Hassans
International Law Firm

PO Box 199
Madison Building
Midtown, Queensway
Gibraltar, GX11 1AA
T: +350 20079000
F: +350 20071966
E: info@hassans.gi
www.gibraltarlaw.com

Direct e-mail: lewis.baglietto@hassans.gi

Your reference RGF/JT/V18039
Our reference LB/JM/4931-162-5
Date 05 July 2019

Gibraltar Regulatory Authority
2nd Floor
Eurotowers 4
1 Europort Road
Gibraltar

Dear Sirs

Proposed Determination under the Communication Act 2016

We act for Gibtelecom in this matter and refer to the email from Gavin Santos dated 24 June 2019 and the attached proposed determination on which our client was invited to comment.

Gibtelecom is grateful for the opportunity to provide its comments and we provide our client's initial comments in this letter. Given the timeframe allowed by the GRA for comment, it has not been possible to prepare a detailed and exhaustive submission. We therefore reserve our client's rights to present additional comments or make representations if deemed necessary.

1. The proposed determination relates to a dispute settlement procedure regarding GibFibre's request for access to the Mount Pleasant Data Centre (the "Data Centre" as defined below, that is, the data centre suite(s)) based on Gibtelecom's wholesale leased lines offerings. It appears to us that the central issue in this matter is whether the Data Centre is subject to the relevant legislation and as a consequence whether the GRA has jurisdiction under the Communications Act 2006 (the "Act") and its subsidiary legislation to bind Gibtelecom by its decision in relation to the Data Centre and, in this case in particular, if access for GibFibre to the Data Centre can be ordered by the GRA.

2. GibFibre seeks to offer high speed broadband connectivity services to hosted entities in the Data Centre. It has asked our client to sign a Reference Leased

Lines Offer ("**RLLO**") for the purpose of linking the GibFibre network outside the Data Centre to Rockolo hosted entity servers on the racks inside the Data Centre. It seeks to purchase wholesale leased lines ("**WLL**") services which it claims Gibtelecom is obligated to provide under its Significant Market Position ("**SMP**") obligations in the WLL market (Market 6 of the EU's Recommendation 2007/879/EC on relevant products and service markets of 2007) contained in the GRA's Decision Notice No. 04/08.

3. In commercial negotiations, Gibtelecom has offered WLL services on Gibtelecom leased lines leading from the GibFibre network at a point outside the Data Centre to a point in the vicinity of the Data Centre. However, Gibtelecom has also informed GibFibre that such an arrangement would not give GibFibre a linkup with any hosted entity because it would need separate, inactive lines from the company operating the Data Centre, Rockolo. To connect to the hosted entity, Rockolo would have to supply one or more cross connect service ("**CCS**") cables to reach the relevant hosted server (one CCS cable for each hosted entity). Rockolo has decided, as a matter of commercial policy, that it will not provide the CCS cables and allow GibFibre access to hosted entities.

4. Before providing our client's substantive comments on the legal analysis, we would like to clarify some factual points. In the first paragraph under "Question 1" (p.14), the GRA states that "*Furthermore, in an email dated 8th August 2018 from Gibtelecom to GibFibre, it was stated that "...Gibtelecom could, in principal [sic], provide a wholesale leased line service to a location at the Mount Pleasant area,", which asserts that Gibtelecom is able to provide a WLL* ***to a point inside the Data Centre.*** *Additionally, the GRA must conclude that,* ***as a hosted entity itself,*** *and Provider within the Data Centre, Gibtelecom is at liberty to request a CCS from Rockolo for the purposes of connecting to a hosted entity.*" [Emphasis added]. These findings are, with respect, incorrect.

5. Firstly, by explaining to Gibfibre that Gibtelecom could provide a wholesale leased line service to a location at the Mount Pleasant area, this meant to a point *outside* the data centre. The GRA needs to be clear that the "data centre" is only part of the wider Mount Pleasant complex. When referring to the "data centre", this should only mean to refer to the data centre suite, and not the entire Mount Pleasant premises. It is therefore incorrect to infer that being able to provide a wholesale leased line to a point at the Mount Pleasant area means being able to do so to a "*point inside the Data Centre*".

6. Secondly, Gibtelecom is *not* a hosted entity within the Data Centre, as the GRA's statement in point 4 above seems to assert. The Company has no racks within the Rockolo Data Centre. As explained during the site visit of 12 April 2019,

Gibtelecom has a technology room at the Mount Pleasant complex from which it serves and provides a variety of services. The room is *not* a data centre and does not host any clients.

7. Moving on to the legal analysis, Rockolo is a separate legal entity that owns and runs the Data Centre offering hosting services in rack space for high speed data computing in a safe and secure environment with guarantees on the constant supply of electrical power and proper temperature/humidity levels. This service does not offer electronic communications network ("ECN") or electronic communications services ("ECS"). It is apparent therefore that the services offered by the Data Centre fall outside the regulatory purview of the GRA. Its services are simply not within the scope of the EU and Gibraltar electronic communications framework. For this reason, the Data Centre can make the commercial choice of with whom to do business. This is true for all data centres offering such hosting services. Rockolo therefore, does not have SMP obligations and the GRA does not have regulatory power to order it to grant access. In seeking to compel Rockolo, directly or indirectly, to grant access to GibFibre, the GRA has exceeded it powers under the Act.

8. The fact that Rockolo is Gibtelecom's subsidiary makes no difference. In fact, as we will explain, even if Gibtelecom owned and ran the Data Centre directly, the arguments set out in this letter would still stand. In particular, we would draw your attention to the following:

   (1) Rockolo is not an authorised operator as its activities do not fall under the general authorisation regime;

   (2) under Gibraltar's tax rules, its income – as income generated not from ECN or ECS - is subject to a far lower tax rate than Gibtelecom's income;

   (3) Rockolo's turnover is reported to the GRA separately from that of Gibtelecom in an annual exercise designed to calculate Gibtelecom's contribution to cover the GRA's budget expenditures. Rockolo's income – being from non-telecommunications operations - is not counted in the tabulation and its exclusion reduces the amount that Gibtelecom is found to owe. The GRA has accepted this approach;

   (4) GibFibre's court proceedings against the GRA over a different attempt to compel access to the Data Centre (whether the Data Centre can be compelled to allow GibFibre to locate its own server on the racks and connect it to its own network through its own fibre cables placed in ducts leading to and

within the Data Centre) makes it clear that the Data Centre is not ECN or ECS. The GRA itself accepted in its letter of 16 February 2017, that the Data Centre lacks the attributes of an ECN or an ECS. Both the Supreme Court in its judgment of 30 November 2018 and the Court of Appeal in its judgment of 26 April 2019, held that the Data Centre as a whole is not "network elements" or "associated facilities" As SMP obligations can only be targeted at network elements and associated facilities, the Court of Appeal stated that the Data Centre cannot be subject to SMP obligations. The GRA itself argued these points before both Courts;

(5) the GRA itself seems careful to state at points in the proposed determination that SMP obligations imposed on Gibtelecom do not extend to Rockolo.

9. By extension, similar points can be made in relation to the nature of the Data Centre's business even if Gibtelecom was the direct owner and operator of the Data Centre. The nature of the service provided by the Data Centre does not change due to the identity of its owner. If the Data Centre had been operated by an unrelated third party but Gibtelecom had been granted access privileges, it is clear that the third party could not be forced by the GRA to accommodate GibFibre.

10. GibFibre is, in effect, attempting to achieve the same goal it already sought in its request which is the subject of the ongoing court proceedings. In that case the GRA accepted it was an "illegitimate request" masquerading as an access request. We fail to see how the current request is any different in substance.

11. The main conclusion of this analysis is that the nature of the services offered by the Data Centre, essentially the provision of space, security, and a controlled and managed environment to host private servers and equipment does not fall within the access regime set out in the European directives and codified by the Act and its subsidiary legislation.

We also refer to our letter to you on behalf of our client dated 8 July 2016, in which many of the points set out above were articulated in further detail. That letter related to GibFibre's request that is the subject of the litigation referred to above [redacted].

In light of the all the arguments set out above, our client strongly contests the proposed determination.

Hassans
International Law Firm

Finally, we note your criticisms as to the alleged delay and lack of transparency on the part of our clients. Our clients reject these criticisms and reserve all their rights including the right to further respond on these points in due course.

Yours faithfully

Hassans

[redacted]