeal, however, reversing the decision of Mr. Justice Butler, held that the GRA had the power to require the requested access under art. 5 of the Access Directive which is concerned with the NRA's powers with regard to access and interconnection. This part of the Court of Appeal's judgment was successfully appealed by the

GRA to the Privy Council. In a judgment dated November 29th, 2021 (*sub nom. Gibfibre Ltd. (t/a GibFibreSpeed)* v. *Gibraltar Regulatory Auth.*, 2021 Gib LR 682), the Privy Council held that art. 5 of Access Directive did not confer the power on an NRA to require an operator to allow access to physical infrastructure where the relevant infrastructure could not be described as being part of the operator's own electronic communications network or its associated facilities.

The parties' contentions in outline

26 At the appeal hearing, Mr. Robert Palmer, K.C. who appeared for Gibtelecom submitted that the GRA had overreached its powers and that the appeal should be allowed for the following reasons:

(1) The GRA's failure to recognize that there had to be an end-user for a leased line, and that the data centre was private property where a private network was operated.

(2) The GRA's resolution of a competition complaint with an inappropriate intervention which was not envisaged by the Access Directive.

(3) The GRA's failure to distinguish between public and private networks. In particular, the GRA's failure to take account of the network termination point ("NTP") where Gibtelecom's public network ended, and that the customer servers in the data centre lay beyond that point and fell outside the scope of the GRA's regulatory regime.

(4) The GRA's error in saying in the course of the appeal that the NTP should be located in the servers in the data centre which was neither a technically sound proposition, nor in-keeping with the applicable guidance from BEREC.

(5) The GRA's error in relying on interconnection rights which are concerned with end-to-end connectivity between public networks, and therefore not relevant in this case.

(6) The GRA's misplaced reliance on the fact that Rockolo is a wholly owned subsidiary of Gibtelecom, a fact which is irrelevant to the access request.

27 Sir Peter Caruana, K.C. who appeared for the GRA, referred to Gibtelecom's designation in 2008 as having SMP in a relevant market, namely WLL which is also referred to as "Market 6," and which he said gave rise to art. 12 obligations to provide access to and use of specific network facilities. Further, he said that as Gibtelecom and Rockolo should be treated as a single undertaking, this meant that Gibfibre could access the network in the data centre.

28 The GRA also submitted that it was its responsibility to say where the NTP should be located, and that the GRA's view was that the NTP should

be located at the customers' computer servers on the racks in the data centre which was in accordance with the GRA's decision notice 02/09 dated July 15th, 2008 ("the NTP decision"). The GRA also submitted that even if Gibtelecom's network did not extend to the customer computer servers themselves, the GRA had the power to require Gibtelecom under art. 12 of the Access Directive to adapt its network by extending it to reach those servers following the decision in *TDC A/S* v. *TeleKlagenaevnet* (5).

29 The GRA went on to say that Gibtelecom was effectively engaging in anti-competitive "vertical leveraging" because it had SMP in the WLL market, and also operated the retail market for the supply of electronic communications services at the data centre. Accordingly, it submitted that access remedies under art. 12 of the Access Directive were appropriate.

30 Finally, the GRA considered that Gibfibre was able to rely on interconnection rights to enable it to locate its equipment within the data centre, as confirmed by the Court of Appeal in *Gibfibre Ltd.* v. *Gibraltar Regulatory Auth.* (2019 Gib LR 92).

The evidence

31 Gibtelecom filed the expert report of Dr. Stephen Unger dated August 27th, 2020, the witness of Dwayne Lara dated July 22nd, 2019, the witness statement of Daniel Hook dated October 3rd, 2019, and exhibit DH1 to the third witness statement of Daniel Hook dated August 28th, 2020.

32 Gibfibre filed the expert report of Edward Peter Opgard Mercer dated December 29th, 2020 but by the time that this appeal hearing commenced on February 28th, 2023, Gibfibre had decided not to participate in the appeal and Mr. Mercer was not called to give evidence at the appeal hearing. I will not therefore take account of the evidence filed by him. Although at one point during the hearing, Sir Peter indicated that he might refer to the joint statement filed by the two experts dated January 14th, 2021, this did not happen.

Dr. Unger

33 As well as providing an expert report dated August 27th, 2020, Dr. Unger provided supplementary evidence-in-chief in response to a number of points made in the GRA's skeleton argument. He gave his evidence on February 28th and March 1st, 2023.

34 Until 2018, Dr. Unger was an executive board member of Ofcom, the UK regulator responsible for the telecommunications sector where he worked for seventeen years, and for a period he served as its acting chief executive. He also represented the UK in BEREC from 2015, and was elected as BEREC vice-chair in 2017.

35 Dr. Unger explained that leased lines provide a connection with greater bandwidth between two points dedicated to one specific customer. Typically, leased lines are used by business users for the operation of a private network, and other telecommunications providers also use this to provide a service to end-users. In his view, and following the statutory definition of a leased line, a leased line should be regarded as a transmission service provided with the use of a wire or fibre optic cable with a modem at each end of that cable. He explained that the modem manages the transmission of data across the fibre, with different varieties of modem technologies allowing for different capacities. By way of an example, he said that a 1 GB leased line would have an Ethernet connection at each end incorporating a modem, which would convert the signals for transmission across the optical fibre. He said that a leased line was not just a piece of fibre and that a leased line requires a transmission component to be present which was provided by the electronics at each end of it. He added that the contract entered into for a leased line would not allow you to remove the modems on it, and that a fibre cable without electronics would be a different product known as "dark fibre."

36 Dr. Unger then explained that public networks are the subject of access obligations, and that private networks are not. He said that the approach to defining the boundary between public and private networks was based on the concept of an NTP which was the point of demarcation between the public and private networks. In his view, the NTP is defined at the point where the public network ended, and an end-user could connect its equipment. He also referred to BEREC description of the NTP as follows:

> "the NTP represents a boundary, for regulatory purposes, between the regulatory framework for electronic communication networks and services on one side and the regulation of the telecommunications terminal equipment (TTE) on the other. Therefore, on one side of the NTP is the network operator's domain which includes the public communications network and the equipment of the public network; On the other side of the NTP is the end-user's domain which includes the end-user's private network and TTE."

37 Dr. Unger referred to the history of the concept of the NTP and said that this first appeared in the European framework in 1988 when the supply of telecommunications terminal equipment was liberalized. This replicated the position in the USA following the 1968 *Carterfone* decision (2) which created the possibility of connecting Carterfone and other devices electrically to the public phone system. Prior to that decision, the incumbent operator had a monopoly over terminal equipment. This liberalization was achieved by requiring that users of the telecommunications services had access to an NTP, where they could connect terminal equipment of their choice. By way of a common example of an NTP, Dr. Unger referred to a master socket

located within the home to which the customer can connect any telephone equipment. Another example was a broadband service providing a consumer access to the internet with the use of a modem and router. Dr. Unger referred to diagrams taken from "BEREC Guidelines on Common Approached to the Identification of the Network Termination Point in Different Network Topologies" (BoR (20) 46) dated March 5th, 2020, showing where the NTP would be located for telephone services, internet access and leased lines. For leased lines, this shows the location of the NTP either before or after the modem receiving the signal, which would be before the router which receives the data and transmits it to the end-user's equipment, in this case the customer servers. Dr. Unger said that with leased lines the router is assumed to be part of the end-user's domain, and that the general principle adopted by BEREC is that equipment which is at the end-user's site should only be considered to be part of the public network if there is an objective technological necessity for that to be the case.

38 He said that whilst national regulators enjoyed a degree of discretion as to how they determine the location of the NTP, they were also required to take "utmost regard" to the guidance issued by BEREC which seeks to foster competition and innovation in the market for terminal equipment. This provides that encroachment into the private network domain should be minimized and should take place only if there is an "objective technological necessity" to do so. He said that whilst it was sometimes necessary for this to happen such as when a router and modem form part of the same box, this did not mean that the regulator had *carte blanche* to push the NTP into the private domain. He also pointed out that the GRA had not designated where the NTP was in the decision.

39 He said that the main question which arises in practice is whether the modem which terminates the access line is included in the end-user domain, or whether it forms part of the public network domain. Whilst he thought that the NTP might reasonably be placed on either side of that modem, he did not consider that it could extend beyond that modem and, could not result in regulation being applied to Rockolo's private network. He said that the GRA's contention that the entirety of Gibtelecom's network was a public one was false. He said that the point was not which company owned the CCS which was transmitting the signal to the servers, but rather the private nature of the service being provided by the CCS. In his view, the service was a private one because there were a limited number of customers which formed part of a closed user group which had their servers hosted at the data centre. The arrangements at the data centre therefore allowed its customers to access the CCS which formed part of the private network, something which would not be possible for an outside entity. This should be contrasted with public networks which provide a service to everybody.

40 Dr. Unger said that the fact that Gibtelecom had a public network did not mean that it was prevented, via its subsidiary, to run a private network. Further, he said that if the GRA was correct in saying that the data centre was subject to regulation because of its ultimate ownership, Gibtelecom would be discriminated against because other operators providing similar services would not be regulated. He said that access obligations were imposed on publicly available services to promote competition, not to provide the general public with access to private property.

41 Dr. Unger said that it was common in his experience for public network operators to run private networks of this sort which were outside the scope of the regulatory regime. He said that BT operates private networks in the UK which include data centres and cloud services for large corporate and banking clients. He also referred to the fact that BT is currently constructing a private mobile network to provide private communications services to the police, fire, and ambulance services in the UK, and he said that all these services were clearly outside the scope of regulation which applied to BT's public network. Dr. Unger's view was that all these services were private, even though some of the masts and equipment in the radio access network were used for them. He said that Ofcom would not be able to regulate BT for these services just because it was able to regulate BT elsewhere. He said that the regulator's only concern in relation to data centres was access to the edge of those centres, and that onward transmission beyond that point was a private matter.

42 Dr. Unger disagreed with the GRA's contention that the NTP was located at the customer servers themselves in the data centre because that was where Gibtelecom's network connection ended and where the "end-user" was. Dr. Unger's view was that Rockolo was the "end-user" as it linked the data centre to the outside world and then served its customers in a closed user group. He said that this approach was consistent with the statutory definition of "end-user." Dr. Unger said that the GRA's position in this regard made no sense and confused Rockolo's operation of its private network at the data centre with the public network which provided it with connectivity. In any event, he said that even if the GRA could define the NTP as somehow being next to, or at the customer servers on the racks in the data centre there would be no right of connection with the servers themselves which would be governed by the Radio Equipment & Telecommunications Terminal Directive (R&TTE Directive).

43 Dr. Unger also rejected the idea that interconnection rights could provide a means of accessing the servers in the data centre. He said that interconnection provided for the connection of different public networks so that users of one network could speak to the users of another network. Co-location where the networks interconnected then managed the interconnection of these networks. As an example of this, he referred to Gibtelecom's competitors' access to the public network and which allowed

them to provide a service. He also gave an example based on his own experience, namely, the end-to-end connectivity obligation imposed in 2006 by Ofcom on BT to make sure its subscribers could make calls to subscribers of other networks including mobile networks. He stressed that interconnection was about connectivity between public networks, not connecting to the end-user in a private network which is what Gibfibre was seeking here.

44 Dr. Unger was referred to a 2007 document entitled "ERG's common position on best practice in remedies imposed as a consequence of a position of significant market power in the relevant markets for wholesale leased lines" which referred to co-location taking place at either end of a leased line. It was then put to him that this showed that co-location could take place at the end of the line here which reached the data servers. Dr. Unger first explained that the publisher of this document, ERG, was information group sharing best practice which was BEREC predecessor. Dr. Unger was familiar with ERG, and with this document which he said had to be read in the context of the competition issues which it sought to address at the time. This included the unbundling of local loops, "backhaul" (a different part of the network connecting the access network to the core network) and ensuring that broadband was being delivered. In his view, this did not extend the scope of the GRA's powers which were governed by the Access Directive.

45 Dr. Unger was then asked about the statement made by the Court of Appeal in *GibFibre Ltd.* v. *Gibraltar Regulatory Auth.* (2019 Gib LR 92) that GibFibre would undoubtedly have been able to link with the servers in the data centre had it chosen to interconnect with them. Dr. Unger said that he thought that this statement was wrong because art. 4 dealt with a different part of the CRF which was separate to the SMP framework and art. 12 rights. He added that even if interconnection rights with Gibtelecom's network at Mount Pleasant could be established, this still did not get Gibfibre into the data centre which was a private network.

46 Dr. Unger also dealt in his evidence with whether it was appropriate to regulate connectivity to data centres based on a finding of market power for "wholesale terminating segments of leased lines," as is the case here. He said that, based on a recommendation published by the European Commission in December 2007, "wholesale terminating segments" of leased lines are currently susceptible to *ex ante* regulation, and that "trunk segments," and retail leased lines are presumed to be competitive. He explained that although regulators can apply *ex ante* regulation to those markets which are not included in the Commission's recommendation, it must first be demonstrated that this is appropriate by reference to a detailed market analysis and specific criteria, which he did not consider had taken place here.

47 Based on the witness statement filed by Daniel Hook, Dr. Unger said that there were factors suggesting that this connection might be regarded as part of a trunk network, and others which suggested that it was part of an access network. Further, he said that Gibraltar should not be assumed to be the same as the UK in this regard as the infrastructure was different. Dr. Unger's conclusion, however, was that a proper market analysis was required before concluding that this market was not competitive, and that there appeared to be no such analysis in this case. Further, he said that the market analysis which had been published in August 2008 was unlikely to provide a sound basis for intervention in 2020, not only because it was out of date but because it did not deal with relevant matters such as the boundaries adopted between "terminating segments" and "trunk segments."

48 Dr. Unger also dealt with the GRA's reference to a "competitive bottleneck" in its skeleton. Dr. Unger explained that this referred to the "local loop" of final connection, namely the final stretch connecting a local network to an end-user. This "bottleneck" would run from the customer to the first point in the network and would often not be replicable by communications providers other than the incumbent provider because it might involve digging up the streets again to lay cables at significant cost to provide an alternative means of reaching the end-user. This often arose because legacy networks had been created with public funding over the years which it was not economically viable to replicate. In such cases, other operators were given access to those leased lines but his view was that even if this applied, it did not provide a means to reach the servers in the data centre.

49 Dr. Unger did not consider that the NTP decision was relevant to the circumstances of this case either. He said that the NTP decision was aimed at the problems in apartment blocks where the position varied. He explained that tenants of apartment blocks often enjoyed property rights, including the right to request a telecommunications service, and that consequently the NTP was in their flat. At the other end of the spectrum, he gave the example of hotel residents who did not enjoy the rights to install their own telephone in their room, that calls were made through the hotel's private network, and that the regulator therefore had no right to intervene. In his view, the position of the data centre was closest to the position of a hotel because the customers of the data centre were allowed to place their equipment in the racks there just like hotel guests were able to occupy a hotel room, but they were not allowed to install other equipment there and did not enjoy property rights just as hotel guests did not enjoy the rights of a tenant.

50 Dr. Unger was asked about the allegation contained in the GRA's skeleton that Gibtelecom was engaging in anti-competitive "vertical leveraging." Dr. Unger said that the vertically related market to WLL was retail leased lines, and that any concern would therefore be limited to

leveraging the wholesale leased line market into the retail leased line market. In his view, the supply of electronic communications services in a data centre was not a vertically related market to WLL, and this had no application in this case. Further, he said that any concerns about anti-competitive practices in a data centre should be dealt with by means of an *ex post* competition case.

51 During his cross-examination, Dr. Unger was challenged about this and it was put to him that various references to vertical leveraging in a document entitled "Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework" dated May 2006 showed that the prohibition against vertical leveraging was not limited to the related wholesale and retail markets for leased lines. Dr. Unger rejected this and said that this feature of the regime was directed at the different markets in leased lines, and that the 2006 document relied on by the GRA only referred to a general description of the economics behind this.

52 Dr. Unger also disagreed with the GRA's submission that if the public network did not extend to the servers in the data centre, it could be required to connect to those servers based on the decision in *TDC A/S* v. *TeleKlagenaevnet* (5). Dr. Unger said that that principle on which the decision in that case was made did not apply here. He explained that this principle was concerned with ensuring that public operators could not avoid regulatory obligations by saying that they did not have relevant equipment or spare capacity in the network. He stressed, however, that any such obligation could not extend beyond the NTP, and that it was not concerned with pushing back the NTP in a private data centre.

53 Dr. Unger's view was that whilst data centres played a critical role in modern communications networks, this did not mean that they should automatically be regulated. He added that regulation might be harmful to these centres as it could stand in the way of the innovation which comes from competition. Dr. Unger made the further point that the view of regulators and economists was that the limited scope of the Access Directive, which had shrunk over time, was necessary to foster competition and innovation between different networks. He said that imposing access obligations when they were not necessary could be positively harmful because it prevented the emergence of infrastructure competition when this might otherwise have blossomed.

Daniel Hook

54 Daniel Hook is a director of Rockolo, and he has worked at the data centre for thirteen years during which time he has overseen operations. He gave evidence on March 1st and 2nd, 2023, and he adopted as his evidence-in-chief his witness statement dated October 3rd, 2019 originally filed in support of an application for a stay of the decision pending the hearing of

this appeal. Mr. Hook also referred to exhibit DH1 referred to in his witness statement dated August 28th, 2020 which contained a "Master Services Agreement" and a "Service Order Form" which Rockolo provides its customers. Mr. Hook confirmed that these documents govern the relationship between Rockolo and the customers which have their servers on the racks at the data centre. Clause 4 of the master services agreement states that the customer is granted a licence to occupy the data centre, and sets out a number of restrictions which apply to that licence.

55 Mr. Hook provided a detailed explanation about what the data centre consists of, and how it operates. He explained that the data centre hosts IT technology hardware, namely private servers belonging to third party companies including online gambling and gaming companies. These servers then connect to the carrier via a CCS which he described as a passive cable from one point to another. In cross-examination, he clarified that the CCS connected to the servers with a patch cable which connected to a patch panel on the racks. He said that this internal connection was provided in segments and terminated in the distribution frame ("DF"). The DF was in either the Gibtelecom or Sapphire suite, and it was via this DF that the connection to the outside network was provided. He explained that both these rooms housed similar facilities, with the incoming traffic coming in through trunk lines, and by means of a router with the operators' own IP and MAC address, the data was then directed to the CCS via the DF.

56 Mr. Hook said that a peculiarity of the facility was that it did not have a meet me room ("MMR") which would usually be the point at which a carrier would enter a facility such as this one, and where the separation between carriers and customers would take place. Instead, he explained that there is a meet me frame ("MMF") which serves as the hub where the carriers connect to customers and where the distribution frames converge.

57 Mr. Hook explained that whilst Gibtelecom was originally the sole bandwidth supplier in the data centre, some customers required an alternative bandwidth carrier to provide added resilience to the service, and that this led to it reaching terms with Sapphire. As part of these commercial arrangements, he confirmed that Sapphire paid a service charge for their presence in the data centre, and that Rockolo provided it with access to the CCS pursuant to that agreement. He said that customers at the data centre are now offered the services of one or both of the carriers, and that some customers only contracted with Sapphire. He then confirmed that Gibtelecom's view was that the data centre was adequately served by two operators and that the customers at the data centre could switch between operators should they so choose.

58 In the course of the hearing, Mr. Hook was also asked about his third witness statement dated August 28th, 2020 which had also been filed in the

context of the stay application. In this statement, Mr. Hook confirmed that Rockolo had not and would not provide consent to any of its customers to house Gibfibre equipment within the customer racks which was a secure area. Mr. Hook was referred to the definition of "customer equipment" in cl. 1 of the master services agreement which allowed for customers' agents to access its equipment with Rockolo's consent. He was then referred to cll. 4 and 6 of the service order form which envisage the customers' agents accessing the equipment on the racks for maintenance with Rockolo's consent. In this connection, Mr. Hook said that it was fairly normal for this work to be carried out by third party IT suppliers who required Rockolo's permission to enter the data centre.

59 Mr. Hook confirmed that there was a Gibtelecom management device placed in the customer racks, but he explained that this was not a modem. The modem, he confirmed, was located in the operator's distribution room which is where the data was routed onto the CCS. In his view, it was in these two rooms that the clear delineation took place as to what was Rockolo's responsibility and what was not. Thereafter, the CCS service was just a passive one consisting of fibre optic cables which connected the operators to the servers, but he added that the CCS service also had other functions such as connecting two customers together and connecting two racks belonging to the same customer together.

Dwayne Lara

60 Mr. Lara is Gibtelecom's corporate and regulatory manager and he gave evidence on March 2nd, 2023. Mr. Lara adopted a witness statement which he had given dated July 15th, 2019 which had also been filed in support of an application for a stay. In this witness statement, Mr. Lara explained the background to GibFibre's request to gain access to the data centre. Mr. Lara was asked about his exchanges with GibFibre leading up to its request for access, and to Gibtelecom's Reference Leased Line Offering ("RLLO"). This RLLO defined a wholesale leased line as a telecommunications facility which provides for transparent transmission capacity between network termination points not including on-demand switching. Mr. Lara made the point that this was not just concerned with access to data centres and he said that the data centre formed part of a private network.

Impressions of the main witnesses

61 I should make some comments about Dr. Unger and Mr. Hook who were the main witnesses who gave evidence orally and were cross-examined.

62 Dr. Unger was the only expert who gave evidence. It was clear from his evidence that Dr. Unger had a very comprehensive understanding of the

telecommunications industry, and a very firm grasp of the various technical and regulatory matters which arose in this appeal. Dr. Unger also provided clear and consistent answers to the questions that were put to him, and I found that his evidence was reliable and persuasive.

63 Dr. Unger stuck to his guns in refusing to accept a number of propositions put to him by Sir Peter in cross-examination about the scope of the Access Directive, but he was fully entitled to do so. His views on the various issues on which he gave evidence were coherent, they accorded with principle and they took into account applicable guidance. Dr. Unger's evidence exposed the GRA's approach to be unreliable for a number of reasons. These included the GRA's failure to correctly approach where the boundary should lie between public and private networks, disregarding BEREC guidance, and misunderstanding the nature of interconnection rights.

64 In my view, Dr. Unger's sound evidence served to highlight the flawed nature of the GRA's reasoning, which was not consistent with the CRF, and at times was based on little more than decontextualized references contained in selected materials. Dr. Unger who was familiar with all these documents which were often outdated or irrelevant, was able to show why the GRA's reliance on these documents was wrong, and why its approach was ultimately at odds with the principles governing the CRF.

65 Turning to the factual evidence, the evidence of Mr. Hook was the most relevant for the purposes of the appeal as he set out what the data centre consists of, and how it is operated. I found that Mr. Hook's evidence was clear and helpful, especially as it showed that the boundary between the public and private networks was situated in Rockolo's suite. He also provided the documents governing the commercial arrangements between Rockolo and its customers which showed the limited rights enjoyed by the owners of the data servers at the data centre.

Discussion

66 Gibtelecom was designated by the GRA as having SMP in WLL in 2008 which imposed on it access obligations. The market analysis resulting in that designation, however, is required to be repeated every three years, with a possible extension to six years, as provided for in art. 16 of the Framework Directive. This requirement reflects the fact that markets can change and develop over time, and that there must be a current assessment before the SMP obligations set out in arts. 9–13 are imposed. Gibtelecom's designation as having SMP in 2008 under Decision Notice No. 04.08 is therefore out of date, a fact which the GRA accepted in the course of the hearing.

67 The GRA in any event relied on that designation and said that the interposition of Rockolo was a fig leaf used by Gibtelecom to try and

distance itself from the need to comply with its SMP obligations. Far from seeking to distance itself from Rockolo, however, Gibtelecom accepted that if the SMP obligation was still applicable, it could not avoid access obligations simply because a service which is subject to the regulatory purview of the GRA is run through Rockolo. Gibtelecom's case was that the SMP obligations under the Access Directive do not extend to a private facility such as the data centre simply because the site in question is owned by the same undertaking that operates the dominant electronic communications network.

68 The first request made by Gibfibre was held to fall outside the Access Directive by the Privy Council. Although the request which gave rise to that appeal concerned a proposal that fibre cables be routed into the data centre by means of certain ducts, and not obtaining access by means of a WLL as is now the case, the Privy Council judgment still provides applicable guidance in this case.

69 The Privy Council's judgment refers to the fact that "access" as understood in the Access Directive means access to the "electronic communications networks and associated facilities" of the requested operator as defined in the Access Directive, and that it does not mean access to a building or other physical infrastructure that is neither "electronic communications networks and associated facilities" (see 2021 Gib LR 682, at para. 36). Further, it refers to the definition of "operator" in art. 2 of the Access Directive, namely "an undertaking providing or authorised to provide a public communications network or an associated facility." A "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."

70 The Privy Council therefore made it clear that the requested access to the data centre was not to a "public" electronic communications network, and that the access sought lay on the other side of the NTP beyond which the network was a private one. As for the NTP, Lord Hamblen states as follows in his judgment (2021 Gib LR 682, at para. 40):

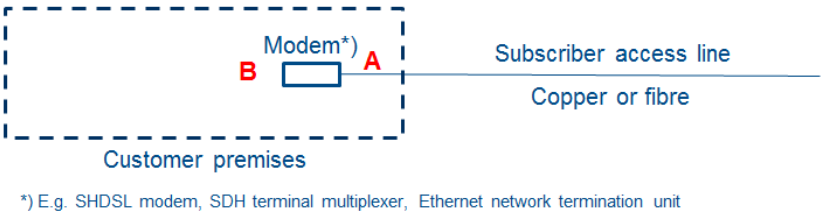
> "40 The network termination point therefore marks the boundary of a public communications network. Beyond that boundary will lie private networks and telecommunications terminal equipment, which are not subject to regulation under the common regulatory framework."

71 This demarcation is important because it identifies where Gibtelecom's public network which leads to the data centre ends, and where the private network which operates within it starts. Lord Hamblen then states as follows (*ibid.*, at paras. 43–45):

> "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."

72 This reasoning set out above, including where the NTP boundary lies in the data centre dividing the public from the private network, applies as much in this case as it did to the previous one. This makes it clear that the data servers lie beyond the NTP, a conclusion which is now further supported by the evidence provided at the appeal hearing. Mr. Hook explained that the incoming traffic into the data centre goes in via the trunk lines into Gibtelecom's and Sapphire's suites. Further, he said that this traffic is then split by the distribution routers in those suites which directs the traffic to the IP or MAC addresses of the servers to which that traffic is destined. He referred to this being the point where Rockolo's responsibilities were engaged. Dr. Unger then said that whilst the NTP might be located at either side of Gibtelecom's modem at the end of the leased line, it would still be before the router which Gibfibre would need to install if allowed to access the CCS in the data centre.

73 The fact that any connection provided to Gibfibre would not reach the data servers is illustrated by the following a diagram contained in the annex to the "BEREC Guidelines on Common Approached to the Identification of the Network Termination Point in Different Network Topologies" (BoR (20) 46) dated March 5th, 2020:



74 This shows that the NTP would be located at the point marked A or B which would demarcate the public network from the private network in customer premises provided with connectivity by leased lines. The signal converted by the modem would be carried onto a router which would usually be located on the left side of point B in the diagram, and that router which would then direct that traffic to the data servers which would be located on the left side of that router. Whether the NTP is located at point A or point B, it would not reach the data servers which are within the private network in the customer's premises, and which in the diagram above would be well beyond the NTP to the left side of point B. This is the case regardless of whether the cross connect cables which provide this link are owned by Rockolo or even Gibtelecom, nor does it matter that those fibre optic cables are passive. Wherever the leased line terminates, in this case Rockolo's suite in the data centre, there is no right to onward access beyond that point.

75 The demarcation between a public and a private network is also referred to in Garzaniti, *Electronic Communications, Audiovisual Services and the Internet*, 4th ed., at para. 2–012 (2019). This refers to the fact that most obligations, including access obligations, are imposed only on providers of publicly available electronic communications services, and that a service is considered to be publicly available when any part of the public may choose to make use of the service offered. The authority cited in support of this proposition by the authors of that text is *Fjarskipti hf.* v. *Icelandic Post & Telecom Administration* (4), which the GRA also relied on. In that case, the court held that a text service operated by Vodafone in Iceland constituted a "public communications network" even though it was available only to its subscribers. This was because there was no limit to the number of subscribers to the service, and provided it was used wholly or mainly for the provision of such publicly available services. It then goes on to state that this reasoning is consistent with recital 55 of the Citizens' Rights Directive and an earlier position of the Commission which specifically excludes corporate networks and closed user groups.

76 This point is also made in "BEREC Guidelines on the Implementation of the Open Internet Regulation," dated June 9th, 2022, which states at para. 12 that internet services provided by cafés and restaurants are not publicly available services because access to that service is limited.

Further, it states that enterprise services having a closed group of end-users that are not available to the general public would ordinarily not be considered to be publicly available.

77 This all shows that the data centre does not form part of a public communications network. There is clearly a limit to the number of customers the data centre can host because there is only a limited space available on the racks at that facility. Dr. Unger was also clear that in his view the data centre is a private facility hosting a closed user group which did not form part of the public network.

78 The decision therefore drove a coach and horses through the regulatory scheme. The GRA failed to turn its mind to the critical question which was whether Gibfibre's request came within the ambit of the Access Directive, which in turn requires a distinction to be drawn between a public and a private network. Instead, the GRA wrongly concluded that it was Rockolo's status as a wholly owned subsidiary of Gibtelecom which automatically entitled Gibfibre to access to the data centre. The GRA's misguided approach was highlighted during the hearing when it said that in its view, the operator of a public network such as Gibtelecom could never operate a private network without being required to provide access to other operators such as Gibfibre, and that this was the price it had to pay because it had SMP. This is clearly wrong as a matter of principle, and to illustrate the point Dr. Unger explained that BT operates private networks in the UK which are outside the scope of regulation, even though they are run using BT infrastructure.

79 The GRA then sought to get around this by saying that because it had the responsibility of determining where the NTP should be located, the GRA could determine that the NTP should be in the computer servers themselves. There is no reference to this in the decision, nor is it implicit from it. If this had formed part of the GRA's reasoning, one would have expected some reference to have been made to it, especially as the GRA relied on the NTP decision in this regard which is not referred to in the decision. In any event, there are various flaws in this submission.

80 First, this argument was based on the servers in the data centre being the end-users, as defined in the regulatory scheme. This is clearly not correct and again fails to take into account the divide between the public service provided by Gibtelecom, and Rockolo's private network. When that is properly taken into account, it is clear that the end-user in this case is Rockolo, more specifically the point at which Gibtelecom's public network reaches Rockolo's suite at the data centre, which then connects the public network to the CCS. This was confirmed by Dr. Unger in his evidence. By saying that the NTP was located in or around the data servers themselves, in itself a somewhat amorphous proposition, the GRA disregarded the purpose of the NTP which is to demarcate the public

network from the data centre which, as Dr. Unger said, is a private closed user group.

81 Further, the fact that the GRA can determine where the NTP should be located does not mean that it has *carte blanche* in this regard as Dr. Unger put it, and that it can disregard BEREC guidance. This states that that any encroachment of the NTP into the private domain should be minimized. The general principle adopted by BEREC, to which the utmost regard should be had, is that an end-user's site should only be considered to be part of the public network if there is an objective technological necessity for that to be the case. There was no reason advanced by the GRA why such an exceptional course might be appropriate in this case. Indeed, the GRA does not appear to have turned its mind to this principle at all, let alone having the utmost regard to it.

82 The NTP decision does not assist the GRA either. This concerns the position of tenants in blocks of flats and the conclusion there was that the cables leading to those flats formed part of the public communications network, regardless of who owned them. Further, the NTP was located at the customer's premises to ensure that flat owners could choose which operator it wanted to contract with. The NTP decision, however, recognizes the division between the public network, probably a wall terminal in each flat, and the flat owner's private network and private terminal equipment. The NTP decision does not consider the position of data centres, nor does it consider the situation or other user groups such as where the end-user does not have any premises of their own. Indeed, it recognizes that it would be unwise to define the exact location of the NTP in every case, and that the NTP could represent different equipment in different locations. There is no part of the NTP decision that suggests that the NTP should be pushed into a private network which is the effect of what the GRA is saying.

83 The analogy which the GRA sought to draw between the position of flat owners and the servers in the data centre was also a poor one as there is a material distinction between the two. The flat owners referred to in the NTP decision enjoy rights as tenants, which includes the right to choose their broadband provider. The owners of the data servers on the other hand do not enjoy similar private law rights, as Mr. Hook explained in his evidence by reference to Rockolo's master services agreement. The owners of the data servers are only licensed to place their servers on the racks and connect to the MMF, and beyond that to the carrier in the data centre which they have contracted with. They do not have the right to demand that Gibfibre or another communications provider provides it with connectivity. In response, the GRA referred to the fact that third parties such as IT technicians are allowed access to the servers with Rockolo's permission, but this takes its argument no further. These rights are very limited and prescribed and, in any event are subject to Rockolo's permission. If

anything, they only show that the rights of the data centre customers are not akin to those of tenants.

84 If anything, a better analogy is that of telephone services provided by hotels to guests. The public network reaches the switchboard in a hotel which would be the equivalent of Rockolo's suite in the data centre. It is around that point that the division between the public network and the hotel's private network takes place, even if the hotel were owned by Gibtelecom. Thus, a hotel guest, the equivalent of the servers on the racks, would not be able to insist on connectivity with the operator of his choice as the public electronic communications service would not reach her room.

85 The GRA also said that it had the power to require Gibtelecom to adapt its network by extending it to reach the servers following the decision in *TDC A/S* v. *TeleKlagenaevnet* (5). This was another new argument not referred to in the decision, and again it was misconceived. *TDC* was concerned with a case of an operator with SMP being required to meet reasonable requests for access to broadband connections, including the installation of drop cables over a maximum distance of thirty metres in order to connect the distribution frame of an access network to the NTPs at the end-users' premises. *TDC* was not therefore concerned with extending the network beyond the NTP and pushing it back into a private network, but rather establishing new NTPs at each house to ensure that access to the end-user's premises was not denied in practice. Accordingly, the principle established by that decision was that the Access Directive should be interpreted in a way which is consistent with its purpose. Requiring Gibtelecom to provide a terminating segment of leased line to access a private network is not, however, an application of this principle nor is it concerned with promoting the aims of the Access Directive. In fact, it is outside the scope of the Access Directive altogether.

86 The other argument relied on by the GRA, again not referred to in the decision, was that Gibtelecom's ultimate ownership of the data centre meant that it was engaged in anti-competitive vertical leveraging. This was postulated on Gibtelecom operating both a wholesale market (WLL) and a vertically related retail market, namely the supply of electronic communications services hosted in the data centre, and because it had SMP on the upstream. The GRA also said that terminating segments of leased lines had been specifically identified as a form of "competitive bottleneck," and that access remedies under art. 12 of the Access Directive were appropriate for this sort of anti-competitive behaviour.

87 Dr. Unger's evidence on this issue was that there was no vertically related market in this case as Gibtelecom's WLL and the data centre were separate markets. In his view, the vertically related market in this case would be retail leased lines. The reliance by the GRA to reference to "downstream markets" in an old 2006 document to try and build a case that

this principle could apply to other unrelated markets such as data centres was neither a sound, nor a principled basis to extend the scope of this to markets such as data centres which have nothing to do with terminating segments of leased lines. Further, and as Dr. Unger stated, the reference to a "competitive bottleneck" in that document was concerned with another issue altogether. The GRA's reliance on vertical leveraging does not therefore bring Gibtelecom within the scope of the *ex ante* regulatory regime either.

88 Finally, the GRA argued that Gibtelecom was required to provide Gibfibre with access to the data centre by means of co-location as provided for in art. 12(1)(f) of the Access Directive which states that operators may be required to "provide co-location or other forms of associated facilities sharing."

89 The first point to make about co-location is that it goes with interconnection between public networks, and that this was not the basis on which Gibfibre requested access to the data centre, nor did the GRA make reference to this in the decision. In this appeal, however, the GRA relied on the following statement made by the Court of Appeal (2019 Gib LR 92, at para. 36):

> "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."

90 The GRA said that this aspect of the Court of Appeal's judgment had not been appealed to the Privy Council, and that it provided a statement of principle to the effect that interconnection rights allowed access to the data centre. In response, Gibtelecom said that this statement was made *obiter* without competing submission on the point, and that it had not been common ground that art. 4 would provide access. Further, Gibtelecom said that this was wrong in principle, and a copy of Gibtelecom's case before the Privy Council was provided to show that it had sought to correct this statement but that in the end, this issue did not feature in the Privy Council's judgment which was only concerned with arts. 12 and 5, and not art. 4 of the Access Directive.

91 As arts. 1 and 2 of the Access Directive makes clear, access and interconnection are separate concepts. Article 4 of the Access Directive which deals with interconnection refers to communication providers agreeing terms between them for the purpose of providing publicly available electronic communications services to ensure interoperability of

services. Interconnection is therefore concerned with the point where two public networks meet each other where there are rights of co-location. Although this is clearly not the case here, Gibfibre argued that co-location could take place at either end of a leased line and, on that basis, sought to argue that this could provide them with a connection to the data servers in the data centre at the end of that line.

92 The notion that interconnection can take place at either end of a public network is hardly a novel concept, and Dr. Unger agreed this can happen to ensure interoperability of public telecommunications services. What is novel, however, is the suggestion made by the GRA here that this can provide a connection to an end-user at the other end of that line in a private facility. As Dr. Unger said, art. 4 is not concerned with allowing connections to private networks which is what Gibfibre want to achieve, and this is not a case about interoperability of public telecommunications services. Further, the 2007 ERG document relied on by the GRA in this regard sought to address particular issues at that time. That does not in my view provide a proper basis to depart from established principles governing the CRF. I do not consider, therefore, that art. 4 of the Access Directive provides a proper basis for the decision to stand either.

93 Whilst the Court of Appeal did suggest *obiter* that interconnection rights could provide a means for Gibfibre to achieve its objective, that statement has to be put in its proper context. It arose in an appeal which was not concerned with art. 4 rights, it was not the product of adversarial argument, and the Court of Appeal did not have the benefit of the evidence which has been provided to this court.

94 This does not mean, however, that anti-competitive behaviour within a facility such as the data centre cannot be addressed, only that this is the wrong way to go about it. As Lord Hamblen went on to say (2021 Gib LR 682, at paras. 51–52):

> "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."

95 A claim has been issued in the Supreme Court by Gibfibre against Gibtelecom and Rockolo alleging breaches of abuse of dominant position in respect of the data centre. In that claim, Gibfibre seeks an injunction requiring access to the data centre and damages. Whether such anti-competitive behaviour exists is a matter which has yet to be determined in those proceedings, but that claim provides the correct route for Gibfibre's complaint to be determined.

Conclusion

96 For all the reasons set out above, the decision was based on material errors of law and of fact such that it cannot stand. The further arguments relied on by the GRA at the hearing to support that decision were also flawed, and they do not justify the GRA's decision either.

97 The appeal is therefore allowed, and the GRA's decision dated July 16th, 2019 is quashed. Pursuant to s.91(4) of the Act, the matter is remitted to the GRA for reconsideration in accordance with the findings of this court.

Appeal allowed.