[2024 Gib LR 301]

GIBFIBRE LIMITED v. GIBTELECOM LIMITED and ROCKOLO LIMITED

SUPREME COURT (Restano, J.): July 22nd, 2024

2024/GSC/022

Competition Law—abuse of dominant position—market definition—colocation services and cloud services form part of same product market—market also includes remote gambling jurisdictions such as Channel Islands, Malta and Isle of Man—defendants not dominant in market

The claimant alleged a breach of competition law.

The claimant ("Gibfibre") provided electronic communication services to customers in Gibraltar by means of a network of fibre optic infrastructure that it had constructed. The first defendant ("Gibtelecom") provided electronic communications services to customers in Gibraltar. The second defendant ("Rockolo") was a wholly owned subsidiary of Gibtelecom, and it owned and ran two data centres that offered third-party colocation services. The first was established by Gibtelecom at Mount Pleasant ("the MP data centre"). Rockolo later took over the ownership and running of the MP data centre and also set up a small data centre in 2017 at the World Trade Centre ("the WTC data centre").

There were currently three other operators of data centres in Gibraltar: Continent 8, Sapphire Networks and Gibfibre.

Data centres offering colocation services in Gibraltar were popular with large betting and gaming companies which offered remote gambling services to customers outside Gibraltar and which required their servers and other IT equipment to be housed there. A business which placed its IT equipment in a data centre would require connectivity services running from that data centre to allow its IT equipment within the data centre to communicate with IT equipment outside the data centre. Reliability in relation to connectivity was very important. This would typically consist of a high-band internet connection with inbuilt redundancy. The MP data centre operated on a carrier owned model which meant that as well as providing for storage of servers in the controlled conditions of the data centre, Gibtelecom provided connectivity services at the data centre. There was an exception to this arrangement in that Rockolo also had a commercial agreement with Sapphire Networks (another rival telecommunications

company) which was allowed to provide its own connectivity services there.

Gibfibre's complaint concerned the defendants' decision to prevent it from providing connectivity services to users of the MP data centre, which Gibfibre alleged was in breach of competition law. Gibfibre complained that because of the defendants' refusal to grant it access to the MP data centre, clients using that data centre had been unable to make use of Gibfibre's connectivity services. It had lost the chance to provide international circuits for five identified customers as well as the chance to provide identified internet protocol access or transit circuits to Gamesys and to 75% of Gibtelecom's Flexiband customers in both of the defendants' data centres.

There was a factual dispute as to whether the defendants had refused to supply Gibfibre at the WTC data centre or whether its conduct in that regard amounted to a constructive refusal.

As the claim dated back to 2015, both the Treaty on the Functioning of the European Union and the Competition Act 2020 were relevant. Article 102 of the TFEU provided:

> "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Section 10(1) of the Competition Act provided:

> "Subject to section 11, any conduct on the part of one or more undertakings which amounted to the abuse of a dominant position in a market was prohibited if it might affect trade within Gibraltar."

It was common ground that Gibtelecom and Rockolo should be treated as the same economic unit and therefore an "undertaking" for the purposes of competition law.

The court had to determine, first, whether the relevant market for colocation services included cloud services and, if so, when cloud services formed part of this market; and whether the relevant market for colocation services extended to other remote gambling jurisdictions such as the Isle of Man, the Channel Islands, Malta and the Republic of Ireland. The parties agreed that if the relevant market for colocation services included cloud

services or extended to other jurisdictions, that would be the end of the claim. Secondly, if the market definition was narrow, excluding cloud services and colocation services in other jurisdictions, the court had to determine whether the defendants enjoyed a position of economic strength enabling them to prevent effective competition in the market. Thirdly, if the defendants were dominant in a market limited to third party colocation services in Gibraltar, the court had to determine whether their refusal to allow Gibfibre access to customers within the MP data centre amount to unlawful abuse. Fourthly, in the event that Gibfibre established its claim, the court had to determine whether it suffered loss and, if so, how much.

The 2024 Commission Notice on Market Definition stated that the main approach used by the Commission to define the product market was to assess the substitutability of products from the perspective of the customer, *i.e.* demand substitution. The Notice stated that the theoretical criterion often used to determine whether the candidate market constituted a relevant product market was whether a hypothetical monopolist in the candidate market could exercise market power (the HMT test). This could be assessed by asking whether a hypothetical monopolist would find it profitable to implement a small but significant non-transitory increase in price (the SSNIP test). An alternative test assessed how consumers would respond to a small but significant non-transitory decrease in quality (the SSNDQ test). The Notice stated that the test for defining the geographic market was whether the conditions of competition were sufficiently homogenous for the conduct to be assessed, and which could be distinguished from other geographic areas, in particular because conditions of competition law were appreciably different in those areas. The Commission would examine evidence such as the presence of the same or different suppliers across geographic areas, similarities or differences in their market shares and prices, similarities or differences in customer preferences and purchasing behaviour, barriers and costs associated with supplying customers in a different area, and distance-related factors affecting costs.

Gibfibre argued in relation to market definition that (a) when considering the product market, cloud services should be limited to "Infrastructure as a Service" ("IaaS"), the lowest level of cloud service, and that references to "Back-up as a Service" ("BaaS"), a cloud service offering more features, arose late in the day and it had not had a fair opportunity to address this; (b) there were material differences between colocation services and cloud services; (c) it was unlikely that a small and diluted change in the relative supply conditions of the two services would constitute a material factor in determining the pace of the trend away from colocation services; (d) the prevailing prices were already supra-competitive, requiring a counterfactual price that would prevail under more effective competition for the SSNIP test; (e) cloud services formed part of the product market from 2021 or 2022 when there was a sharp decline in demand for colocation services in Gibraltar; and (f) the geographic market was limited to Gibraltar. Gibfibre argued in relation to dominance that (a) floorspace was not a relevant metric when considering market share; (b) the data on rack capacity and

rack occupancy showed that the defendants had a market share of over 50%, which gave rise to a presumption of dominance; (c) when other relevant factors were taken into account, none of the past or current colocation providers in Gibraltar constituted a sufficiently effective constraint on the defendants, and constraints from outside the market (self-provision, cloud services and other e-gambling jurisdictions) were not sufficiently strong either; (d) there were various barriers to entry and expansion in the colocation market in Gibraltar, and there was no convincing evidence that countervailing buyer power constituted an effective constraint on the defendants' conduct; (e) Continent 8 was unable to offer any effective constraint on the defendants, having fewer racks than the defendants and relying on the defendants for connectivity; (f) the fact that Sapphire had no capacity for new clients meant that it could not provide a constraint, and the fact that it was located below sea level constituted a competitive disadvantage; (g) any out-of-market constraint was marginal and did not materially affect the analysis of dominance; (h) the defendants enjoyed several advantages including their size, "first mover advantage," a related reputational advantage, the fact that it had two data centres, and that it was the only undertaking in the market which could use the sub-sea cable as of right; (i) the costs of switching service providers were high and constituted a major barrier for rivals or potential rivals to win business from the defendants; and (j) the fact that e-gambling customers were large multi-national companies was not enough to show buyer power. The defendants' customers did not have an effective choice because of switching costs, the rivals' lack of rack capacity and that out-of-market options were marginal. As to abuse, Gibfibre pleaded specific examples of abusive conduct, namely abusive tying, abusive discrimination, abusive refusal to supply, abusive trading conditions, abusive exclusive purchasing agreements, abusive limitation of markets to the prejudice of consumers and abusive market sharing with Sapphire. The basic wrong or overarching theory of harm relied on by Gibfibre was that (i) the defendants leveraged their dominance in the relevant upstream market for colocation services to foreclose effective competition on the relevant downstream markets for the provision of connectivity services at the defendants' data centres; and (ii) the defendants' conduct had had the effect of distorting the structure of competition in those downstream markets. It was said that this was an "essential facilities" case, like cases involving ports and airports.

In relation to market definition, the defendants argued that (a) the product market included colocation services and cloud services; (b) from 2017–2018, they had lost important colocation customers to cloud services; (c) the cloud formed part of the same product market from 2017; and (d) the market included other gambling jurisdictions. In relation to assessing dominance, the defendants argued that (a) floorspace should be taken into account and their market share, if measured by floorspace, was far below the level where one might expect any finding of dominance; (b) the data did not point to dominance; (c) they could not behave independently of customers, unconstrained by competition; (d) taking the example of a large

multinational gaming company, it was clear that there were various options open to such a customer if it was not content with the defendants' colocation services for any reason, including price. It could use cloud services, relocate its servers (or at least the bulk of them) to another jurisdiction, decide to utilize self-provision and manage its servers in-house, or go to a competitor instead; (e) the defendants relied on the fact that they had not raised their prices in 12 years; (f) Continent 8 and Sapphire provided competitive constraint; (g) both cloud services and other e-gaming jurisdictions constrained the defendants' ability to behave to an appreciable extent independently of its competitors, customers and ultimately consumers; (h) whilst costs for setting up a data centre were high, they could be recovered through revenues that were generated once a new business was operational; (i) although switching costs were high, the defendants had both won and lost customers which showed that there were no material barriers to customers switching; and (j) the fact that e-gambling customers were big, sophisticated players that could switch or threaten to switch to competing suppliers (including out-of-market providers) showed that they had significant countervailing customer buyer power. In relation to abuse, the defendants submitted that Gibfibre's overarching theory of harm was incorrect.

Held, dismissing the claim:

(1) Cloud services and colocation services formed part of the same product market. When considering whether cloud services formed part of the same market as colocation services, the court's focus was on interchangeability or substitutability. There were differences between cloud services and colocation services, principally that with colocation services the customer owned the equipment whereas with cloud services the cloud provider owned the equipment and there were layers of service on offer. However the differences did not detract from the interchangeability of the products. What mattered was whether the services sufficiently competed with each other to be sensibly regarded as being in the same market. Cloud services and colocation services were materially the same in the sense that they involved outsourcing the management of data to premises owned, equipped and maintained by a third party. Cloud services could be seen as an evolution from traditional hosting services. If a hypothetical monopolist supplier of colocation services were to increase prices by 5%–10%, a sufficient number of hypothetical monopolist customers would switch to cloud services, making a SSNIP unprofitable and constraining a hypothetical monopolist in colocation services. Looking at the evidence in the round, cloud services and colocation services were sufficiently interchangeable and sufficiently competed with each other to be sensibly regarded as forming part of the same market from January 1st, 2018. Furthermore, remote gambling jurisdictions should be included in the relevant market definition for the period of this claim. The core customer base for colocation services comprised large and sophisticated e-gaming companies that operated in multiple jurisdictions. There was real

competition between jurisdictions such as Gibraltar, the Isle of Man, Malta and the Channel Islands. The proper conclusion to be drawn from all the evidence was that a SSNIP by a hypothetical monopolist in colocation services in Gibraltar would not be profitable because customers would switch to a different remote gambling jurisdiction. It followed that colocation providers in Gibraltar and other remote gambling jurisdictions sufficiently competed with each other to be sensibly regarded as being in the same market. Whilst the precise boundaries of the geographical market might be unclear, it made no difference in practice. It only took one of these jurisdictions to be included in the relevant market for the allegation of dominance to fail, and the evidence showed that at least one and probably most of these jurisdictions formed part of the same geographic market for the entire period of this claim. Therefore, colocation services in Gibraltar, cloud services, and colocation services in some other jurisdictions all sufficiently competed with each other to be regarded as forming part of the same market. The defendants therefore did not have a dominant position in the market and the claim would be dismissed (paras. 24–49; paras. 207–320).

(2) Even if the court had accepted Gibfibre's narrow market definition, Gibfibre had not established that the defendants were dominant in the market for colocation services. Dominance related to a position of economic strength enjoyed by an undertaking which enabled it to prevent effective competition in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and consumers. If an undertaking was capable of profitably increasing prices above the competitive level for a significant period of time it did not face sufficiently effective competitive constraints and could generally be regarded as dominant. An assessment of dominance would take into account the competitive structure of the market, and in particular constraints imposed by actual competitors, potential competitors and countervailing buyer power. An undertaking's market share was an important tool in assessing market power but was not the sole indicator of an undertaking's strength in the market. Other factors that might be relevant included barriers to entry or expansion, access to specific assets and inputs, product differentiation and the degree of substitutability. In determining market shares in this case, floorspace was a relevant metric and should be taken into account as a feature of spare capacity for competitors, along with occupied racks and total rack capacity. On the figures, in particular given the presence in Gibraltar of a strong international competitor (Continent 8) which had a large market share, the defendants did not have a dominant position in the market. In any event, market shares needed to be interpreted in the context of the market and its particular dynamics. Important factors in this case were pricing behaviour, the position of other competitors in the market, out-of-market constraints, barriers to entry and expansion, switching costs and countervailing buyer power. The defendants' prices for colocation services had remained static from 2007 to 2018, and it only then raised prices by 10% to new customers. This was not indicative of an

undertaking able to price without meaningful competitive constraints. In addition to the defendants, there were currently three other operators of data centres in Gibraltar: Continent 8; Sapphire; and Gibfibre. The evidence showed that together these local competitors presented an effective constraint on the defendants. If the court's finding that the cloud and colocation formed part of the same product market were wrong, the parties agreed that the possible effects of those markets as out-of-market constraints must be considered. The court considered that, even if the cloud and other e-gaming jurisdictions were in a different market from the colocation market, they amounted to material competitive constraints on the defendants. The impact of expansion by existing competitors and entry by potential ones was important when considering dominance. There was no suggestion that there were legal or regulatory barriers limiting the development of data centres in Gibraltar, beyond the usual business requirements. The barriers to entry and expansion were unexceptional in the context of a dominance assessment. Switching colocation provider was likely to be expensive unless it could be timed with the renewal of a colocation contract or when hardware needed to be refreshed. There was however a chance that the prospective colocation provider would offer an incentive to mitigate these costs. Whilst there might be some business challenges to bringing about switching, they were not insurmountable and there were ways in which this could be achieved effectively. The fact that the defendants had lost customers to various alternative providers and gained customers from rivals was real-world evidence which served to confirm this. There was evidence of significant countervailing customer buyer power in the colocation market. Taking everything in the round, the evidence did not support a finding that the defendants' market power was such as to enable them to behave to an appreciable extent independently of their competitors, their customers and ultimately their consumers. There was no valid basis for a finding of dominance for the period of this claim (paras. 50–67; paras. 327–392).

(3) Even if the defendants had a dominant market position, there had been no abuse of that position. The TFEU and the Competition Act listed four specific examples of abusive conduct, namely (i) the imposition of unfair trading conditions; (ii) the limitation of production, markets or technical development to the prejudice of customers; (iii) the application of dissimilar conditions to equivalent transactions; and (iv) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, had no connection with the subject of such contracts. The relevant market was business retail connectivity services and there was no plausible case that the refusal of access to the defendants' data centres had resulted in any degree of foreclosure in the business retail connectivity market. There was no identified anti-competitive effect arising from the correctly defined retail business connectivity market. The court rejected Gibfibre's characterization of the upstream/downstream markets and its aftermarkets theory. Gibfibre's overarching theory of harm was wrong and not in accordance

with orthodox legal or economic principles. The court nevertheless considered some of the specific abuse complaints. In relation to refusal to supply, when determining whether a refusal to supply to a customer in a downstream market amounted to an abuse of dominant position, five issues must be addressed: (i) was there a refusal to supply? (ii) did the accused undertaking have a dominant position in an upstream market? (iii) was the product to which access was sought indispensable to someone wishing to compete in the downstream market? (iv) would a refusal to grant access lead to the elimination of effective competition in the downstream market? (v) was there an objective justification for the refusal? There was no question that the defendants had refused to supply Gibfibre with access to the MP data centre. The defendants did not have a dominant position in an upstream market. Gibtelecom was not dominant in the retail business connectivity market. Access to the MP data centre was not indispensable to someone wishing to compete in the downstream colocation services market. Anyone wanting to compete in that market would be able to establish a data centre, as Gibfibre had in fact done. Even if the downstream market were to be the retail business connectivity market, there was no question of access to the MP data centre being indispensable for someone to compete in that market. If, as the court had found, the downstream market was in fact the third party colocation market, it followed that effective competition in this market did not depend on Gibfibre being granted access to the defendants' data centres. Even if the downstream market were to be the retail connectivity market, refusal to grant access to the defendants' data centres could not be said to have led to the elimination of effective competition in that market. There were various players in the business connectivity market and Gibtelecom was not dominant in that market. There was therefore no need for the defendants to justify any refusal to supply, as the refusal to supply complaint failed for the reasons set out above. In relation to abusive tying, assuming the defendants were dominant in the colocation services market, the complaint failed in so far as it related to the MP data centre. Customers at the MP data centre could purchase connectivity from the defendants or Sapphire, and they were not required to take connectivity services from the defendants. Although there was no choice of an alternative connectivity provider at the WTC data centre, there was no evidence that that was because of any tying arrangement. Further, customers who wished to take connectivity from Sapphire could opt for the MP data centre instead of the WTC data centre. In relation to abusive discrimination, there were no transactions to which Gibfibre could say that dissimilar conditions were being applied. Indeed, the basis of Gibfibre's complaint was that it had not entered into a transaction with the defendants. Therefore even if, contrary to the court's conclusion, the defendants were dominant in any relevant market, they had not abused their position (paras. 68–75; paras. 393–465).

(4) As the competition law claim failed it was not strictly necessary to consider, if it had succeeded, the level of damages that would have been awarded to Gibfibre. However, since this issue was fully argued on both

sides, the court indicated its views. The relevant principles which applied to a claim for damages for breach of statutory duty in the competition law context were that: (i) claims were to be assessed on the tortious compensatory basis, *i.e.* placing the party who had suffered in the same position as they would have been if they had not sustained the wrong for which they were now getting compensation; (ii) loss of a chance was a recognized head of damage or loss in the context of such claims, and Gibfibre needed to show that it had lost the particular chance(s); (iii) where it did so, the lost chance must be quantified and expressed as a percentage. At this stage, the court did not apply a balance of probabilities approach. Instead, the court estimated the loss by making the best attempt on the evidence to evaluate the value of the chances lost; (iv) to the extent that the supposed beneficial outcome depended on what a third party would have done, namely the colocation customers seeking connectivity services, Gibfibre must show that it had a real and substantial chance of achieving a better outcome than was in fact achieved. A real and substantial chance was not a negligible one. A 10% prospect of succeeding in relation to a transaction worth billions of pounds might not be negligible for the same company compared with one that is worth thousands; and (v) the fundamental requirement of justice was that the court must do the best it could with the available evidence, often labelled the "broad axe" or "broad brush" principle. The court did not accept all of Gibfibre's alleged losses. Gibtelecom's Flexiband connectivity offering for premium customers was superior to Gibfibre's equivalent product. There were material differences in network resilience and the service offered. Although more expensive, Gibtelecom's premium service appeared to be most attractive to premium customers in the e-gambling industry where, although price was important, resilience was the most important factor. In all the circumstances, on the hypothetical basis that Gibfibre would have succeeded with its claim, it would have been entitled to £311,990, less costs (paras. 466–543).

Cases cited:

(1) *Aberdeen Journals Ltd.* v. *Director General of Fair Trading*, [2002] CAT 4; [2004] Comp AR 358, considered.

(2) *Aéroports de Paris* v. *E.C. Commn.*, Case T-128/98; [2001] 4 CMLR 38; on appeal, Case C-82/01; [2003] 4 CMLR 12, distinguished.

(3) *Allergan plc* v. *Competition Markets Auth.*, [2023] CAT 56, considered.

(4) *Arriva The Shires Ltd.* v. *London Luton Airport Operations Ltd.*, [2014] EWHC 64 (Ch), referred to.

(5) *BGL (Holdings) Ltd.* v. *Competition & Markets Auth.*, [2022] CAT 36, considered.

(6) *Corsica Ferries Italia Srl* v. *Corpo dei Piloti del Porto di Genova*, C-18/93, EU:C:1994:195, referred to.

(7) *Gøtrrup-Klim e.a. Grovvareforeninger* v. *Dansk Landbrugs Grovvareselskab AmbA*, [1994] ECR I-5641; [1994] EUECJ C-250/92, referred to.

(8) *Hoffmann-La Roche* v. *Commn.*, Case C-85/76, ECR 1979; [1979] 3 CMLR 211, considered.
(9) *Hutchison 3G (UK) Ltd.* v. *Office of Communications*, [2005] CAT 39, considered.
(10) *Konkurrensverket* v. *TeliaSonera Sverige AB*, [2011] EUECJ C-52/9, referred to.
(11) *Mastercard Inc.* v. *Merricks*, [2020] UKSC 51; [2021] 3 All E.R. 285; [2021] Bus. L.R. 25, referred to.
(12) *Merci Convenzionali Porto di Genova SpA* v. *Siderurgica Gabrielli SpA*, Case C-179/90, EU:C:1991:464; [1994] 4 CMLR 422, referred to.
(13) *NV Nederlandsche Banden Industrie Michelin* v. *E.C. Commn.*, [1983] EUECJ C-322/81; [1985] ECR 3461, considered.
(14) *Oneplus Technology (Shenzhen) Co. Ltd.* v. *Mitsubishi Electric Corp.*, [2020] EWCA Civ 1562, referred to.
(15) *Oscar Bronner GmbH & Co. KG* v. *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, Case C-7/97; [1998] EUECJ C-7/97; [1998] ECR I-7791, considered.
(16) *Perry* v. *Raleys Solicitors*, [2019] UKSC 5; [2020] A.C. 352; [2019] 2 W.L.R. 636; [2019] 2 All E.R. 937; [2019] PNLR 17, referred to.
(17) *Purple Parking Ltd.* v. *Heathrow Airport Ltd.*, [2011] EWHC 987 (Ch), considered.
(18) *United Brands Co.* v. *E.C. Commn.*, [1978] EUECJ C-27/76; [1978] ECR 207, applied.

Legislation construed:

Competition Act 2020, s.10(1): The relevant terms of this subsection are set out at para. 17.

Treaty on the Functioning of the European Union, art. 102: The relevant terms of this article are set out at para. 15.

N. Gibson and *P. Grant* (instructed by Signature Litigation) for the claimant;
R. Palmer, *K.C.*, *N. Grubeck*, *M. Levy* and *S. Marrache* (instructed by Hassans) for the defendants.

JUDGMENT (NON-CONFIDENTIAL VERSION)[1]

[1] Redactions in this judgment relate to commercially confidential information further to a confidentiality ring order made on June 13th, 2023.

1 **RESTANO, J.:**

A. Introduction

This is my judgment following the trial of a claim in which the claimant, Gibfibre Ltd. ("Gibfibre") alleges an abuse of a dominant position against the defendants. Gibfibre's core complaint, on which the claim is based, concerns the defendants' decision to prevent it from providing connectivity services to users of the defendants' data centre at Mount Pleasant, and which Gibfibre alleges is in breach of competition law.

2 The trial was heard on March 4th–22nd, 2024. Gibfibre was represented by Nicholas Gibson of Matrix Chambers and Paul Grant of Signature Litigation. The defendants were represented by Robert Palmer, K.C. and Nikolaus Grubeck of Monckton Chambers, and Moshe Levy and Samuel Marrache of Hassans. I would like to express my thanks at the outset of this judgment to counsel for the high quality of their submissions in this technical case which have been of great assistance to me, especially as this happens to be the first competition law claim to come before the Gibraltar courts.

3 As will become apparent, the evidence was detailed and concerned many features of the data centre and connectivity industries. Many disputed factual, expert and legal issues arose in this claim, with lengthy written opening and closing submissions filed by both sides. It is neither possible nor desirable for me to summarize every aspect of the evidence given by

all the witnesses, or to deal with every single argument advanced by the parties. The fact, however, that these do not feature expressly in this judgment does not mean that they have been overlooked.

A brief overview of the dispute

4 Gibfibre is a family-owned company, providing electronic communication services to customers in Gibraltar by means of a network of fibre optic infrastructure that it has constructed. It has also recently established a data centre as part of its business.

5 The first defendant, Gibtelecom Ltd. ("Gibtelecom") provides electronic communications services to customers in Gibraltar, and it was the first to do so. The second defendant, Rockolo Ltd. ("Rockolo") is a wholly owned subsidiary of Gibtelecom, and it owns and runs two data centres that offer third-party colocation services. The first of those data centres was established by Gibtelecom in 2007 at Mount Pleasant ("the MP data centre"), and it is that data centre which is the main focus of this case. Rockolo later took over the ownership and running of the MP data centre, and also set up a smaller data centre in 2017 at the World Trade Center ("the WTC data centre").

6 Typically, data centres offering colocation services will have high levels of security, back-up power supplies, and a temperature and humidity-controlled environment intended to optimize performance of IT equipment.

7 Data centres offering colocation services in Gibraltar are popular with large betting and gaming companies which offer remote gambling services to customers outside Gibraltar, and which require their servers and other IT equipment to be housed there.

8 A business that places its IT equipment in a data centre will require connectivity services running from that data centre to allow its IT equipment within the data centre to communicate with IT equipment outside the data centre. Reliability in relation to connectivity is therefore very important. This will typically consist of a high-band internet connection with inbuilt "redundancy." Redundancy generally refers to extra capacity available in the network to deal with disruptions so that connectivity is not affected. Such connectivity can, in principle, be provided either by the operator of the data centre or by a third-party provider. Data centres that exclusively provide connectivity services are referred to as a "carrier owned" model of the business, as opposed to a "carrier neutral" model where data centres allow third parties to provide connectivity.

9 The MP data centre does not operate on a carrier neutral basis, and it is not open to all telecommunications operators. Rather, it operates on the

carrier owned model. This means that as well as providing for storage of servers in the controlled conditions of the data centre, Gibtelecom provides connectivity services at the MP data centre. There is an exception to this arrangement in that Rockolo also has a commercial agreement with Sapphire Networks ("Sapphire") (another rival telecommunications company) which is allowed to provide its own connectivity services there.

10 Gibfibre's main complaint is that because of the defendants' refusal in November 2015 to grant it access to the MP data centre, clients using that data centre have been unable to make use of Gibfibre's connectivity services as from that date. Gibfibre alleges that it has suffered losses running into millions of pounds because of its exclusion from the MP data centre.

11 The defendants say that this is a complaint without precedent because, despite this being a heavily regulated and investigated industry, no competition authority in Europe has ever held that a carrier-owned data centre is required to admit competing connectivity providers.

12 This complaint has already come before the courts in another guise. Gibfibre previously sought access to the MP data centre by means of regulatory intervention, first by routing its own fibre cables though ducts, and then with a leased line. Both these attempts were ultimately unsuccessful: see *Gibfibre Ltd. (t/a GibFibreSpeed)* v. *Gibraltar Regulatory Auth.* (reported at 2021 Gib LR 682), and *Gibtelecom Ltd.* v. *Gibraltar Regulatory Auth.* (reported at 2023 Gib LR 266). In the Privy Council's judgment in the first of those two cases, Lord Hamblen said (2021 Gib LR 682, at para. 51) that if Gibtelecom's behaviour was anti-competitive or if it was abusing its dominant position that is a matter to be addressed by *ex post* regulation under competition law. This is now that competition law claim.

B. The issues in the case

13 The headline questions for the determination of this claim are as follows:

Market definition

(1) Whether the relevant market for colocation includes cloud services. If so, as from when did cloud services form part of this same market?

(2) Whether the relevant market for colocation extends to other "remote gambling jurisdictions" such as the Isle of Man, the Channel Islands, Malta and the Republic of Ireland.

Dominance

(3) The parties agreed that if the relevant market for colocation services includes cloud services or extends to other jurisdictions, that is the end of the claim. Assuming a narrow market definition excluding cloud services and colocation services in other jurisdictions, the next question is, do the defendants enjoy a position of economic strength enabling it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers. This dominance assessment will involve consideration of market shares and competitive constraints.

Abuse

(4) Assuming that the defendants had been dominant in a market limited to third party colocation services in Gibraltar, does their refusal to allow Gibfibre access to customers within the MP data centre amount to unlawful abuse?

Quantum

(5) In the event that Gibfibre establishes its claim, has it suffered loss, and if so how much?

C. The relevant competition law principles

14 Prior to the UK's, and therefore Gibraltar's, exit from the EU on January 31st, 2020, EU law applied in Gibraltar under s.3(1) of the European Communities Act 1972. This included art. 102 of the Treaty on the Functioning of the European Union ("TFEU") which is directed towards the unilateral conduct of dominant firms that act in an abusive manner.

15 Article 102 provides as follows:

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

16 The European Communities Act continued to apply after Gibraltar's departure from the European Union until December 31st, 2020 pursuant to s.4A of the European Union (Withdrawal) Act 2019. The following day, on January 1st, 2021, the Competition Act 2020 came into force in Gibraltar. Like s.18 of the Competition Act 1998 in England & Wales, s.10 of the Competition Act 2020 is closely modelled on art. 102 TFEU, and the case law relating to art. 102 therefore remains relevant.

17 Section 10(1) in chapter 2 of the Competition Act 2020 provides that:

"Subject to section 11, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within Gibraltar."

18 Section 10(2)(a)–(d) lists the same, non-exhaustive examples of abuse as set out in art. 102(a)–(d) TFEU. Section 10(3) provides that "dominant position" means a dominant position within Gibraltar.

19 As the claim dates back to 2015, both the TFEU and the Competition Act 2020 are relevant, with each prohibition covering a different period. Given that s.10 of the Competition Act 2020 mirrors the art. 102 TFEU prohibition, when referring to the prohibitions in this case, I will generally only refer to art. 102 TFEU for the sake of convenience.

20 The TFEU prohibitions apply to one or more "undertakings," and it is common ground that Gibtelecom and Rockolo should be treated as the same economic unit and are therefore an "undertaking" for the purposes of competition law.

21 In its seminal judgment in *United Brands Co.* v. *E.C. Commn.* (18), the Court of Justice of the European Union ("the Court of Justice"), at that time known as the European Court of Justice, laid down the following test of what is meant by dominance ([1978] EUECJ C027/76, at para. 65):

"The dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

22 That test, which has been repeated many times since, requires the following:

(1) A determination as to whether an undertaking has the necessary market power to give rise to dominance. This in turns requires the market in which that power is said to exist to be defined. This means identifying the relevant product and geographic market in which the allegedly dominant undertaking operates. In this case, the question for the court is whether the market is restricted to third party colocation services in Gibraltar, as Gibfibre contends, or whether it includes cloud services and colocation services providers outside Gibraltar, as the defendants contend.

(2) Having defined the relevant market, the court must consider whether the undertaking is dominant within that relevant market. That requires an assessment as to dominance to be carried out, identifying the correct metrics for that purpose.

(3) If dominance is established, the court must then consider whether there has been an abuse of its position by the dominant undertaking.

23 The parties diverge on all these three major issues.

C1. Markets

Market definition and market power

24 The legal concept of "a dominant position" in art. 102 equates to the economic concept of "substantial market power." Competition law adopts a two-stage procedure when determining whether an undertaking has market power. First, the relevant market is defined in relation to which market power may exist. This requires a definition of both the relevant product and the relevant geographic market. The second stage is to determine whether the undertaking has market power in the relevant market. Market definition is therefore only a means to an end: the crucial question is whether an undertaking has market power.

General principles of market definition

25 The EU Commission's Notice on the definition of the relevant market for the purposes of Union competition law 22.02.2024, C(2024/1645) ("the 2024 Commission Notice on Market Definition") was published on February 8th, 2024, shortly before this trial commenced, and it is the first revision to the market definition guidelines since 1997. This significantly expands the Commission's guidance, and brings it in line with new market realities and developments, in particular the increased digitalization and the new ways of offering goods and services. This provides a recent, comprehensive and authoritative summary of relevant principles for defining markets, which both parties relied on. I will now proceed to highlight a few of these principles that are relevant to this case.

26 Paragraph 6 of the 2024 Commission Notice on Market Definition, which deals with the role of market definition, states as follows:

> "Market definition is a tool that the Commission uses to identify and define the boundaries of competition between undertakings. The main purpose of market definition is to identify in a systematic way the effective and immediate competitive constraints faced by the undertakings involved when they offer particular products in a particular area. Market definition leads to the identification of the relevant competitors of the undertaking(s) involved when they offer those products, as well as the relevant customers. Only products that exert effective and immediate competitive constraints within the relevant timeframe form part of the same relevant market as those of the undertaking(s) involved, while other less effective, or merely potential, constraints are considered as part of the competitive assessment." [Footnotes excluded.]

27 Pausing there for a moment, I note that the UK Office of Fair Trading Guideline on Market Definition dated December 2004 ("OFT 403") adopts the same approach as that of the Commission. Paragraph 2.1 of OFT 403, for example, states that:

> "Market definition is not an end in itself but a key step in identifying the competitive constraints acting on a supplier of a given product or service. Market definition provides a framework for competition analysis. For example, market shares can be calculated only after the market has been defined and, when considering the potential for new entry, it is necessary to identify the market that might be entered. Market definition is usually the first step in the assessment of market power."

28 Returning to the 2024 Commission Notice on Market Definition, the role of market definition is set out in para. 8 of the 2024 Commission Notice on Market Definition as follows:

> "The Commission generally uses market definition where there is a need to assess the relative competitive strength of undertakings as part of the competitive assessment and, most notably, to assess whether an undertaking holds market power. Market definition is thus an intermediate tool to structure and facilitate the competitive assessment in appropriate cases and is not a mandatory step in all assessments under Union competition law. When subsequently conducting the competitive assessment and analysing market power, the Commission carries out an overall assessment of all relevant constraints on the undertaking(s) involved in the relevant product and geographic markets, which may include an assessment of barriers to entry or expansion, the impact of scale economies (which may include those that may be drawn from out-of-market activities) or network

> effects, access to specific assets and inputs, as well as product differentiation. That assessment may also include sufficiently foreseeable changes in such constraints when the case calls for a forward-looking assessment. As an intermediate step in the overall assessment process, it is necessary for market definition to be up-to-date at the time of the relevant conduct or concentration and based on facts, as further explained in paragraph 14." [Footnotes omitted.]

29 This is repeated at para. 22 of the 2024 Commission Notice on Market Definition. This states that the main purpose of market definition is to provide, in an intermediate step, a framework to structure and facilitate the competitive assessment, by identifying in a systematic way the effective and immediate competitive constraints faced by the undertaking(s) involved when they offer particular products to customers in a particular area.

30 Paragraph 12 sets out the test to define markets in accordance with the jurisprudence as follows:

> "First, in line with the case law of the Court of Justice and the General Court of the European Union ('the Union Courts') and the Commission's case practice, the relevant market within which the Commission appraises competition dynamics typically comprises a product and a geographic dimension.
>
> (a) The relevant product market comprises all those products that customers regard as interchangeable or substitutable to the product(s) of the undertaking(s) involved, based on the products' characteristics, their prices and their intended use, taking into consideration the conditions of competition and the structure of supply and demand on the market.
>
> (b) The relevant geographic market comprises the geographic area in which the undertakings involved supply or demand relevant products, in which the conditions of competition are sufficiently homogeneous for the effects of the conduct or concentration under investigation to be able to be assessed, and which can be distinguished from other geographic areas, in particular because conditions of competition are appreciably different in those areas." [Footnotes omitted.]

31 The concept of the market definition includes both the *relevant product market*, *i.e.* those products that compete with each other to a sufficient extent to exercise a competitive constraint, and the *relevant geographic market*, *i.e.* the geographic area in which competition between the relevant products takes place. This provides an analytical tool or conceptual framework within which the evidence on this question can be

organized and helps in the process of determining whether undertakings possess market power.

32 Paragraph 14 of the 2024 Commission Notice on Market Definition makes the point that market definition is ultimately a fact-sensitive inquiry:

> "Second, market definition is based on the facts of the case. Relevant markets within the meaning of Union competition law differ from sector to sector, at different levels of the supply chain and sometimes across geographic areas. Where past Commission decisions concerning a specific market exist, the Commission may start its analysis from such prior decisions and verify whether the definition of the relevant market used in those past decisions may be applied to the case at hand. However, the Commission is not bound to apply the definition of a relevant market from its past decisions in future cases and will always be attentive to possible changes driven by broader trends such as digitalisation, shifts in value chains or in sourcing by customers, or developments in the degree of globalisation of commercial exchanges." [Footnotes omitted.]

33 Paragraph 17 of the 2024 Commission Notice on Market Definition also makes it clear that as part of the overall competitive assessment one must take account of all competitive constraints, both from within and outside the market. Thus, if a product or geographic area falls outside the relevant market, it can still present a competitive constraint.

34 It is also important to bear in mind that the concept of the "relevant market" is a term of art, and different from the term "market" in other contexts, in particular business contexts: see para. 19 of the 2024 Commission Notice on Market Definition.

35 Finally, para. 20 of the 2024 Commission Notice on Market Definition states that the Commission is not obliged to reach a definitive conclusion on the precise scope of the market where the outcome of the assessment would not change under various plausible market definitions.

The product market

36 Paragraph 12(a) of the 2024 Commission Notice on Market Definition set out above is significant as it sets out the key concept of interchangeability or substitutability when considering the product market. The general methodology for defining product markets is set out in s.2.1 of the 2024 Commission Notice on Market Definition, including demand substitution and supply substitution.

37 Paragraph 25 of 2024 Commission Notice on Market Definition states that the main approach used by the Commission to define the product market is that of assessing the substitutability of products from the perspective of the customer, *i.e.* demand substitution. Paragraph 26 goes on to refer to the

range of evidence that the Commission looks at to determine that issue, and which include indicators for the reasons why customers would or would not substitute one product with another, such as customer preferences relating to product characteristics, prices, functionalities, intended use, barriers to switching and switching costs. Paragraph 27 then states that the main question to be answered when examining that evidence is to what extent and to what readily available substitute products (if any) the customers of the undertaking(s) involved would switch in response to a deterioration in the conditions of supply of the products of the undertaking(s) involved relative to other products. This is usually a price increase but it can also include other competitive parameters such as quality and innovation.

38 Paragraphs 48 onwards of the Commission Notice on Market Definition also provides helpful guidance on the evidence used to define product markets. Evidence on product characteristics processes, functionalities and intended use is generally useful to identify the range of possible substitutes that are available to the customers of the undertakings involved. This, however, may be insufficient to determine whether two products are demand substitutes. Conversely, differences in product characteristics, prices and intended use may not always, in themselves, be sufficient to determine that two products belong to different product markets. This is because such considerations may not accurately reflect how customers value the different product attributes and how customers would react to changes in relative supply conditions, such as a price increase. The Commission therefore assesses the underlying reasons why customers would or would not substitute one product for another to identify the parameters that are most relevant for the choices of customers.

39 Evidence of past substitution can be particularly informative for demand substitution especially when caused by an exogenous shift in relative supply conditions.

40 Evidence of customers shifting away from a product because of factors unrelated to change in relative supply conditions, such as change in preferences or consumption patterns over time, are less informative for demand substitution.

41 Paragraph 29 of the 2024 Commission Notice on Market Definition states that the theoretical criterion often used to determine whether the candidate market constitutes a relevant product market is whether a hypothetical monopolist in the candidate market could exercise market power (the HMT test). This question can be assessed by asking whether a hypothetical monopolist in the candidate market would find it profitable to implement a small but significant non-transitory increase in price (the SSNIP test).

42 The 2024 Commission Notice on Market Definition also emphasizes that firms often compete on non-price parameters or different levels of innovation of different product characteristics, which means that a traditional SSNIP could be challenging. It then refers to an alternative tool, namely the "SSNDQ test," which assesses how consumers would respond to a small but significant non-transitory decrease in quality (see *e.g.* paras. 98 and 102 of the 2024 Commission Notice).

43 These principles are also summarized in decisions of the English courts and decisions of the Competition Appeal Tribunal ("CAT"), the specialist judicial body in the UK whose function includes hearing competition law cases. After reviewing leading authorities dealing with the relevant product market, the CAT summarized the relevant principles in its first *Aberdeen Journals* judgment, *Aberdeen Journals Ltd.* v. *Director General of Fair Trading* (1) as follows ([2002] CAT 4, at paras. 96–99):

> "96. The foregoing cases indicate that the relevant product market is to be defined by reference to the facts in any given case, taking into account the whole economic context, which may include notably (i) the objective characteristics of the products; (ii) the degree of substitutability or interchangeability between the products, having regard to their relative prices and intended use; (iii) the competitive conditions; (iv) the structure of the supply and demand; and (v) the attitudes of consumers and users.
>
> 97. However, this check list is neither fixed, nor exhaustive, nor is every element mentioned in the case law necessarily mandatory in every case. Each case will depend on its own facts, and it is necessary to examine the particular circumstances in order to answer what, at the end of the day, are relatively straightforward questions: do the products concerned sufficiently compete with each other to be sensibly regarded as being in the same market? Are there other products which should be regarded as competing in the same market? The key idea is that of a competitive constraint: do the other products alleged to form part of the same market act as a competitive constraint on the conduct of the allegedly dominant firm?
>
> 98. In cases where the products concerned have similar objective characteristics, and cater for similar groups of consumers, there will be no particular difficulty in finding that the products fall within the same market (e.g. that bananas from different Caribbean islands all form part of the market for bananas). But if the question is more complex (e.g. whether the relevant market is not limited to bananas but also includes fresh fruit) a number of approaches exist for identifying the products which form part of the relevant market. These may include an assessment of 'demand side substitution' (namely how far it would be open to customers to switch to alternative products,

notably in the event of a price increase by the allegedly dominant company) as well as an assessment of 'supply side substitution' (namely how far and how quickly other suppliers might enter the market, again in the event of a price increase by the allegedly dominant company).

99. In dealing with these issues, both the Commission's Notice on Market Definition and OFT 403 mention various economic techniques for determining whether products may properly be regarded as substitutable with each other. One such technique is the so-called 'SSNIP test', namely whether in normal competitive circumstances a Small but Significant and Non-transitory Increase in relative Prices (say 5 to 10 per cent) would result in customers switching to an alternative supplier, and if so whether such substitution would be enough to make the price increase unprofitable because of the resulting loss of sales (see e.g. the Commission's Notice on Market Definition, paragraphs 15 to 19; OFT 403, paragraphs 3.1 to 3.6). This test is also part of the 'hypothetical monopolist' test, under which it is assumed that the allegedly dominant firm is the only supplier of the products in question (say advertising space in a daily paid-for newspaper). One then asks whether such a monopolist would be constrained in setting its prices by the possibility that it might lose customers to an alternative product (say a weekly free newspaper offering advertising at cheaper rates). If the number of customers who might switch to the alternative product is large enough to constrain the hypothetical monopolist from setting prices above the competitive level as it wishes, then the two products may be regarded as being in the same market (see OFT 403, 2.6 to 2.11)."

44 This formulation of the approach in defining a product market was cited with approval by the CAT in *BGL (Holdings) Ltd.* v. *Competition & Markets Auth.* (5). Further, in that case the CAT stated as follows ([2022] CAT 36, at para. 114(5)–(10)):

"(5) When considering the relevant product market—which is the only aspect we here consider, the relevant geographic market being uncontentious—it is important to bear in mind precisely what it is that is being bought and sold and *why*. As the Commission Notice on Market Definition observes, the purpose of defining a relevant product market is to identify the products or services which are sufficiently close substitutes to the focal product so as to exercise a competitive constraint on the price of the product or service under consideration. The test is often stated to be whether there is a 'sufficient degree' of interchangeability between them, so far as the specific use of such products or services are concerned. Substitutability is not assessed solely by reference to the objective characteristics of the products or services at issue. The competitive

conditions and the nature of supply and demand in the market must also be taken into consideration . . .

(6) Accordingly, it is important to consider *why* a given good or service is being bought (when considering demand side substitutability, as we are here) in the first place. This is an important question, that can be lost sight of. To revert to our aspirin/paracetamol example, if the reason why (in this hypothetical case) aspirin is being purchased is to thin blood and not alleviate headaches, then paracetamol is not a relevant substitute and to include it in the product market definition would be an error. If, on the other hand, the reason why aspirin is being purchased is precisely to relieve headaches, then the exclusion of paracetamol from the product market definition needs to be considered far more carefully. Thus 'demand side substitution' (namely, the extent to which customers are able to switch to alternative products, in the event of an increase in price) is generally regarded as the most important factor in determining the relevant product market, since it constitutes the most immediate constraint on suppliers of a given product or service.

(7) In both the Commission Notice on Market Definition and OFT403, various techniques are mentioned for determining demand side substitutability, one such technique being the SSNIP test. This test is part of the Hypothetical Monopolist Test, under which it is assumed that there is only one supplier of the product in question, the hypothetical monopolist. The purpose of the Hypothetical Monopolist Test is to provide an objective conceptual framework for market definition, by eliminating certain variables, notably competition *between* the suppliers (or buyers) of the focal product. In that way, if a SSNIP results in marginal customers moving away from the focal product to an alternative product, that cannot be said to be because of competition between suppliers (or buyers) of materially the same focal product. Rather it is an indication that the monopolist is constrained in setting its prices by the possibility of losing business to the supplier of an alternative product. Of course, the level of switching must be significant enough to prevent a monopolist from profitably sustaining prices sufficiently above competitive levels (the 'critical loss' is the tipping point—which is the smallest percentage of sales which, if lost, would render any SSNIP unprofitable). The Department of Justice and Federal Trade Commission 1992 'Horizontal Merger Guidelines' state:

> 'A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximising firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least

> a "small but significant and non-transitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test.'

We set out these Guidelines not because they are controversial, but because it is necessary—given the dispute on market definition that came before us—for this Judgment to spell out its terms of reference with as much clarity as it can.

(8) It is important that market definition not be over-analytical or over-dependent on expert evidence. It is necessary that the law be predictable to those persons who are subject to it, so that their behaviour can conform without the need for regulatory intervention. It may be that a market is sufficiently technical to require *technical* expert evidence as regards the product and its uses, but (as a general proposition) we do not consider that this Tribunal will always be assisted by solely expert economic evidence *on questions of substitutability*. It is incumbent on the parties to consider and establish the probative value of expert economic evidence on this issue. Although we appreciate that market definition is, from time-to-time, referred to as a science, we consider such a description to unduly accentuate the technical aspects of what ought to be a common sense exercise of judgement, informed substantially by an understanding of the thinking of the persons in the market in question.

(9) The importance of judgement—as opposed to a slavish following of what are, at most, helpful subsidiary analytic tools—is demonstrated by the well-known 'Cellophane Fallacy':

> 'It is necessary to enter a word of caution on the hypothetical monopolist test when applied to abuse of dominance cases. A monopolist may already be charging a monopoly price: if it were to raise its price further, its customers may cease to buy from it or switch to alternative products. In this situation the monopolist's "ownprice elasticity"—the extent to which consumers switch from its products in response to a price rise—is high. If a SSNIP test is applied in these circumstances between the monopolised product and another one, this might suggest a high degree of substitutability, since consumers are already at the point where they will cease to buy from the monopolist; the test therefore would exaggerate the breadth of the market that would exist in normal competitive circumstances . . ."

(10) The short point is that in defining a market it is necessary to be alive to the realities of the case, including as to anti-competitive distortions already present in the market. There is no reason to consider that the Cellophane Fallacy—or some similar solecism—

cannot be made when defining the market for the purpose of the Chapter I Prohibition." [Emphasis in original. Footnotes omitted.]

45 In *Allergan plc* v. *Competition Markets Auth.* (3), the CAT highlighted ([2023] CAT 56, at para. 86) that neither the HMT nor the SSNIP involve any findings of fact in the traditional sense. Whilst market definition is rooted in the facts, the test is counterfactual.

The geographic market

46 The geographic market is the second aspect of market definition.

47 Paragraph 12(b) of the 2024 Commission Notice on Market Definition set out above states that the test for defining the geographic market is whether the conditions of competition are sufficiently homogeneous for the conduct to be assessed, and which can be distinguished from other geographic areas, in particular because conditions of competition law are appreciably different in those areas.

48 The CAT in *Aberdeen Journals* (1) stated that the geographic market could be defined as follows ([2002] CAT 4, at para. 100):

"100. Similar questions arise when delineating the relevant geographic market, which is essentially the area over which substitution takes place:

'Under the scheme of Article 82 of the Treaty, definition of the relevant geographical market, like that of the product market, calls for an economic assessment. The geographical market can be defined as the territory in which all the traders concerned are exposed to objective conditions of competition which are similar or sufficiently homogenous . . .'"

49 Paragraph 39 of 2024 Commission Notice on Market Definition refers to the sort of evidence that the Commission examines when defining geographic markets. This includes the presence of the same or different suppliers across geographic areas, similarities or differences in their market shares and prices, similarities or differences in customer preferences and purchasing behaviour, barriers and costs associated with supplying customers in a different area, and distance-related factors affecting costs. Paragraph 40 further states that the Commission usually analyses demand substitution between suppliers located in different geographic locations or areas.

C2. Dominance

50 Once the relevant markets have been defined, an assessment must be carried out by reference to that market definition as to whether Gibfibre has established that the defendants were dominant in the market for colocation services.

51 If a broad market definition is adopted, including cloud services and outsourcing to other jurisdictions, the defendants' market share would be small and a finding of dominance could not be sustained in those circumstances. As explained above, even if a narrow market definition is adopted excluding cloud services and outsourcing to other jurisdictions, these other markets remain relevant in considering whether they provide a constraint on the defendants.

52 The legal framework to be applied for assessing dominance is not in dispute. The classic definition of dominance, as articulated by the Court of Justice in its seminal judgment in *United Brands* v. *Commission* (18) is set out above.

53 In *Hoffmann-La Roche* v. *Commission* (8), another leading authority in this area, the Court of Justice described dominance in terms of an undertaking being (Case C-85/76, at para. 41):

> "[I]in a position of strength which makes it an unavoidable trading partner and which, already because of this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominance position."

54 The European Commission's "Guidance on Article 102 Enforcement Priorities," OJ C 45, February 24th, 2009 ("Commission Article 102 Enforcement Priorities Guidance") (as amended by the Communication of March 27th, 2023) expands on this at para. 10, as follows:

> "This notion of independence is related to the degree of competitive constraint exerted on the undertaking in question. Dominance entails that these competitive constraints are not sufficiently effective and hence that the undertaking in question enjoys substantial market power over a period of time. This means that the undertaking's decisions are largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers. The Commission may consider that effective competitive constraints are absent even if some actual or potential competition remains. In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative." [Footnotes omitted.]

55 Paragraph 11 of the Commission Article 102 Enforcement Priorities Guidance further states that if an undertaking is capable of: "profitably increasing prices above the competitive level for a significant period of time," it does not face sufficiently effective competitive constraints and can generally be regarded as dominant.

56 In this connection, para. 6.6 of OFT's "Assessment of Market Power," OFT 415 (December 2004) ("OFT 415") further states high prices or profits alone are not sufficient proof that an undertaking has market power and may be consistent with a competitive market, "[h]owever, persistent

significantly high returns, relative to those which would prevail in a competitive market of similar risk and rate of innovation, may suggest that market power may exist."

57 Paragraph 12 of the Commission Article 102 Enforcement Priorities Guidance further states that the assessment of dominance will take into account the competitive structure of the market, and in particular constraints imposed by:

Actual competitors

Existing supplies from, and the position of the market of, actual competitors. The market position of the dominant undertaking and its competitors: see further paras. 13–15 of the Commission Article 102 Enforcement Priorities Guidance.

Potential competitors

The threat of expansion and entry by potential competitors, including impediments to switching to a new supplier: see further paras. 16 and 17 of the Commission Article 102 Enforcement Priorities Guidance. Entry barriers include not only those factors that prevent new entry but those that impede (without necessarily preventing) new entry: see also OFT 415, para. 5.5. Sunk costs can constitute a barrier to entry: see OFT 415 paras. 5.8–5.11.

Countervailing buyer power

The bargaining strength of the undertaking's customers, or countervailing buyer power: see further para. 18 of the Commission Article 102 Enforcement Priorities Guidance. This turns on an assessment of whether there is evidence of an effective constraint exerted in practice on the undertaking, in the context of its actual relationship with the buyer. As the Tribunal said in *Hutchison 3G (UK) Ltd.* v. *Office of Communications* (9) ([2005] CAT 39, at para. 110(c)), this is not a binary question but a concept that embodies a possible range of strengths. The relevant question is not likely to be whether countervailing buyer power exists or not but whether there is any countervailing buyer power, how much and what effect does it have.

58 Section 3 of OFT 415 deals with a framework for market power. This states that when assessing whether and to what extent market power exists, it is helpful to consider the strength of any competitive constraints. These include existing competitors, potential competition, and buyer power. Paragraph 3.6 of this guideline further states that the various indicators of market power in practice are often related, and they will be considered "in the round" before coming to an assessment.

59 Market shares are an important factor in the assessment of dominance, and the correct metric must be established to determine this question. This is traditionally measured by volume and/or by value.

60 Returning for a moment to the 2024 Commission Notice on Market Definition, s.5 of that notice also revisits its guidance on the use and importance of market shares. It states that whilst an undertaking's market share is an important tool in assessing market power, it is not the sole indicator of an undertaking's strength in the market. Other factors that might be relevant depending on the facts of the case include barriers to entry or expansion, access to specific assets and inputs, product differentiation and the degree of substitutability. Whilst also noting that market shares are based on sales value and sales volume in traditional markets, it addresses additional metrics that are relevant when considering other markets including digital markets: see para. 108 of the 2024 Commission Notice on Market Definition.

61 Paragraph 13 of the Commission Article 102 Enforcement Priorities Guidance also makes the point that market shares "provide a useful first indication" on the assessment of dominance but that this will need to be interpreted in the context of that market and its particular dynamics, including competitive constraints. Paragraph 15 of the Commission Article 102 Enforcement Priorities Guidance further states, the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position.

62 Further, para. 4.4. of the OFT 415 states that: "market shares alone might not be a reliable guide to market power, both as a result of potential shortcomings with the data . . . and for the following reasons . . ."

63 Generally, "the possession, over a long period, of a very large market share" is likely to lead to a finding of dominance because (*Hoffmann-La Roche* (8) (Case C-85/76, at para. 41)):

> "An undertaking which has a very large market share and holds it for some time . . . is by virtue of that share in a position of strength which makes it an unavoidable trading partner."

64 Correspondingly, where an undertaking has only a limited market share, it is unlikely to hold a dominant position: see *Gøtrrup-Klim e.a. Grovvareforeninger* v. *Dansk Landbrugs Grovvareselskab AmbA* (7) ([1994] ECR I-5641, at para. 48).

65 Whish & Bailey, *Competition Law*, 10th ed. (2021) provides a useful table of market share thresholds (table 1.1, *op. cit.*, at 45–48), compiling different materials on this topic. That table sets out a summary of the indications that can be taken from different levels of market shares. For example, it states that you may hold a dominant position with a market

share of 40% or more, and that there is a rebuttable presumption that you hold a dominant position if your market share is 50% or more.

66 As stated above, however, before reaching a conclusion on dominance, a wider competitive assessment of the conditions of competition, and particularly the constraints, if any, imposed by actual or potential competitors must be carried out. As the Court of Justice emphasized in its judgment in *United Brands* (18) ([1978] EUECJ C-27/76, at para. 66): "in general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative."

67 The economic test for the assessment is also not in dispute. The experts agree that this entails: "an assessment of the competitive constraints on an allegedly dominant firm, and the effectiveness of such constraints."

C3. Abuse

68 Although a finding of dominance is a threshold requirement for an abuse complaint, a finding of dominance in itself does not mean that there has been a breach of competition law. If the court concludes that the defendants were dominant, it must then go on to decide whether their conduct amounts to an abuse of that dominance.

69 In *NV Nederlandsche Banden Industrie Michelin* v. *E.C. Commn.* (13), the Court of Justice held as follows ([1983] EUECJ C-322/81, at para. 57):

> "A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition . . ."

70 The classic articulation of the concept of abuse in EU competition law can be found in the Court of Justice's judgment in *Hoffmann-La Roche* (8) (Case C-85/76, at para. 91) as follows:

> "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products of services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

71 The special responsibility of a dominant undertaking not to abuse its dominant position has been stressed many times by the Court of Justice.

The actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case: see *e.g. Konkurrensverket* v. *TeliaSonera Sverige AB* (10) ([2011] EUECJ C-52/09, at para. 84). Although neither art. 102 nor the case law provide a precise definition of abuse, the TFEU (and the Competition Act) both list four specific examples of abusive conduct, namely:

(1) The imposition of unfair trading conditions: art. 102(a);

(2) The limitation of production, markets or technical development to the prejudice of consumers: art. 102(b);

(3) The application of dissimilar conditions to equivalent transactions: art. 102(c);

(4) Making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts: art. 102(d).

72 Further categories of abuse that have been prohibited to date under art. 102 include abusive refusal to supply, and abusive market-sharing. The categories of abuse, however, are not closed and art. 102 is capable of being applied to new situations. The court must look at conduct and ask the overall question of whether there is abuse by reference to the various ways of committing that abuse.

73 When considering refusals to deal or supply, the starting point is summarized in the opinion of Jacobs, A.G. in *Oscar Bronner GmbH & Co. KG* v. *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* (9) (Case C-7/97, at para. 56), where he stated that:

> ". . . [T]he right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification."

74 Jacobs, A.G. went on to state as follows (*ibid.*, at para. 57):

> ". . . [T]he justification in terms of competition policy for interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a

> dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it."

75 In determining whether abusive tying has taken place, five issues must be addressed. These are conveniently summarized by *Whish & Bailey*, *op. cit.*, at 726 as follows:

(1) Does the accused undertaking have a dominant position in the tying market?

(2) Has the dominant undertaking tied two distinct products?

(3) Was the customer coerced to purchase both the tying and the tied products?

(4) Is the tie capable of having an anti-competitive foreclosure effect?

(5) Is there an objective justification for the tie?

D. Outline witness portraits

76 As well as hearing the testimony of factual witnesses, the parties were given permission to rely on (1) an expert economist in relation to issues of market definition, dominance, abuse, causation and/or quantum; and (2) an accountancy expert in relation to issues on quantum.

77 The evidence given by the factual and expert witnesses relates to various issues in this claim. Whilst it is best to examine the evidence of the witnesses by reference to each of those issues, I will first provide a short summary of their evidence and my overall impression of them.

78 Before moving on though, a preliminary observation is called for about the different roles that factual and expert evidence play in a competition law case such as this one.

79 The evidence of factual witnesses informs economic propositions for the economic experts to then provide their opinion on. Where the line should be drawn between factual and expert evidence can perhaps be best illustrated by way of an example. Mr. Hook who was the main factual witness for the defendants was asked whether various products were "complements" to each other or whether jurisdictions were "complements" to each other, rather than substitutes. Whilst one might understand the term "complement" given its ordinary meaning, in this case, it is an economic concept with a specific meaning. Clearly, Mr. Hook was not giving evidence as an economics expert but as a witness of fact, and his answers were not

being given in the technical economic sense. The same applies to questions about "markets."

80 Similarly, any opinions given by the experts must be based on a solid factual basis. This was an issue that arose with Dr. Rander's evidence, as I explain below.

D1. Gibfibre's witnesses

81 The following factual witnesses gave evidence for Gibfibre.

Genevieve Sheriff

82 Ms. Sheriff is Gibfibre's managing director, and she provided two witness statements dated November 10th, 2023 and December 4th, 2023 that covered important topics such as the nature of the colocation business in Gibraltar, the cloud and colocation services in other jurisdictions, and the opportunities that Gibfibre alleges that it has lost. She gave her evidence on March 6th and 7th.

83 Although Ms. Sheriff described how connectivity and colocation services operate in her witness statements, when she gave her testimony, her handle on the technical aspect of the business appeared to be very limited, and she repeatedly said that these were matters for Mr. Berniz. The same happened when Ms. Sheriff was asked about the observations she made on cloud-based services in her first witness statement, including the speed, security and cost of these services. Ms. Sheriff also seemed to have a limited technical understanding of Gibfibre's own network.

84 One issue which arose during Ms. Sheriff's questioning concerned Gibfibre's attempts to gain access to the EIG sub-sea cable, a submarine communications cable which allows a non-terrestrial route out of Gibraltar for a connectivity provider. Ms. Sheriff said that the EIG sub-sea cable is owned by a consortium which includes Gibtelecom, and that she had not asked Gibtelecom for access to this as she hardly expected it to agree when it was not providing access to the MP data centre. She said that she had approached another member of the consortium, Verizon in the USA, for access but she said that they had refused, and she inferred that this was because of Gibtelecom, although this all seemed a little vague.

85 Ms. Sheriff also referred to Gibfibre's new data centre. She said that this was a much smaller facility than the defendants' data centres with only thirty racks, fifteen of which are used for Gibfibre's own IT equipment. She said that in view of its size and lack of track record, Gibfibre cannot realistically compete with the defendants' data centres for the custom of the likes of the major e-gambling companies. She added in her oral evidence that this was a carrier neutral facility, although this had not yet

been announced at the time she gave her evidence because she said that promotion of that service had not yet started.

86 Ms. Sheriff was asked whether Gibfibre was in effect seeking to undercut the prices of connectivity in carrier-owned facilities, and thus avoid the cost and risk of setting up data centres like those of the defendants, where recovery of those costs form part of the pricing. In response, Ms. Sheriff said that she was asking for access to provide competitive pricing on connectivity alone. She also referred to the presence of Sapphire at the MP data centre, stating that Gibfibre just wanted the same access that Sapphire had. Later, Ms. Sheriff added that Gibtelecom expected to get a return on its investment very quickly, and that Gibfibre allowed for a longer period to make a return on its investment, although this seemed to me to be little more than a throwaway remark made without any proper basis.

87 Ms. Sheriff was also asked about her statement that Gibtelecom had refused to permit Gibfibre to provide connectivity to the WTC data centre, and she was taken to some of the contemporaneous exchanges in that regard. This showed that an offer had been made by Gibtelecom, and that Gibfibre had asked for a "Most Favoured Nation" clause stating that no-one else would be offered better terms than Gibfibre (including Gibtelecom), and for an acceptance by Gibtelecom that it was dominant in other parts of the communications marketplace. Ms. Sheriff accepted that appeared to be Gibfibre's position in those negotiations but she said that she was not an expert on legal matters. She also made the point that the terms offered by Gibtelecom were very one-sided.

88 Ms. Sheriff said that she had received inquiries to provide connectivity to customers at the MP data centre but not at the data centres run by Continent 8 and Sapphire. She then identified six opportunities from or on behalf of gaming companies that could have been won if Gibfibre had had access to the MP data centre, namely: Gamesys, Kindred, BetVictor, and William Hill (via Interoute), GVC/Entain (via Expereo) and a customer of connectivity intermediary, Point 5. The details of these claims and the underlying correspondence relied on to support them are set out in section F below. Ms. Sheriff emphasized that these were not an exhaustive list of customers that she thought Gibfibre could have attracted, had it enjoyed access to the defendants' data centres.

89 It was clear from Ms. Sheriff's evidence that she has a strong sense of grievance about not being able to provide connectivity services to the MP data centre like Sapphire, and about what she considers the high prices charged by Gibtelecom to its customers for connectivity. It seemed to me, however, that Ms. Sheriff did not always distinguish between carrier-owned data centres and carrier-neutral data centres. During her evidence, for example, she referred to Interxion, a data centre in Madrid, having ten or fifteen carriers. That, however, is a business run on a carrier-neutral basis.

90 Further, Ms. Sheriff gave her evidence very hesitantly, her answers were often vague, and she quickly found herself out of her depth and unable to answer many questions which are pertinent to Gibfibre's complaint, and which she had referred to in her witness statement. This included the extent to which cloud services and/or other jurisdictions can be substitutes for colocation services, Gibfibre's standard contractual terms, and Gibfibre's network including its Points of Presence ("PoPs") and transit providers. To emphasize the point, counsel for the defendants prepared an eight-page annex to their closing submissions listing eighty-six questions which Ms. Sheriff had been unable to answer or which she referred to the experts.

91 It is sometimes understandable for executive directors of a telecommunications company to defer to technical staff on technical matters. It is also understandable that witnesses are assisted by lawyers when a witness statement is drafted. The lack of knowledge which Ms. Sheriff showed on key aspects of the business including the essential architecture of Gibfibre's network was such that I gained the impression that her evidence had been drafted largely by professionals, and that her personal knowledge about the topics it covered was at best superficial.

92 Overall, therefore, I consider that Ms. Sheriff's evidence should be treated with caution, and that it should be accorded little or no weight.

Miguel Berniz

93 The other factual witness for Gibfibre was Mr. Berniz who is its Head of Technology, and who provided a witness statement dated February 16th, 2024 in response to Mr. Hook's third witness statement concerning the quality of Gibfibre's network. Mr. Berniz gave his evidence on March 7th, 2024.

94 Mr. Berniz has over thirty years' experience working for both suppliers of telecommunications services and their customers, including BetVictor, an e-gambling firm. Thus, Mr. Berniz was able to provide evidence not only on technical features of Gibfibre's case but also to provide an insight into the demands of e-gambling operators.

95 Mr. Berniz disagreed with Mr. Hook who said that Gibfibre was unable to provide a level of service to premium customers comparable to that provided by the defendants to its premium customers (Gibtelecom's "Flexiband" package) and he provided details about Gibfibre's infrastructure. He said that the network they had built had all the elements necessary to provide high performance, availability and resiliency to support carrier-class services, including three 10 Gbps transport circuits between Gibraltar and Madrid, five BGP sessions with Tier 1 providers and IX, DDoS protection for at least one of the Transit sessions and the possibility to provide on-demand DDoS protections to IP customers (although not part of the standard offer), and redundant Cisco equipment

with automatic sub-second failover in both cases of singular device failure and multiple N-1 service failure.

96 Further, Mr. Berniz said that Gibfibre had invested significantly in infrastructure for reliable premium services, ensuring robust global connectivity through strategically placed PoPs (two in Gibraltar, two in Madrid, one in Amsterdam and a virtual PoP in London) and partnership with industry leading partners.

97 Mr. Berniz said that PoPs allowed for more control, reliability and service. By reference to Gibfibre's existing PoPs, he said that a customer who wanted a service to Amsterdam would not require Gibfibre to contract with a transport carrier but that a customer requiring a service to London would require Gibfibre to contract with a separate transport service provider.

98 Mr. Berniz said that Gibfibre was able to offer attractive terms to enterprise customers including 24/7 customer support with thirty minutes maximum response time and four hours mean time to repair. He explained that level 1 engineers staffed Gibfibre's Network Operations Centre ("NOC"), the centralized location where the systems are monitored and managed, and that and after hours calls coming in for level 3 engineers (the most experienced, such as himself) would be routed to them at home.

99 When asked whether e-gambling customers were price sensitive, he said that, in his experience, reliability and resilience came first, and pricing came second. He also said that these customers were less interested in receiving guarantees from connectivity providers for compensation in the event of a connectivity failure, and that what they wanted above all was a reliable service.

100 Although Mr. Berniz is Spanish, he gave his evidence fluently and confidently in English. I found that Mr. Berniz was genuinely willing to assist the court, that he engaged fully with the questions he was asked, and that his answers were full and candid. Further, it was helpful that he had worked in an e-gambling company even though his evidence was not given from a customer perspective.

101 Given the limited scope of Mr. Berniz's evidence and the unsatisfactory nature of Ms. Sheriff's evidence, it is worth pointing out at this stage that Gibfibre's factual evidence on important questions was very slender indeed.

102 Gibfibre also called two expert witnesses.

Dr. Robin Rander

103 Dr. Rander was called as Gibfibre's expert economist. He is a Vice President of Compass Lexecon, a global economic consulting firm, and has

over fifteen years' experience as an applied economist in the field of competition and regulation having worked for various regulators. Dr. Rander provided two expert reports dated December 22nd, 2023 and January 18th, 2024, and together with the defendants' expert produced a joint expert memorandum. Dr. Rander gave his live evidence on March 12th and 13th, 2024.

104 Dr. Rander's view was that cloud services are unlikely to be close substitutes for colocation services and did not therefore form part of the same market. He emphasized that cloud services cover more than third-party colocation services, as colocation requires a customer to own and operate IT infrastructure. Thus, he said that there is a choice for the customer between owning and operating infrastructure (and the attendant cost), and on the other hand using the cloud. He also considered it unlikely that a 5%–10% increase in the price of colocation services would trigger a switch to cloud services. He made the point that this translated into a smaller percentage increase because colocation costs were only one component of overall costs, and that one had to take into account the cost of owning IT equipment with colocation services. When pressed about this in cross-examination, Dr. Rander accepted that the cost of colocation over a three or five year contract would be millions of pounds, and that the hardware costs could be in the hundreds of thousands and that these two costs components were therefore in a different order of magnitude.

105 Dr. Rander also said that there was evidence that customers see significant differences between cloud services and using their own infrastructure in terms of product characteristics including security, performance, and the costs structures available. In this connection, and as well as relying on Ms. Sheriff's evidence, he relied on the CMA's decision in 2016 in the Pulsant/Onyx merger which recorded customer concerns about the cloud's security and speed. He also referred to the Commission's Equinix/Telecity merger decision of 2015 (Case M.7678). He said that the CMA and Commission were highly credible competition authorities, and that these were cases that raised similar issues to this case. Whilst he accepted that product characteristics alone do not establish that two products are in separate markets, he said that they helped inform market definition where they demonstrated that they served different needs. As for costs, Dr. Rander referred to the fact that cloud services offer a pay-as-you-go model which could be attractive for certain types of customers.

106 When it was put to Dr. Rander in cross-examination that the merger decisions he relied on pre-dated 2017/2018, which was the period when Mr. Harman said that the colocation services formed part of the same market as cloud, he accepted that he had not undertaken a comprehensive review of technological developments that might have taken place over time. He referred, however, to an email from a potential customer to

Gibtelecom expressing a preference for colocation as it gives "guaranteed performance."

107 Dr. Rander then dealt with evidence about customers switching to the cloud, and he concluded that this did not provide reliable evidence that cloud services are close substitutes to colocation services. Further, he said that the evidence of some customers shifting to the cloud suggested migration, and that it did not imply that cloud services are a close substitute to colocation services.

108 Although Dr. Rander referred to the "cellophane fallacy" in his report, dealing with the concern that prices are not at an actual competitive level whilst carrying out the HMT, he accepted that he had not assessed whether prices were above the competitive level.

109 Dealing with the geographic market, Dr. Rander's view was that the relevant market only comprises Gibraltar, and that colocation services offered in data centres located in other jurisdictions were unlikely to be a close substitute to such services offered in data centres located in Gibraltar. He again placed significant reliance on the Equinix/Telecity merger decision where the Commission found that the relevant geographic market for colocation services was a metropolitan area. He also relied on the Pulsant/Onyx decision where the CMA found that proximity between the customer's office and data centre was important because of the need to visit the data centre.

110 Commenting on the evidence of Mr. Montegriffo and Mr. Macias, Dr. Rander said that switching from colocation services in Gibraltar to similar services in other jurisdictions appeared to have been driven by customer requirements but not due to changes in price or quality of third-party colocation services. In his view, these switches were mainly driven by regulatory changes and mergers. In cross-examination, he accepted that there was no evidence that tax or regulation were the decisive factors when deciding where to locate servers.

111 Turning to dominance, Dr. Rander's view was that the defendants had a market share of over 50% based on the data on installed rack capacity and occupancy, and that they should be presumed to be dominant. He disregarded floor space as a metric as he said this was a poor measure of a colocation service providers' market position. His view was that it was unlikely that floor space could be converted to usable racks without a need to adjust existing assets, additional investments or delays.

112 Dr. Rander again relied on the merger decisions referred to above as part of his dominance assessment, and he referred to high barriers to entry and expansion in the third-party colocation market, high switching costs, and customer preference for a colocation provider with an established

service record. He considered that high sunk costs made entry into the market risky. He also considered it unlikely that any but the largest of the defendants' colocation customers, if at all, could have a significant degree of bargaining strength, and said that in any event that was unlikely to benefit smaller customers.

113 Dr. Rander also pointed out that the only other supplier of connectivity to the MP data centre was Sapphire and that it was likely to have a modest share of the market. In his view, this meant that customers did not have a strong bargaining position.

114 Turning to abuse, Dr. Rander's starting point was to define the market by reference to the specific conduct in question, *i.e.* the focal product in the focal area. In his view, the correct market definition was connectivity services provided to customers with equipment in each of the defendants' data centres. It followed, according to this approach, that there are no demand-side or supply-side substitutes. This was based on a broad aftermarket framework, with colocation services as the primary product and connectivity to the data centre as the aftermarket. Dr. Rander accepted in cross-examination that no regulator had defined a relevant market in this way.

115 Whilst Dr. Rander was clearly a well-qualified economist, who gave thoughtful and careful evidence, and largely made concessions reasonably, there are several reasons why I consider limited weight can be accorded to his evidence.

116 For a start, Dr. Rander had limited experience in the telecommunications field, which was limited mainly to mobile markets, and which did not include experience in e-gaming.

117 Dr. Rander had also only been provided with a fraction of the factual material in the case, and it was clear that he had not seen thousands of documents, many relevant, which had been disclosed. Whilst Dr. Rander relied on the evidence of Ms. Sheriff, as I said above, this does not provide a sound basis to draw any conclusions from. The inadequacy of this position was only compounded by the fact that, as Dr. Rander accepted, key evidence that one would expect to see in an abuse of dominance case was not available. This could have included a quantitative SSNIP analysis, customer evidence, and information from competitors.

118 I also found that Dr. Rander relied too heavily on previous merger decisions, notably, Pulsant/Onyx and Equinix/Telecity without fully having regard to the context in which those decisions fell to be considered, and the date of those decisions. Finally, Dr. Rander's approach on certain specific economic issues also lacked rigour, as explained further below.

Geoffrey Senogles

119 Mr. Senogles was called as Gibfibre's accountancy expert. He is a chartered accountant and a partner in Senogles & Co., a firm of chartered accountants with its head office in Switzerland. Mr. Senogles has wide experience of acting as an expert witness.

120 Mr. Sengoles provided two reports dated December 22nd, 2023 and January 26th, 2024, and together with the defendants' expert produced a joint expert memorandum. This evidence was directed at assessing Gibfibre's alleged losses. When he gave his testimony on March 12th, 2024, Mr. Senogles also provided an updated assessment of probabilities in the light of developments in the proceedings. This refers to the loss of revenue claimed for each contract that Gibfibre says that it could have obtained, and an assessment as to the probability of success (see further section F below).

121 Whilst Mr. Senogles was clearly an experienced expert witness, there were various problems with his evidence. First, he assumed (on instructions) that the connectivity services provided by Gibfibre and Gibtelecom were equivalent when this was not always the case. Further, he provided views about the level of interest shown by customers based on his business experience. In doing so, however, he exceeded his brief, which was limited to evidence from an accountancy expert in relation to issues of quantum. Finally, I found that his views on quantum in certain respects had been reached without a thorough analysis having been undertaken.

D2. The defendants' witnesses

122 The following factual witnesses gave evidence for the defendants.

Daniel Hook

123 Mr. Hook was the defendants' main factual witness, and he provided extensive evidence in relation to the claim in three witness statements dated November 13th, 2023, December 5th, 2023 and January 29th, 2024. He gave live evidence on March 7th, 8th and 11th, 2024.

124 Mr. Hook has overseen the defendants' data centre operations since around 2010, and he has been Rockolo's Managing Director since 2017. He gave an account of the development and operation of data centre services in Gibraltar.

125 Mr. Hook explained that there had been an influx of gaming companies into Gibraltar in the early 2000s that originally managed their own data centre services, known as self-provision. These companies then became interested in outsourcing this part of their business, as it reduced capital expenditure and the burden of managing those services that were not part of their core business. As a result, the defendants invested in the

establishment of the MP data centre in 2007, which grew with time and following further investment.

126 In around 2009, the defendants entered into an agreement with Sapphire to allow it to enter the MP data centre to provide its own connectivity services there, which he explained came about because some of the defendants' clients required access to an alternative connectivity provider, largely because of the need for resilience and due to compliance requirements. Mr. Hook said that Gibfibre had not been provided access to the MP data centre because there was no demand for a third connectivity provider.

127 Mr. Hook explained how Gibtelecom had built up its infrastructure to an "enterprise" or premium level, which provided high levels of connectivity and resilience like a typical London type network. This was achieved by having a route out of Gibraltar through Spain, and investment in PoPs in multiple jurisdictions, namely Madrid, London, Marseille, Dublin, Malta, Singapore and Malaysia, where Gibtelecom has its own equipment facilitating onward connectivity for its clients. Further, Mr. Hook also said that Gibtelecom had invested in a sub-sea cable as part of the EIG consortium. This provides an alternative to the over-ground channeling of connectivity out of Gibraltar through Spain, something that the gambling industry had pressed for. He added that Continent 8 purchased and re-sold connectivity from Gibtelecom, including through this sub-sea cable. As far as Mr. Hook was concerned, other companies were also free to reserve capacity on the EIG sub-sea cable and re-sell it on the market as Continent 8 was doing.

128 Mr. Hook explained the type of equipment the defendants' data centres had to provide a secure and stable environment for the IT equipment housed in racks there. He said that, generally, data centres tended to keep a buffer of around 20% in terms of rack occupancy, and that they would consider expanding when occupancy reached that level.

129 Mr. Hook also referred to the setting up of the WTC data centre in around 2016, and which he said took around six months to be established and commissioned. He said that this has never been profitable given the increasing competition with the cloud, and that the rack occupancy is in steady decline there.

130 Mr. Hook said that following a request by Gibfibre for access to the defendants' WTC data centre, proposed contractual arrangements were discussed. As part of these discussions, Mr. Hook said that he had met Mark Castle, Gibfibre's Chief Operating Officer at the time, in October 2018 but that in the end Gibfibre decided not to go ahead with this. He denied that the defendants were insisting as a condition of access to the WTC data centre that customers should take a minimum amount of bandwidth from Gibtelecom first. His view was that Mr. Castle had misinterpreted what had

been discussed when they met at the Supernatural Café at the World Trade Center in October 2018 as part of these discussions and that neither the draft contract that had been provided to Gibfibre, nor any other contract, made any mention of Gibfibre being limited to acting as a secondary supplier. In his view, "the contracts speak for themselves." Mr. Hook said that he had discussed this option with Mr. Castle, whom he knew and got on well with, but only as something that had been discussed internally within Rockolo Ltd. in the past, and possibly something that might come up again the future. He stated:

> "I've known Mark since I started working, and I still know him now and I still have a good working relationship with him. I think I put all the cards on the table for him to assess, but I think he took it as a done deal, as to what we were going to do, and I put it to him as a possibility that that would happen in the future."

131 Mr. Hook said that he found it odd that if Mr. Castle's understanding was that Gibfibre would be limited to acting as secondary supplier, that he had not mentioned this in his email later to him. Mr. Hook confirmed that the proposed arrangement at the WTC Centre with Gibfibre was the same as the one with Sapphire at the MP data centre which did not constrain them from winning business there either expressly or by virtue of an understanding as suggested to him. He confirmed that customers at the MP data centre had never been told that they had to buy minimum bandwidth from Gibtelecom, nor had this been imposed on customers. He said that this and other options had been considered in the past but not brought into force, and that Gibtelecom had decided to put its efforts into developing other parts of the business such as the cloud and overseas data centres. Mr. Hook added that Gibfibre had wanted to introduce unreasonable terms into the WTC data centre contract such as a "Most Favoured Nation" clause.

132 Mr. Hook provided his views on other competitors in Gibraltar, including Continent 8, formerly Vault 247. He said that Continent 8 was the defendants' biggest rival with a strong client base and a global reach. He said that Continent 8 had a far larger capacity than the MP data centre with more available space, and a unique and secure location inside the Rock of Gibraltar at the ex-NATO headquarters. Whilst this location required dehumidification equipment, this had not stopped the business from thriving.

133 Mr. Hook's view was that every data centre has its own unique advantages and disadvantages. He pointed out that the MP data centre is housed inside an old building which had to be redesigned and which has limited capacity.

134 Mr. Hook also referred to Sapphire as a significant competitor. Although their market share was more limited than that of the defendants or Continent 8, he said that it had been able to attract important customers,

often exclusively, to use its services. He referred to Mansion as a customer that the defendants had lost to Sapphire quite early on and never regained.

135 He said that in around 2017 or 2018, Gibtelecom considered building two further data centres in the Treasury Building, also known as "The Haven," a large building next to their headquarters which they had acquired in around 2014 or 2015. He said that in the end they decided against this for several reasons including costs (it would have cost around £15m.–£20m. to refurbish), clients moving to cloud services and other jurisdictions, and the existence of local competitors.

136 Turning to the cloud, Mr. Hook described this as a generic term for a managed service. He said that as far back as 2013 it was clear that cloud services were a real threat to the existence and profitability of physical data centres. He referred to the fact that large clients such as William Hill made it clear in 2016 that they were developing a cloud alternative to using physical racks, and that in 2017–2018 the defendants lost big colocation customers to the cloud.

137 Mr. Hook produced a table showing confidential material referring to the defendants' customers and identifying them by industry. This shows that the defendants' customers are mainly sophisticated multi-national gambling customers. Further, this table shows how rack space fluctuated from 2009 to 2024. Broadly speaking and without referring to that confidential information in detail, the table shows rack occupancy steadily increasing from 2009 to January 1st, 2019, and then steadily declining until 2024 when the figure for rack occupancy is lower than that in 2009.

138 Whilst Mr. Hook also referred to the size of equipment having reduced over the years, referred to as "miniaturization" (something he referred to in an article written for a publication in 2019, referred to below) and that this development might account for the reduction of rack occupancy, he did not believe it was a reason why customers were leaving the data centre or downsizing. His view was that the reason for the reduction in the colocation business in Gibraltar was because of migration to the cloud or moves to other jurisdictions, although he accepted that there were other reasons for drops in rack occupancy including companies leaving Gibraltar because of Brexit and merger activity, as explained in the table he provided. Mr. Hook added that the defendants' last investment in the data centre business was made in 2017, when the WTC data centre was opened.

139 Mr. Hook said that the defendants launched cloud services themselves in 2017, something that he saw as a natural evolution of the data centre market.

140 Mr. Hook explained that cloud-based services took the logic of outsourcing one step further from traditional hosting services. He explained that cloud was a managed service with a range of options which ranged

from providing suitably equipped physical space for IT equipment, to connected racks of servers with no intelligence on them (referred to as "tin"), to servers equipped with operating systems such as Microsoft Office. He referred to these options as "stacks." He also drew a distinction between public cloud (whereby a cloud provider allocates one piece of physical hardware to different customers at different times) and private cloud (whereby the physical hardware remains exclusive to a specific customer), and which could better provide guaranteed performance.

141 Mr. Hook said that the defendants had lost colocation customers and gained cloud customers, and he pointed out that cloud services could be more cost-effective. He also explained that whilst some companies preferred the services provided by a physical data centre, many companies preferred the cloud. He added that more recently, companies started using the cloud from the moment they were established, and he described these companies (an example of which was Cobovec in 2021) as "born on the cloud," as they had never used any physical infrastructure. He also said that some companies adopted a hybrid strategy, using cloud services alongside colocation services, and even using both public and private cloud as part of that hybrid model.

142 Mr. Hook said that security was a concern for customers when the only available service was public cloud, which meant that data was stored in shared servers. He said that the defendants started offering a private cloud service in around 2021 to 2022. He added that some customers such as banks might be more cautious about outsourcing and that, in his view, personal preference had a lot to do with the choice made by a company, and he made the point that some companies preferred colocation because they "prefer to keep their crown jewels somewhere where they can hug them and touch them."

143 In addition, he said that the commercial reality is that data centres in Gibraltar also compete with data centres in other jurisdictions, especially those situated in other reputable European locations where big gaming operators tend to do business such as Ireland, the Isle of Man, Malta, Jersey and Guernsey. He said that the defendants had lost substantial amounts of business to those jurisdictions, and that they had gained incoming business. Further, he explained that operators often hosted their servers in more than one jurisdiction, which he described as "multi-homing" and that this was often due to different technological or compliance functions. Therefore, the defendants sometimes found themselves seeking to convince an existing client to host more of their servers in Gibraltar. Mr. Hook referred to Bet365, an e-gaming company that historically hosted its servers at the MP data centre, as an example of a client relocating all of its servers to Malta.

144 Mr. Hook's view, therefore, was that he thought of the data centre market as being one big competitive market, which includes the cloud and

data centres in other jurisdictions. He said that there were a number of factors underpinning any business's decision to choose whether to self-provide, use colocation services in Gibraltar or elsewhere or use cloud services.

145 Mr. Hook rejected the various reasons given by Ms. Sheriff as to the advantages physical data centres have over cloud services. Contrary to what Ms. Sheriff said, Mr. Hook said that easy access to its IT equipment, time lag or latency issues, or speed were not issues that would have anything to do with a decision to choose colocation over cloud services. He said that data centres (including the defendants' data centres) provide expert technicians who have access to equipment in case of a fault, known as a "hands and eyes" service, but that this does not generally include opening up equipment, accessing operating systems or changing configurations. He also said that equipment should generally be accessed physically as little as possible. Further, he said that equipment can often be monitored and fixed remotely, that there was no need to be on the ground. By way of example, he said that the defendants managed data centres in Malaysia and Dublin remotely.

146 Mr. Hook's view was that colocation did not offer any real advantage either when it came to speed and security. He said that large cloud providers have enough bandwidth to cater for all their customers' requirements, and that they also offer strong security. Further, and also contrary to what Ms. Sheriff had said, the costs for cloud services were not less predictable than the costs for hosting in data centres.

147 Turning to the defendants' negotiating power, Mr. Hook said that despite the demand for rack space, the defendants could not set whatever commercial terms they liked when contracting with customers. He said that lengthy and substantial contractual negotiations took place when negotiating with bigger gaming companies, covering matters such as price, limitation of liability, and many other contractual terms.

148 Mr. Hook provided some examples of negotiations with big gaming companies, about which he was questioned. It was put to him that the defendants were able to stand up to these big gaming companies in negotiations but Mr. Hook said that the defendants were not in a position to say "take it or leave it," and that they could agree to certain terms and not others in negotiations. Further, he explained that the defendants had to be firm on certain things because they were taking on a lot of liability and the business needed to be protected. In his view, the defendants had to work hard to create relationships with potential customers and maintain its relationship with existing customers.

149 Mr. Hook also described how the MP data centre had developed over the years and said that extensions which had been created had initially taken around twelve months but then took less time, around eight or nine

months, as the defendants gained experience. His view was that if a client such as Entain came knocking on Continent 8's door, they could "spin up" a room (meaning build an extension with additional racks) within six months to cater for additional demand. He said that it had taken the defendants six months to set up a one-hundred rack data centre at the World Trade Center, and he thought that Continent 8 would probably take no more than three or four months. He said that whilst this was expensive, the cost could be recovered through fees.

150 When dealing with the costs of a customer moving from one provider to another, Mr. Hook accepted that this could be expensive but that the cost depended on the stage at which the customer's IT "refresh" was, which often coincided with colocation contract renewals. He said that the cycle of hardware changes tended to be every three or four years, although users try to extend this. He also said there was strong competitive pressure on providers at the time of contract renewals. Further, he said that Gibraltar was always under pressure because it is regarded as an expensive jurisdiction due to the size of the local market, and economies of scale.

151 He said that whilst relocation costs could be a barrier, it was not an insurmountable one, and he said that he had lost a customer in March 2024 who moved to Dublin.

152 Mr. Hook then commented on Gibfibre's claim for damages. He said that access to the defendants' data centres did not impact on Gibfibre's ability to offer international connectivity for data centre customers, and that there are thousands of businesses that do not require connectivity to a data centre but require connectivity services generally.

153 Mr. Hook then also referred to the high quality and service level provided by Gibtelecom's Flexiband connectivity offering, designed for enterprise customers requiring a premium service. He said that this quality of service was possible for several reasons. He explained that Gibtelecom has PoPs in various locations (Madrid, London, Marseille, Dublin, Malta, Singapore and Malaysia) with its own equipment in these locations facilitating connectivity and providing a backup network in the event of a fault.

154 He also explained that onward connections are provided by global Tier 1 Internet Service Providers, and that all connectivity links provide fast connectivity of at least 10 gigabits per second, with some of them going up to 100 gigabits per second. To avoid disruptions, he said that Gibtelecom has two separate links to Madrid, and the EIG sub-sea cable, which links Gibraltar directly to its PoPs in London and Marseille. Further features of Gibtelecom's offering include a "self-healing connection" (traffic is automatically redirected in the event of a default), a dedicated NOC (24/7 monitoring of the service by qualified Tier 2 engineers), and protection against distributed denial-of-service ("DDoS") attacks. Further,

he said that Gibtelecom has ISO27001 certification, and both its data centres are Payment Card Industry Data Security Standard certified. Further, he said that Flexiband customers can exceed their contracted bandwidth by 50% for up to one hour a day, that they are provided with multiple IP addresses, and if there are two disruptions to the connectivity in a month, the customer is unilaterally able to terminate the contract.

155 Mr. Hook said that whilst he was not aware what Gibfibre's network consisted of, on the limited information provided, he thought that Gibfibre offered a different type of service, both in terms of the physical network, and the processes. He said that there was no indication given of PoPs, route capacity and many of the features referred to above. He thought that what Gibfibre offered was a service designed for residential or small/medium sized customers, and more like other products offered by Gibtelecom but not the Flexiband service. He therefore thought that Gibfibre was "comparing apples with pears." Having heard the evidence of Mr. Berniz, Mr. Hook said that there were some "glaring differences," and pointed out that Gibfibre does not offer DDoS protection as standard, and that it has a lower-level response time to problems. He echoed what Mr. Berniz had said that first and foremost gaming customers wanted continuity of service, and that money was secondary.

156 In Mr. Hook's view, the differences in the quality of connectivity service impacted the likelihood that customers which had been in contact with Gibfibre would have ended up contracting with it.

157 Mr. Hook also said that colocation customers, especially sophisticated betting and gaming customers, would generally consider their connectivity requirements at the same time as their colocation needs. In his experience if a potential or important customer said that they had received a good offer elsewhere, the defendants would make a counteroffer or offer incentives to get them to stay with them. He also confirmed that the connectivity prices that Gibtelecom offers to colocation customers are, and have been, the same prices offered to all businesses in Gibraltar.

158 Commenting on the counterfactual scenario, and about the customers that Gibfibre might have won from the information it had provided, Mr. Hook said that it was unrealistic to assume that every approach from a potential customer would have been converted into a paying client. He said that premium customers tend to get various quotes to bring down prices (which he referred to as a "bid monkey"), and they take a wide range of factors when making their decision.

159 Turning to the specific business which Gibfibre said it had lost, Mr. Hook commented as follows:

160 *Gamesys*: This company used Gibtelecom's Flexiband service, with its needs varying over the years. He thought, therefore, that it was unlikely

that they would have gone for Gibfibre and that it was more likely that they were just getting a second quote. He added that if Gamesys wanted to save costs, Gibtelecom could have offered a cheaper product such as Direct Internet Access (which does not include DDoS) but that it was never asked about this. Further, Mr. Hook made the point that if Gamesys were interested in a third supplier at the MP data centre, he would have expected to have been contacted directly by Gamesys about this too. Finally, Mr. Hook said that, if Gamesys had been considering a move, the defendants would have made every effort to retain their business.

161 *Kindred*: Mr. Hook said that Gibtelecom's offer was cheaper than Gibfibre's offer, and that the quality of Gibtelecom's service was better.

162 *Interoute*: Assuming that this was inquiry for William Hill, Mr. Hook said that the costs of extending the connectivity to the desired locations had to be added to Gibfibre's quote to Interoute, given that William Hill would have required connectivity to two locations in London.

163 *Expereo on behalf of GVC/Entain*: Mr. Hook said that GVC/Entain were involved in negotiating a three-year contract commencing on January 1st, 2019 to consolidate all services pending the setting up of their data centre in Equinix in Dublin. He did not consider that the request for a 1 Gb circuit to Madrid matched the requirements GVC was negotiating with Gibtelecom at the time, and he therefore thought that the request might relate to the replacement of a couple of point-to-point circuits to Slough that were active then.

164 *Point 5*: Mr. Hook thought this was a speculative inquiry, and he was confident that it was unlikely to materialize into a serious business opportunity.

165 *Betvictor*: Mr. Hook provided confidential details of the quotes Gibtelecom gave Betvictor in 2019 for 100 and 200 Mbps point-to-point circuits to Megaport in London, a connectivity solutions provider that offers connection directly into hyperscale cloud providers like AWS, which Betvictor uses. In 2020, Betvictor then contracted with Gibtelecom for a 200Mb unprotected link to that location, which was upgraded to a protected link in 2023, with a reduction in bandwidth.

166 Mr. Hook said that it was not clear whether Gibfibre was offering Betvictor two active circuits to London or just one but he thought that Gibtelecom's prices were better.

167 Finally, Mr. Hook said that Gibfibre's alleged 90% profit margin appeared hugely inflated.

168 Mr. Hook's evidence was clear, convincing and helpful, and he showed a detailed knowledge of the colocation industry and the practical aspects of running a data centre in Gibraltar. He also effectively rebutted

many of the points by Ms. Sheriff about the colocation business in Gibraltar, the cloud and colocation services in other jurisdictions. Further, I found Mr. Hook was very knowledgeable about the connectivity business generally. Overall, I found Mr. Hook was a straightforward and impressive witness, and I largely accept his evidence.

Peter Montegriffo, K.C.

169 Mr. Montegriffo is a lawyer who specializes in gambling law, and who is familiar with the development of the gambling industry in Gibraltar. His evidence contained in a witness statement dated November 13th, 2023 was agreed, and there was therefore no need for him to give evidence in court.

170 In his witness statement, Mr. Montegriffo refers to online or remote gambling taking off in the early 2000s, and that Gibraltar was one of the early jurisdictions to license and regulate this business with considerable success. In those early days, it was important for these operators to demonstrate a substantive presence in Gibraltar in terms of personnel, local office space and technical infrastructure. This was the reason why there had been a long running requirement for gambling companies to host at least some of their IT infrastructure and equipment geographically within Gibraltar. In those early years, IT equipment would have been largely owned and housed by operators in their own premises, although that changed with the development of data centres. Further, he states that at that time, the view adopted across various jurisdictions was that betting or gaming took place where the servers processing the transactions were located. This analysis rested on the premise that gambling was licensed and regulated on a "point of supply" basis. This was important for tax and legal reasons.

171 Mr. Montegriffo observes that this approach was followed under the Gambling Act 2005 that only requires a single piece of IT equipment to be located in Gibraltar, although he states that the Gibraltar Gambling Commissioner continued to insist on locating more than the minimum required equipment in Gibraltar. This meant that these companies were likely to establish much of their IT equipment in Gibraltar, especially the servers dealing with the actual betting and gaming transactions.

172 Mr. Montegriffo states that in the early 2010s, companies in Gibraltar started looking into relocating some of their servers outside Gibraltar. For resilience and latency reasons, it benefited them to have some of this equipment in other jurisdictions, potentially closer to key markets they were serving. For example, non-transactional servers such as those hosting very elaborate graphics were routinely moved outside Gibraltar. He recalls that the early approach of insisting that most of a company's IT equipment be situated in Gibraltar was becoming unsustainable. This was compounded

by developments in 2014, when the UK (like other EU countries) also decided to move away from a "point of supply" to a "point of consumption" model for remote gambling. This meant that a UK licence would also be needed by operators seeking to access the UK market, and they would be liable for UK gambling duties in respect of their UK business. This all led to greater latitude in the configuration and location of IT equipment, except for the core servers dealing with the core gambling transactions recording the betting or gaming undertaken. This led to operators becoming freer to divide their servers and equipment in the manner they saw fit between different jurisdictions including Gibraltar, Ireland, the Isle of Man, Malta, Guernsey and more.

173 Mr. Montegriffo also states that from his discussions within the industry and with the Regulator, since at least 2016 hyperscale cloud solutions offered by the likes of Amazon (Amazon Web Services or "AWS"), Microsoft Azure, and Google have driven operators to seek to migrate to the various integrated solutions provided by these infrastructure companies. Another reason given by Mr. Montegriffo for this shift was the 2016 Brexit vote.

174 Mr. Montegriffo's evidence provided some helpful background, which traces the move away from the need to host all or most of an e-gambling's IT equipment in Gibraltar.

Nicholas Macias

175 Mr. Macias is the secretary of the Gibraltar Betting and Gaming Association ("GBGA"), having previously worked in various compliance roles for e-gaming firms. He provided a witness statement dated December 5th, 2023, and he gave evidence on March 11th, 2024.

176 Mr. Macias agreed with Mr. Montegriffo's evidence that following legal and regulatory changes in the UK and elsewhere, there has been increasingly less focus on IT equipment having to be kept in Gibraltar. He explained that this also followed the evolution of the industry since the 2010s. Whilst companies used to host games and customer platforms on their servers, known as "Business to Customer" services ("B2C"), these services were increasingly outsourced to other businesses that offered "Business to Business" services ("B2B"). These B2B suppliers often host their technology in a central location and then service multiple jurisdictions from that location. As a result, he stated that there is less emphasis from a licensing perspective on where technology is located although he confirmed that the Gambling Commissioner still requires certain IT equipment to be in Gibraltar, notably equipment with data on customer records and activities.

177 Mr. Macias said that Gibraltar is one of several jurisdictions where remote gambling operators would consider being licensed. Other

jurisdictions include Malta, the Isle of Man, Alderney and Guernsey. As part of its decision on selecting a suitable "home," the quality of IT services in that jurisdiction is important, including how that can be incorporated into the wider infrastructure. Further, he stated that remote gambling operators and suppliers are typically very price sensitive when it comes to the provision of colocation services.

178 During his cross-examination, he said that there are various factors in play when a gambling company is deciding where to place its technology. These include licensing requirements in various jurisdictions, latency, resilience, a data centre's capacity, and cost. Further, he said that he had been involved in a consultation exercise with the membership of the GBGA in 2020 about the location of IT equipment, from which it was clear to him that latency and higher costs of hosting in Gibraltar were recurring themes for GBGA's members, which compared Gibraltar to other jurisdictions such as the Isle of Man, Guernsey, Alderney and Malta. He said that as costs were already seen as being high in Gibraltar, an increase in costs of 5%–10% would just "feed into the narrative that they wouldn't want to host over here because of the costs of being in Gibraltar."

179 Mr. Macias also added that there is nothing unique about the services offered in Gibraltar for colocation. He said that gambling operators review and assess their IT equipment, and its location, on an ongoing basis to ensure that it is in the best place economically and operationally.

180 I found that Mr. Macias was able to provide helpful non-technical insight from the gambling industry point of view into colocation and connectivity.

181 The defendants also called a single expert to deal with both fields of expertise.

Greg Harman

182 Mr. Harman was the defendants' expert on both competition economics and issues of quantum. He provided two expert reports dated December 22nd, 2023 and January 29th, 2024, and he gave evidence on March 14th and 15th, 2024.

183 Mr. Harman is a managing director in the Economics and Damages practice of Berkeley Research Group, a global firm specializing in the provision of economic and financial expert advice, and he has a wealth of relevant experience. His evidence was based on a review of all the documents in the case which he had carried out with the assistance of his team.

184 After setting out the legal and economic framework on which he was proceeding and the key points in the evidence, he first dealt with market definition for the purposes of assessing dominance.

185 Mr. Harman's view was that the narrow colocation market definition proposed by Gibfibre was not coherent, and that the defendants in fact compete in a much broader market. In his view, this market includes cloud services, and colocation services in other jurisdictions. In coming to this conclusion, he relied on the evidence of Mr. Hook that the defendants had lost colocation customers to cloud services and gained cloud customers from rival colocation providers. His view was that both services were alternative ways of outsourcing IT requirements.

186 Mr. Harman stated that the data centre industry developed primarily to serve demand from e-gambling firms. He compiled a table summarizing the evidence of switching which he included as Annex D to his first report highlighting the move of key customers such as William Hill and BetVictor from the defendants' colocation services to those of cloud providers such as AWS. In his view, this showed that cloud services became a demand-side substitute to colocation services from 2017 to 2018, and thus form part of the same relevant market as colocation.

187 Mr. Harman did not consider that the merger decisions relied on by Dr. Rander in Equinix/Telecity and Pulsant/Onyx provided much assistance on the question of market definition. He pointed out that the Equinix/Telecity decision did not consider cloud services, and that both decisions lacked relevant evidence. In his view, the available information in this case from the defendants' documents as well as public information was more relevant.

188 In response to the point made by Dr. Rander about the cost of colocation not being limited to the colocation fee, Mr. Harman compiled a table setting out the fees paid for colocation for four large gaming customers which he concluded were significant and of a different order of magnitude to the costs of the equipment. In his view, therefore a long-lasting 5%–10% increase in these fees would encourage a company to switch some of its demand to a more cost-effective service, even taking into account the costs of IT equipment. Further, he relied on Mr. Macias' evidence that e-gaming companies are very price sensitive, a fact which is regarded as consistent with the nature of the business in any event. He also referred in this connection to a statement made by AWS in 2021 that William Hill had switched to their service due to improvements in scalability and agility, as well as cost reductions.

189 Mr. Harman did not agree with Dr. Rander that technical and cost structure differences between colocation and cloud services were material, and he said that any such differences had not stopped customers switching demand from the defendants colocation services to cloud services.

190 Mr. Harman also added that if there was a trend of technological migration (switching from an old product to a new one for other reasons), the relevant question was whether a SSNIP in relation to colocation

services would have accelerated an underlying switching trend to cloud services to such an extent that it would not have been profitable. In his view, the evidence in this case suggested an answer in the affirmative to this question and that cloud services would constrain a hypothetical monopolist in colocation services.

191 Mr. Harman also considered that the geographic scope of the market was wider than Gibraltar and included other jurisdictions. He referred to the evidence of Mr. Macias who referred to these jurisdictions as "remote gambling jurisdictions" which are, apart from Gibraltar, the Isle of Man, the Channel Islands and Malta. Further, he stated that Ireland could also be possibly included in this multi-jurisdictional geographic market for colocation services.

192 Having considered the evidence, his view was that the defendants considered that they were actively competing against these outside colocation providers. Further, the evidence generally showed this to be the case, and that e-gaming companies tended to spread their requirements across jurisdictions, including these "remote gambling jurisdictions."

193 Mr. Harman disagreed with Dr. Rander's view that a SSNIP for colocation services would be unlikely to trigger switching to colocation services in other jurisdictions, and that other factors would be much more important to drive such a decision such as changes in laws, regulation, and customer requirements. In his view, the evidence in this case (which he considered more relevant than customer views reported by the Commission and CMA in the merger decisions relied on by Dr. Rander) was that e-gaming customers operated across multiple jurisdictions, especially since regulatory requirements had been relaxed, as explained by Mr. Montegriffo. He referred to the example provided by Mr. Hook of Gamesys, a leading international online gaming operator which runs its entire operations from Malta but which has its main data centres in the UK and Gibraltar, and from 2024 entirely in Dublin. He also said that Dr. Rander appeared to ignore the fact that e-gaming companies had licences in multiple jurisdictions and had established operations in multiple data centres across these jurisdictions. Thus, he considered that the right approach was to consider that in response to a SSNIP (or a SSNDQ) an e-gaming company would substitute between Gibraltar and other jurisdictions for its incremental/marginal colocation service requirements.

194 Overall, Mr. Harman's view was that the narrow market proposed by Gibfibre comprising only colocation in Gibraltar was inconsistent with the evidence on the competitive constraints provided by cloud services and colocation services in other jurisdictions. Further, his view was that this was at odds with the fact that the major customers in this market are multinational e-gaming companies.

195 In assessing whether the defendants were dominant in the relevant market for the relevant period, Mr. Harman said that the defendants only had a *de minimis* share of the European market for colocation and cloud services, and a low share of the alternative multi-jurisdictional colocation-only market. Even in the case of a narrower Gibraltar-only colocation-only market, he did not consider that the defendants were dominant.

196 First, he said that the assessed market shares did not support a presumption of dominance. He reviewed the available data on rack numbers, which resulted in a market share of only marginally above [*redacted*]%. He also considered that floor space should be taken into account, which he said brought this figure down.

197 Secondly, he said that market shares should not be considered in isolation, and that there was strong evidence of competitive constraints. In particular, he referred to (1) cloud services which, even if excluded under this narrower definition, exerted a strong competitive constraint; (2) similarly, the data centre market in the remote gambling jurisdictions; and (3) e-gaming companies wielding significant countervailing customer power due to (a) the concentration of the e-gaming industry in a small number of global operators; (b) the availability of alternative competing colocation services to which e-gaming customers can switch; and (c) the near total dependence of colocation suppliers in Gibraltar on the e-gaming industry. Further, he said that this was consistent with the observation that the defendants opened their first data centre in 2007, and only implemented their first price increase for colocation services twelve years later, despite cost inflation during that time.

198 Turning to abuse, Mr. Harman did not agree with Dr. Rander's definition of the market. He rejected the claimant's contention that there are individual connectivity markets for each individual data centre and concluded that there is a single retail business connectivity market in Gibraltar. Mr. Harman explained that the connectivity market is not a by-product of data centres but it is the core business for which there is competition. In support of this view, Mr. Harman relied on regulatory precedents and a determination made by the GRA in 2023 that a single Gibraltar-wide market should be identified.

199 I found that Mr. Harman was a careful and conscientious witness, who provided clear, authoritative, and balanced evidence. Mr. Harman was fully briefed as he had considered all the material in the case together with his team, and he applied himself carefully and thoroughly to the issues in the case. His expert evidence seemed to me to be analytically rigorous and in keeping with principle, and I found his opinions as far more authoritative and persuasive than those of Dr. Rander. Overall, I found Mr. Harman's evidence most helpful in resolving the issues in this case.

E. Analysis

200 Before turning to the core issues, I must deal with some preliminary points arising from submissions made by Gibfibre that it was labouring under several disadvantages in bringing this claim.

The confidentiality ring order

201 Whilst Gibfibre accepted that it had the burden of proof, it submitted that it had been hamstrung in the preparation of the case as a result of what it described as "a highly restrictive confidentiality ring regime."

202 The evidence disclosed by the parties was subject to a confidentiality ring order made on June 13th, 2023. The order was made following a hearing on the issue applying agreed principles, as summarized by Floyd, L.J. in *Oneplus Technology (Shenzhen) Co. Ltd.* v. *Mitsubishi Electric Corp.* (14). That provided for designated confidential information to be disclosed to the parties' respective lawyers and experts only but contained a "safety valve" in the sense that it allowed for the designation of confidentiality to be challenged in accordance with a specific regime set out in that order. Such an order is usual in cases of this sort, and it is designed to strike a balance between the need for disclosure and the need to protect the confidentiality of commercially sensitive information.

203 At no time did Gibfibre seek to challenge the designation of confidential information and ask for permission to ask, say Ms. Sheriff or Mr. Berniz, questions about it, nor was any example given as to how this would have assisted it. As is clear from the evidence in the trial, the confidential material was largely relevant to the experts in their assessment of the claim. I do not consider, therefore, that this confidentiality ring order should have caused any real difficulties for Gibfibre.

204 Gibfibre also said that a distinction should be drawn between a regulatory investigation carried out by a public regulator and a private litigant, and that it was unfair to seek to impose unrealistic standards on private litigants in terms of the materials that they can produce to the court. Gibfibre therefore submitted that the court had to reach findings as best it could, based on the available evidence.

205 Whilst it is true that this court is not issuing a regulatory decision nor does it have the attendant investigative powers, I do not consider that Gibfibre, as a claimant in private proceedings, is exempted from discharging the burden of proof, or that it can proceed without producing even basic data on certain key issues. In that regard, I cannot see why Gibfibre could not have applied for third party disclosure orders for market information against Continent 8, Sapphire and some of the larger customers in the colocation market. This would have provided the court with a much

better picture of the market, on the question of market shares, and on issues surrounding quantum.

206 Turning now to the central issues.

E1. Market definition

207 The first step in assessing dominance or market power is defining the relevant market. This provides a focal point for the assessment of whether an abuse of a dominant position has taken place. Market definition is therefore an extremely important element in assessing dominance and limiting the jurisdictional ambit of competition law intervention. Unless an undertaking is dominant in a particular market, there can be no abuse of dominant position.

208 The principles on market definition summarized in section C1 above are not controversial, and the parties' respective economic experts agreed on the conceptual framework for market definition. They agreed that the 2024 Commission Notice on Market Definition was an up-to-date and authoritative summary of the principles to be applied, and that the hypothetical monopolist test (or SSNIP test) was particularly relevant in this context. There were, however, some differences of opinion as to how this should be applied in practice.

Product market

209 Turning to the product market first. The first question which needs to be answered is whether cloud services form part of the same market as colocation services. Substitutability or interchangeability lie at the heart of whether two products are in the same relevant market. This is not just concerned with the objective characteristics of the products and services in issue but what is being bought and sold and why. This is usually tested using the conceptual framework of the SSNIP test or HMT.

210 Before turning to that, it is important to define the scope of "cloud services" which is what the defendants say is a substitute for the focal product which is third-party colocation services. This is because cloud services can consist of different types of services.

211 Gibfibre submitted in its closing submissions that cloud services in this case should be limited to "Infrastructure as a Service" ("IaaS") (the lowest level of cloud service), and that references to "Back-up as a Service" ("BaaS") (a cloud service offering more features) arose late in the day, and that it had not had a fair and proper opportunity to address this.

212 If one turns to para. 7(c)(i) of the defence which deals with this point, one can see that it refers to cloud services generally, which clearly includes IaaS and BaaS. Further, it was clear from the defendants' factual and expert evidence before the court that they treated cloud services as including both

IaaS and BaaS. Mr. Hook referred to the different layers of cloud service, and Mr. Harman considered both IaaS and BaaS in his expert report and reached his conclusions accordingly. Despite this, Gibfibre did not advance a positive case on this issue, and only raised it at the last minute.

213 In any event, I do not consider that it would be appropriate to limit the scope of cloud services when assessing the product market. The court's focus is on interchangeability or substitutability, and this should not be assessed solely by reference to the objective characteristics of the services at issue. This depends on the facts of the case, and regard must be had to the conditions of competition and the structure of supply and demand on the market. Whilst some types of cloud services like IaaS might be more akin to traditional colocation services than others like BaaS, when looking at this issue and as set out above, one needs a broader canvas than merely focusing on the objective product characteristics. It still seems to me that when one looks at substitutability contextually, the correct course is not to delimit the scope of cloud services.

214 Ms. Sheriff's evidence was that there were material differences between colocation services and cloud services. She pointed out that colocation services provided for a business's data to be stored and processed on the business's own IT equipment, albeit housed in a third-party's data centre. She contrasted this with cloud-based services that involve transferring and storing data to the provider of the cloud service. She also said that third-party colocation services were faster than cloud services as they were not dependent on the processing capacity of another organization's IT equipment. However, when challenged about whether the speed of connectivity for either service really depended on what the parties contracted for, she was quick to say that this was a matter for the experts.

215 Similarly, Ms. Sheriff made the point that colocation services were more secure than cloud-based services and less vulnerable to hacking but when challenged that security could work in the same way for both services, she again said that this was a matter for the experts.

216 Finally, she said that the cost structures associated with third-party colocation services and cloud-based services are different, with colocation providing fixed costs and the price of cloud-based services being less predictable. When it was put to her in cross-examination that cloud services could be purchased via usage charges or a flat monthly rate, she said that she was not aware of this.

217 Despite Ms. Sheriff's position as managing director of Gibfibre, which now has its own data centre, the cloud was clearly a subject about which she had little personal knowledge. She was also reticent about discussing the development of cloud-based competitors such as Amazon,

Microsoft, and Google. Further, Ms. Sheriff failed to consider and engage with the evidence before the court of actual interchangeability.

218 Ms. Sheriff accepted that her lawyers had helped her write this part of her statement, and it was clear that this was the case. Ms. Sheriff, however, also failed to investigate these matters following Mr. Hook's further witness statement dealing with these issues, nor did she seek to correct her evidence in this regard either.

219 In my view, the contents of Ms. Sheriff's evidence on this topic should therefore be accorded little or no weight. Although Mr. Berniz also gave evidence in support of Gibfibre's case, this was concerned with the quality of the network in response to Mr. Hook's third witness statement and did not therefore add anything to Gibfibre's case on these topics.

220 Mr. Hook dealt with the cloud in his first witness statement dated November 13th, 2023, and then addressed issues raised by Ms. Sheriff about this in his further witness statement dated December 5th, 2023. In sharp contrast with Ms. Sheriff, Mr. Hook displayed in-depth knowledge, not just in his witness statements but also in his oral testimony, about the differences between colocation and cloud services.

221 First, Mr. Hook explained that as far back as 2013 it was clear that cloud services were a real threat to the existence and profitability of physical data centres, and that he saw this as a natural evolution of the data centre market. His view was that since the emergence of the cloud as a viable alternative, the cloud and colocation were all part of the same market. He said that some of the defendants' biggest customers, such as William Hill, made it clear that in 2016 they were developing cloud alternatives to the racks that they held at the MP data centre. Further, he said that from 2017 to 2018, the defendants had lost important colocation customers to cloud services. He explained that this forced the defendants to develop a cloud alternative themselves, and that they have gained cloud customers from other hosting services such as Continent 8.

222 Some specific examples before the court of former customers of the defendants moving from colocation services to the cloud include:

(1) William Hill, which started using cloud services provided by AWS instead of the defendants' services.

(2) Betvictor, which started using AWS and subsequently downsized the number of colocation racks it was using over a few years.

(3) Betfred, which adopted a hybrid approach and reduced its rack occupancy with the defendants.

(4) Nektan and Tombola, which moved from the defendants' colocation services to its cloud offering.

223 As set out above, Mr. Hook stated that whilst some companies preferred the services provided by a physical data centre, as they "prefer to keep their crown jewels somewhere where they can hug them and touch them," many preferred the cloud and some had only used the cloud, or were "born on the cloud" as he put it. He also explained cloud-based services took the logic of outsourcing one-step further from traditional hosting services, the different levels of service on offer from "tin" to systems including operating systems, and the difference between public and private cloud. This form of outsourcing, he explained, allowed businesses such as gaming companies to focus on their core business, and provided flexibility so that customers could scale up or down according to their needs.

224 Mr. Hook also said that private cloud which had been available since around 2021 to 2022 catered for security concerns, even though some customers such as banks might be more cautious about outsourcing. He said that security clearance associated with a physical server can be replicated on the cloud, and that the cloud's firewall can be just as strong, if not stronger than a data centre's firewall.

225 Mr. Hook further observed that Rockolo had seen a significant decline in rack space from 2019 to 2024 and in his view this was because customers had opted for a hybrid approach to data storage including public cloud, private cloud, and colocation.

226 Mr. Hook also rejected the suggestion that physical data centres were necessarily faster than cloud-based rivals. He explained that bandwidth was entirely commoditized, and that large cloud providers such as AWS or Google have enough bandwidth to cater for the requirements of all customers. Further, he said that it was wrong to say that the processing power of physical data centres is superior to what cloud services can offer. He also said that physical proximity to a data centre was not an advantage as IT equipment could be managed remotely, and to illustrate this, he said that the defendants managed data centres in Malaysia and Dublin remotely.

227 Mr. Hook rejected the suggestion that the cost of using a cloud-based service was less predictable than the cost of colocation services, and he pointed out that typically cloud-based services offered both usage-based and fixed-pricing models. Mr. Hook also stated that in his experience, and contrary to what Ms. Sheriff had said, for around a decade, most businesses have incorporated cloud-based services into their IT infrastructure, resulting in a dramatic reduction of rack occupancy.

228 In my view, Mr. Hook's evidence on how cloud-based and colocation services operate was well informed and persuasive, and it showed his command of this industry. He fully engaged with the points made by Ms. Sheriff in her witness statement about what she said were differences between one service and the other. Unlike Ms. Sheriff, who clearly had little knowledge about the matters set out in her witness statement, Mr. Hook

was able to provide precise and convincing answers on all these points. This meant that the various points made by Ms. Sheriff about security, speed and the cost of cloud services fell away one by one.

229 Further, Mr. Hook's evidence was supported by the unchallenged evidence of Mr. Montegriffo who states at para. 31 of his witness statement that:

> "[S]ince at least 2016 hyperscale cloud solutions being offered by the likes of Amazon (Amazon Web Services), Microsoft Azure, and Google have driven operators to seek to migrate to the various integrated solutions provided by these . . . companies."

230 Let me now draw these strands of factual evidence together.

231 Cloud and colocation services are both distinct from self-provision as they involve the outsourcing of data storage. Cloud and colocation also differ from each other, principally because with colocation services the customer owns the equipment, whereas with cloud services, the cloud provider owns the equipment and there are layers of service on offer.

232 Most importantly, however, these services are materially the same in the sense that they involve outsourcing the management of data to premises owned, equipped and maintained by a third party. The maintenance of that equipment involves dealing with matters such as power and back-up power, temperature control, humidity control, security and monitored access, fire detection and suppression, and that is dealt with by a third party rather than the customer itself. As Mr. Hook explained, cloud services can be seen as an evolution from traditional hosting service.

233 Turning to the opinions from the expert economists on this issue.

234 Dr. Rander considered that there was insufficient interchangeability between cloud and colocation services, which meant that they did not form part of the same relevant market. He said cloud services covered more than colocation services, and that customers who had chosen colocation would have done so for a reason such as speed, security or cost. As set out above, he also made the point that for the proper application of the HMT in this case, the fact that the fees paid for colocation services were a small part of those overall costs needed to be taken into account.

235 Mr. Harman's view on the other hand was that cloud services have formed part of the same relevant product market as colocation services since 2017–2018, and he provided an analysis of customers switching services from the defendants' colocation services to those of cloud providers, such as William Hill and BetVictor. In his view, cloud and colocation services became viable substitutes for some large e-gaming companies at the point when cloud technology achieved an acceptable level of performance. I pause here to observe that whilst there were several

examples of actual switching, there may well be others from other colocation service providers such as Continent 8 but that evidence was not before the court, and neither the experts nor the court had those potentially important data points available. The court must, however, proceed on the evidence which it has before it.

236 Mr. Harman accepted that whilst there was likely to be an underlying migratory trend amongst some customers to use the cloud, that trend would be accelerated by a SSNIP or a SSNDQ.

237 In response to Dr. Rander's point about the cost of colocation services forming a small part of the overall costs of colocation services, Mr. Harman analysed the annual colocation fees paid by various gaming companies over the length of a notional three-year contract. Whilst Mr. Harman accepted that there was a diluting effect, he concluded that it was far from clear that colocation fees were a small proportion of the overall total costs. In his view, a SSNIP would still be material, even when the costs of equipment are taken into account and matters are looked at over time. This was on the basis that gaming customers were price sensitive.

238 I pause here on the question of price sensitivity because Gibfibre submitted that the evidence about this was weak and was based on the evidence of Mr. Macias who only had a background in compliance and not in commercial operations. I do not agree with this assessment. Mr. Macias came across as someone who was very familiar with all aspects of this gaming industry. Further, an overall picture emerged during the trial as to the price sensitivity of gaming customers, even if price was not the foremost consideration. This was a point made by Ms. Sheriff (although as I have said, her evidence was patchy and superficial), Mr. Berniz (who had worked at Betvictor) and Mr. Hook. The position was in my view best expressed by Mr. Berniz in his testimony when he said that the foremost consideration for gaming customers was resilience and reliability but that after that came pricing, a view with which Mr. Hook agreed.

239 Dealing with the evidence of switching, Dr. Rander said that whilst switching can be relevant, it does not in itself constitute sufficient evidence of substitutability such that a SSNIP applied to the price of colocation services would be unprofitable. Further, he focused on the difference between cloud services and colocation services when reaching this conclusion and said that the move to the cloud represented a "paradigm shift" in the business environment that would not be affected by relative supply conditions. Thus, Gibfibre submitted that it was unlikely that a small and diluted change in the relative supply conditions of the two services would constitute a material factor in determining the pace of the trend away from colocation services.

240 As I have already indicated, I consider that there were several problems with Dr. Rander's evidence, and that the evidence of Mr. Harman is to be preferred when considering the question of the product market.

241 For a start, Dr. Rander's opinion was based on Ms. Sheriff's evidence, and she was unable to give any meaningful evidence about the differences between cloud and colocation services, and about the things that they had in common. She said that she was unsure whether cloud was cheaper than colocation, professed not to know whether Amazon, Microsoft and Google had scale advantages, did not know whether there were different ways of purchasing cloud services, and could not even answer whether Gibfibre itself had a cloud offering. A striking feature of Gibfibre's case, therefore, was the paucity of the evidence that it adduced on these important factual issues.

242 Although Dr. Rander referred to a single email dated May 2018, in which a customer stated that "we prefer the colo[cation] option as it gives us guaranteed performance," this was nothing more than the view of a single customer. Dr. Rander accepted that he had not sought a range of views from a range of customers about this to see whether those concerns were shared or not. I do not consider that this single item of evidence (and a few years old at that) enables a proper conclusion to be drawn about the proper definition of the market today. Further, and as Dr. Rander accepted, this appeared to refer to concerns about shared capacity using public cloud. Mr. Hook explained that there is also a private cloud offering and cloud providers can adjust their systems to meet the requirements of customers. Whilst there will always be customers with a preference, that does not mean that they operate in the different product markets.

243 Further, Dr. Rander had not seen important evidence that one would expect to see in cases of abuse of dominance. This includes data that would enable a quantitative analysis to be carried out, customer views, input from industry experts, or information from key competitors such as Continent 8 and Sapphire, or from cloud providers such as AWS or Microsoft.

244 There was also evidence of a shift towards cloud-based services. Some examples of this include William Hill reducing their rack space considerably at some point between 2018 and 2019, BetVictor considerably reducing its rack capacity between 2019 and 2022, and Betfred reducing its capacity between 2021 and 2022. The evidence points to this happening because of a shift to cloud services such as AWS. Tombola, Britain's biggest online bingo moved to the defendants' own cloud offering in April 2018. I do not consider that Dr. Rander had taken sufficient account of these important data points either.

245 It was also clear that Dr. Rander placed considerable weight on the two regulatory decisions referred to above in his evaluation of market definition.

246 The first of these was the Commission's Equinix/Telecity merger decision where the Commission approved the acquisition by Equinix Inc., a global operator of data centres and related services, of Telecity, another data service provider. The parties' activities mainly overlapped in the provision of colocation, interconnection, and managed IT services. That merger decision, however, did not consider cloud services in the market definition process, nor the position of e-gaming customers that is central in this case. Rather, it concluded that the relevant product market comprised colocation services provided by third party data centres without segmenting the relevant product market into services provided by carrier-neutral and carrier-owned data centres, wholesale and retain operators or by types of customers. Although Dr. Rander also referred to subsequent Commission decisions, namely Bite/Tele2 and Colony Capital, these decisions did not revisit the market definition in Equinix/Telecity.

247 The second decision relied on by Dr. Rander was the CMA's 2016 decision in Pulsant/Onyx, which concerned colocation services offered around Edinburgh. That was a decision where cloud services were considered in the context of market definition, and where the CMA did not include cloud services in the same frame of reference as colocation services. Although this might appear on its face to be relevant, one needs to see the conclusion reached by the CMA in its proper context.

248 That decision was a short Phase 1 decision, *i.e.* a decision on whether to refer the relevant merger situation for a full (Phase 2) investigation. It was only in that context that the CMA excluded cloud services on "a cautious basis" (see para. 36 of the decision) as it was not clear to the CMA what had caused switching between colocation and cloud services, and the concerns raised by customers about the speed and security of cloud services. Thus, the CMA only proceeded based on a narrower market because it reasoned that there were no issues warranting a referral to a Phase 2 investigation on that basis, and it followed that there would also be no issues in a wider market. As for the evidence in that case which led the CMA to adopt that approach, and as Dr. Rander accepted in cross-examination, there is no explanation in the decision as to the identity of the customers and how comparable they would be to e-gaming customers in Gibraltar at a later point in time in a fast-evolving industry.

249 Those two decisions do not therefore compel the conclusion in this case that there is insufficient interchangeability between colocation services and cloud services as contended by Dr. Rander.

250 It is also worth recalling that whilst regulatory precedents may offer some guidance, ultimately the question of market definition is a question of economic analysis based on the facts of the case. This is especially the case when dealing with developing technologies such as cloud, as confirmed by para. 55 of the 2024 Commission Notice on Market Definition.

251 It is also clear from Dr. Rander's evidence that he had not considered technological developments since those merger decisions, nor the evidence of switching to the cloud provided by Mr. Hook.

252 Apart from placing excessive reliance on those merger decisions, the approach urged by Dr. Rander was also incorrect for other reasons. He also placed too much reliance on distinctions between the product characteristics of colocation and cloud services, many of which, as already explained, he was incorrect about in any event. Further, whilst such distinctions are one indicator of substitutability, a wider inquiry on the question of substitutability is required.

253 When one looks at the differences between these two services, one obvious difference is that with colocation, a customer owns the hardware and with cloud services, the cloud provider owns hardware. As Mr. Harman explained, however, from an economic perspective there is no real difference:

> "this is a lease or buy difference, I would buy the equipment as a Cap Ex expenditure or I'm leasing, so from a financial economic perspective, I don't see the difference . . . you still have to have equipment, and you still have to pay for it."

254 There are some further differences between these two services. The cloud option, unlike colocation, offers various levels of service with different "layers." Further, the cloud option encompasses private and public cloud. Private cloud provides for physical hardware to remain exclusive to a specific customer. Public cloud services allocate one piece of physical hardware to different customers at different times. According to Mr. Hook, in practice, customers may have public cloud, private cloud and colocation.

255 In my view, however, none of these differences detracts from the interchangeability of the products which, in any event, do not need to share identical characteristics to be in the same market. What matters is whether these products sufficiently compete with each other to be sensibly regarded as being in the same market.

256 This was illustrated by the Tribunal in *BGL* (5) using the example of paracetamol and aspirin (see para. 114(6) of the judgment set out above), emphasizing that what really matters is why a good or service is being bought and sold. In reaching a determination on this issue, the real focus should be on whether the products are close enough substitutes in practice to be regarded as being in the same market. An important question to consider in this context is why a good or service is being bought, and the extent to which customers are able to switch to alternative products in the event of an increase in price, *i.e.* demand side substitution. This is generally regarded as the most important factor in determining the relevant product

market since it constitutes the most immediate constraint on suppliers of a given product or service.

257 Further, as the Tribunal said in *BGL*, in answering this question one must eschew an over-analytical approach or one that is over-dependent on expert evidence, and ultimately a common-sense exercise of judgment has to be undertaken, informed substantially by an understanding of the thinking of the users of these services. The "mixing and matching" amongst a range of different incremental options for these services only serves to point to interchangeability, and it shows that switching between these products takes place in the real world.

258 The main purpose why colocation or cloud services are bought is to outsource the management of data for customers so that they do not have to carry out this function themselves. This means that customers can focus on their core business, and they do not need to concern themselves with everything that goes with running a data centre, including back-up power, temperature control, humidity control, security and monitored access, fire detection and suppression and so forth. In my view, this is the critical question and points to cloud services constituting a substitute for colocation, and both services forming part of the same market.

259 A further error in Gibfibre's analysis of this issue was to focus on the reasons for switching from colocation to cloud as if it were a factual test to be solved by detailed inquiry. In this context, Gibfibre submitted that:

> "The question for the purposes of market definition is what the causes of these trends are and, in particular, whether they are the result of changes in the relative conditions of supply (price, quality, etc.) or because of other factors . . ."

260 Gibfibre then relied on specific instances of switching that were not for price reasons, such as mergers and Brexit, or made the point that they took place after 2017–2018.

261 The HMT test, however, is a theoretical tool and counterfactual in nature as the Tribunal highlighted in *Allergan* (3). The SSNIP test is a speculative thought experiment, to be informed by such facts as are available but a speculative thought experiment, nonetheless. Gibfibre's approach therefore elided the conceptual framework provided by the HMT with a factual inquiry into switching, which in my view represented a further flaw in its reasoning on this issue.

262 Although Dr. Rander alighted on a reasonable point in the context of the SSNIP test when he said that a SSNIP would be diluted when one took into account the cost of the hardware in calculating the SSNIP, the implications of it were not as significant as he suggested, and I do not consider that this would ultimately have the effect of rendering a SSNIP unprofitable.

263 First, as set out above, my view is that e-gambling customers that form the bulk of this market are price sensitive, even if price is not ultimately determinative in this market.

264 Secondly, I accept Mr. Harman's calculations in this regard which show the colocation costs to be in a different order of magnitude from the hardware costs. Thus, even factoring in this diluting effect to a SSNIP, and taking into account the disruptive effect of switching, I consider that enough customers would be inclined to switch to make the price rise unprofitable.

265 Gibfibre also said that the prevailing prices were already supra-competitive, requiring a counterfactual price that would prevail under more effective competition for the SSNIP test. Whilst Mr. Macias made it clear that prices in Gibraltar for colocation were viewed as high in the industry, I do not consider that this referred to anything other than the small scale of operations in Gibraltar and the economic disadvantages which flowed from this, as Mr. Hook confirmed in his evidence.

266 Mr. Harman's approach to the HMT on the other hand, properly took account of the factual evidence and had the heft of a rigorous economic analysis behind it. He relied on the factual evidence showing there were no significant product differences in terms of speed, security or cost effectiveness. Whilst acknowledging some product difference, Mr. Harman did not focus on these, and he approached the question in accordance with economic principles and properly placed his focus on substitutability.

267 Further, unlike Gibfibre, Mr. Harman did not fall into the trap of treating his inquiry on switching as a factual one. Whether switching has taken place for reasons other than price or whether there is migration to a newer product, Mr. Harman correctly did not treat that as the end of the matter and applied the correct conceptual framework. He correctly proceeded to consider demand-side substitutability and, in the case of migration, to consider whether the SSNIP would accelerate an existing trend to an extent that it would not have been profitable.

268 As Mr. Harman concluded, the actual evidence of switching combined with the fact that colocation prices remained static for the claim period, shows that colocation and cloud services are viable substitutes for one another in the real world. The fact that hybrid approaches are possible only serves to reinforce their interchangeability. In my view, the correct conclusion to draw from this evidence is that cloud and colocation have for some time been in the same product market.

269 The fact that the defendants launched their own cloud service in 2017 also reinforces this conclusion, and it illustrates the connection between cloud and colocation services. There is also contemporaneous evidence referred to in the course of the trial that the defendants saw the cloud and

other jurisdictions as competition. The Tribunal in *Aberdeen Journals* (1) makes it clear in its judgment ([2002] CAT 4, at paras. 103–104) that evidence such as this as to how an undertaking sees the market is particularly significant.

270 As I have already said, it is likely that information on the market would have been helpful, and Gibfibre could have applied for third party disclosure orders to obtain customer evidence on the market from third parties such as Continent 8. Gibfibre could have also commissioned a specialist survey to obtain customer responses or obtained input from industry experts. Gibfibre, which has the burden of proof in this claim, has not pursued any of these avenues. The court can therefore only go on the basis of the evidence that it has.

271 Against this background, if a hypothetical monopolist supplier of colocation services were to increase prices for 5%–10% (or slightly less taking into account Gibfibre's dilution point), I agree with Mr. Harman's conclusion that a sufficient number of hypothetical monopolist customers would move away from colocation services and switch to cloud services, making a SSNIP unprofitable and constraining a hypothetical monopolist in colocation services.

272 Although Mr. Hook did say at one point that the defendants were "not competing with Amazon or any of those guys," I did not take that to mean that they were operating in a different market. Rather, in my view, he meant that the defendants, a very small business in international terms, are unable to present any serious threat to global businesses such as Amazon. A note of a call between Mr. Hook and Gibtelecom staff in 2020 confirms this assessment and refers to the defendants being unable to compete with global providers of cloud services on price but being able to provide a more bespoke service with additional guarantees.

273 Further, Mr. Hook's article in the *EGR Intel Report 2019: Jurisdictions* also assists. In this article where Mr. Hook considers the development of infrastructure delivery in e-gaming, he states that five years prior to that article the use of public cloud amongst the e-gambling community was minimal but that by 2019 there were very few organizations in the industry that had not embraced the flexibility of the public cloud in some shape or form. He attributes these changes to the cloud's ability rapidly to scale infrastructure to meet peak demands and control costs and the fact that AWS allowed gambling companies to use its services as from 2016 (in line with its main rivals Microsoft and Google). Mr. Hook states that at the time of writing that article, clients were not just looking for colocation services but also IaaS. He then added that start-up e-gaming businesses have never purchased equipment to run their platforms. Having explained this, Mr. Hook then stated that Rockolo had embraced the industry shift to in jurisdiction cloud services by broadening its product portfolio

with a flexible and high-performance cloud platforms. He then extols the virtues of Rockolo's cloud offering, highlighting that customers did not need to invest in equipment, that it can be cross-connected with existing data centres, and that long term contracts are not necessary. He states that the removal of the upfront capital expenditure of this model allows for innovation and creativity.

274 Ultimately, a conclusion must be drawn based on the economic analysis based on the preponderance of evidence. For the reasons set out above, there are serious difficulties with the methodology adopted by Gibfibre in contending for a narrow market definition. The approach to market definition contended for by the defendants on the other hand is based on an orthodox economic analysis taking into account the preponderance of evidence.

275 In my view, therefore, cloud services form part of the same market as third party colocation services.

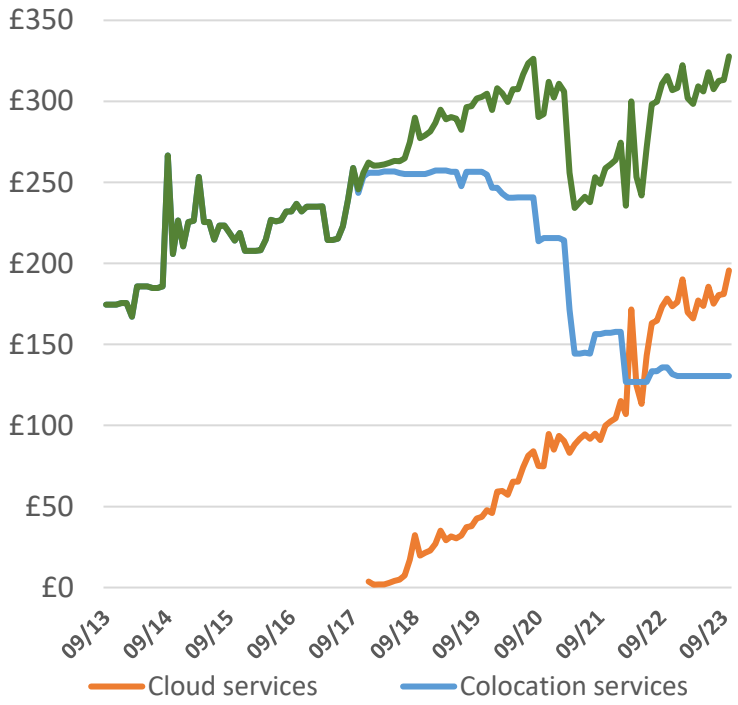
Date when cloud services form part of product market

276 There is also a temporal aspect to this inquiry into the relevant product market as Gibfibre's claim dates to late 2017, and the date when cloud services form part of the product market must therefore be determined.

277 Mr. Hook's view was that it was clear as far back as 2013 that cloud services were a threat to the existence of physical data centres. Further, he said that the defendants launched their own cloud product in 2017 to stem the fall in its colocation revenues, and that this resulted in them gaining cloud customers.

278 Mr. Harman's view was that cloud services formed part of the relevant product market for colocation services as from 2017–2018 onwards. This was on the basis that it was at that point that cloud services achieved an acceptable level of performance. Following questions put to Mr. Harman about trends over time in the number of colocation racks and amount of colocation revenues that the defendants had earned, he produced the following figure showing the defendants' colocation and cloud revenues.

279 This shows the upwards trend in cloud services since the launch of that service in 2017, and colocation services largely remaining steady from 2017–2019 and then falling from around 2019–2020. One can also see cloud services overtaking colocation services in around 2021–2022, which is partly attributable to the fact that in 2021 Hillside Sports (GP) Ltd. (part of Bet365) and Entain both gave up twenty-six and thirty racks, respectively. This data clearly shows that the driver for growth in the defendants' business was the launch of their cloud service.



280 There is also specific evidence that switches were in contemplation from at least 2017–2018 onwards. William Hill indicated to the defendants that by October 2018 it was starting to use AWS's cloud service (although this may have happened in 2019), and it significantly reduced the racks it occupied with the defendants. Similarly, Betvictor also moved to a cloud provider and significantly reduced the racks it occupied with the defendants in the period 2019–2022. Whenever the precise date was that this happened, the evidence shows that by 2018 the cloud was acting as a constraint on the defendants.

281 Gibfibre said that the relevant date is 2021 or 2022 when there was a sharp decline in demand for colocation services in Gibraltar, which it described as a "paradigm shift." Gibfibre also referred to the fact that the defendants' private cloud offering did not arrive until 2021, and further relied on a graph plotting a sharp decline in occupied racks around this time and cloud services overtaking colocations services at around that point. Dr. Rander said that if he was wrong about cloud and colocation services forming part of the same product market he had "significant doubt" about

this happening in 2017–2018 and suggested that this would have happened at some later unspecified date.

282 Mr. Harman's helpful table shows that the defendants' revenues for cloud service increased steadily from the moment of its launch in 2017, that colocation revenues largely remain fixed, and then started to drop in 2020, and that the defendants' total data centre revenue rise since then is attributable to cloud services. This analysis points to the cloud forming part of the same product market almost immediately after the launch of that service in 2017, which accords with the date proposed by the defendants. I am fortified in this conclusion by the fact that the sharp decline in rack occupancy in 2021, rather than representing a "paradigm shift," was largely attributable to Hillside Sports (GP) Ltd. moving its colocation services to Malta, and Entain giving up thirty racks due to a merger. I consider that the launch of the Gibtelecom's private cloud offering in around 2021 is particularly significant in this regard given the clear trend shown in the available data.

283 Finally, Gibfibre said that the point at which the SSNIP is properly tested is when switching takes place. For example, it relied on the fact that William Hill started using AWS in around 2018–2019 to show that 2017–2018 was not the correct date. I do not agree with this approach. In my view, this disregards important evidence before the court, particularly the trend that the cloud had become a viable alternative to colocation earlier than then, hence the defendants introducing this alternative service as part of their offering to clients. Further, whilst examples of actual switching are a part of the overall context when considering this issue, it must be recalled that what matters is the constraint posed by the potential of a switch on colocation services applying the HMT and looking at the position across the market generally.

284 I therefore accept the evidence of Mr. Harman and his application of the HMT which I regard as sound, and his conclusion that by around 2017–2018 enough customers would have moved to the cloud to make a SSNIP unprofitable and recognizing the dynamic nature of technological shifts when reaching this conclusion. Prior to that point, cloud services were still in a state of development and could not provide a substitute. These technologies then developed including available connectivity and processor power. As Mr. Hook observed, the quality for cloud services had reached the necessary level of quality when the defendants set up the WTC data centre in 2017. The CMA decisions relied on by Dr. Rander are of limited assistance as they only provide an insight into the position in around 2015 or 2016.

285 When one looks at all the evidence in this case in the round, including the evidence on the development of cloud services, and one applies the HMT, my view is that cloud services and colocation services are sufficiently

interchangeable and that they sufficiently compete with each other to be sensibly regarded as the same market as from January 1st, 2018. In other words, in response to a SSNIP, enough colocation customers would switch to the cloud to make the increase unprofitable as from that date.

286 I have not overlooked the fact that the period of colocation contracts is typically for a number of years, say three years, which means that customers tend to be locked into agreements for some time, and that any switching in response to a price increase would likely take effect at the end of the contract period. The issue, however, is whether the price rise is unprofitable. The fact that the unprofitability does not take effect immediately as part of this counterfactual exercise, does not detract from the negative impact it would have on the business when it is taken.

Geographic market

287 The other dimension in defining the market is the geographic market. This comprises the geographic area in which the conditions of competition are sufficiently homogeneous for the effects of the conduct to be assessed. Like the relevant product market, the scope of the geographic market must be considered in the whole economic context of the case.

288 As with cloud services, the HMT is applied to define the geographic market, and in this case to determine whether the market definition should extend to jurisdictions other than Gibraltar.

289 Again, in this context, Gibfibre contends for a narrow geographic market definition limited to Gibraltar, and the defendants say that it is wider and includes certain other gambling jurisdictions.

290 The evidence before the court, in particular that of Mr. Montegriffo, K.C., Mr. Macias and Mr. Hook, establishes certain key factual parameters that are relevant when considering this question.

291 The core customer base for colocation services is made up of large and sophisticated e-gaming companies that operate in multiple jurisdictions. Further, because of regulatory developments, it became possible as from around 2010 for Gibraltar-based gambling operators to divide their servers and equipment as they saw fit between different jurisdictions, including Gibraltar, Ireland, the Isle of Man, Guernsey. The evidence that emerged at trial showed that this flexibility was still, however, subject to two limitations, namely regulatory requirements and latency issues. As regards the latter, there is some IT equipment handling graphics-heavy functions that needs to be located close to end-users in countries such as the UK and Germany. Apart from these limitations, there is now, and has been for some time, a significant amount of equipment that gaming companies can distribute across jurisdictions.

292 Gibfibre submitted that this point had not been properly developed during the exchange of expert reports, meaning that it was unclear how many of its servers an e-gaming company was able to relocate. Thus, it said that there is no meaningful basis on which to assess whether it would constitute a sufficient part of business to render the SSNIP in colocation services overall in Gibraltar unprofitable.

293 In my view, the evidence filed by the defendants regarding the ability of e-gaming operators to move servers to other jurisdictions is clear, especially Mr. Montegriffo's undisputed evidence about the developments in the e-gambling industry in relation to server location. Mr. Montegriffo also refers to one case where the Gibraltar Gambling Commissioner was required to agree to virtually all of a major gaming company's IT equipment being moved to Malta with a single piece of equipment left in Gibraltar to comply with local licensing requirements.

294 Mr. Macias' oral testimony was also helpful. He agreed with Mr. Montegriffo's evidence and added that subject to regulatory approval and approval from the Government of Gibraltar, gaming companies have a choice as to where they place their servers. Further, he referred to a consultation exercise carried out by the Government of Gibraltar in 2020 to ascertain why gambling companies might want to host their IT equipment outside Gibraltar. Mr. Macias stated that latency and cost kept coming up as a recurring theme.

295 This evidence clearly shows that there are some items of IT equipment that need to be in a particular jurisdiction for regulatory reasons, and other items that need to be placed close to end-users for latency reasons. To the extent that latency is an issue, that clearly is not a factor operating in Gibraltar's favour as the core markets are all outside Gibraltar. This leaves a large amount of equipment that can be distributed across different jurisdictions.

296 There is no dispute, therefore, that from the start of the claim period big gaming operators have been able to disperse some of their equipment to different locations. Although there was no precise evidence in terms of a percentage split of the servers that gambling operators hold in Gibraltar and elsewhere, it seems to me that the amount of equipment that can be placed outside Gibraltar is significant. Subject to approval which it appears is not particularly problematic, servers supporting activity such as sophisticated graphics, community rooms, chats and other functionalities can be hosted outside Gibraltar. Further, and in event, this corresponds to a sufficient number such as to render the SSNIP in colocation services unprofitable.

297 The other issue which the parties disagreed on was the motivation behind any such moves once regulatory requirements and latency are taken out of the equation, with Gibfibre arguing that there were a wide number

of factors behind any such decision. Whilst any business decision of this sort for multinational operators of the type we are concerned with will be motivated by several different factors, including consolidation following mergers or regulatory changes, the evidence clearly pointed to the key issues being operational reliability and then price.

298 In any event, the court is not concerned with showing that a given switch was caused by a change in price or quality. That would be to repeat the mistake of looking for evidence of a hypothetical change in the real world. I do not consider the fact that there might be different considerations in play when making such a decision detracts from the conclusion that in allocating and moving servers between jurisdictions, like any sophisticated and price sensitive customer, these customers are likely to be sensitive to differences in price and quality. Looked at contextually, in my view a SSNIP by a hypothetical monopolist would likely be unprofitable because customers would switch to an alternative jurisdiction.

299 The parties also disagreed over the import of contemporaneous evidence relied on by the defendants.

300 These included Gibtelecom's board papers and presentations in 2016, which Gibfibre pointed out only refer to domestic colocation providers, suggesting that colocation providers outside Gibraltar were not viewed as part of the same market.

301 Gibfibre also referred to an internal Gibtelecom email dated November 21st, 2016, which referred to a possible collaboration with Manx telecom, which it also said did not support the wider geographical market contended for by the defendants.

302 As for the 2016 Gibtelecom documents, there could be several reasons for these only referring to domestic colocation providers, which in my view does not make this omission particularly weighty.

303 The email referring to a possible collaboration with Manx Telecom must be read in context. An earlier email in the same thread contains a message from Gibtelecom's former CEO to Gibtelecom's International Marketing and Business Development officer, where he clearly takes umbrage at the fact that someone at Gibtelecom has invited Manx Telecom's Business Development director to a function, because he considers that they are "a real competitor when it comes to e-gaming business both by company and their jurisdiction." This suggests that the defendants regarded Manx Telecom, and the Isle of Man, as competitors.

304 In any event, I consider that Mr. Hook's clear and convincing evidence on this issue is far weightier than anything that might be inferred from these documents. He said that the defendants consider that they compete against data centre operators in other locations where big gaming operators tend to do business such as Ireland, the Isle of Man, Malta, Jersey

and Guernsey. Further, his view was that because many of these e-gambling companies are present in several of the relevant jurisdictions, they can take up hosting services in those jurisdictions with relative ease. He also explained that it is common to see gambling companies in one jurisdiction using hosting services in another location.

305 Further, there was evidence of colocation customers switching services to other e-gambling jurisdictions. Entain, which retains bases in Gibraltar and Ireland, moved its colocation services from the defendants in Gibraltar to Equinix, a data centre in Ireland. 32Red, which retains bases in Gibraltar and elsewhere, also made the decision to contract with data centres outside Gibraltar. Entertaining Play (acquired by Gamesys, now Bally's) considered moving its colocation requirements to Ireland, whilst acknowledging that its infrastructure was largely managed from Malta. Bet365 relocated its business to Malta in 2021. Whilst the reasons behind these moves were no doubt multifaceted, they are all relevant when looking at the question of substitutability.

306 The evidence at trial also showed that there is real competition between jurisdictions such as Gibraltar, the Isle of Man, Malta and the Channel Islands in the gaming industry, with each jurisdiction vying to become the "home jurisdiction" of a given e-gaming operator, which typically has multiple bases. This is clear from articles and advertisements in the *EGR Intel Report 2019: Jurisdictions*, a publication targeted at the e-gaming industry, and the fact that the defendants have made efforts to attract customers from other jurisdictions such as Inseic and SBTech, to take space in their data centres.

307 This is therefore an industry where e-gambling operators have the choice as to where to place many of their racks, and where switching is actually taking place, which indicates substitutability.

308 Dr. Rander also referred to the fact that e-gambling operators tended to spread their colocation requirements across multiple jurisdictions meant that they might be expected to choose a single data centre that offers the best value. This, he suggested, meant that these other jurisdictions are not close substitutes but rather that they are complements.

309 A product would tend to be considered as a "complement" to another when their respective uses or consumption may be interrelated but there is little substitutability between them. Thus, milk may be a complement to coffee. A rise in the price of coffee may reduce the consumption of coffee, and thus the consumption of milk that goes with it but in normal circumstances they are not substitutable. The fact that two products are "complements," however, does not necessarily exclude the possibility that they are also substitutes. How the matter is to be analysed depends on the facts of each case.

310 Based on the facts of this case, it is possible to see how in some circumstances one aspect of a customer's hosting needs complements another. For example, a customer may need to have some data hosted in Gibraltar for regulatory reasons, and other data hosted elsewhere for latency reasons, especially heavy-graphics games. These, however, are only certain specific types of cases where location is dictated by regulatory or technical needs. When one looks at the position holistically, however, one can see that e-gambling companies use colocation services in multiple remote gambling jurisdictions and that there is broad substitutability.

311 The position is also reflected by Continent 8 in a KPMG report from an e-gaming summit in 2014. In this report, Continent 8's Chief Development Officer provided "a global jurisdictional comparison, using Gibraltar as a base standard against which to bench mark the staple offerings of providers in power, telecommunications, and hosting bundles." This entailed a careful comparison of these aspects of colocation offerings across various jurisdictions including Gibraltar, Malta, the Isle of Man, Alderney and Ireland. As the defendants submitted, such an exercise only makes sense if Continent 8 and other summit participants considered that there was competition for colocation services across remote gambling jurisdictions.

312 Another point made by Dr. Rander (again relying the merger decisions referred to above) was that physical proximity to a data centre is important on the basis that a company's IT staff may need to access the equipment. I do not regard this is a sound argument.

313 As I have already stated, the merger decisions relied on by Dr. Rander arose in a different factual context. How the matter is to be analysed depends on the facts of each case. Unlike the customers in those decisions, big e-gambling customers have not targeted specific metropolitan areas but have used colocation services spread across different e-gambling jurisdictions throughout the claim period.

314 Further, and as Mr. Hook explained, a physical disconnect between an operator's office and the location of its server is not unusual in this industry, and IT equipment can be monitored and serviced remotely. Mr. Hook explained that a "hands and eyes" service is a standard part of the colocation offering which caters for any physical tasks that may need to be carried out on equipment.

315 Ultimately, the correct approach is to consider whether the competitive conditions across the various remote gambling jurisdictions that have specialized in this industry for colocation services are "sufficiently homogenous" that in the event of a SSNIP, enough operators would move incremental racks to make that switch unprofitable. The proper conclusion to be drawn from all the evidence is that a SSNIP by a hypothetical monopolist in colocation services in Gibraltar would not be profitable because customers would move their incremental colocation services to

provide a different remote gambling jurisdiction instead. It follows that colocation providers in Gibraltar and in other remote gambling jurisdictions sufficiently compete with each other to be sensibly regarded as being in the same market.

316 Mr. Harman put forward the following market definition:

> "[T]he geographic market is wider than Gibraltar and includes other jurisdictions—specifically, the other 'remote gambling jurisdictions' and potentially Ireland too."

He said that this was because—

> "an e-gaming company would substitute between Gibraltar and other jurisdictions for its incremental colocation services in response to an exercise of market power by a hypothetical monopolist in Gibraltar."

317 Mr. Harman acknowledged that—

> "it may not be possible to conclude definitively on which jurisdiction to include. That is, the precise boundaries of the multijurisdictional geographic market for colocation services may be unclear."

He went on to say that this is a common issue in market definition. The precise scope of the geographical market definition makes no practical difference in this case because even if only the data centres in the Isle of Man are included with the Gibraltar data centres, according to Mr. Harman's rough calculations, the defendants would not be dominant in the relevant market and the claim fails.

318 In my view, all the evidence, including the evidence of actual switching, shows that whilst the precise boundaries of this market definition may be unclear, it makes no difference in practice. It only takes one of these jurisdictions to be included in the relevant market for the allegation of dominance to fail, and the evidence shows that at least one, and probably most of these jurisdictions, formed part of the same geographic market for the entire period of this claim. As para. 20 of the 2024 Commission Notice on Market Definition states (see section C1 above), a definite conclusion is not required on the precise scope of the market where the outcome would not change.

The consequences of my conclusions on market definition

319 My conclusion is that colocation services in Gibraltar, cloud services, and colocation services in some other jurisdictions all sufficiently compete with each other to be regarded as forming part of the same market.

320 Market definition is not a self-contained issue and arises in the context of the wider question, which is whether the defendants had a dominant position at the material time for the purposes of the art. 102 prohibition. In

this case, however, Gibfibre's claim is based on the defendants' dominance of a narrow market of colocation in Gibraltar, which means that its claim fails, as agreed between the parties' respective experts.

321 Even though it is not, therefore, strictly necessary for me to consider the rest of the claim, I should indicate in any event what I would have done had I concluded that a narrow market definition was appropriate, and it is on that basis that I will deal with the rest of the claim.

E2. Dominance

322 Had I found that a narrow market existed as contended by Gibfibre, dominance by the defendants in that market would remain a prerequisite to triggering jurisdiction under art. 102 TFEU.

323 The legal and economic tests for dominance are not in dispute. Dominance equates to market power and cannot be determined only by reference to an undertaking's market share. A finding of dominance derives from a combination of several factors which, taken separately, may not be determinative, as summarized in section C2 above.

324 As to market share, Gibfibre said that that floor space was not a relevant metric when considering market share, and that the data on rack capacity and rack occupancy showed that the defendants had a market share of over 50%, which gave rise to a presumption of dominance. Further, Gibfibre said that when the other relevant factors were taken into account, they supported this presumption. These included the fact that none of the past or current colocation providers in Gibraltar constituted a sufficiently effective constraint on the defendants, and that constraints from outside the market (self-provision, cloud services and other e-gambling jurisdictions) were not sufficiently strong either. Further, it said that there were various barriers to entry and expansion in the colocation market in Gibraltar, and that there was no convincing evidence that countervailing buyer power constituted an effective constraint on the defendants' conduct.

325 The defendants submitted that floor space should be taken into account, disagreed with Gibfibre's calculations on market share, and said that this data did not point to dominance. Further, they said that a brief overview of the position showed that the defendants could not behave independently of its customers, unconstrained by competition. Taking the example of a large multinational gaming company, the defendants said that it was clear that there were various options open to such a customer if it was not content with the defendants' colocation services for any reason, including price. It could use cloud services, relocate its servers (or at least the bulk of them) to another jurisdiction, decide to utilize self-provision and manage its servers in-house, or go to a competitor instead. Further, any such customer would not even need to wait for their contract to expire as the defendants' standard contract provides for penalty-free termination in

the event of a price rise of more than 10% of monthly recurring charges. The defendants also relied on the fact that the defendants have not raised their prices in twelve years.

326 Dealing first with the question of the defendants' market share.

Market share

327 As outlined in section C2 above, market share tends to provide a useful first indication which must then be interpreted in the light of the relevant market conditions and the dynamics of the market.

328 As stated above, whilst the parties agreed that "installed racks" and "occupied racks" in the data centres were relevant metrics for determining market shares, they disagreed on whether floor space was also a relevant metric. Mr. Harman said that floor space was another appropriate metric that could be used for calculating shares of supply of colocation services. Dr. Rander on the other hand, said that floor space should be ignored. Alternatively, he said that the defendants' previous ownership of the Haven building should be taken into account if floor space were relevant, a proposal that Mr. Harman rejected.

329 It is therefore necessary to first address whether floor space should be used as a relevant metric for the assessment of market shares.

330 In support of their contention that floor space should be taken into account when assessing market share, the defendants again referred to the Equinix/Telecity merger decision. In that decision, the Commission stated at recital (48) that while spare space and spare power are very important indicators that should be taken into account when assessing the market power of market players and their ability to compete, revenue market shares is the most appropriate starting point. The Commission went on to note at recital (52) that the ability of the various players to compete for future business depends to a large extent on the available spare capacity and spare power. Further, it noted that when a data centre is full and has no capacity to expand, it may not have the ability to compete, though it may generate a lot of revenue due to the established customers.

331 In response, Gibfibre submitted that this decision, properly understood by reference to recitals (42)–(44), was only referring to rack capacity or rack occupancy.

332 I do not read the Commission's decision in the way urged by Gibfibre on this issue. When one looks at the table 2 set out at recital (45), that clearly refers to the fact that spare capacity is measured both by reference to spare space in square metres and spare power in kilowatts. Further, recital (119) of that decision which considers the additional space for Interxion, one of the data centre competitors in that case, refers to it gaining an additional 2000m².

333 The defendants also relied on the Pulsant/Onyx decision. In that decision, the CMA found that raised floor space could be used to calculate shares of supply, although it did not go on to do so because it did not have access to the requisite information. Raised floor space is of course different from raw floor space as it allows for, among other things, air-conditioning to circulate under the racks. The principle remains, however, that the CMA said that floor space could be used as a metric.

334 Dr. Rander also sought to distinguish those decisions on the basis that they were *ex ante* decisions. He said that as forward-looking assessments, they were not relevant, and that this metric was not conceptually suitable for the *ex post* assessment of the defendants' market position when it was the defendants' historical position and conduct that needed to be considered. I do not agree that this is a valid point of distinction. The question for the court is whether the defendants' decisions are, and were, largely insensitive to the actions and reactions of competitors and customers throughout the claim period. At the time such decisions were made the defendants cannot have known what competitors' expansion plans were. Thus, additional floor space would have acted as a competitive constraint.

335 In any event, the question of market shares needs to be considered contextually. Continent 8 is located at the ex-NATO command centre inside the Rock of Gibraltar with many rooms already built that are suitable in principle for data centre use, and infrastructure already present. Mr. Hook also made it clear that the defendants were very conscious of Continent 8's potential to expand rapidly, and that they could create new suites in its centre very quickly, probably in around three to four months. As Mr. Hook put it: "They have a huge amount of floor space there that they have basically water on tap." Even though the court did not have any firm information as to what those costs would be, I consider it reasonable to assume that those would be much lower than building a new data centre or a large extension from scratch given the nature of Continent 8's facility and its international operation.

336 Dr. Rander also expressed concern that the floor space estimates relied on by Mr. Harman were uncertain. These measurements, however, are taken from a public document produced by the previous owners of the data centre, which I regard as a satisfactory data point. Further, there was nothing stopping Gibfibre from obtaining a better indication of floor space measurements but it has not done so.

337 In all the circumstances, I consider that floor space is a relevant metric for measuring market shares. Whilst unusable space was not excluded from Mr. Harman's calculations, this was not excluded from other calculations either. I therefore doubt that this makes much of a difference in the overall calculation.

338 Dr. Rander said if floor space was to be taken into account, the defendants' considerable additional spare floor space at the Haven building which was available to it until 2023 should also be taken into account because potentially it could have been converted into a data centre. I do not agree with that assessment. As Mr. Hook explained, the Haven building required significant investment, around £15m.–£20m., to refurbish. As also noted by Mr. Harman, any data centre can acquire further premises but that is an entirely different proposition from expanding within existing premises within a relatively short period. This is reinforced by the fact that, as Mr. Hook explained, data centres generally keep a buffer of 10%–20% spare capacity. That means that any expansion can probably be carried out seamlessly, filling the extra space pending the creation of new racks and thus providing an effective and immediate constraint.

339 In considering market shares in the round, I therefore consider that floor space should be taken into account as a feature of spare capacity for competitors, along with occupied racks and total rack capacity. Turning to the specific figures now.

340 If measured by spare floor space, the defendants' market share is [*redacted*]% in 2015–2016, [*redacted*]% in 2017 and [*redacted*]% in 2018–2022. The defendants submitted that this was far below the level where one might expect any finding of dominance.

341 Turning to rack capacity, the data in this regard was largely based on a Gibtelecom's business plan dated December 2016, which attempts to guess the capacity of local telecoms competitors at the time. These guesses are set out in very brief terms, with no information provided as to the source of the estimate. Other internal documents produced at different times all appear to be based on that original estimate. I pause here to observe again that Gibfibre, which bears the burden of proof in this claim, could have taken steps to obtain third-party disclosure to obtain firm evidence on these data about rack capacity and rack occupancy.

342 Coming back to the 2016 business plan, this states that Continent 8 has "current" capacity for some [*redacted*] racks, and Sapphire has around [*redacted*] racks. Based on that limited information the experts calculated market shares as follows:

(1) Dr. Rander estimated that the defendants' "market share measured by installed racks was been between [*redacted*]% and [*redacted*]% on one set of evidence, and between [*redacted*]% and [*redacted*]% on an alternative set of evidence." Further, he estimated that the defendants' "market share measured by number of occupied racks was [*redacted*]% in 2016 and [redacted]% in 2017."

(2) Mr. Harman estimated that the defendants' market share "based on total rack capacity" was [*redacted*]% in 2015–2016 and [*redacted*]% in

2017. Further, he estimated that its market shared "based on customer-occupied racks" was [*redacted*]% in 2015, [*redacted*]% in 2016 and [*redacted*]% in 2017, and (as set out above). Finally, he estimated that the defendants' market share "based on floor space estimates" ranged from [*redacted*]% in 2015 to [*redacted*]% in 2022.

343 Putting to one side floor space data for a moment, and if these figures on racks were reliable, they might well raise a presumption of dominance as a first step of the assessment. In this case, however, I cannot see why the court should proceed on this basis given the unreliable nature of this data. This is one of those cases which, as noted by para. 4.4. of the OFT 415 set out in section C2 above, the potential shortcomings of the data mean that market shares alone are not a reliable guide to market power.

344 Further, when the figures on floor space are taken into account, this reduces the defendants' market share. Even if these measurements on floor space need to be adjusted to take into account unusable floor space by say 15%, it seems to me that any possible presumption of dominance would be extinguished. As Mr. Harman stated in his oral evidence, even taking conservative assumptions such as corridors into account when factoring in floor space, market share would not be over [*redacted*]%.

345 The other issue to bear in mind is that there is no data for sales revenue, which can be informative when measuring market shares.

346 The conclusion that a presumption of dominance should not be made in this case is also reinforced if one stands back to take an objective view of the situation. As Mr. Harman observed, given the presence in Gibraltar of a strong international competitor, namely Continent 8 which has a large market share:

> "[E]ven before one gets to the question of constraints, I would be saying to myself as an economist, this does not appear to be the type of case where there is dominance that could lead to abusive effects."

Competitive constraints

347 In any event, as stated above, market shares need to be interpreted in the context of the market and its particular dynamics. An overall assessment as to competitive constraints needs to be carried out "in the round" (see para. 3.6 of OFT 415 referred to in section C2 above) bearing in mind the *United Brands* test for dominance. This turns on whether an undertaking can behave to an appreciable extent independently of its competitors, its customers and ultimately its consumers. This notion of independence is related to the degree of competitive constraints exerted on the undertaking in question.

348 Important factors when assessing dominance in the round have been summarized in section C2 above, and important factors in this case are as

follows: pricing behaviour, the position of other competitors in market, out-of-market constraints, barriers to entry and expansion, switching costs, and countervailing buyer power. Further, Gibfibre refers to the defendants' market conduct, which it says is relevant to this assessment. I will deal with each of these factors in turn.

Pricing behaviour

349 The defendants' prices for colocation services have remained static from 2007 to 2018, and it only then raised prices by 10% to new customers. Mr. Hook also explained that connectivity prices offered to colocation customers are the same as those offered to all business customers across Gibraltar. Further, Rockolo's profits are relatively small and fell during the period of this claim.

350 Dr. Rander pointed out that dominance could exist in a declining market, and that if prices were inflated in the first place, none of this would show a competitive marketplace. He did not, however, put forward any evidence that costs were inflated in the first place although Gibfibre relied on Mr. Macias' testimony that latency and costs were issues of concern for e-gambling customers when considering data centres in Gibraltar.

351 Mr. Harman's view was that businesses with high fixed costs such as data centres, were under pressure to increase the number of their customers to be profitable, and thus compete harder.

352 I do not consider that the logical inference to draw from all this evidence is that the defendants have been charging inflated prices for colocation services. As I have already said, costs in Gibraltar are generally regarded as high and this, together with the competitive prices they are facing, is the likely reason why the defendants have been unable to raise their prices. Whilst none of this is conclusive, it is not particularly indicative of an undertaking able to price without meaningful competitive constraints.

Other competitors

353 There is no dispute that, apart from the defendants, there are currently three other operators of data centres in Gibraltar: Continent 8, Sapphire and Gibfibre. In addition, Cube operated a data centre between 2015 and 2017, and Vault247 sold its business to Continent 8. Further, it is clear that of all these operators, Continent 8 was the largest.

354 The parties' respective positions on Continent 8 were as follows. Gibfibre said that Continent 8 was unable to offer any effective constraint on the defendants, pointing out that it has fewer racks than the defendants, and that it relies on the defendants for connectivity. The defendants on the other hand said that Continent 8 was a major global company, which provided a seriously effective constraint on the defendants.

355 Mr. Hook provided evidence about Continent 8, and he explained that it was the defendants' biggest local competitor with major customers including big online companies and the Government of Gibraltar. He also explained that Continent 8 is a global company with hundreds of data centres around the world, a fact which Mr. Hook said had led a customer who was in negotiations with the defendants deciding to go to Continent 8 in the end. Mr. Hook also said that Continent 8 had an effective and prospering business model and that his estimate was that they were roughly "on par" in terms of customers. In his view, however, he thought that Continent 8 were "head and shoulders" above the defendants as a company. Further, whilst Mr. Hook accepted that Continent 8 had fewer racks than the defendants, he considered that they had the ability to expand quickly as explained above, and he estimated that it has roughly the same market share as the defendants. This evidence, which I accept, clearly indicates that Continent 8 is a serious competitor for the defendants.

356 Further, as Mr. Harman said, the fact that Continent 8 is a global company probably means that it enjoys economies of scale, for example in the purchase of equipment such as generators, giving it a competitive advantage. This was put to Dr. Rander in cross-examination, and he accepted that this was a possibility but he added that this was something that he had not considered in detail. Although Dr. Rander made the point that he had only seen one customer switch from the defendants to Continent 8, this does not take into account customers who consider both options and end up entering a contract with Continent 8, something that Mr. Hook also referred to in his evidence.

357 Gibfibre also sought to suggest that Continent 8 might be vulnerable because it was dependent on Gibtelecom for wholesale connectivity for both domestic and international circuits (through the EIG sub-sea cable). There was, however, no evidence relied on by Gibfibre to support the contention that this affected Continent 8's position in the market. In any event, this is the basis upon which all communication providers operate across the market. I do not therefore consider that this materially affects the assessment on dominance.

358 The next operator in terms of size is Sapphire. Mr. Hook's view was that although Sapphire was smaller than both the defendants and Continent 8, it was still a significant competitor. He said that Sapphire had attracted significant customers, often exclusively, to use its services, including luring customers from its rivals and retaining them. He said that the defendants lost customers to Sapphire, a fact that Mr. Harman regarded as a constraint. By way of example, he said that Mansion, a large e-gambling operator, had held around thirty racks with the defendants, had moved to Sapphire, and that the defendants had never managed to get this client back. Mr. Hook's understanding was that Sapphire's racks were full.

359 Gibfibre said that the fact that Sapphire had no capacity for new clients meant that it could not provide a constraint and it also referred to the fact that it was located below sea level, which constituted a competitive disadvantage.

360 Mr. Harman said that despite being full, the fact that Sapphire might be providing lower prices would still result in a competitive constraint. There is also the fact that whilst it currently has no capacity for new customers, customers may move on and release racks.

361 Gibfibre has now opened its own data centre. This is a modest entry into the market with only fifteen racks. Further, it has only come about towards the end of the claim period.

362 In my view, this evidence shows that, together, the defendants' local competitors present an effective constraint on the defendants. Clearly, the most significant constraint comes from the presence of Continent 8. Whilst Sapphire and Gibfibre's own data centre would on their own provide a weak constraint because of their size, and in the case of Sapphire the fact that it is full, I do not consider that they should be disregarded altogether from the overall assessment that the court needs to undertake. In particular, this conclusion is based on Sapphire's presence in the market, which covers the period that this claim covers. These additional, albeit smaller, operators are features of the market that should also be taken into account, and in my view serves to confirm that the defendants are unable to behave, to any appreciable extent, without consideration from its local competitors.

Out-of-market constraints

363 If I am wrong about the finding that cloud and colocation form part of the same product market, the parties agreed that the possible effects of those markets as out-of-market constraints must be considered.

364 The parties' diverged, however, when it came to the importance that these constraints should be given. Gibfibre said that any constraint was marginal and did not materially affect the analysis of dominance. The defendants said that both cloud services and other e-gaming jurisdictions constrained the defendants' ability to behave to an appreciable extent independently of its competitors, its customers, and ultimately of its consumers.

365 For all the reasons that I have already given in the market definition stage in section C1 above, I consider that even if cloud and other e-gaming jurisdictions are in a different market to the colocation market, they at least provide a viable alternative to, at least, some aspects of their business needs. Further, as Mr. Harman explained (in the context of cloud services):

> "[W]hen you have your own customers who are considering AWS, then that is a constraint. If you are losing your customers to AWS, then that is going to constrain your position."

I consider that the same logic applies in respect of other e-gambling jurisdictions that are an option for at least some customers.

366 I must also say a word at this stage about self-provision. Although the parties agreed that self-provision should be excluded from the colocation market definition, it is a further matter to take into account in this context. The fact that companies can run their own private data centres in-house can exert a competitive constraint was a conclusion that the CMA reached in para. 41 of its decision in Pulsant/Onyx.

367 Dr. Rander said that he did not think that self-provision was a very effective constraint because of economies of scale. Whilst it is true that not every customer can adopt self-provision, some of the larger e-gaming customers are able to do this if they want. A table prepared by Mr. Harman with an analysis of rack occupancy showed that Kindred had left the defendants data centre in favour of self-provisioning (at least for part of their hosting) in another jurisdiction. Mr. Hook also said that he could think of two or three companies that had opted for self-provision.

368 In my view, therefore, these three options amount to material competitive constraints bearing on the defendants that should be properly considered in the round as part of the *United Brands* test for dominance.

Barriers to entry and expansion

369 The impact of expansion by existing competitors, and entry by potential ones, is important when considering dominance.

370 There was no suggestion in this case that there were legal or regulatory barriers limiting the development of data centres in Gibraltar, beyond the usual business requirements. The parties' arguments in this case revolved mainly around the costs involved in setting up a data centre in Gibraltar.

371 Gibfibre submitted that the defendants enjoyed several advantages including their size, "first mover advantage," a related reputational advantage, the fact that it has two data centres, and that it is the only undertaking in the market that can use the sub-sea cable as of right. It also relied on the fact that investment in data centres was high, that there were two examples of market exits in Gibraltar (Vault247 and Cube), and to the high cost of failure constituting a further disincentive for investment. In this context, Dr. Rander also referred to the merger decisions he relied on when defining markets, which made findings about customers staying with the data centre they have contracted because of the high costs of moving.

372 The defendants said that whilst costs for setting up a data centre were high, they could be recovered through revenues that are generated once a new business is operational. Mr. Harman referred to the fact that, apart from two exits, there have been a few entries in the market during the relevant period. In his view, the fact that there are five data centres in a small place like Gibraltar, with entries and exits into the market, suggests that barriers to entry are not particularly high. Further, Mr. Hook explained that Vault 247 exited the market before the claim period and for an unrelated reason, namely the stress of running of data centre.

373 In reaching a conclusion on this issue, I consider that it is important to consider the real-world evidence in its entirety. This shows that companies such as Sapphire, Continent 8, and most recently Gibfibre itself, have been able to enter the market, and in the case of Continent 8, it has been able to contract with the defendants to use the sub-sea cable. Whilst the initial costs of setting up a data centre are high, and it is possible that some or even many of those costs may not be recoverable if the business fails, the hope is that there will be a return on that investment. That is part of the competitive marketplace, and in my view, what this shows is that the barriers to entry and expansion are unexceptional in the context of a dominance assessment.

Switching costs

374 Gibfibre said that the costs of switching from one service provider to another were high and constituted a major barrier for rivals or potential rivals to win business from the defendants, and it relied on some of the defendants' internal email exchanges in this regard. Gibfibre referred, for example, to an exchange dated June 17th, 2018, referring to the fact that a bid that the defendants had made for a new customer, Inspired Gaming, had failed because the customer had decided to stay with Continent 8 citing "relocation costs as the major issue." It also referred to another exchange dated July 27th, 2020 concerning William Hill contracts. In response to a proposal by William Hill that they should be allowed to terminate the contract if they were not happy with an increased charge, the defendants' directors comment as follows:

> "the probability of this happening is not great as WH would find itself in a position where they would have to remove all their racks and associated equipment at the end of the term."

375 The defendants, whilst accepting that switching costs are high, referred to the data showing that the defendants had both lost and won customers and said that this showed that there are no material barriers to customers switching. Whilst the costs of switching colocation provider are clearly high, Mr. Hook explained that they are not insurmountable, and he explained how this could best be achieved. He explained that customers

would try to renew their colocation contract at the same time as a hardware renewal cycle, which he referred to as a "refresh."

376 Further, service providers are prepared to offer incentives to facilitate a move. This is clear from the email discussing Inspired Gaming, where the defendants' employees refer to "kicking around the idea of a 'transition' a pricing deal that would reduce the colo costs for an agreed period to help them offset this and remove barrier to move." Mr. Harman referred to this in his testimony as the outcome of a competitive marketplace. Further, he said that much depended on where a customer was in a cycle and how much hardware needed to be "refreshed."

377 It seems to me that switching colocation provider is likely to be an expensive operation unless this can be timed with the renewal of a colocation contract, when hardware needs to be refreshed, or both. There is, however, a chance that the prospective colocation provider will offer an incentive to mitigate these costs. Whilst there may be some business challenges to bringing about switching, they are not insurmountable and there are ways in which this can be achieved effectively. The fact that the defendants have lost customers to various alternative providers and gained customers from rivals is real-world evidence which serves to confirm this.

Countervailing buyer power

378 A further issue of significance is whether colocation suppliers are confronted with buyer power, *i.e.* the ability of customers to switch, or to credibly threaten to switch, to competing suppliers.

379 Gibfibre said that the fact that e-gambling customers were large multi-national companies was not enough to show buyer power. It contended that the defendants' customers did not have an effective choice because of switching costs, the rivals' lack of rack capacity and that out-of-market options were, by definition, marginal. When cross-examined about this, Dr. Rander accepted that his assessment in this regard was linked to his other conclusions, including barriers to entry.

380 By contrast, the defendants said that the fact that e-gambling customers were big, sophisticated players which could switch or threaten to switch to competing suppliers (including out-of-market providers) showed that they had significant countervailing customer buyer power.

381 Although the size of a company is not sufficient to show buyer power, it seems to me that this is a relevant feature here, and one needs to have in mind the difference in scale between e-gambling customers and colocation providers in Gibraltar.

382 Mr. Harman referred to the fact that Entain Group's entire group annual revenue was around £3.9bn. in 2021, Flutter's 2022 annual report

shows global revenue of £7.6bn. (and £918m. of adjusted EBITDA in 2022), William Hill's 2020 report shows that it generated £1.32bn. of revenue (and £144m. of EBITDA), and Evolution Gaming generated €1.46bn. in review (and €1bn. in EBITDA in 2022). Mr. Harman further referred to the fact that the defendants' customer base is dominated by e-gambling companies such as these.

383 The defendants' entire group annual revenue was around £38.8m. in 2021.

384 The difference in scale between the customer and colocation provider is such that, from a common-sense commercial perspective, it is difficult to imagine the defendants dictating terms, or that such companies would not have choice in the provision of colocation services.

385 Mr. Hook also referred to some negotiations with e-gambling companies. [*Redacted.*] This evidence shows that the defendants, unlike companies such as Apple or Amazon, are not able to just dictate standard terms to large e-gaming customers. Rather it negotiates bespoke contracts in the knowledge that potential clients have various options available to them for their colocation needs.

386 As I have already concluded above, there are other providers of colocation services available, even if available rack capacity is low. Further, the practical reality is that a major competitor, Continent 8, also has plenty of room for expansion, and there are also other out-of-market options.

387 This is reinforced by Mr. Hook's evidence who stated:

> "It was never the case that Gibtelecom/Rockolo could set whatever commercial terms it liked in the data centre service contracts negotiated with clients. With almost every client, especially the bigger gaming companies, we would have to enter into lengthy and substantive contractual negotiations which covered matters such as price, limitation of liability, and many other contractual terms."

388 I therefore consider that Mr. Harman was right to conclude that:

> "[T]here is evidence of significant countervailing customer buyer power in the colocation market, due to: (i) the concentration of the e-gaming industry (a small number of very large global operators) . . .; (ii) operators are sophisticated customers whose own competitiveness depends in large part on their outsourced IT platforms; (iii) the customers are in essence technology companies that review their IT needs continuously and are price-sensitive . . .; (iv) there are alternative competing colocation services, to which e-gaming companies can

switch . . .; and (v) the Gibraltar colocation industry is almost totally dependent on the e-gaming industry."

Market conduct

389 Gibfibre submitted that in assessing dominance, it was also relevant to consider the wider situation in the relevant market, which includes taking account of "the facts put forward as acts amounting to abuses without necessarily having to acknowledge that they are abuses": see *United Brands* (18) ([1978] EUECJ C027/76, at paras. 67–68). Gibfibre referred to two main points in this regard. First, what it described as the defendants' exclusionary behaviour in refusing them access. Secondly, there was a reference to the defendants' approach to previous litigation.

390 I do not consider that there is any merit in these complaints. As I found in *Gibtelecom Ltd.* v. *Gibraltar Regulatory Auth.* (2023 Gib LR 266), Gibtelecom was entitled to refuse Gibfibre access to the MP data centre, and that is not conduct that can therefore be relied on as an indicator of dominance. As for the other litigation relied on by Gibfibre, this was not initiated by Gibtelecom, and all that it did in those cases was to seek to vindicate its rights.

391 Gibfibre also appeared to refer to a separate claim brought against it by Gibtelecom concerning Gibfibre's conduct in the local residential broadband and television market. Those proceedings are still at an early stage and there is nothing to suggest at this stage that they are an indicator of dominance either.

Conclusion on dominance

392 Taking everything in the round, I do not consider that the evidence supports a finding that the defendants' market power is such as to enable them to behave to an appreciable extent independently of their competitors, their customers and ultimately their consumers. I do not consider therefore that there is valid basis for a finding of dominance for the period of this claim.

E3. Abuse

393 Even if, contrary to what I have found, the defendants had been dominant in a narrow market limited to that of colocation services in Gibraltar alone for any period, that is still not enough for the claim to succeed. Gibfibre still needs to establish that the defendants' refusal to allow Gibfibre access to customers within the MP data centre amounts to unlawful abuse.

394 Gibfibre's case on abuse is set out at para. 40 of the particulars of claim, and specific examples of abusive conduct have been pleaded at

paras. 40.3.1–40.3.6, namely abusive tying, abusive discrimination, abusive refusal to supply, abusive imposition of unfair trading conditions, abusive trading conditions generally, abusive exclusive purchasing agreements, abusive limitation of markets to the prejudice to consumers, and abusive market sharing with Sapphire.

395 Further to the general principles on abuse outlined in section C3 above, I would like to highlight a point of clarification provided by Mr. Justice Mann in *Purple Parking Ltd.* v. *Heathrow Airport Ltd.* (17), when abuse complaints are being considered. He explained in his judgment ([2011] EWHC 987 (Ch), at paras. 79 and 91) that one should not pigeonhole cases into a specific established category of abuse and the court must keep an eye on the "basic wrong itself." This is critical in this case given the basic wrong or overarching theory of harm relied on by Gibfibre as pleaded at paras. 40.1–40.4 of the particulars of claim, namely:

(1) The defendants leveraged their dominance in (what Gibfibre says) is the relevant upstream market for colocation services to foreclose effective competition on the relevant downstream markets for the provision of connectivity services at the defendants' data centres; and

(2) The defendants' conduct has had the effect of distorting the structure of competition in those downstream markets.

396 This theory is built on the twin premises that (1) the colocation market is "upstream" to "downstream" markets for the provision of connectivity services; and (2) the relevant downstream connectivity services markets are each geographically limited to a single data centre belonging to the defendants.

397 Further, it is based on the fact that connectivity services form an "aftermarket" to colocation services, and that they are analogous to ports and airports, access to which is essential to provide services which can only be provided at that specific location.

398 The defendants submitted that this overarching theory of harm is incorrect and that the abuse complaints therefore all fall away.

399 Before moving to the detail of the specific abuse complaints, there is therefore one big point that needs to be considered, namely, the correctness of the overarching theory of harm on which the "basic wrong" alleged is based.

The framing of the abuse complaints

400 The starting point in considering this theory of harm is Gibfibre's reliance on a narrow market, namely the individual connectivity markets for individual data centres, which it said was the area being investigated.

401 The defendants rejected this narrow definition of the market, and they said that the relevant market was the single business retail connectivity market in Gibraltar. Mr. Harman said that this approach was consistent with the Commission's general approach, and he referred specifically to the Commission's conclusions in Proximus/Nexus Infrastructure/JV (European Commission, March 24th, 2021). Further, he said that it was in accordance with the approach taken by competition authorities and regulators generally, and that it is important to bear in mind that there was competition in connectivity prior to data centres coming up. Mr. Harman also relied on the approach taken by the GRA in its decision notice dated January 16th, 2023 (C01–23) on "Wholesale Infrastructure Access, Wholesale Broadband Access," which he said was consistent with this general approach.

402 The decisions relied on by Mr. Harman are *ex ante* regulatory decisions that did not concern specific market conduct viewed through the prism of art. 102 TFEU prohibitions. Further, they are not binding on this court. The GRA's 2023 decision notice, however, is of assistance when considering how Gibfibre has cast its market definition when framing its abuse complaint.

403 The GRA issued its 2023 decision notice following a public consultation and having regard to detailed submissions provided by Gibfibre. In these submissions, Gibfibre complained that it did not have access to data centres and, contrary to the market definition proposed by the GRA, contended for a market definition providing for a submarket consisting of entry to data centres and provision of services to people hosted there. With this data centre point in mind, the GRA rejected the proposed narrow definition proposed by Gibfibre and concluded that a single Gibraltar-wide market should be identified. Factors given in support of this definition are the extremely small market size, the conditions of competition, network coverage and product and pricing differentiation. Further, the GRA noted at p.5 of the decision notice that:

> "[T]here are three active operators which cover extensive areas throughout Gibraltar, often overlapping, with no specific areas where one operator conducts its business exclusively. Furthermore, all products and services are provided uniformly all throughout Gibraltar with no difference in prices depending on location either. Therefore, there is no evidence to suggest that a separate geographic market for access to data centres can be defined." [Footnotes omitted.]

404 Further, the GRA considered relevant competition case law, including *United Brands* (18), applied the HMT, and BEREC's "Common Position on Geographical Aspects of Market Analysis (Definition and Remedies)" dated June 5th, 2014. The GRA concluded that the geographic market was national in scope as conditions of competition were homogenous

throughout Gibraltar. Further, the GRA found that the market was effectively competitive given the extensive rollout of three operator networks, the increase in market shares of the alternative operators over time and the range of products offered. Gibfibre did not challenge this decision by the GRA.

405 Whilst the GRA's decision is not binding on the court, I do not regard it as irrelevant as Gibfibre contended. On the contrary, it is helpful because, unlike this court, the GRA has full visibility of the market.

406 In any event, the application of the HMT leads back to precisely the result that the GRA and other regulators have consistently taken, namely that of a single homogenous market, where prices do not vary according to different locations including data centres.

407 The relevant market is therefore one of business retail connectivity services, and there is accordingly no plausible case that the refusal of access to the defendants' data centres has resulted in any degree of foreclosure in the business retail connectivity market.

408 Although Dr. Rander said many customers prefer to take connectivity from one supplier, this was based on a reference in a survey commissioned by Ofcom for its Business Connectivity Market Review of 2016. That market review, however, considered the connectivity needs of all businesses in the UK, and it was not targeted at customers that occupy Gibraltar's data centres, notably premium e-gambling businesses. Although Dr. Rander accepted that this survey was not specific to online businesses that operated on an international scale, he said that it was also reasonable to conclude that they would have the same preference for a single supplier. In my view, however, that was a conclusion drawn from a source of tenuous relevance, and one that is at odds with the nature of the online e-gambling industry.

409 The evidence before this court is that these multi-jurisdictional e-gambling companies, whose business is based upon global interconnectivity, use a wide variety of providers to fulfil their needs. That includes (as both Ms. Sheriff and Mr. Hook agreed) by comparing quotes from different providers, having internal procurement policies, and being price sensitive in the decisions they make.

410 Moreover, as Dr. Rander accepted, his position was at odds with the approach taken by Mr. Senogles who said that "price sensitivity creates opportunities for switching on a regular basis between providers."

411 In my view, therefore, the basis on which Gibfibre has identified "customer foreclosure" in the context of the retail business connectivity market is flawed and should be rejected. Nor is there any business upon which to identify any distortion of the structure of that market.

412 The result is that there is no identified anti-competitive effect arising from the correctly defined retail business connectivity market.

413 The other important feature of Gibfibre's case was that it proceeded on the basis that a connectivity market lies downstream of third-party colocation market. This is important because Gibfibre then argued that it followed that this was an "essential facilities" case like cases involving ports and airports. I will turn to those cases later but staying with the upstream/downstream characterization for now, the first important point to be made about that is that this part of Gibfibre's case was not underpinned by Dr. Rander's expert economic evidence, which proceeded on an aftermarkets theory to which I will turn shortly.

414 Mr. Harman, on the other hand, relied on the Commission's decision in Case M.9843, Colony Capital/PSP/NGD, where colocation services were referred to as downstream to retail business connectivity: see para. 63 which states:

> "*Retail business connectivity services* are also upstream to colocation services provided by third party data centres as colocation providers rely on retail business connectivity providers to offer data/network connectivity between multiple data centres and customer sites. Such connectivity services are essential for the attractiveness of data centres, given these connectivity services connect customers' IT equipment (e.g. servers, routers), which is housed in the data centres, with the rest of the customers' network and the cloud."

415 This approach, namely, that colocation providers rely on connectivity services as an essential input and not the reverse, is hardly surprising. There is and always has been independent demand for retail business connectivity which is not dependent on the existence of any data centre, so data centres can only be sensibly conceived of as being downstream of connectivity services. Data centres exist precisely because their customers want connectivity to their servers first and choose to outsource the provision of the necessary technical facilities to run, maintain and connect those servers. It is therefore entirely artificial to seek to reverse that reality, the implication of which is that data centres operate in a world where connectivity services only follow from the provision of colocation.

416 Returning to Dr. Rander's aftermarkets theory. Dr. Rander described an aftermarket as "a product which is purchased only as a result of a primary product." On this basis, he said that third party colocation services is a primary product, and that it would be appropriate to consider connectivity services to data centres as a secondary market. It was on this basis that his assessment of the market then proceeds.

417 A more precise description of aftermarkets than that used by Dr. Rander is provided by the Commission which defined aftermarkets in

"Competition Issues in Aftermarkets—Note from the European Union" dated June 13th, 2017, as follows (para. 1):

> "Aftermarkets are markets for the supply of products or services needed for, or in connection with, the use of what is often a relatively long-lasting piece of equipment that has already been acquired. This equipment is referred to as the 'primary product' (and hence its market is called 'primary market'). The complementary product(s) (typically spare parts or consumables) and services used in connection with the primary product are referred to as 'secondary products' (and their market is called 'secondary market' or 'aftermarket')."

418 Mr. Harman adopted this definition, and he stressed that the feature of an aftermarket is that the development and existence of the durable good creates the aftermarket. Mr. Harman also provided a table listing EU and UK competition cases that have concerned aftermarkets in his second expert report dated January 29th, 2024. Typical examples of aftermarket products contained in that table include spare parts for cars and ink cartridges for printers.

419 It seems to me that the aftermarkets definition adopted by Dr. Rander is too broad, and that he was wrong to proceed on the basis that connectivity services arose from the purchase of third-party colocation services.

420 As can be seen from the Commission's definition of aftermarkets referred to above, it is not sufficient in this context that a product is bought simply as a result of the purchase of the primary product. Rather, it must be one for which demand is created only as a result of the purchase of the primary product, and for which there is no independent demand.

421 Gibfibre's approach to this question is also entirely artificial as it assumes that colocation services are taken before connectivity is purchased, which is not realistic. In fact, it is far more realistic to proceed on the basis that sophisticated multinational businesses that use Gibraltar's data centres would consider colocation and connectivity services together from the outset, as Mr. Macias stated in his evidence.

422 As Mr. Harman also explained, it is wrong to liken an essential facilities doctrine with an aftermarkets doctrine from an economic perspective. The former is concerned with whether a facility can be replicated, as opposed to the latter, which is concerned with a possible abuse in a secondary market.

423 Mr. Harman, whose approach was in accordance with principle, explained in the context of this case, unlike printers or cars, using a colocation service does not create a demand for connectivity services. Rather, most users of IT equipment are likely to require connectivity services regardless of whether they locate that equipment in a data centre.

424 In any event, even if colocation services were a product (and not a service, which it plainly is), the need for that product arises from the need for connectivity and not the other way around.

425 In cross-examination, Dr. Rander appeared to recognize this point and acknowledged to some extent the commercial reality that customers made a choice regarding colocation and connectivity together. In my view, this is a further reason why an aftermarkets analysis is not appropriate in the present case and operates against abusive conduct. As Mr. Harman explained, when a customer made a choice of data centre, whether a carrier owned or a carrier neutral option, it was likely to be considering both the cost of the data centre and the connectivity, and comparing that to options that exist elsewhere, and that that was a constraining factor. He continued:

> "You don't get into a position where you buy data centres without thinking about [connectivity], and then say somewhere down the line, 'oh my gosh, I wish I had considered that connectivity because now they can ramp the prices up' and there is no evidence of that.
>
> My point is, is that you go into the decision, assessing costs on an up front basis. Having done that, that reduces the possibility of an abuse taking effect. If it does take effect, obviously you would be able to exit that contract at the end of the cycle, but you enter it knowing what the costs are. Now, that's different to most time cases, because when I buy a razor and razor blade I typically don't think about the cost of the razor blades going forward . . . At its essence is that you can abuse the aftermarket because people haven't considered the costs up front, and the difference, of course, with those cases is that there aren't long contractual periods, so it would be possible to suddenly raise a razor blade in three months' time, but that can't happen once you are looked into a three to five year connectivity contract."

426 Whilst Dr. Rander also referred to barriers to switching away at the end of the term of a contract, as I have already said, I do not consider that there is any proper basis to reach such a conclusion.

427 Having rejected Gibfibre's characterization of the upstream/ downstream markets and its aftermarkets theory, I turn now to the cases involving the supply of services at specific facilities such as ports and airports that Gibfibre kept coming back to in support of its claim.

428 Gibfibre relied heavily on *Aéroports de Paris* v. *E.C. Commn.* (2). That was a case where the Court of Justice found that Aéroports de Paris ("ADP") abused its dominant position by imposing discriminatory commercial fees on ground-handling services supplied within Paris airports including Orly and Roissy-Charles de Gaulle, which it managed. Gibfibre referred to the Court of First Instance's reasoning ([2001] 4 CMLR 38, at paras. 137–144) dealing with the definition of the markets.

The court held that both the product and geographic markets, which were linked, should be defined narrowly because ground-handling services could only be provided at the Paris airports if authorized by ADP. The same approach was taken by the Court of Justice on appeal.

429 Gibfibre also relied on other essential facilities cases including cases concerning the port of Genoa (*Merci Convenzionali Porto di Genova SpA* v. *Siderurgica Gabrielli SpA* (12), and *Corsica Ferries Italia Srl* v. *Corpo dei Piloti del Porto di Genova* (6)), and transport and parking services at English airports (*Purple Parking Ltd.* (1), and *Arriva the Shires Ltd.* v. *London Luton Airport Operations Ltd.* (4)).

430 Mr. Gibson argued with considerable persuasive skill that these cases were analogous to the position here, where the defendants needed to authorize connectivity services to its data centres. In my view, however, there is a very clear difference between the reasoning underpinning those essential facilities cases and the present case.

431 In *Aéroports de Paris*, ground-handling services could only be provided at one place, namely the "indispensable" Paris airports, and the same reasoning applies to the other cases relied on by Gibfibre. The geographic restrictions which form part of the reasoning in this line of cases, however, does not apply to data centres which could be anywhere in Gibraltar, or indeed outside Gibraltar. A customers' choice of data centre at which to be supplied with colocation and connectivity services is not determined in any way by the specific geographic location of the data centre within Gibraltar. I therefore agree with the defendants' submission that Gibfibre collapsed the product and geographic dimensions of the market into one, thus allowing its argument to assume its own conclusion.

432 Further and in any event, airports lie upstream of the ancillary downstream services (such as ground handling) unlike data centres and connectivity, as explained above.

433 Mr. Harman also considered that the cases were not analogous from an economic perspective. He stated as follows during his cross-examination:

> "I think that the nature of the two cases are fundamentally different. In the case that you are referring to you have a situation where the airport itself is an essential facility. It cannot be replicated. In this case, a data centre can be replicated.
>
> The second significant difference is the second market. In data centres and connectivity there is already independent demand for connectivity. Connectivity is not just provided to the data centre, and that is often a big difference between port or airport cases because the secondary market has a geographical constraint that doesn't allow competition. So, for example, Purple Parking. You cannot have a car park in a

> different location that's not close to the airport to be able to compete, and so that's different because what you end up having in those circumstances is, in effect, two essential facilities that can't be replicated, whereas in this, actually both of the markets can be replicated, and there is independent demand for the connectivity service, and that's fundamentally important."

434 Having concluded that Gibfibre's overarching theory of harm is wrong and not in accordance with orthodox legal or economic principles, Gibfibre's abuse case founders, taking with it the specific abuse complaints. I will now turn, in any event, to some of those abuse complaints briefly.

Refusal to supply

435 There are circumstances in which a refusal on the part of a dominant firm to supply goods or services can amount to an abuse of a dominant position. Gibfibre contends that the defendants' refusal to enter into an agreement with it for the supply of access to its data centres amounts to such an abuse.

436 The relevant legal principles when considering this argument are not in dispute, and they are summarized in Whish & Bailey, *Competition Law*, 10th, ed., at 735 (2021). This states that in determining whether a refusal to supply to a customer in a downstream market amounts to an abuse of dominant position, five issues must be addressed:

(1) Is there a refusal to supply?

(2) Does the accused undertaking have a dominant position in an upstream market?

(3) Is the product to which access is sought indispensable to someone wishing to compete in the downstream market?

(4) Would a refusal to grant access lead to the elimination of effective competition in the downstream market?

(5) Is there an objective justification for the refusal to supply?

437 Further, Gibfibre points out that a constructive refusal, *i.e.* the making of an offer on unacceptable terms, can also constitute an abuse.

438 Turning to each of those issues in turn.

Is there a refusal to supply?

439 There is no question that the defendants have refused to supply Gibfibre with access to the MP data centre. There is a factual dispute, however, as to whether the defendants had refused to supply Gibfibre at the WTC data centre or whether its conduct in that regard amounted to a

constructive refusal. The background to these negotiations, insofar as is necessary, is as follows.

440 The WTC data centre includes a Meet Me Room designed to allow access from an alternative provider, an arrangement that was explored by the parties following a request by Gibfibre. In an email dated November 14th, 2017, Mr. Hook emailed Mr. Sheriff with pricing for a cross-connect at the WTC data centre. This would have enabled customers at the WTC data centre to contract with a second connectivity supplier.

441 In September 2018, the parties discussed the terms of an agreement. Not all terms were agreed. Notably, the defendants refused to accept a proposal by Gibfibre that a "Most Favoured Nation" clause be included in the agreement, and acknowledgements also proposed by Gibfibre that the defendants were dominant in other parts of the communications marketplace, and that the WTC data centre was an essential facility.

442 It appears that negotiations finally broke down following a meeting between Mr. Hook and Mr. Castle (who was at that point Gibfibre's Chief Operating Officer) in October 2018 and which took place at a café at the World Trade Center.

443 Mr. Castle did not give evidence but there is an email from him to Ms. Sheriff dated October 16th, 2018 reporting on the meeting, which states as follows:

> "The access we get into wtc is not going to help us too much. We should still sign the contract because we wou[l]d be competing with sapphire as second provider for a customer that requests bandwidth. Gi[b]telecom will only allow a customer to have another supplier if the customer takes a certain amount of bandwidth from them first. So [this] is not really great for us. If we get access into [MPDC] it wou[l]d be on the same terms. They will not allow us or sapphire to buy hosting from therm either. It[']s [clear] we have to do our own DC."

444 Following a request by Ms. Sheriff for clarification of the proposed terms, Mr. Castle sent her a further email dated October 17th, 2018 where he states that the defendants:

> "[H]ave (or will have) a 'preferred' supplier policy which is obviously bandwidth from Gibtelecom and this is the only bandwidth that they will provision in WTC. Should a customer then require a second supplier (for resilience etc) Rockolo would then offer two choices which would be Sapphire and ourselves. The customer chooses based on these options. However, he also mentioned that there is a minimum amount of bandwidth the customer would NEED to take from them first. In my years with BV I have not seen this in any contract (may have missed this) so I assume they will be putting this clause in their contract with customers going forward?"

445 In her response of the same day, Ms. Sheriff states as follows:

> "I have a copy of the contract (confidential from the court case) that Sapphire have with Gibtelecom (access to Mount Pleasant DC)—I don't think this condition is specified in their contract . . . unless they have suddenly decided to do so (in which case it probably only applies to us and not them!)"

446 In fact, Ms. Sheriff and Mr. Castle were correct in saying that the condition that a customer must first take a certain amount of bandwidth from the defendants before being allowed to contract with another supplier is not contained in other contracts, and neither Sapphire nor any of the customers at the MP data centre have such a clause in their contracts. Further, although it was suggested by Gibfibre that there may have been a supposed "gentleman's agreement" with Sapphire to this effect, there was no evidence in that regard.

447 Gibfibre submitted that the negotiations in relation to access to the WTC data centre culminated in a constructive refusal, with unacceptable terms being offered by the defendants. This was because the defendants knew that Gibfibre wanted to compete fully, without restriction, as none of the WTC customers who had expressed an interest in purchasing connectivity services from Gibfibre to the WTC data centre had suggested that they wanted Gibfibre's services simply as a backup to the defendants' connectivity service.

448 The defendants, however, disputed this version of events and relied on the evidence of Mr. Hook who, unlike Mr. Castle, provided oral testimony at trial about those discussions. Mr. Hook said that Mr. Castle had misunderstood the terms that had been advanced by the defendants. Mr. Hook said that when Mr. Castle referred to connectivity being offered as a secondary provider only, he appeared to be referring to an explanation that he had given Mr. Castle about all the options that the defendants had considered in relation to access to WTC data centre, not a proposed term of an agreement. Further, in his evidence, Mr. Hook said that the restriction referred to by Mr. Castle was not included as a term of the agreement, and that it was just something that the defendants reserved the right to revisit in the future. Mr. Hook added that he felt he was being fair by putting all his cards on the table about this.

449 The defendants also pointed out that in an exchange that took place between Mr. Castle and Mr. Hook following this meeting between October 19th and November 6th, 2018, there was no mention of this. Rather there was clarification on whether Gibfibre would be able to access the hosting space to sub-lease racks to customers.

450 The fact that Mr. Castle's recollection about this discussion is set out in a contemporaneous email, albeit to Ms. Sheriff, would usually be of

assistance in getting to the truth about what happened years ago. In this case, however, the value of this item of evidence was greatly diminished by the fact that Mr. Castle did not give evidence in court about it. Documents do not represent the whole story and the court must consider the evidence holistically, including the impression given by the witnesses in cross-examination.

451 Mr. Hook gave clear and compelling evidence that there was no firm proposal made by the defendants for the restriction discussed to be included in any agreement between the parties, or in the contracts entered into with the colocation customers. This proposed arrangement also accords with the defendants' arrangements with Sapphire where there is no such restriction. Further, if any restriction along these lines was to be put in place, one would have expected it to feature in the correspondence between the parties at some point. Viewing all this evidence as a whole, I do not consider therefore that there is a proper basis to conclude that this restriction formed part of the terms offered by the defendants. Rather, this was something raised by Mr. Hook as something that had been discussed internally by the defendants previously, and which he indicated that they might revisit in the future but nothing more than that.

Does the accused undertaking have a dominant position in an upstream market?

452 In any event, the defendants do not have a dominant position in an upstream market. As explained above, the GRA has confirmed in its 2023 decision notice that Gibtelecom is not dominant in the retail business connectivity market, and there is no evidence to the contrary.

Is the product to which access is sought indispensable to someone wishing to compete in the downstream market?

453 Access to the MP data centre is not indispensable to someone wishing to compete in the downstream colocation services market. Anyone wanting to compete in that market would be able to establish a data centre, as Gibfibre has in fact done. Even if the downstream market were to be the retail business connectivity market, there is no question of access to the MP data centre being indispensable for someone to compete in that market.

Would a refusal to grant access lead to the elimination of effective competition in the downstream market?

454 If, as I have found, the downstream market is in fact the third-party colocation market, it follows that effective competition in this market does not depend on Gibfibre being granted access to the defendants' data centres.

455 Even if the downstream market were to be the retail connectivity market, refusal to grant access to the defendants' data centres cannot be said to have led to the elimination of effective competition in that market. As stated above, there are various players in the business connectivity market, and Gibtelecom is not considered by the GRA to be dominant in that market.

Is there an objective justification for the refusal to supply?

456 There is therefore no need for the defendants to justify any refusal to supply, as the refusal to supply complaint fails for the reasons set out above.

Abusive tying

457 Tying is the practice of a supplier of one product, the tying product, requiring a buyer also to buy a second product, the tied product. The abusive tying of two products is covered by art. 102(2)(d) of the TFEU (or s.10(2)(d) of the Competition Act), and the relevant principles are summarized in section C3 above.

458 Assuming for the purposes of this inquiry that the defendants were dominant in the colocation services market, the complaint fails insofar as it relates to the MP data centre. Customers at the MP data centre can purchase connectivity from the defendants or Sapphire, and there is no requirement that they take connectivity services from the defendants.

459 Although there is no choice of an alternative connectivity provider at the WTC data centre, there is no evidence that that is because of any tying arrangement. Further, customers who wish to take connectivity from Sapphire can opt for the MP data centre instead of the WTC data centre.

Abusive discrimination

460 Abusive discrimination is covered by art. 102(c) TFEU (and s.10(2)(c) of the Competition Act). Mr. Justice Mann proceeded to consider a discrimination complaint in *Purple Parking* (17) as follows:

(1) Whether there was equivalence between the transactions in question ([2011] EWHC 987 (Ch), at paras. 134–137).

(2) Whether dissimilar conditions were applied to those transactions (*ibid.*, at paras. 138–140).

(3) Whether the conduct resulted in a competitive disadvantage (*ibid.*, at paras. 145–167).

(4) Whether any such differential treatment was justified (*ibid.*, at paras. 168–238).

461 In *Purple Parking Ltd.*, the conduct complained of was that Heathrow Airport Ltd. had altered the terms on which it allowed competing "meet and greet" parking operators access to the forecourts and short-term parking areas attached to Terminals 1, 3 and 5 of Heathrow Airport. Unlike earlier existing arrangements, those operators which competed with Heathrow Airport Ltd. in this ancillary market had been treated on an equal basis. They used the same areas of the airport, and on the same terms. They were then demoted to lesser areas and charged a fee for each customer, in a manner which was dissimilar to Heathrow Airport Ltd.'s own "meet and greet" operations. This was, in form as well as substance, a complaint that dissimilar conditions were being imposed on equivalent transactions.

462 As can be seen, the claimants in *Purple Parking Ltd.* were existing suppliers of ancillary services to airport passengers. They were not in substance seeking access that they had not already enjoyed, and their complaint was that they were being treated differently from other providers of the same service. There are no transactions here to which Gibfibre can say that dissimilar conditions are being applied. Indeed, the whole basis of Gibfibre's complaint is that it has not entered into a transaction with the defendants.

463 Even if one were to consider putative transactions, based on what Mr. Castle understood Mr. Hook had told him about possible changes to trading conditions as set out above, this was at best nothing more than an informal discussion about a possibility that might arise in the future. Ultimately, however, the negotiations did not progress, and this cannot give rise to a discrimination claim.

Other heads of abuse

464 Gibfibre has also referred to complaints of abusive imposition of unfair trading conditions, abusive limitation of markets to the prejudice of consumers, and abusive market sharing. Having already set out the erroneous premise underlying the tying complaint and the refusal to supply complaint, these claims also fall away.

Conclusion on abuse

465 Even if, contrary to my conclusion above, the defendants were dominant in any relevant market, it has not abused its position. The claim therefore breaks down at each stage.

F. Quantum

466 Since I have concluded that the competition law claim fails, it is not strictly necessary to consider whether, if it had succeeded, what the level of damages available to Gibfibre should be. Since, however, this issue was fully argued on both sides, I will indicate my views on the damages sought.

The relevant principles

467 The parties largely agreed the relevant principles, as summarized in *McGregor on Damages*, 21st ed. (2020), which apply to a claim for damages for breach of statutory duty in the competition law context. These can be summarized as follows:

(1) These claims are to be assessed on the tortious compensatory basis, *i.e.* placing the party who has suffered in the same position as they would have been if they had not sustained the wrong for which they are now getting compensation.

(2) Loss of chance is a recognized head of damage or loss in the context of such claims, and Gibfibre needs to show that it has lost the particular chance(s).

(3) Where it does so, the lost chance must be quantified and expressed as a percentage. At this stage, the court does not apply a balance of probabilities approach. Instead, the court estimates the loss by making the best attempt on the evidence to evaluate the value of the chances lost.

(4) To the extent that the supposed beneficial outcome depends on what a third party would have done, namely the colocation customers seeking connectivity services, Gibfibre must show that it had a real and substantial chance of achieving a better outcome than was in fact achieved: see *Perry* v. *Raleys Solicitors* (16). Further, a real and substantial chance is not a negligible one. A 10% prospect of succeeding in relation to a transaction worth billions of pounds might not be negligible for the same company compared with one that is worth thousands: see *McGregor on Damages*, *op. cit.*, at para. 10–052.

(5) The fundamental requirement of justice is that the court must do the best it can with the available evidence, often labelled the "broad axe" or "broad brush" principle: *Mastercard Inc.* v. *Merricks* (11) ([2020] UKSC 51, at paras. 47–54).

A preliminary issue: the respective quality of services offered

468 Gibfibre claims that it has lost the chance to provide international circuits for five identified customers namely, Kindred, William Hill, Entain, Point 5 and Betvictor, as well as losing the chance to provide identified internet protocol access or transit circuits to Gamesys, and to 75% of Gibtelecom's Flexiband customers in both of the defendants' data centres.

469 The defendants submitted that when assessing the likelihood or otherwise that an enterprise customer would enter into a connectivity service with a particular supplier, an assessment must be made of the relative quality and service level of each offering, as well as the price. This is in the context of sophisticated e-gambling customers who, as Mr. Berniz

said, value resilience above all. Mr. Hook also said that customers asked about the technical details of the connectivity provided when considering the defendants' service.

470 It follows that it cannot be assumed that customers would simply take the cheapest price for any circuit offered to them, and that before turning to each of the claims, the relative quality and service levels of the services provided must therefore be considered.

471 Although Mr. Senogles assessed these prospects for Gibfibre, he proceeded on the footing that the technical and service level of the services were comparable at all material times, and his evidence is therefore not relevant for this part of the assessment. The only real evidence adduced by Gibfibre was that of Mr. Berniz, although he was only able to give evidence as to the development of Gibfibre's network from May 2015 to May 2019, when he left Gibfibre, and then after November 2023 when he returned.

472 In any event, Gibfibre disputed that it offered a service of lesser quality and said that it was just running a more efficient business model.

Gibfibre's services

473 Dealing first with Gibfibre's physical network.

474 Gibfibre established its first PoP in Madrid in late 2015 and it added a further PoP in Amsterdam in 2016 which was connected to Gibfibre's network via the single data centre in Madrid. Although a second PoP was established by Gibfibre in Madrid, Mr. Berniz was only able to say that this happened after 2019 and before 2023 when he was not working for Gibfibre. The defendants said that this was relevant because a second PoP eliminates a single point of failure.

475 Gibfibre established a "virtual" PoP in London in December 2018. Mr. Berniz explained that this consists of a combination of a third-party transit service from Madrid to London, providing a connection to the London Internet Exchange ("LINX"), which allows Gibfibre to peer to other networks. Whilst this provides more choice for internet protocol connection with peers, it could not be used to provide an international circuit to London.

476 A physical rather than a virtual PoP will typically offer more control and reliability over the service offered to customers, and Mr. Berniz accepted that there were advantages to a connectivity provider that builds its own network to PoPs.

477 When Gibfibre established the first PoP to Madrid in late 2015, there was only a single route to it. A second route was provided around a year later. A third one was then added, and Mr. Berniz thought this happened in

around mid-2017. All these routes terminated at the same data centre in Madrid.

478 Mr. Berniz confirmed that Gibfibre cannot provide wavelength division multiplexing ("WDM" or "wave") which provides "a better, more proficient use of your fibre infrastructure."

479 Turning next to Gibfibre's operational arrangements.

480 Mr. Berniz acknowledged the importance of a NOC and explained that Gibfibre's NOC is staffed with Level 1 engineers and opens during office hours. He said that it referred technical problems they could not resolve to more experienced engineers who were more involved on the operations side, and who would be "on call."

481 Whilst Gibfibre offered a service level guarantee in their contracts, there was evidence that the resources available at its NOC was of concern to some potential customers whose main concern, as explained previously, was the reliability of the service. There was evidence that both Gamesys and Nektan had raised this as a concern, in 2015/2016 in the case of the former, and in 2020 in the case of the latter.

482 Gibfibre has recently obtained ISO 27001 in information security management for its data centre but not for its connectivity services.

483 Mr. Berniz also confirmed that DDoS did not form part of Gibfibre's standard offer but that it is available on demand.

Gibtelecom's services

484 As summarized in section D above, Mr. Hook explained that Gibtelecom's premium network has PoPs in various jurisdictions including Madrid and London, two terrestrial routes to Madrid and a further independent route via the sub-sea cable providing resilience. It also offers WDM services and has ISO 27001 certification covering its connectivity service.

485 Further, Gibtelecom has a full time NOC with round the clock Level 2 engineers and proactively monitoring problems on the network, not just responding to automated alarms. Finally, it offers DDoS protection as standard on its premium Flexiband service, although not on the substantially cheaper IP Transit services it also provides which are in turn cheaper that Gibfibre's equivalent product.

Conclusion on technical and service quality

486 As can be seen from the overview set out above on the relative technical and service quality of both services, Gibtelecom's Flexiband connectivity offering for premium customers is superior to Gibfibre's equivalent product. This is not just a question of Gibfibre running a leaner

business model as contended by Gibfibre but there are material differences in network resilience and the service offered by Gibtelecom. Whilst it appears that Gibtelecom's Flexiband prices are substantially higher than Gibfibre's prices, and that it offers a cheaper alternative to its Flexiband product, Gibtelecom's premium service still appears to be the one that is most attractive to premium customers in the e-gambling industry where, although price is important, resilience is the most important factor. That does not mean that Gibfibre's product should be excluded from the counterfactual exercise that the court must carry out. Rather, this is all important context to be taken into account when considering the claimed lost opportunities.

The claimed lost opportunities

487 When Mr. Senogles took the stand, he produced an updated assessment of the claimed lost opportunities in respect of various online gaming companies in a document entitled "Updated assessment of probabilities following DH3 and new Harman documents received on 6 March 2024," and it was on this basis that the case proceeded. Turning to each of those claimed opportunities in turn.

Gamesys

488 At the material time, Gamesys was a Gibtelecom Flexiband customer making monthly payments of between around [*redacted*]. Gibfibre claims that it lost out on the opportunity of providing it with 10Mbps IP access service to the MP data centre.

489 Gibfibre refers to various meetings with Gamesys culminating in a quote provided by Gibfibre on April 9th, 2018 providing for a one-off set-up cost of £3,000, and then £2,460 per month for a one-year contract or £2,118 per month for a three-year contract.

490 On July 2nd, 2020, Gamesys requested a proposal for a 100 Mbps protected link to MP data centre, to be delivered via a wholesale leased line, and Gibfibre provided a quote, namely £3,000 as a one-off set-up cost and £12,360 per month.

491 Gibfibre relies on the high prospect of winning this contract following various email exchanges, ending in the following response from Gamesys on May 30th, 2018:

> "As discussed earlier, I can confirm that we're in agreement to partner with GibFibreSpeed (or 'GFS') in your works to deliver bandwidth connectivity to the Mt Pleasant DC, and we'll initially look to utilise 10 Mbps of your new service. Once your team is able to confirm connectivity then we'll look to cement the agreement via a formal contract.

> I hope that this email is what you need to progress, but if there is anything else required then please don't hesitate to give me a call to discuss."

492 Mr. Senogles originally assessed this loss at £600,000 based on a probability of 100%, which he accepted was too optimistic and then moderated to 90%–95%. This was based on Gamesys entering into two successive contracts with Gibfibre, namely (i) a contract for a 10 Mbps connection from June 2018 to July 2020 at £2,118 per month; and (ii) a contract for a 100 Mbps connection from August 2020 at £12,360 per month until July 2023, and £11,633 from August 2023 to March 2024. Mr. Senogles sought to defend his assessment based on his business experience as well as his experience as an accountant.

493 In response, the defendants drew attention to the fact that there were further relevant exchanges dated July 3rd and 14th, 2020. They said that these further exchanges make it clear that Gamesys had started its "internal legal/compliance review" and that its security compliance team had sought confirmation of whether Gibfibre possessed any security-related certifications and had attached a number of review controls "which we would need answers for." This attached a list of ten review controls which Gibfibre was required to respond to by providing specific technical/ organizational evidence. The defendants said that there is no evidence that Gibfibre ever responded to this email, and no evidence that Gibfibre would have been able to fulfil Gamesys's compliance requirements.

494 Alternatively, the defendants said that the high percentage ascribed to this head of claim by Mr. Senogles was unrealistic. They said that this did not take into account the fact that the defendants had technical concerns (*e.g.* DDoS and NOC 24x7 as set out in an internal Gibfibre email dated December 18th, 2015), or that Gibtelecom would fight back to win the contract and could offer a cheaper comparable product itself, namely a 100 Mbps DIA service for [*redacted*]. Further, they said that Mr. Senogles had not been called as an expert in business or the connectivity business and was unable to give expert evidence on the chances of winning this contract bearing in mind the technical features which were relevant.

495 It seems to me that the fact that a quote was sought by Gamesys does not mean that it would proceed to conclude a contract, especially when, as appears to be the case here, there were unresolved technical issues, and Gibtelecom could offer a cheaper product too. Further, one needs to factor in the chance of Gibtelecom winning back a customer, if not initially then at the end of the period of an assumed contract with Gibfibre. Losses should not therefore extend to beyond the length of one contract. I also agree with the defendants that Mr. Senogles was not giving evidence based on his business experience but rather as an accountant.

496 Taking all of this into account, doing my best with the available evidence, and on the assumption that the likely bandwidth that Gamesys would be interested in is for 100 Mbps, I consider that the loss for this assumed contract should be assessed as at 25% for a three-year contract at £12,360 per month plus a £3,000 (one-off fee) making a total of £111,990.

Kindred

497 Kindred has been a Gibfibre connectivity customer since 2017, and Gibfibre alleges losses arising from its inability to provide it with connectivity services at the MP data centre. This claim arises from a request by Kindred for a quote for 1 Gbps connections to Madrid from both the WTC data centre and the MP data centre.

498 Although Kindred's original inquiry was not available, the response to it from Gibfibre dated April 27th, 2017 confirms that Gibfibre offers connectivity outside Gibraltar, that it has a direct route to Madrid but that it would need to verify with the "tech guys" how it would connect to London. The implication, therefore, is that Kindred were interested in a link to London through Madrid.

499 There is a further email from Gibfibre dated April 27th, 2017 stating that it could not offer wave (or WDN) technology but that they could offer transparent Ethernet services. Further, this states that Gibfibre could arrange a circuit extension to London with a carrier of the customer's choice.

500 On May 5th, 2017, Gibfibre provided a quote (dated May 4th, 2017) for 1 Gbps Ethernet service from the WTC data centre to Madrid. Gibfibre quoted a one-off set-up charge of £59,000 or £79,000 (depending on whether the service was protected or unprotected) followed by a monthly cost of between £47,600 and £69,000 (depending on whether the service was protected or unprotected, and the length of the contract term). Gibfibre confirmed that it could not provide a service from the MP data centre. In an email from Kindred to Gibfibre dated May 9th, 2017, Kindred stated as follows:

> "I have had a look at the quote and I now know what we have as a base for potentially implementing this as a new solution. But we can't terminate redundant circuits towards Mount Pleasant DC, we need to consider our options we have to potentially solve this issue.
>
> Once we have discussed internally and reviewed our options I will get back to you with more information."

501 Mr. Hook refers to the fact that in the latter part of 2017 and following its acquisition of 32Red, Kindred was discussing its connectivity needs with Gibtelecom, and ended up asking for two 1 Gb circuits from Gibraltar to Madrid, and from Gibraltar to London. Mr. Hook further stated

that Gibtelecom's offer was cheaper than Gibfibre at £[*redacted*] per month for each protected 1 Gb line to Madrid and London for a twelve-month contract and £[*redacted*] per month for a thirty-six-month contract. Further, he stated that Kindred placed significant importance on the fact that Gibtelecom had a 24/7 NOC and Tier 2 engineers available to them.

502 In the event, Kindred contracted with Gibtelecom for the following: [*redacted*].

503 Mr. Senogles assessed this loss at £500,000 based on a probability of 25%. Although he accepted that Gibtelecom's price was [*redacted*]% cheaper, he said that a switch was still possible given that Kindred repeatedly showed an active intent to replace Gibtelecom as its supplier.

504 In my view, the prospects of Gibfibre winning this contract were negligible. Whilst Kindred was an existing customer of Gibfibre at the material time, that was in relation to broadband services only. When it came to premium services, Gibtelecom was cheaper than Gibfibre and had a superior operational service, which appeared to be important to Kindred. Further, Gibtelecom's superior network meant that Kindred did not require a third-party transit provider from Madrid to London (keeping costs down and improving resilience), which would have been required if Kindred had opted to contract with Gibfibre. Unlike Gibfibre, Gibtelecom was also able to offer wave technology, which appeared to be Kindred's preference, as well as offering a superior network generally. Gibtelecom therefore had the edge over Gibfibre in every respect. Finally, I note that as from 2021 Kindred has been self-providing.

505 In all the circumstances, I do not consider that Gibfibre have established that there was a real and substantial chance that it would have been awarded this connectivity contract, and I would exclude this claim altogether from any assessment.

William Hill (via Interoute)

506 This claim relates to a quote provided to Interoute, a company that organizes connectivity services on behalf of other businesses, in this case William Hill.

507 On April 10th, 2017, Gibfibre provided Interoute with a proposal for a 2 Gbps Ethernet service between the WTC data centre (which should have been the MP data centre) and Madrid as follows: a one-off set-up cost of £75,000 or £92,000 (depending on whether the service was protected or unprotected) followed by a monthly cost of between £60,000 and £92,000 (depending on the length of the contract term, and whether the service was protected or unprotected). As it later transpired that the service was required for the MP data centre, it was not possible for Gibfibre to take this further.

508 Mr. Hook stated that Gibtelecom provided William Hill with quotes for various services in April 2017, which included two protected 2 Gbps circuits to London and Slough during the first of a three-year contract, and then reducing to two 1 Gbps circuits in years two and three. In the event, William Hill contracted directly with Gibtelecom, and the prices paid for these services was [*redacted*] per month for both circuits (*i.e.* [*redacted*] per month per circuit) for the year one proposal, and [*redacted*] per month (*i.e.* [*redacted*] per circuit) thereafter. William Hill continues to use this service.

509 Mr. Senogles said that the correct comparison to be drawn was between the price offered by Gibfibre, and Gibtelecom's price for two 1 Gbps circuit or for one 2 Gbps circuit. He accepted, however, that if the correct comparison to be drawn was with the 2 Gbps circuits offered by Gibtelecom, then Gibtelecom was cheaper.

510 In my view, the correct comparison to be drawn was on the basis of the figures provided by Mr. Hook, which is borne out by the contract subsequently entered into between William Hill and Gibtelecom which refers to two 2 Gbps circuits for year one, and two 1 Gbps circuits for years two and three of the contract. William Hill's requirements went up afterwards, although this is not relevant for present purposes.

511 Thus, Gibtelecom's services were cheaper than Gibfibre's: £[*redacted*] per month as against £[*redacted*] per month.

512 Apart from the question of price, in an email dated April 24th, 2017 from Interoute to Gibfibre, they stated that: "Also they insist that one leg should go on the EIG submarine cable for a more redundant solutions. Any chance you can provide a solution for this?" Later on that day, Interoute also said that they required "a terrestrial route, so Gibraltar–Madrid (up to UK), and a route on EIG."

513 It seems to me that whilst Gibfibre have sought to argue that the only reason that they did not get this contract was because they did not have access to the MP data centre, there was more to it. Apart from Gibtelecom offering a cheaper monthly rate of the service requested, it was clear that access to the sub-sea cable was an important part of the service William Hill required, and which Gibfibre was unable to provide.

514 Further, Gibfibre's quote was based on the service ending in Madrid. Whilst onward traffic could have been arranged, this might have incurred additional costs, and William Hill may have preferred the integrity of the service Gibtelecom could offer, along with the other benefits referred to above.

515 It therefore seems to me that Gibfibre would have been assessed as second best in terms of price, quality and service.

516 Mr. Senogles assessed this loss at £4.9m. based on a probability of 100%, which he then reduced to 90%. I do not consider that this is accurate. Mr. Senogles failed to take into account a proper price comparison (partly because he was not provided with all the relevant materials) and failed to take into account other technical aspects of the services, including the EIG link, when reaching his conclusion.

517 In my view, Gibfibre did not have a real or substantial prospect of contracting with William Hill for the circuits it required, and this claim should be excluded altogether from any assessment.

GVC/Entain (via Expereo)

518 Expereo is a company that organizes connectivity services on behalf of other businesses. This claim is based on email exchanges that took place between Gibfibre and Expereo between January 31st, 2018 and February 2nd, 2018. Although this exchange is mostly concerned with a quotation for an internet protocol circuit from 185 Main Street, Gibraltar to Interxion, Madrid, in the course of that email chain, Expereo refer to two new requests on behalf of the GVC Group for a 1 Gbps connection from the MP data centre to Interxion, Madrid.

519 Mr. Hook stated that he had been engaged in negotiating a three-year contract with GVC/Entain to commence on January 1st, 2019, and that this involved consolidating all services of Ladbrokes and Gala Coral, companies that they had previously acquired. Further, he stated that GVC/Entain were planning to move their operations to Equinix in Dublin, and that the three-year term was designed to enable them to wind down their operations in Gibraltar. Mr. Hook stated that the request made to Gibfibre by Expereo did not match the requirements that formed part of his negotiations, and he assumed that it related to a possible replacement of two P2P circuits to Slough, or for a broadband connection line from Madrid potentially to replace Flexiband.

520 The defendants submitted that as no quote was in fact provided by Gibfibre, nor the matter followed up by either side, there was no genuine opportunity lost. Further, and in any event, an inquiry cannot be undertaken as to whether GVC's technical requirements (whatever they might have been) could have been met, or whether they would have been cheaper than Gibtelecom.

521 Mr. Senogles assessed this loss at £1.5m. based on a probability of 50%. This was based on a comparison between the price of two separate 400 Mbps circuits subsequently provided by Gibtelecom, with the estimated price provided by Ms. Sheriff of Gibfibre for a 1 Gbps circuit in her witness statement, namely around £42,000–£51,000 per month, with the amount depending on the length of the contract term and whether the service was

protected or unprotected (plus a one-off set up fee). Mr. Senogles concluded on this basis that Gibfibre's quote would have been marginally cheaper.

522 The difficulty with the comparison on which Mr. Senogles' opinion is based is that, apart from not factoring in Expereo's margin, it fails to compare like with like. I do not consider that it is correct to compare the price of two separate circuits with the price of one circuit by aggregating bandwidth. Each circuit has its own cost to provide, which does not simply increase proportionately to bandwidth. Further, there may be reasons why two circuits are preferable to one, such as resilience or the need for different end-points for each circuit. Bearing all of this in mind, the likelihood is that Gibtelecom would in fact have been cheaper than Gibfibre.

523 In my view, the nature of this inquiry was highly uncertain, not only on its face and because it was not followed up but also for the reasons given by Mr. Hook. Further, Gibtelecom would probably have been cheaper than Gibfibre. This taken together with the advantages that Gibtelecom could offer in terms of its network and operations leads me to the conclusion that it is profoundly unrealistic that Gibfibre lost a real and substantial chance of securing a contract in this case. This claim should accordingly also be excluded from any assessment.

Point 5

524 Point 5 is another intermediary that organizes connectivity services for businesses.

525 On February 21st, 2018, Point 5 contacted Gibfibre via email to request two 10 Gbps connections from the MP data centre for an unnamed customer. One of the connections sought was to the internet, and the other one was to a private connection to a location in Malta.

526 Ms. Sheriff stated that had Gibfibre been able to provide the services sought, it would have charged around £123,000–£145,000 per month per 10 Gbps connection, with the amount depending on the length of contract term and whether the service was protected or unprotected (plus one-off set-up fee to cover Gibfibre's initial costs). Mr. Senogles assessed this loss at £1.8m. based on a probability of 10%.

527 Mr. Hook said that Point 5 had also been in touch with Gibtelecom in February 2018, that they discussed their requirements during a call that took place in March 2018 but that the matter was not followed up by Point 5. Mr. Hook also said that the inquiry did not match the requirements of any customer at the MP data centre, and that the inquiry relied on by Gibfibre looked like a speculative inquiry that would have not translated into real business.

528 Mr. Senogles said that this claim was worth £1.8m. based on a probability of 10%.

529 I do not consider that the 10% probability ascribed to this part of the claim by Mr. Senogles is accurate based on the evidence relied on by Gibfibre, which at best suggests that any business arising from the inquiry was negligible. This is, in my view, all far too speculative to establish that the inquiry made by Point 5 represented a real and substantial loss of a business opportunity for Gibfibre. It follows that no loss of chance claim can be made in respect of it.

BetVictor

530 Ms. Sheriff stated that on July 24th, 2019 BetVictor emailed Gibfibre to say that it required (i) a 50 or 100 Mbps unprotected connection from the MP data centre to London, and (ii) a 100 or 200 Mbps protected connection from the MP data centre to either London or Madrid.

531 Gibfibre provided various quotes that included a setting-up cost of £16,000, and monthly charges for a one-year contract of £18,292.50 (100 Mbps protected circuit) and £20,650 (200 Mbps protected circuit).

532 Mr. Hook said that BetVictor had also been in touch with Gibtelecom in the second quarter of 2019 to discuss connectivity requirements into Megaport. Megaport is a connectivity solutions provider that offers connections directly into hyperscale cloud providers such as AWS that BetVictor uses. Gibtelecom quoted £[*redacted*] for a 100 Mbps circuit, and £[*redacted*] for a 200 Mbps circuit, with a non-recurring cost of £[*redacted*] for either service. Gibtelecom ended up entering into a contract with BetVictor for a 200 Mbps unprotected link into Megaport, London for £[*redacted*] per month. This was upgraded to a 200 Mb protected link for £[*redacted*] in June 2023. As part of this upgrade, Gibtelecom provided a reduction in the Flexiband bandwidth.

533 As can be seen based on the original quotes, Gibfibre's recurring cost was £[*redacted*] cheaper per month. This, however, does not take into account the fact that Gibfibre's setting up costs were at least double that of Gibtelecom's which were £[*redacted*] or £[*redacted*], depending on whether the bandwidth was dual or not.

534 Despite Gibtelecom possibly having the edge because of the lower set-up costs and higher quality service, I consider that there is a real and substantial chance that if matters had been allowed to progress a contract would have been concluded between Gibfibre and BetVictor. In reaching this conclusion, I have in mind that BetVictor was an existing client of Gibfibre, and whilst this was for another service, the fact that a business relationship existed suggests that matters may have progressed given the broad similarities of the quotes. I consider that a substantial reduction is appropriate in all the circumstances but I agree with Mr. Sengoles that this loss should be estimated at £200,000 based on a probability of 25%.

Other unidentified customers

535 Ms. Sheriff further states the above examples are not an exhaustive list of the customers that Gibfibre would have been able to attract had it not been denied access to the defendants' data centres. In her view, Gibfibre would have been able to attract a very substantial portion of the customers at the MP data centre and WTC data centre given Gibfibre's prices have always been significantly lower than Gibtelecom's and Sapphire's prices.

536 Mr. Senogles' view was that Gibfibre would have won 75% of Gibtelecom's Flexiband IP customers within the MP data centre and WTC data centre given the fact that Gibfibre was on average [*redacted*]% cheaper than Gibtelecom. Mr. Senogles focused on price and assumed equivalence of services but accepted that certain customers would not switch just because Gibfibre was cheaper. Based on the bandwidth provided by Gibtelecom in the period January 2016 to March 2024, Mr. Senogles valued this claim at £6.5m.

537 In response, the defendants submitted as follows:

(1) There is no evidence that, apart from the identified customers above, any of Gibtelecom's Flexiband customers sought a quote from Gibfibre for an IP service.

(2) Mr. Senogles did not make a comparison with Gibtelecom's other IP Access/Transit products, which are cheaper and more comparable with Gibfibre's offering.

(3) Mr. Senogles wrongly assumed that Gibfibre's service was in all respects comparable to Gibtelecom's premium Flexiband service.

(4) The fact that so many of Gibtelecom's IP customers remain with the Flexiband product and have neither switched to Gibtelecom's cheaper products or even inquired about Gibfibre's product suggest that Flexiband is the most suitable product for their needs.

(5) A table produced by Gibtelecom shows that half of its Flexiband customers are from outside the data centres, which could have switched connectivity provider at any time.

538 It seems to me that Mr. Senogles' approach to this head of claim is not soundly reasoned. As submitted by the defendants, if a loss of chance is to be alleged in this context, one needs to ensure that one is drawing proper comparisons in terms of the quality of Gibfibre's service and Gibtelecom's Flexiband service. Further, one also needs to bear in mind that if a customer wanted a cheaper service, another option to that client would be to consider Gibtelecom's cheaper alternative service.

539 Further, Mr. Senogles has failed to take into account that Gibfibre's network has been developing since 2016, and that it was not in the same

position to compete in the period 2016–2018 as it is now. For example, the first time that Gibfibre had a second fully independent connection, using a second data centre in Madrid, was sometime between May 2019 and November 2023.

540 The core assumption made by Mr. Senogles as to the likelihood of a switch based on cheaper prices also flies in the face of the data on Flexiband customers who are not customers at the MP data centre, where there is no bar to access to Gibfibre's service. In my view, this was an important aspect of the inquiry that Mr. Senogles did not consider at all. This showed that out of the eighteen Flexiband customers outside the MP data centre, thirteen had remained with Gibtelecom, and out of the five that were not, three had either left Gibraltar or stopped trading. Mr. Hook considered that one customer had moved to Continent 8, and the position was unknown in relation to the remaining customer. This points to the price differential between services not having the impact that Mr. Senogles said that it did. Further, the fact that the MP data centre customers are largely e-gambling customers who value resilience above all only serves to weaken Mr. Senogles' conclusion even further.

541 In all the circumstances, the most that might be said is that it is not entirely implausible that Gibfibre might secure some business at the MP data centre for one reason or another. That, however, is not sufficient for Gibfibre to discharge the burden of establishing on the balance of probabilities that there is a real and substantial chance it would have been awarded unspecified connectivity contracts at the MP data centre, let alone 75% of those contracts.

542 As regards the WTC data centre, as I have concluded above, there was nothing stopping Gibfibre from having pursued negotiations with Rockolo in that regard.

Conclusion on quantum

543 As stated above, I have concluded that the headline figure for quantum is £111,990 plus £200,000, making a total of £311,990. To this, however, deductions would need to be made to take into account Gibfibre's costs of setting up and accessing the MP data centre. If necessary, a further inquiry would need to be carried out to assess those costs.

G. Summary of conclusions

544 Gibfibre's claim is dismissed. My reasons for dismissing the claim are as follows:

545 *Market definition*: Cloud services and colocation services form part of the same product market as from January 1st, 2018. Further, the "remote gambling jurisdictions" referred to above should also be included in the

relevant market definition for the period of this claim. Although the precise boundaries of the multi-jurisdictional geographic market for colocation services may be unclear, it makes no difference in practice because it only takes one of these jurisdictions to be included in the relevant market for the allegation of dominance to fail.

546 *Dominance*: Even if, contrary to my conclusion above, I had accepted Gibfibre's narrow market definition, taking all the evidence on competitive constraints in the round, the defendants were not in a dominant position for the relevant period.

547 *Abuse*: Even if, contrary to my conclusion above, the defendants were dominant in any relevant market, it has not abused its position.

548 *Quantum*: On the hypothetical basis that Gibfibre would have succeeded with its claim, it would have been entitled to £311,990, less costs.

Claim dismissed.