

# **DETERMINATION C02/19**

## **COMMUNICATIONS ACT 2006**

### **DETERMINATION PURSUANT TO SECTION 95 OF THE COMMUNICATIONS ACT 2006**

**Pursuant to its powers and obligations in section 95 of the Communications Act 2006, (the "Act"), the Gibraltar Regulatory Authority (the "GRA"), hereby issues this Determination, having reached its conclusions as to how a dispute between GibFibre Ltd ("GibFibre") and Gibtelecom Limited ("Gibtelecom"), is to be resolved (the "Dispute").**

#### **1. Background**

##### **1.1. Decision Notice**

On 11<sup>th</sup> August 2008, the GRA published Decision Notice No. 04/08 on Wholesale Fixed Markets (the "Decision Notice")<sup>1</sup>. The GRA found Gibtelecom, a provider of publicly available electronic communications services ("Provider"), to have Significant Market Power ("SMP") in the market known as "Wholesale Terminating Segments of Leased Lines, Irrespective of the

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<sup>1</sup> Decision Notice No. 04/08 on Wholesale Fixed Markets  
(<https://www.gra.gi/communications/wholesale-fixed-markets-04-08-gibtelecom>)

Technology Used to Provide Leased or Dedicated Capacity". Consequently, SMP obligations were imposed on Gibtelecom.

### **1.2.SMP obligations**

The SMP Obligations ("the Obligations"), imposed were:

- Obligation of transparency
- Obligation of non-discrimination
- Obligation of accounting separation
- Access obligations
- Price control and cost accounting obligations

### **1.3.Wholesale Leased Lines**

In accordance with the Decision Notice, a Wholesale Leased Line ("WLL"), is defined as *"wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity."* In simple terms, a WLL is a network path between two points. WLL are sold in a variety of measures of capacity and the capacity leased by a Provider will depend entirely on the purchasing party's specific requirements.

Although a WLL can have various uses, a common use for WLL is when a Provider sells dedicated capacity on its network, to another Provider, on a wholesale basis, usually for the second Provider to sell its services to retail customers. The second Provider will use this capacity to transmit its own signals between the two points it has specified, which in this scenario, are inaccessible on its own network, thus extending their network reach to a location they have no physical presence at. Without the reach of the first Provider's network, the second Provider is unable to reach its customers.

There may be a number of reasons why a particular Provider's network may not extend to a specific location and these may include, but not be limited to, financial limitations, lack of access to public ducts, town planning issues, lack of capacity over its existing network as well as lack of access to private land and buildings.

The principles of EU Law, in particular those of liberalising markets to allow access to incumbents' networks, and those of ensuring fair competition when dominant operators are able to cause negative market effects, are amongst those ensuring that legislative provisions exists to ensure WLL are available to operators by those designated as having SMP.

## 2. The Dispute

### 2.1. Summary

On 13<sup>th</sup> February 2019, the GRA received a request for the resolution of a dispute from GibFibre. GibFibre, an authorised operator under the Act, provided information concerning a breach of the Obligations by Gibtelecom, in not granting GibFibre WLLs. GibFibre had requested access, via WLLs, to the equipment of high data-consumption entities which are hosted in a data centre located at Mount Pleasant (the "Data Centre"). The Data Centre is operated by Rockolo Limited ("Rockolo"), which is a wholly-owned subsidiary of Gibtelecom.

A bundle of correspondence between GibFibre and Gibtelecom was submitted in evidence (the "Evidence"), as part of the request to resolve this dispute. The Evidence showed that GibFibre had made attempts to negotiate access to the Data Centre with Gibtelecom by means of a WLL. It was possible to conclude the following from the Evidence:

- a) That, in principle, Gibtelecom was willing to provide a WLL to a point within the "*vicinity of Mount Pleasant*" but not necessarily to a point within the Data Centre<sup>2</sup>; and
- b) That after Rockolo had reviewed GibFibre's request, it had decided that it would not be connecting any new operators to the Data Centre, pending the outcome of a legal matter, the outcome of which had the potential to affect how access to the Data Centre by operators was to be granted<sup>3</sup>.

### 2.2. Relief/Remedy Sought by GibFibre

The relief or remedy sought by GibFibre, in accordance with its submission, is that "*the economic unit which is formed by Gibtelecom/Rockolo enter into a Gibtelecom RLLO leased line contract in respect of a leased line from inside Rockolo's data centre at Mount Pleasant to a spot on the complainant's/dispute referencer's network.*"<sup>4</sup>

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<sup>2</sup> In an email dated 8<sup>th</sup> August 2018, from Gibtelecom to GibFibre, Gibtelecom provide that "*...Gibtelecom could, in principal [sic], provide a wholesale leased line service to a location at the Mount Pleasant area...*".

<sup>3</sup> In an email dated 8<sup>th</sup> August 2018, from Gibtelecom to GibFibre, Gibtelecom provide, "*Having being able to check and consult this now with Rockolo, the decision is that they will not be connecting anyone to the data centre pending the outcome of the court case which GibFibrespeed brought against the GRA in early May.*"

<sup>4</sup> GibFibre's submission to the GRA, point 24 of Section C, as required under Annex 2 of the Notice Concerning the Procedures and Guidelines for the Handling of Complaints and Disputes Referred to the Gibraltar Regulatory Authority, Notice No. 6/2006.

## **2.3. GRA's Legal Requirements**

### **2.3.1. Legislation**

Upon receipt of a request to resolve a dispute between operators, the GRA is bound to comply with and follow the Dispute Resolution provisions of the Act, namely ss92 – 98. For ease of reference, these are laid out below.

#### ***Reference of disputes to the Authority.***

*92.(1) This section applies in the case of any dispute if*

- (a) it relates to existing rights, conditions or obligations conferred or imposed by or under this Act;*
- (b) it is a dispute between–*
  - (i) persons authorised pursuant to this Act to provide electronic communications services, electronic communications networks or to make associated facilities available in Gibraltar; or*
  - (ii) persons referred to in subparagraph (i) and persons in a Member State who benefit from obligations on access and/or interconnection in Gibraltar pursuant to this Act; and*
- (c) it is not an excluded dispute.*

*(2) Any one or more of the parties to the dispute may refer it to the Authority.*

*(3) A reference made under this section is to be made in such manner as the Authority may require.*

*(4) The way in which a requirement under subsection (3)*

- (a) is to be imposed; or*
- (b) may be withdrawn or modified,*

*is by a notice issued under section 12 published in such manner as the Authority considers appropriate for bringing the requirement, withdrawal or modification to the attention of the persons who, in its opinion, are likely to be affected by it.*

*(5) Requirements imposed under subsection (3) may make different provision for different cases.*

*(6) A dispute is an excluded dispute for the purposes of subsection (1) if it is about a contravention of section 45.*

*(7) For the purposes of this section*

- (a) disputes that relate to the provision of network access include disputes as to the terms or conditions on which it is or may be provided in a particular case; and*
- (b) disputes that relate to an obligation include disputes as to the terms or conditions on which any transaction is to be entered into for the purpose of complying with that obligation.*

#### ***Action by the Authority on dispute reference.***

*93.(1) This section applies where a dispute is referred to the Authority under and in accordance with section 92.*

*(2) The Authority must decide whether or not it is appropriate for it to handle the dispute.*

*(3) Unless the Authority considers that*

- (a) there are alternative means available for resolving the dispute;*

- (b) a resolution of the dispute by those means would be consistent with the objectives set out in section 19; and
- (c) a prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it,

its decision must be a decision that it is appropriate for it to handle the dispute.

- (4) As soon as reasonably practicable after the Authority has decided that
  - (a) it is appropriate for it to handle the dispute; or
  - (b) it is not,

the Authority must inform each of the parties to the dispute of its decision and of its reasons for it.

- (5) The notification must state the date of the decision.
- (6) Where

- (a) the Authority decides that it is not appropriate for it to handle the dispute, but
- (b) the dispute is not resolved by other means before the end of the four months after the day of the Authority's decision,

the dispute may be referred back to the Authority by one or more of the parties to the dispute.

### **Legal proceedings about referred disputes.**

94.(1) Where a dispute is referred or referred back to the Authority under this Act, the reference is not to prevent

- (a) the person making it;
- (b) another party to the dispute;
- (c) the Authority; or
- (d) any other person,

from bringing, or continuing, any legal proceedings with respect to any of the matters under dispute.

(2) Nor is the reference or reference back to the Authority under this Act of a dispute to prevent the Authority from

- (a) giving a notification in respect of something that it has reasonable grounds for believing to be a contravention of any obligation imposed by or under this Act;
- (b) exercising any of its other powers under this Act in relation to a contravention of such an obligation; or
- (c) taking any other step in preparation for or with a view to doing anything mentioned in the preceding paragraphs.

(3) If, in any legal proceedings with respect to a matter to which a dispute relates, the court orders the handling of the dispute by the Authority to be stayed

- (a) the Authority is required to make a determination for resolving the dispute only if the stay is lifted or expires; and
- (b) the period during which the stay is in force must be disregarded in determining the period within which the Authority is required to make such a determination.

(4) Subsection (1) is subject to section 97 (8) and to any agreement to the contrary binding the parties to the dispute.

(5) In this section "legal proceedings" means civil or criminal proceedings in or before a court.

### **Procedure for resolving disputes.**

95.(1) This section applies where

- (a) the Authority has decided under section 93 (2) that it is appropriate for it to handle a dispute; or
- (b) a dispute is referred back to the Authority under section 93 (6).

- (2) *The Authority must*
  - (a) *consider the dispute; and*
  - (b) *make a determination for resolving it.*
- (3) *The procedure for the consideration and determination of the dispute is to be the procedure that the Authority considers appropriate.*
- (4) *In the case of a dispute referred back to the Authority under section 93 (6), that procedure may involve allowing the continuation of a procedure that has already been begun for resolving the dispute by alternative means.*
- (5) *Except in exceptional circumstances and subject to section 94 (3), the Authority must make its determination no more than four months after the following day*
  - (a) *in a case falling within subsection (1)(a), the day of the decision by the Authority that it is appropriate for it to handle the dispute; and*
  - (b) *in a case falling within subsection (1)(b), the day on which the dispute is referred back to the Authority.*
- (6) *Where it is practicable for the Authority to make its determination before the end of the four month period, it must make it as soon in that period as practicable.*
- (7) *The Authority must*
  - (a) *send a copy of its determination, together with a full statement of its reasons for it, to every party to the dispute; and*
  - (b) *publish so much of its determination as (having regard, in particular, to the need to preserve commercial confidentiality) it considers it appropriate to publish.*
- (8) *The publication of information under this section must be in such manner as the Authority considers appropriate for bringing it to the attention, to the extent that it considers appropriate, of members of the public.*

### ***Disputes involving Gibraltar and one or more Member States.***

*96.(1) This section applies where it appears to the Authority that a dispute referred or referred back to it under this Act relates to a matter partly falling within its jurisdiction and partly falling within the jurisdiction of the regulatory authorities of one or more Member States.*

*(2) A dispute relates to a matter partly falling within the jurisdiction of the regulatory authorities of one or more Member States to the extent that*

- (a) *it relates to the carrying on of activities by any of the parties to the dispute in one or more Member States or to activities carried on by any of the parties to the dispute in one or more Member States;*
- (b) *the activities to which the dispute relates, so far as they are carried on in a Member State, are carried on in the Member State for which those authorities are the regulatory authorities; and*
- (c) *the Minister certifies in writing to the Authority that in his opinion, the dispute relates to any such matter.*

*(3) For the purposes of subsection (2) the activities that are carried on in a Member State include anything done by means of an electronic communications network, or part of such a network, which is situated in that Member State.*

*(4) Before taking any steps under this Act in relation to the reference or the dispute, the Authority must inform the Minister and consult the other regulatory authorities within whose jurisdiction the matter falls.*

*(5) It shall be the duty of the Authority to secure that steps taken in relation to the reference or dispute (whether taken by it or by the other regulatory authorities) are, so far as practicable, agreed between the Authority and those authorities.*

*(5A) The Authority shall have the right to—*

- (a) *consult BEREC;*
- (b) *request BEREC to adopt an opinion,*

*in order to bring about a consistent resolution of the dispute in accordance with the Framework and Specific Directives.*

*(5B) If the Authority, or the other regulatory authority within whose jurisdiction the matter falls, has requested BEREC to adopt an opinion, the Authority shall await that opinion before taking action to resolve the dispute and take the utmost account of that opinion.*

*(5C) Subsection (5B) is without prejudice to the Authority being able to take urgent measures where it considers it necessary to do so.*

*(6) Accordingly, section 95 is to have effect in relation to the reference as if the period for making a determination which is specified in subsection (5) of that section were such period (if any) as may be agreed between*

- (a) the Authority; and*
- (b) the other regulatory authorities within whose jurisdiction the matter falls.*

### ***Resolution of referred disputes.***

*97.(1) Where the Authority makes a determination for resolving a dispute referred to it under this Act, its only powers are those conferred by this section.*

*(2) The Authority's main power (except in the case of a dispute relating to rights and obligations conferred or imposed by or under Part VI of this Act) is to do one or more of the following*

- (a) to make a declaration setting out the rights and obligations of the parties to the dispute;*
- (b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;*
- (c) to give a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by the Authority; and*
- (d) for the purpose of giving effect to a determination by the Authority of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.*

*(3) The Authority's main power in the excepted case is just to make a declaration setting out the rights and obligations of the parties to the dispute.*

*(4) Nothing in this section prevents the Authority or the Minister, as the case may be, from exercising the following powers in consequence of the Authority's consideration of any dispute under this Act*

- (a) the Authority's powers under this Act to set, modify or revoke conditions attached to a general authorisation, conditions on the use of numbers, universal service conditions, access related conditions or obligations or SMP obligations; or*
- (b) the Minister's powers to vary, modify or revoke radiocommunications licences or grants of recognised spectrum access.*

*(5) In the case of a dispute referred back to the Authority under section 93 (6)*

- (a) the Authority may, in making its determination, take account of decisions already made by others in the course of an attempt to resolve the dispute by alternative means; and*
- (b) the determination made by the Authority may include provision ratifying decisions so made.*

*(6) Where the Authority makes a determination for resolving a dispute, it may require a party to the dispute*

- (a) *to make payments to another party to the dispute in respect of costs and expenses incurred by that other party in consequence of the reference of the dispute to the Authority, or in connection with it; and*
  - (b) *to make payments to the Authority in respect of costs and expenses incurred by the Authority in dealing with the dispute.*
- (7) *The Authority may also require payments to be made to it pursuant to subsection (6)(b) where it appears to it that the reference of the dispute by a party was frivolous or vexatious or that a party to the dispute has otherwise abused the right of reference conferred by this Act.*
- (8) *A determination made by the Authority for resolving a dispute referred or referred back to it under this Act binds all the parties to the dispute.*
- (9) *Subsection (8) is without prejudice to section 91.*
- (10) *A party referred to in subsection (8) who does not abide by a determination of the nature referred to in that subsection is guilty of an offence and is liable—*
- (a) *on summary conviction, to a fine not exceeding level 5 on the standard scale; and*
  - (b) *on conviction on indictment, to a fine.*

***The Authority's power to require information in connection with a dispute.***

*98.(1) Where a dispute has been referred or referred back to it under this Act, the Authority may require any person to whom subsection (2) applies to provide it with all such information as it may require for the purpose of*

- (a) *deciding whether it is appropriate for it to handle the dispute;*
  - (b) *determining whether it is necessary for it to consult the regulatory authorities of a Member State; or*
  - (c) *considering the dispute and making a determination for resolving it.*
- (2) *This subsection applies to*
- (a) *a party to the dispute; and*
  - (b) *a person who is not a party to the dispute but appears to the Authority to have information that is relevant to the matters mentioned in subsection (1)(a) to (c).*
- (3) *Section 4 shall apply to a demand for information required for the purpose of this section and section 4 (3) is to have effect as if it allowed the Authority to specify such period of less than one month for the provision of the information as the Authority considers appropriate for the purpose of enabling it to comply with an obligation to make a determination within a particular period.*
- (4) *In fixing the period within which information is to be provided in accordance with a requirement under this section the Authority must have regard, in particular, to*
- (a) *its obligation to make a determination for resolving the dispute within the period specified in section 95 (5);*
  - (b) *the nature of the dispute; and*
  - (c) *the information that is required.*

### **2.3.2. Dispute Resolution Procedures**

The GRA is also guided by its Procedures and Guidelines for the Handling of Complaints and Disputes Referred to the Gibraltar Regulatory Authority<sup>5</sup> (the "Procedures and Guidelines"), which provide guidance on what factors the GRA must consider before it decides that there are no alternative mechanisms which could resolve the dispute<sup>6</sup>.

### **2.4. Initial Views and Acceptance of the Dispute**

Upon GibFibre submitting its request for resolution of a dispute on 13<sup>th</sup> February 2019, the GRA was required to confirm receipt of the submission within two days from that date. The GRA provided GibFibre with acknowledgement of the submission within which it also requested clarification from GibFibre, on whether the submission was to be considered non-confidential in nature.

GibFibre confirmed that the submission did not contain any confidential information in an email dated 18<sup>th</sup> February 2019. Without specific confirmation that GibFibre's submission contained non - confidential information, the GRA was unable to begin its 15 day enquiry phase, in which it is required to take this time to fully understand the scope of the dispute, as well as decide if it was appropriate to accept the request for resolution of this dispute, in accordance with s93 of the Act.

Upon commencement of the enquiry phase, the GRA shared GibFibre's submission with Gibtelecom for it to provide its own preliminary views on the Dispute, as it is entitled to do under the provisions of Notice No. 6/2006, specifically on the appropriate scope of the dispute. Gibtelecom replied on 22<sup>nd</sup> February 2019 stating that negotiations had not yet failed and that, therefore, no dispute existed. The GRA however, was unable to accept this and was satisfied, based on the Evidence, that a failure of commercial negotiation about a matter that falls within the scope of section 92 of the Act, i.e. the provision of network access and/or other regulatory obligations or conditions imposed by the GRA had taken place. This was in line with the Dispute Resolution Procedures.

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<sup>5</sup> Notice Concerning the Procedures and Guidelines for the Handling of Complaints and Disputes referred to the Gibraltar Regulatory Authority, Notice No. 6/2006

([https://www.gra.gi/download/882/u8T1k\\_Dispute\\_Resolution\\_Procedure\\_new\\_.pdf](https://www.gra.gi/download/882/u8T1k_Dispute_Resolution_Procedure_new_.pdf))

<sup>6</sup> *Ibid*, page 15

The GRA concluded its enquiry phase of 15 days, which it used to fully understand the scope of the dispute brought to it and to reach a decision about whether it was appropriate to accept the dispute for it to resolve. On the latter, the GRA was guided by Table 3, page 15 of the Procedures and Guidelines, which matrix clearly points towards the GRA's obligation to accept the Dispute in light of the circumstances.

On 7<sup>th</sup> March 2019, the GRA communicated to both Gibtelecom and GibFibre that it had accepted the request for resolving this dispute.

## **2.5. The Scope of the Dispute**

It was established that GibFibre had been attempting to enter into a Reference Leased Lines Offer ("RLLO") agreement with Gibtelecom in order to purchase WLL services from Gibtelecom. It is through this WLL service that GibFibre intended to provide its services to hosted entities located in the Data Centre.

GibFibre claimed that the lack of access to hosted entities was affecting its business and was of the view that Gibtelecom should comply with its obligations by entering into a WLL contract to facilitate delivery of WLL(s) from a point on GibFibre's network to a point within the Data Centre.

GibFibre provided that the obligations in paragraph 3.5 of the Decision Notice had been, and continued to be, breached in that Gibtelecom was refusing to enter into a RLLO agreement. This dispute therefore concerns GibFibre's submission that Gibtelecom did not act in accordance with the Obligations.

The GRA recognised that, on the face of the referral, there appeared to be a dispute between the parties that commercial negotiations had failed to resolve. In resolving disputes, the GRA must act in a manner which is consistent with its General Functions and Objectives, pursuant to sections 18 and 19 of the Act.

On 7<sup>th</sup> March 2019, the GRA published on its website, a statement establishing the scope of the dispute<sup>7</sup>.

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<sup>7</sup> GRA Statement Establishing the Scope of the Dispute, 7<sup>th</sup> March 2019 (<https://www.gra.gi/download/1150/GRA+Statement+Establishing+Scope+of+the+Dispute.pdf>)

### **3. Investigation**

#### **3.1. Site Visit**

Upon commencement of the investigation into the facts, it became apparent that visiting the Data Centre would be necessary to achieve a level of certainty.

A site visit was arranged for Friday 12<sup>th</sup> April 2019 with the primary aim being to understand how Gibtelecom and Rockolo interact so that communications services can be delivered to Rockolo hosted customers.

Rockolo, Gibtelecom and GRA staff were present during the site visit<sup>8</sup>, which included a detailed tour of the facility. A run-through of how the provision of electronic communications services to Rockolo hosted customers is made within the Data Centre was also provided.

The visit concluded with a Q&A session with both Gibtelecom and Rockolo staff, still on site. As a result of the visit, the GRA was in a far better position to assess the matter and draw conclusions. At the end of the site visit, Gibtelecom and Rockolo were asked to provide copies of the various contracts which were in place for the provision of services to hosted customers. The majority of the contracts and agreements were provided by 18<sup>th</sup> April 2019 after various requests, but the GRA was not in possession of all outstanding information it had requested, including the services Gibtelecom currently provides to Rockolo hosted customers, until 9<sup>th</sup> May 2019.

#### **3.2. Conclusions Drawn from Site Visit**

It was established that two authorised operators are present in the Data Centre. These are Gibtelecom and Sapphire Networks, who are present at the Data Centre by virtue of a hosting agreement which in turn permits them to connect to hosted entities. Each of these operate independently of each other and offer their services to hosted entities in the Data Centre. In order to connect a hosted entity at the Data Centre to a network operator, a cross connect service ("CCS") from Rockolo, is required. This is a physical cable which connects the hosted entity to the Data Centre's Meet-Me Frame ("MMF"), which is a physical location in the Data Centre where both the operators' services reach, and so are therefore able to connect to hosted entities. It was further established that every hosted entity has CCS terminating on

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<sup>8</sup> For Gibtelecom, Dwayne Lara, Corporate & Regulator Manager, for Rockolo, Daniel Hook, Managing Director of Rockolo and for GRA, Gavin Santos, Communications Regulatory Manager (Case Leader), and Ibrahim Alba, Communications Regulatory Officer.

the MMF and it is therefore, via a CCS, that hosted entities receive telecommunications services from either one, or both, of the operators.

It has been concluded that Rockolo's policy requires that one CCS must be purchased for every individual service which hosted entities request from either of the operators.

Furthermore, all hosted entities by virtue of them both being physically present at the Data Centre are granted the ability to connect to the MMF. In other words, any party physically located outside the Data Centre is unable to purchase CCS from Rockolo. This means that both Gibtelecom and Sapphire Networks are currently the only Providers that Rockolo is able to grant CCS to, and by default are the only operators who can provide telecommunications services directly to hosted entities within the Data Centre.

#### **4. Matters for Consideration**

##### **4.1. The extent of the Obligations in respect of Rockolo**

It is not in dispute that Rockolo is not an authorised operator for the purposes of the Act and so, the Obligations are unable to apply to Rockolo in its capacity as an independent legal entity. Furthermore, Gibtelecom acknowledge that the Obligations do apply to the extent that it is obliged to supply a WLL "to a location at the Mount Pleasant area"<sup>9</sup>, however, assert that any physical element within the Data Centre belonging to, or in the control of Rockolo is outside of this parameter<sup>10</sup>.

In contrast, GibFibre asserts that Gibtelecom and Rockolo form a single economic unit for the purposes of European Competition Law and so, the Obligations must extend to Rockolo in that "to do otherwise would make a mockery of the regulations because the creation simply of a subsidiary would excuse a company from its SMP obligations."<sup>11</sup>

The GRA has determined that the crux of the dispute therefore revolves around a key factor, namely, whether the Obligations extend to Rockolo, or require Rockolo to act in such manner so as to ensure the Gibtelecom does not fail to comply with the Obligations. This conclusion is drawn from the fact that, if not for Rockolo's refusal to extend a physical connection to a

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<sup>9</sup> See Note 2 *supra*.

<sup>10</sup> See Note 3 *supra*.

<sup>11</sup> GibFibre's submission to the GRA, point 16 of Section B, as required under Annex 2 of the Notice Concerning the Procedures and Guidelines for the Handling of Complaints and Disputes Referred to the Gibraltar Regulatory Authority, Notice No. 6/2006.

hosted entity beyond the parameters of Gibtelecom's network, the WLL being requested by GibFibre could be granted. Under circumstances where Rockolo was not a wholly owned subsidiary of Gibtelecom, this matter might not be one in which the GRA may have competency to resolve however, the fact remains that this is not the case. If for example, it was not in dispute that Rockolo had the legal entitlement to refuse to make a physical connection between Gibtelecom's network and a hosted entity, thus denying GibFibre the benefit of obtaining a WLL, this matter would not be under the competency of the GRA. The GRA however must account for GibFibre's submission that Gibtelecom and Rockolo do form a single economic unit and so, this must be considered.

The GRA has therefore decided to make a finding in respect of the following two questions with a view to determining the extent of the Obligations in respect of Rockolo:

- 1) Does Gibtelecom's obligation to grant a WLL extend 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 the answer to the above is in the affirmative, does Gibtelecom's obligation to provide GibFibre with a WLL to a point within the Data Centre extend to those parts of the Data Centre under the control of Rockolo, namely but not limited to, the provision of CCSs, by virtue of the fact that Rockolo is wholly owned by Gibtelecom, and/or, as the case may be, that it forms part of a single economic unit with Gibtelecom?

If the answers to both of the above are in the affirmative, the GRA can only conclude that Gibtelecom is under an obligation to provide a WLL 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), irrespective of whether such a point is within the control or ownership of Rockolo.

### **Question 1**

**Does the obligation to grant a WLL extend 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?**

A WLL allows, as per the description in 1.3 above, a Provider who has existing network infrastructure extending to two specific locations, to provide dedicated capacity on a wholesale basis, to an alternative Provider between said locations. It is not in dispute that Gibtelecom's

network extends at least as far as the Data Centre, namely because Gibtelecom has a presence in the Data Centre from which it is able to provide services to hosted entities. 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,”<sup>12</sup>, 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. In having obtained the CCS, it is abundantly clear that the CCS forms a part of Gibtelecom’s network as it is able to provide services through it.

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 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 at 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 to 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.

In the circumstances, the GRA finds that the answer to Question 1 is in the affirmative.

## **Question 2**

**Does Gibtelecom’s obligation to provide GibFibre with a WLL to a point within the Data Centre extend to those parts of the Data Centre under the control of Rockolo, namely the CCS, by virtue of the fact that Rockolo is wholly owned by Gibtelecom, and/or, as the case may be, that it forms part of a single economic unit with Gibtelecom?**

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<sup>12</sup> See Note 2 *supra*.

In considering this point, the GRA is guided by the principles of EU Competition Law, especially in light of its competition-related objectives under section 19 of the Act (Objectives of the Authority).

Under competition rules, two or more separate legal entities may be treated as one because of their economic links. In the Akzo Nobel case, (*case T-112/05 Akzo Nobel NV and Others v Commission*) the CJEU held that a 100% control over a subsidiary creates a rebuttable presumption of decisive influence over the subsidiary company.

It is not in dispute that Rockolo is wholly owned by Gibtelecom and, therefore, in accordance with the above ruling, the GRA must conclude that Gibtelecom and Rockolo are a single economic unit.

Furthermore, the GRA is guided by a decision by the *Cour de Cassation* (French Supreme Court) January 6<sup>th</sup> 2015<sup>13</sup>, in which examples of the criteria that can be used in order to assess whether a subsidiary has acted autonomously on its market were provided. Here the court held that matters to be considered were, *inter alia*:

- Whether the management team of the subsidiary consisted of personal staff from the parent company;
- Whether all the members of the subsidiary's board of directors held, or had formerly held, strategic positions within the parent company;
- Whether in certain business offers, the subsidiary presented itself and its parent company as a group to potential clients;
- The two companies framed their services together;
- The parent company was actively involved in the promotion and dissemination of the subsidiary's products.

During the investigation, it was established that the Rockolo Board of Directors is made up entirely of active Gibtelecom employees. Furthermore, the majority, if not all of Rockolo staff, are Gibtelecom employees who have been seconded to Rockolo and some employees are directly employed by Rockolo. Whilst it was not felt necessary to determine whether to any extent, Gibtelecom and Rockolo presented themselves as a group to potential clients, whether they framed their services together or whether Gibtelecom was actively involved in the

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<sup>13</sup> Commercial Chamber of the *Cour de Cassation*, January 6, 2015, n°13-21305 and 13-22477

promotion of dissemination of the Rockolo's products, the facts relating to the make-up of Rockolo's employees was sufficient to further satisfy the GRA of the existence of a single economic unit. Indeed, the mere fact that Rockolo is a wholly-owned subsidiary is sufficient to conclude this. However, if this ceased to be the case, many factors would still lend towards the establishment of a single economic unit under EU principles of law.

Additionally, page 8 of the Decision Notice provides, in respect of the SMP obligations imposed on Gibtelecom, that references in "*this section to any given undertaking shall be taken to include any, and all undertakings which are affiliated with, or controlled by, the undertaking in question.*"

Whilst it is not the case that it is being asserted that the SMP obligations imposed on Gibtelecom extend to Rockolo on a *de facto* basis, by virtue of the fact that Gibtelecom and Rockolo are a single economic unit, if Rockolo does something which, had it been done by Gibtelecom would be deemed to be a breach of its SMP obligations, the liability would extend to Gibtelecom. If therefore, Rockolo acts in a manner which has the effect of causing a detriment to other authorised operators, as might be the case if Gibtelecom acted in such manner in breach of SMP obligations for example, Gibtelecom, as the parent company, may be deemed liable for those actions.

In conclusion therefore, the GRA has determined that any action which Rockolo takes, which is related to Gibtelecom's SMP Obligations or those otherwise imposed by virtue of the Act, must be deemed to be the same action as if Gibtelecom was taking it.

In the circumstances, the answer to Question 2 is also in the affirmative.

## **5. Determination of the Dispute**

Given the above, the GRA finds that it has considered the Dispute and is in a position to determine the Dispute, as per its requirements under s95(2) (a) and (b) of the Act.

It is apparent that what GibFibre wishes to achieve is to have Gibtelecom provide one or more WLL(s) from a point outside of the Data Centre, to a point inside the Data Centre which is connected to a hosted entity. In this manner, via the WLL, GibFibre will be able to have a direct connection to a hosted entity, albeit through Gibtelecom's network. The GRA is satisfied that it has effectively concluded that this is both physically possible, and more importantly, within the scope of the Obligations. To argue that Rockolo is in itself a separate legal entity and thus able to determine whether, or interfere with, Gibtelecom's requirement to comply

with the Obligations is redundant, especially as Gibtelecom is both physically and technologically capable of providing a connection from a point outside of the Data Centre to a point inside the Data Centre which is connected to a hosted entity. Indeed, that is how Gibtelecom is actually able to provide any services to hosted entities within the Data Centre. To deny GibFibre (or indeed any operator) the opportunity to do so, and relying on what is but a feeble argument, is incorrect and unacceptable. Furthermore, the GRA is satisfied that Gibtelecom and Rockolo do in fact form a single economic unit and so, any action Rockolo takes to deny GibFibre of its rights as provided for by the Obligations is the equivalent of Gibtelecom taking such action.

**The GRA therefore DETERMINES that:**

**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 WOULD HIGHLIGHT THAT GIBTELECOM IS THEREFORE UNDER AN OBLIGATION TO GRANT GIBFIBRE THE RELIEF SOUGHT AS PER 2.2 ABOVE.**

Having had determined the Dispute, it is highlighted that in accordance with s97(8) of the Act, this Determination binds all the parties to the dispute.

## **6. Additional Comments and Observations**

Having determined the matter resolved by way of the Determination arrived at, the GRA deems it appropriate to highlight specific points about the dispute. Whilst these points do not form part of the Determination, these should be read as additional comments in respect of the matter.

### **6.1. Breach of the Transparency Obligation**

The GRA has taken care to consider the Evidence in detail in order to assess the matter. The GRA feels that it is of the utmost importance that one aspect of the matter be highlighted in respect of the Obligations. In particular, reference is made to s3.5 of the Decision Notice (page 15), namely the SMP obligation of Transparency which provides that "*Gibtelecom shall make public in response to a reasonable request or requests for wholesale terminating*

*segments of leased lines a Reference Leased Lines Offer (RLLO) within 60 days of any such reasonable request or requests being made."*

The GRA notes that the communication between parties on the matter of the WLL commenced on 12<sup>th</sup> May 2017 and thereon, by email, the relevant aspects of which are reflected in the timeline below:

- 12<sup>th</sup> May 2017 – Initial request from GibFibre in respect of Gibtelecom's RLLO
- 22<sup>nd</sup> May 2017 – Gibtelecom replies stating that the RLLO document is to be produced within a "*certain timeframe*" upon receiving a "*reasonable request*". Gibtelecom also ask for "*all relevant details of your request*".
- 27<sup>th</sup> May 2017 - GibFibre asked for clarification of what these details might be and further add "*please take this email as a formal request to provide us with your RLLO*". Gibtelecom is also asked to provide the RLLO so GibFibre can judge the suitability of the offer and analyse it for suitability for providing connectivity services to customers who are hosted at the data centre.
- 22<sup>nd</sup> June 2017 - GibFibre asks again for confirmation of when RLLO is to be provided.
- 29<sup>th</sup> June 2017 – Gibtelecom state that the matter is being looked into and will revert as soon as practicable and provide that "*For the avoidance of doubt, the RLLO is not common for every operator in Gibraltar. In order to develop one, Gibtelecom has to establish whether a request is a "reasonable" one and hence our request for more details. This would have made our assessment as to whether a request is reasonable or not to be made.*"
- 23<sup>rd</sup> August 2017 – GibFibre asks if Gibtelecom are in a position to provide the RLLO.
- 8<sup>th</sup> September 2017 – Gibtelecom replies stating the following key points:
  - Development of RLLO document is complex and costly, requiring external assistance.
  - Therefore, production of the document takes time, in particular as very little information was provided by GibFibre as to its exact requirements but that Gibtelecom "has had to work around this".
  - More information was needed to assess whether the request was a reasonable one as Gibtelecom might need to make important investments to provide leased lines on a wholesale level and "thereby avoid frivolous queries".
  - Gibtelecom does not consider the request to be a "reasonable" one based on the sparse information received, the matter is being progressed.
  - Gibtelecom now need more precise details to proceed namely:

- Expected start and end dates
  - Service use over the next years
  - What number of leased lines
  - What speed of leased lines (including estimated going forward)
  - Routing requirements (start and end points)
  - Redundancy requirements
  - Any site requirements
  - Remote access to QoS monitoring
- 13<sup>th</sup> September 2017 – GibFibre provides all the information requested in previous communication

The GRA notes that the RLLO was published by Gibtelecom on 1<sup>st</sup> December 2017, meaning that there is clear evidence to support the fact that Gibtelecom breached the requirement to publish the RLLO within 60 days. Whilst the GRA is minded to conclude that a reasonable request was made by GibFibre on the 27<sup>th</sup> May 2017, even if this is deemed incorrect, the reasonable request was undoubtedly made (after complying with all of Gibtelecom’s requirements), on the 13<sup>th</sup> September 2017. Given that the RLLO is dated 1<sup>st</sup> December 2017, there can be no doubt that the 60-day limit was not adhered to.

The GRA notes that its role in determining a dispute is not to investigate breaches with a view to imposing additional *ex-ante* regulatory measures or penalise operators who have committed breaches, but rather determine the dispute with a view to resolving the matter. In this respect therefore, the GRA will not take advantage of this platform to seek recourse against the breach of the Transparency Obligation, suffice to say that it reserves the right to do so under its powers as granted by the Act.

## **6.2. Timely Process**

The GRA notes with disappointment, Gibtelecom’s demeanour in the process leading up to the point where GibFibre submitted its request for the resolution of the Dispute. In particular, reference is made to the above timeline, and the obvious delays following GibFibre’s attempts to progress the matter, namely, enter into an RLLO agreement with Gibtelecom. In particular, reference is made to s3.5 of the Decision Notice (page 16), specifically the SMP obligation of Access which provides that:

*1. Gibtelecom shall meet reasonable requests for access to, and use of, specific network elements and associated facilities as described in Regulation 13.*

*2. Gibtelecom shall meet access requests made under 1 above using terms which are fair and processes which are timely.*

The GRA would highlight point 2 above with particular reference to the requirement that processes must be timely. It is clear from the above timeline that Gibtelecom's processes for the production of the RLLO are far from timely. Furthermore, Gibtelecom is aware that it, as with all operators, is required to abide by the General Condition on Access and Interconnection, as published by the GRA on 29<sup>th</sup> January 2018<sup>14</sup> (the "General Conditions"). In particular, the GRA would point out that General Condition 1 provides that "*Undertakings shall negotiate Access and/or Interconnection agreements or amendments to existing agreements with other undertakings for the purpose of providing publicly available electronic communications services within a reasonable period.*" The GRA is clear that Gibtelecom's conduct does not amount to negotiation within a reasonable period, which can only have detrimental effects on the local telecommunications market. It is hoped that Gibtelecom will take the utmost account of this observation, with a view to reflecting upon its future conduct with competing operators.

As stated above, this platform is not designed to bring about a mechanism for imposing additional *ex-ante* regulatory measures or penalise operators who have committed breaches and so, no further action will result directly. However, the GRA reserves the right to investigate this under its powers as granted by legislation.

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<sup>14</sup> Notice on General Conditions, 29<sup>th</sup> January 2018  
(<https://www.gra.gi/communications/documents/notices/notice-on-general-conditions-c08-17>)