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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: IR165Nov20

In the *interim relief application* between:

GovChat Proprietary Limited First Applicant

Hashtag Letstalk Proprietary Limited Second Applicant

and

Facebook Inc. First Respondent

WhatsApp Inc. Second Respondent

Facebook South Africa Proprietary Limited Third Respondent

Panel:	Y Carrim (Presiding Member) I Valodia (Tribunal Member) A Wessels (Tribunal Member)
Heard on:	13 and 18 January 2021
Date of last submission:	19 January 2021
Orders Issued on:	21 January and 10 March 2021
Reasons Issued on:	11 March 2021

REASONS FOR DECISION AND ORDER

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Introduction

- [1] In this matter the First and Second applicants (“**the applicants**”) seek interim relief, in terms of section 49C of the Competition Act No 89 of 1998, as amended (“**the Act**”) against the First, Second and Third Respondents (“**the respondents**”).
- [2] The applicants seek an order preventing Facebook and/or WhatsApp from “off-boarding” the applicants from the WhatsApp’s paid business messaging platform or application programming interface (“**API**”) pending the determination of a complaint submitted to the Competition Commission (“**the Commission**”) or for a period of six months, whichever occurs first. The applicants have lodged a complaint with the Commission for investigation.¹
- [3] There were several procedural² and jurisdictional issues³ raised by the respondents which were largely resolved prior to or at the hearing and need not detain us further in these reasons.

¹ At the time when the application was launched the applicants had not lodged a complaint with the Commission, so the matter was allocated an interdict case number (IDT157Nov20). Proof of lodgement of the complaint was provided on 20 November 2020 and case number IR165Nov20 was allocated to the matter on 3 December 2020. During the hearing, the respondents persisted with the jurisdictional *in limine* point that the lodging of a complaint with the Commission is a jurisdictional prerequisite for an application for interim relief (in terms of section 49C(1); *Papercor CC v Finwood Papers (Pty) Ltd and Others* [2000] ZACT 44 at para 7; *Nqobion Arts Business Enterprise CC and Business Place Joburg & BeEntrepreneuring*, [2006] ZACT 24 at para 16.). As such, this is a requirement that cannot be remedied by a direction of the Presiding Member as in the case of a technical irregularity. Accordingly, the interim relief application IR165Nov20 cannot be said to include the evidence in the affidavits filed under interdict case number IDT157Nov20. The issue was remedied by the applicant re-filing a new CT6 and incorporating all affidavits filed under the interdict into the interim relief application.

² In a supplementary affidavit filed on 20 November 2020, the applicants brought a joinder application in respect of Facebook South Africa (Pty) Ltd (case number IDT157Nov20/JOI159Nov20). After hearing the submissions of the parties, the Panel handed down *ex tempore* order joining Facebook South Africa (Pty) Ltd to the proceedings (Tribunal Transcript of Proceedings IR165Nov20 (13 January 2021) at p135-136).

³ See above n 1.

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The applicants' case

- [4] The applicants render messaging services over multiple channels such as SMS, USSD⁴ and WhatsApp. They employ the use of a WhatsApp Business Account (“**WABA**”) and render services to several government departments over this WABA.
- [5] The respondents have threatened to off-board the applicants from the WhatsApp platform.
- [6] The applicants contend that the respondents are engaging in anti-competitive conduct in that they require the applicants to cease servicing multiple government departments on their WABA and require that each of the applicants' clients obtain their own WABA. This conduct described as an ‘*open first- close later*’ strategy, involves WhatsApp allegedly allowing third parties to use its platform but deciding to off-board them at a later stage when the third parties present actual or competitive threats to its (WhatsApp’s) business. The applicants argued that the respondents do this by applying the WhatsApp terms and conditions (business rules) inconsistently, leaving other third parties to continue flouting these rules while punishing the applicants because the applicants present a competitive threat to them.⁵
- [7] The applicants allege that they are competitors of the respondents in the market for government messaging services and potential competitors in the market for mobile payment solutions.⁶

⁴ USSD (Unstructured Supplementary Service Data) is a Global System for Mobile Communications (GSM) protocol that is used to send text messages. USSD can be used for Wireless Application Protocol (WAP) browsing, mobile money services, prepaid callback service, menu-based information services and location-based content services. With USSD, users interact directly from their mobile phones by making selections from various menus. USSD enables two-way communication of information, as long as the communication line stays open. As such, queries and answers are nearly instantaneous.

⁵ WhatsApp Inc. has been a subsidiary of Facebook, Inc. since 6 October 2014 (*Commission Decision of 17 May 2017 imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information* Case No. M.8228 (17 May 2017) at para 3).

⁶ While examples of these given by the applicants related to government payment solutions it wasn't clear whether the market included for profit services, but we assume these would be included.

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[8] The applicants contend that WhatsApp is a dominant firm as contemplated in the Act,⁷ the respondents' conduct amounts to a prohibited practice in contravention of sections 8(1)(b) and/or 8(1)(c) and/ or 8(1)(d)(ii) of the Act. During the hearing the focus was on section 8(1)(d)(ii) and/or 8(1)(c).

The respondents' case

[9] The respondents contend that, at its core, this case concerns the right and ability of WhatsApp to enforce the contractual terms that govern the use of the WhatsApp business API and those which pertain to their use by government entities. WhatsApp's terms and conditions of use place limitations on customers redistributing the WhatsApp services to third parties unknown to the respondents.

[10] Ms Hilary Fox⁸ on behalf of WhatsApp explained [CONFIDENTIAL].⁹

[11] When it comes to governments, said Fox, [CONFIDENTIAL].¹⁰

[12] In the respondents' view, the applicants flouted all these requirements. In the first instance while they are not authorised by any government department to render services to citizens, the name GovChat creates the impression that they are an official government site. They gather sensitive personal information from citizens and there are no controls in place as to which third party they might share this information with. Furthermore, they flout the rule in relation to government departments by providing services to multiple government departments on their WABA, so the respondents have no sight of who these departments are.

[13] The respondents submitted that they rejected the GovChat use case on several occasions for these reasons.

⁷ As per sections 6 and 7.

⁸ Product Counsel, WhatsApp.

⁹ Transcript (18 January 2021) at p250-253.

¹⁰ Transcript (18 January 2021) above n 9 at p250.

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- [14] They alleged further that the applicants were aware of WhatsApp's terms and conditions especially in relation to government clients and the applicants had misleadingly bypassed those rules using GovChat's wholly owned subsidiary #LetsTalk.
- [15] The respondents disputed that WhatsApp is dominant in any of the markets identified by the applicants and argued that there are several alternative platforms available to the applicants over which they can conduct their business.
- [16] Furthermore, they alleged that the applicants are not competitors but customers of WhatsApp and therefore in a vertical relationship with WhatsApp. The matter should therefore be dealt with as a matter of contract/commercial law and not competition law.
- [17] The respondents also make the point that Facebook and WhatsApp are not one and the same entity thereby suggesting that the applicants' case had not clarified which entities' conduct was in issue. However, we note here that Facebook bought WhatsApp in 2014 and effectively controls the use of the application, as demonstrated by all the correspondence and documents put up in these proceedings.

Legal context: interim relief applications

- [18] The Tribunal approach to adjudicating interim relief applications is circumscribed in section 49C(2)(b) of the Act, which reads:

"Interim Relief

...

The Competition Tribunal ... may grant an interim order if it is reasonable and just to do so, having regard to the following factors:

- (i) the evidence relating to the alleged prohibited practice;*

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- (ii) *the need to prevent serious or irreparable damage to the applicant; and*
- (iii) *the balance of convenience.”*

[19] There are three steps in this process. Upon establishing whether the applicants have a *prima facie* right to the interim relief being sought, we must also consider two other ancillary factors namely, (i) serious or irreparable harm, and (ii) balance of convenience. The three steps must be understood holistically with each factor balanced against the other.¹¹

[20] It is not our function, in interim relief proceedings, to arrive at a definitive finding of a contravention. A successful applicant is only required to make out a *prima facie* case, not to establish its case on a balance of probabilities. In this way interim relief applications under section 49C are analogous to interim interdict applications in the High Court, where applicants seek relief pending the determination of some other dispute.¹² In this instance the applicants seek interim relief pending the outcome of the Commission’s investigation into their complaint.

[21] Our approach to applications for interim relief was set out in *York Timbers*¹³ as follows:

“[W]e must first establish if there is evidence of a prohibited practice, which is the Act’s analogue of a prima facie right. We do this by taking the facts alleged by the applicant, together with the facts alleged by the respondent that the applicant cannot dispute, and consider whether having regard to the inherent probabilities, the applicant should on those facts establish the existence of a prohibited practice at the hearing of the complaint referral.”¹⁴

¹¹ *Natal Wholesale Chemists (Pty) Ltd and Astra Pharmaceuticals (Pty) Ltd* (98/IR/Dec00) [2001–2002] CPLR 363 (CT); *York Timbers Limited v South African Forestry Company Limited* (15/IR/Feb01) [2001] ZACT 19 (9 May 2001) at para 13; *Anchor Zedo Outdoor CC v Passenger Rail Agency of South Africa* (017616) [2013] 2 CPLR 496 (CT) at para 16.

¹² We note the Competition Appeal Court (“CAC”)’s caution in *Business Connexion (Pty) Ltd // Vexall (Pty) Ltd, The Competition Commission* (182/CAC/Mar20) [2020] ZACAC 4 (15 July 2020) that this comparison to a High Court interim interdict should not be taken too far (at para 21).

¹³ Above n 14.

¹⁴ *York Timbers* above n 14 at para 64.

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Section 8 of the Act

- [22] Section 8(1)(c) provides that it is prohibited for a dominant firm to engage in an exclusionary act – other than a type of “named” exclusionary act listed in paragraph (d) – if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain. An exclusionary act is defined as “*an act that impedes or prevents a firm from entering into, or expanding within, a market*”.¹⁵
- [23] Section 8(1)(d) lists specific types of exclusionary acts in the sub-sections which a dominant firm is prohibited from engaging in unless the firm concerned can show technological, efficiency or other pro-competitive gains (“pro-competitive gains”) that outweigh the anti-competitive effect of its act.
- [24] Under section 8(1)(d)(ii), a dominant firm may not engage in the exclusionary act of refusing to supply scarce goods or services to competitors or customers.
- [25] Prior to the 2018 amendments,¹⁶ section 8(1)(d)(ii) only prohibited a dominant firm from refusing to supply scarce goods to competitors. The 2018 amendments have effectively extended the ambit of the prohibition to include scarce goods and services to competitors or customers.¹⁷
- [26] Thus, under the new section 8(1)(d)(ii), the complainant could be a customer of the dominant firm and would, like a complainant-competitor, still be required to satisfy the other elements of the provision.
- [27] The approach to section 8(1)(c) and 8(1)(d) was established by the Tribunal as early as *Competition Commission v South African Airways (Pty) Ltd*.¹⁸ Section 8(1) is a rule of reason prohibition. This means that the conduct

¹⁵ Section 1(1) of the Act.

¹⁶ Competition Amendment Act No. 18 of 2018 (published under Government Notice No 644 in Government Gazette No 42231 on 14 February 2019).

¹⁷ This portion of section 8 came into effect from 12 July 2019.

¹⁸ (18/CR/Mar01) [2005] ZACT 50 (28 July 2005) (“**SAA**”).

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complained of will only be prohibited if it has an anti-competitive effect. Under section 8(1)(c) an applicant or complainant must show the elements of the exclusionary conduct as well as the effects. However, under section 8(1)(d), once the elements of section 8(1)(d) are satisfied the onus shifts to the respondent to demonstrate that the effects are outweighed by pro-competitive gains.

[28] The applicants in this case are therefore required to satisfy the critical elements of the sections namely the dominance of WhatsApp and that the conduct complained of has exclusionary effects. In terms of 8(1)(d)(ii) the onus shifts on the respondent to show that the pro-competitive gains outweigh the anti-competitive effects of the act. In terms of 8(1)(c) the applicants have the onus of showing this.

[29] An assessment of a firm's dominance is almost always done with reference to the market within which it functions.¹⁹

[30] We return to our earlier observation that the respondents suggested that there was some elision in the applicants' case as to which firm's conduct was at issue.

[31] The applicants allege that, although the respondents are part of the same corporate group, the abuse is a strategy of Facebook, the owner of WhatsApp.²⁰ Further, Facebook and WhatsApp are dominant firms in different markets.

[32] For purposes of competition analysis however, a distinction can be drawn between Facebook's social media platform and WhatsApp's messaging platform. In this decision we focus on WhatsApp's messaging platform.

¹⁹ See the definition of market power in section 1(1) of the Act and the recent decision of the CAC in *Babelegi Workwear And Industrial Supplies CC v The Competition Commission of South Africa* (186/CAC/JUN20) [2020] ZACAC 7 (18 November 2020).

²⁰ Facebook announced its intention to acquire WhatsApp in February 2014 for reportedly \$16 billion. Subsequently, during the course of 2018, both of WhatsApp's co-founders decided to leave Facebook (See <https://www.cnbc.com/2018/09/26/whatsapp-co-founder-explains-why-he-left-facebook.html>).

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Market definition

[33] The applicants have suggested that the relevant primary market is for a group of applications, known as Over-The-Top (“OTT”) applications²¹ such as WhatsApp, WeChat and Facebook Messenger via smartphones²² in South Africa (i.e. “linked to a smartphone device run over the internet”) which can be distinguished from other instant messaging channels such as SMS and USSD on the basis of both technology and functionality. They also submit there is a relevant secondary market for government messaging services.

[34] The respondents alleged that the applicants were required, but were unable to show, why other technical solutions to text-based communication needs, including but not limited to those that are smartphone-based, are not adequate substitutes for their business of government messaging services. As the answering affidavit explains:

“The applicants fail to take into account the wide array of alternative messaging channels including SMS, MMS, web messaging, push notifications, in-app messaging, email, and other technical solutions, such as USSD... WhatsApp competes with each of these different forms of messaging.”

Market for OTT messaging applications

[35] In a broad market for rendering government messaging services a range of messaging channels could be utilised by government departments to communicate with citizens. These could include SMS, USSD, web-based services and applications such as WhatsApp for sending messages to citizens.

²¹ Where over the top means third party applications that can be loaded onto smartphones unlike text protocols such as SMS which make use of the mobile operators’ telecommunications service.

²² The use of WhatsApp has increased due to an increase in use of data services over mobile devices.

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- [36] Indeed, GovChat itself utilises multiple channels such as USSD, SMS and WhatsApp, to render services on behalf of its government clients.
- [37] However, these multiple channels or technologies can be distinguished from each other based on technical and functional differences.
- [38] Text messaging services, such as SMS, MMS and USSD do not rely on internet connections or data availability.
- [39] The WhatsApp platform, unlike SMS, MMS and USSD, supports sending and receiving a variety of media: photos, music, videos, voice memos, animated GIFs and even documents like MS Word or PDF files. It also facilitates group chats and video calls and the uploading of videos, pictures, and documents (multi-media).
- [40] The WhatsApp platform only requires customers to have an active internet connection and a suitable phone; everything else is free. Sending a WhatsApp message does not count against a text message limit, so many people use it as a tool for free, unlimited text messages but over their internet (data) services.
- [41] Furthermore, messages or files sent on WhatsApp are encrypted from end-to-end and cannot be intercepted by third parties.
- [42] On the basis of these technical and functional differences the WhatsApp platform is categorised in a narrower market for OTT messaging applications, together with similar internet-based apps such as WeChat, Facebook Messenger and Snapchat.
- [43] The existence of a market for OTT messaging applications via smartphones was recognized by the Competition Commission of India.²³ It found WhatsApp to be *prima facie* dominant in that market in India on the basis that:

²³ Decision of the Competition Commission of India, *In Re: Harshita Chawla v. WhatsApp Inc and Facebook Inc.*, Case No. 15 of 2020.

NON-CONFIDENTIAL

- 43.1 WhatsApp messenger was the most widely used app for social messaging, followed by Facebook Messenger and that it was way ahead of other messaging apps like Snapchat, WeChat etc. showing its relative strength;
- 43.2 given that WhatsApp messenger and Facebook Messenger were owned by the same group, they did not seem to be constrained by each other, rather adding on to their combined strength as a group; and
- 43.3 its popularity and wide usage, for one-to-one as well as group communications and its distinct and unique features, warranted this conclusion.
- [44] A useful analysis of the different types of OTT apps can be found in the European Commission's (EC) description of the relevant market in the Facebook/WhatsApp merger. In that decision, the EC defined broad "*consumer communications services as being multimedia communications solution that allow people to reach out to their friends, family members and other contacts in real time*".²⁴
- [45] The EC found that, as regards functionalities, consumer communications apps enable one-to-one and/or group real-time communication in various forms, such as voice and multimedia messaging, video chat, group chat, voice call, and the sharing of locations.
- [46] The EC found that consumer communication services could be offered on stand-alone apps, for example WhatsApp, Viber or Facebook Messenger and Skype; or as a functionality that is part of a broader offering such as a social networking platform, for example Facebook or LinkedIn.

²⁴ *Facebook/WhatsApp* (Case COMP/M.7217, 3 October 2014) at paras 13-18.

NON-CONFIDENTIAL

- [47] Within these internet protocol based²⁵ group of apps, differences prevail as to whether they are stand-alone or offered as part of a broader offering, available across many operating systems (e.g. WhatsApp) or only one (e.g. Apple iMessage), or available on particular types of devices.
- [48] Therefore, what is evident from the EC approach is that there are clear differences between the kind of messaging services that can be delivered over internet-based applications such as WhatsApp, WeChat or Facebook Messenger (OTT's) and those on SMS or USSD.
- [49] WhatsApp can also be used as a customer service tool. The application usually involves a "chatbot" which serves as an early (first) responder to customer enquiries.²⁶ A "chatbot" is an automated conversation partner on WhatsApp, which facilitates a conversation between a person and a computer.
- [50] In addition to the technological differences, an important factor is the rate of usage of different messaging systems by the public or customer penetration.

Is WhatsApp dominant in the South African market for OTT messaging applications?

- [51] Section 7 of the Act provides that:

"A firm is dominant in a market if –

(a) it has at least 45% of that market;

²⁵ The services run on internet protocol (IP) lines specifically designed to carry data as opposed to the traditional voice networks of telecommunications services. Recent technology improvements allow mobile operators to use IP on their networks, thus allowing wireless internet access. IP has also developed to allow voice over IP (VoIP) transmission which permits internet-based voice calls.

²⁶ See for example the Discovery Health customer service offered on WhatsApp: <https://www.discovery.co.za/corporate/ask-our-chat-bot>

NON-CONFIDENTIAL

- (b) *it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or*
- (c) *it has less than 35% of that market, but has market power”.*

[52] The term “*market power*” is in turn defined in section 1 of the Act as meaning “*the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers*”.

[53] The Autorité de la Concurrence²⁷ recommended identifying “structuring digital platforms” based on the following definition:

“A company that provides online intermediation services for exchanging, buying or selling goods, content or services, and who holds structural market power because of its size, financial capacity, user community and/or the data that it holds, enabling it to control access to or significantly affect the functioning of the market(s) in which it operates, with regard to its competitors, users and/or third-party companies that depend on access to the services it offers for their own economic activity.”²⁸

[54] This definition is helpful because it aims to capture the ways in which dominance may be assured by reason of size, financial capacity, user community and/or the data it holds; which in turn is leveraged to affect players in adjacent markets that rely on the dominant firm in order to offer their own services. These players in adjacent markets can be, and in this case are, concerned with the provision of online intermediation services.²⁹

²⁷ France’s national competition regulator.

²⁸ OECD (2020), Competition in digital advertising markets, accessible at <http://www.oecd.org/daf/competition/competition-in-digital-advertising-markets-2020.pdf> endnote 33 citing The Autorité de la concurrence’s contribution to the debate on competition policy and digital challenges, accessible at https://www.autoritedelaconcurrence.fr/sites/default/files/202003/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en.pdf (our emphasis).

²⁹ The Commission says about this market:

“The importance of certain platforms for reaching consumers makes business users dependent on them, with issues arising in terms of self-preferencing, unfair trading terms, extraction of business data and the potential distortion from ranking algorithms. Whilst these platforms may facilitate participation by SMEs / HDIs, they may also discriminate against and exploit them in the process, undermining participation. Internationally, the focus has tended to be on business

NON-CONFIDENTIAL

[55] The applicants' allege that WhatsApp is the most widely used messaging application in South Africa with 89% of all internet users between the ages of 16 and 64 reporting having used WhatsApp; and at least 58% of all mobile phone users having downloaded WhatsApp. Further, they allege that WhatsApp has an entrenched market position in South Africa, including the fact that WhatsApp comes pre-loaded on almost all Android smartphones; that networks in South Africa offer WhatsApp "data bundles"; that cheaper Android devices have limited storage space and their users would be disinclined to delete the pre-loaded WhatsApp app in order to download and install a competing application; and that, in any event, lower-income consumers are unlikely to consume valuable data on downloading competing messenger applications.

[56] The respondents did not dispute these facts. We accordingly find that WhatsApp is, at least, *prima facie* dominant in the market for OTT messaging applications via smartphones in South Africa.

Market for government messaging services

[57] The applicants also contend that there is a secondary market in South Africa for the provision of government messaging services.

[58] The applicants have developed an application that facilitates communication between government and citizens (the "**GovChat App**") on the WhatsApp platform as a way for South Africans to engage with government directly. They have also developed #LetsTalk on the WhatsApp platform.

to consumer (B2C) platforms rather than business to business (B2B) platforms given the former have greater tendencies to monopolisation."

(The Competition Commission of South Africa, Online Intermediation Platforms Market Inquiry Terms of Reference Draft for Public Comment dated 19 February 2021 accessible at <http://www.compcom.co.za/wp-content/uploads/2021/02/OIPMI-Draft-ToR-19-02-2021.pdf>).

NON-CONFIDENTIAL

- [59] In its early days, the GovChat App enabled users to engage with government in respect of service delivery at a local government level, through agreement established with the Department of Cooperative Governance and Traditional Affairs (“**COGTA**”). Users could, for example, report potholes in their municipalities and find the nearest local councillor in their area. GovChat’s basic services offered to the COGTA were free, whilst value added services carried a fee and services to third parties carried a fee based on the circumstances of the use case.³⁰ At a later stage, GovChat established a wholly owned subsidiary called #LetsTalk, to focus on delivering similar services to non-government customers.
- [60] The service offering by the applicants has morphed over time but they now offer a chatbot described as an “application-agnostic natural-language ChatBot”³¹ to their government partners and citizen-users; as well as, cloud computing, management analytics³² and a secure portal (facilitating sensitive information collection) to its government partners.³³
- [61] At the time that this matter was heard, the services offered by the applicants involved extremely important public interest functions relating management of the Covid-19 pandemic, namely: (1) assisting the National Department of Health (“**NDOH**”) with Covid-19 education, symptom tracking and testing; and (2) assisting the Department of Social Development (“**DSD**”) and the South African Social Security Agency (“**SASSA**”) with enabling citizens to apply for social relief of distress grants.
- [62] Recall that in the earlier discussion on the OTT messaging applications market we highlighted the fact that there are clear differences between the kind of messaging services that can be delivered over WhatsApp and other internet-based applications such as WeChat or Facebook Messenger (OTT’s) in comparison to SMS or USSD.

³⁰ GovChat Business Model and Use Cases (Founding Affidavit Annexure “**FA 18**”) at Record p186.

³¹ GovChat Information Memorandum (Founding Affidavit Annexure “**FA 13**”) at Record p151.

³² GovChat Information Memorandum (Founding Affidavit Annexure “**FA 13**”) at Record p150.

³³ GovChat Business Model and Use Cases (Founding Affidavit Annexure “**FA 18**”) at Record p183.

NON-CONFIDENTIAL

- [63] The kinds of services that can be rendered over OTTs such as uploading multimedia and the like simply cannot be rendered over SMS or USSD.
- [64] Thus, the market for government messaging services over multiple channels could also be segmented into narrower markets based on technology and functionality.
- [65] We therefore understand that the applicants' secondary market for government messaging services is actually a reference to a narrow market for government messaging services over OTT's rather than the broad market for government messaging services over multiple channels.

Government messaging services over OTT

- [66] Both Praekelt Consulting (Pty) Ltd (“**Praekelt**”) and InfoBip Africa (Pty) Ltd (“**InfoBip**”) are authorised Business Service Provider (“**BSPs**”) of the respondents. Where a BSP is a solution provider authorised by WhatsApp to deploy the WhatsApp business solution as a service provider on behalf of its clients. An authorised BSP will have the infrastructure to host the WhatsApp Business API user or “client” and has the capabilities and expertise to manage messaging on behalf of the user. The BSP then manages the WhatsApp API as a service on behalf of the various businesses that are the BSP's own business customers (BSP customers).³⁴
- [67] The applicants submit that they are not the only ones rendering government messaging services over WhatsApp: Praekelt, Aviro Health and Internet Filing presently offer the same service.
- [68] Praekelt also provides the NDOH with a platform known as “MomConnect” over WhatsApp. MomConnect is a platform which provides first time mothers with

³⁴ Respondents' Answering Affidavit (16 December 2020) Record p523 at para 36.

NON-CONFIDENTIAL

information during the first 100 days of their babies' lives. It has also been used during the Covid-19 pandemic to identify and offer grants to qualifying mothers.

[69] Furthermore, Praekelt and InfoBip recently announced a partnership to exploit commercial opportunities which compete with the services offered by the applicants via the GovChat platform.³⁵

[70] To this extent GovChat (or the applicants) can therefore be seen as a direct competitor to Praekelt and these other entities in the narrow market for government messaging services over OTT applications.

[71] However, the applicants are also customers of WhatsApp.

Mobile payment solutions market

[72] A further segment of this market, namely the mobile payment solutions market, was highlighted by the applicants as being relevant to the alleged anti-competitive effects of the respondents' conduct. They submit that Facebook has a clear strategy to expand its reach into the mobile payments market through WhatsApp.³⁶ It is targeting key emerging markets (India and Brazil are WhatsApp's two largest markets worldwide by active users)³⁷ where WhatsApp is the dominant messaging platform for its initial entry. If it can expand in these markets, Facebook/WhatsApp will generate an additional revenue stream in relation to each transaction it processes.³⁸ WhatsApp is thus a platform which may easily be applied within the context of payments by governments to citizens.

³⁵ Founding Affidavit Annexure "FA35" (Record p236).

³⁶ Applicants' Supplementary Affidavit (20 November 2020), Record p 270-273, at paras 66-71.

³⁷ See, for example, <https://techcrunch.com/2020/11/05/whatsapp-receives-approval-to-expand-its-payments-service-in-india/> and <https://www.whatsapp.com/payments/br>

³⁸ See for example, <https://businesstech.co.za/news/banking/257799/absa-launches-whatsapp-banking-in-south-africa-heres-how-it-works/>

NON-CONFIDENTIAL

- [73] Although Mr Eldrid Jordaan of GovChat³⁹ was somewhat reticent about GovChat's plans for the evolution of its business, GovChat's future business objectives are clear enough in the papers before us. The applicants allege that it will most directly encounter WhatsApp/Facebook as a competitor or a potential competitor in the mobile payments space.⁴⁰
- [74] It bears mentioning that GovChat ultimately took over the social relief of distress grant process from Praekelt after, as GovChat alleges, Mr Gustav Praekelt (the founder of Praekelt) asked senior SASSA executive officials for information regarding SASSA's distribution of grant payments. SASSA was uncomfortable with these questions, and the disclosure of this information. However, Praekelt advised it that it was only prepared to continue to provide a digital solution to SASSA with access to the NDOH's WhatsApp number, if the payment information was shared with it. SASSA accordingly approached GovChat and asked whether it could assist with the grant application process. Most commendably, GovChat did so on a *pro bono* basis, effective 11 May 2020.⁴¹
- [75] During the hearing, the applicants brought to our attention another confidential government project in which WhatsApp's intention of moving into the mobile payment space with Praekelt was stated.⁴² This project's details need not be canvassed any further other than to state that it confirms WhatsApp's intention and ability, through its BSP Praekelt, to expand into payment solutions services for government.
- [76] The applicants thus are *potential competitors* of the authorized BSP's of the respondents, and/or the respondents themselves, in the South African mobile payments market for government departments over WhatsApp (OTT).

³⁹ GovChat's founder and Chief Executive Officer.

⁴⁰ Transcript (13 January 2021) above n 2 at p28.

⁴¹ Supplementary Affidavit above n 40 at paras 26-29 (Record p254-255.)

⁴² Transcript (13 January 2021) above n 2 at p29 and Transcript (18 January 2021) above n 9 at p213-217.

NON-CONFIDENTIAL

Conclusion on market definition

[77] Thus, we conclude that the applicants have put up sufficient facts to establish a *prima facie* case for markets described as—

77.1 the primary market for OTT applications in which WhatsApp is dominant;

77.2 the narrow market for government messaging services over OTT applications in which the applicants are active; and

77.3 the narrow market for mobile payment solutions services for government departments rendered over OTT applications in which the parties are potential competitors.

[78] The market participants identified by the parties namely, Praekelt, Aviro Health, Internet Filing, InfoBip and GovChat all render services over the *WhatsApp* platform and not over competing OTT applications. All of them would thus be in a vertical relationship with WhatsApp i.e. either as authorised BSP's or WhatsApp's customers that request a WABA for themselves and work with an authorised BSP to integrate them on the platform.

[79] The respondents have maintained throughout the proceedings that the parties are in a vertical, not a horizontal relationship. However, the applicants being customers of WhatsApp does not mean that the vertical relationship would remove them from the ambit of the new section 8(1)(d)(ii) which includes both customers and competitors.

[80] Nor does it mean that the respondents are not able to leverage their dominance in the upstream/OTT applications market into a downstream/adjacent government services market.

[81] In fact, this is what we understand part of the applicants' case to be – namely that because WhatsApp is dominant in the OTT applications market in South

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Africa, it is a must-have application for the applicants to be able to render their own services over OTT applications. This dominance is then leveraged by WhatsApp (the respondents) in the *services* market against customers when it perceives a competitive threat in that market.

Factual Disputes

- [82] Before turning to assess whether the applicants have satisfied the requirements of section 8(1)(d)(ii) and/or 8(1)(c), we set out some essential facts in the matter.
- [83] It is undisputed that the applicants' use case had been integrated on the WhatsApp platform via an agreement with InfoBip, an authorised BSP.⁴³ It is also undisputed that the respondents wish to off-board the applicants from the platform.⁴⁴
- [84] The factual disputes between the parties revolve around two time periods, the first being during the GovChat/Praekelt period and the second being the GovChat/InfoBip period.
- [85] The respondents' version is that during the Praekelt period, Praekelt identified four commercial entities that were interested in using the "enterprise API" (the earliest or "alpha" version of the WhatsApp Business API) for social impact projects. GovChat was one of these commercial entities.⁴⁵
- [86] The respondents allege that the government programme was put on ice in 2019 pending a review. According to them, GovChat, on the basis of its use case

⁴³ Answering Affidavit above n 38 at paras 80-81 and Founding Affidavit Annexure "FA 6" (Record p109), Answering Affidavit Annexure "BES 12" (Record p592) and "BES 20" (Record p608)

⁴⁴ The chronology of how the GovChat App was developed and subsequent events are on record and we do not canvass these any further here.

⁴⁵ Answering Affidavit above n 38 at para 58 (Record p528).

NON-CONFIDENTIAL

(rendering services to government), fell into the government programme and was rejected on that basis.⁴⁶

- [87] The applicants' version is that its use case had been approved by WhatsApp and it was not commonly understood that GovChat's access was on a test basis.⁴⁷ Had it been operating on a test basis, it would not have invested the significant amount of money⁴⁸ and time into the project which it did.
- [88] We see from the email thread from Praekelt to Mr Jordaan⁴⁹ that GovChat was advised as early as 10 December 2018 that it needed to migrate off the Praekelt platform. It was told to migrate off in March 2019 and was finally removed in September 2019.⁵⁰
- [89] After that, and until it obtained the WABA from InfoBip through #LetsTalk, the respondents' version is that GovChat made at least two attempts to obtain approval for its use case through Clickatell, which were turned down and that GovChat was aware of the reasons for this.⁵¹
- [90] The applicants do not deny that they attempted to obtain a WABA through Clickatell. However, the respondents' version, namely that GovChat was advised of the reasons for being rejected, is not supported by any contemporaneous documents, nor by an affidavit from Mr Praekelt himself as to his understanding of the situation at that time.
- [91] In relation to the InfoBip period, InfoBip and #LetsTalk and Govchat signed the messaging services agreement on 8 July 2020, ("**the InfoBip Agreement**").

⁴⁶ Answering Affidavit above n 38 at paras 75-76 (Record p532).

⁴⁷ Applicants' Replying Affidavit (30 December 2020) at para 17 (Record p687).

⁴⁸ GovChat has spent in excess of R50 million developing systems for government (Supplementary Affidavit above n 40 at para 17, Record p251).

⁴⁹ Replying Affidavit Annexure "**RA 4**" (Record p755-757).

⁵⁰ Answering Affidavit above n 38 at para 62 (Record p529).

⁵¹ Answering Affidavit above n 38 at paras 75-78, 80-81 (Record p532-533).

NON-CONFIDENTIAL

- [92] On the applicants' version the InfoBip Agreement contains clauses which contemplate that the applicants would have third party clients.⁵² Both GovChat and #LetsTalk were parties to this agreement and accordingly the applicants were entitled to assume that the GovChat use case had been approved.
- [93] The respondents allege that #LetsTalk misled InfoBip in the application papers and deliberately concealed the link between #LetsTalk and GovChat from InfoBip.⁵³
- [94] However, the respondents' version is thrown into some doubt by an email from Ms Katerina Parimon of InfoBip to Mr Gareth Bray of Facebook/WhatsApp, demonstrating that InfoBip was aware that the applicants were rendering services to government departments for purposes of the Covid-19 pandemic:
- "...was wondering when you were going to notice...Its (sic) an awesome project – Social Grants and Unemployment Funds are serviced through Govt Chat that serves millions of people to register and check their status...*
- Seems that in SA there is a special place/ role for WA being a vitally important channel for people to communicate. The conditions are harsh and WhatsApp brings them closer to options.*⁵⁴
- [95] Furthermore, no supporting affidavit was provided by InfoBip as to why it concluded an agreement with both GovChat and #LetsTalk wherein it was contemplated that #LetsTalk would have third party clients.
- [96] Even Ms Fox could not shed light on why, [CONFIDENTIAL].⁵⁵
- [97] In our view, these factual disputes cannot be resolved without further investigation by the Commission.

⁵² The definitions of "Client Content" and "Client Services" for purposes of the InfoBip Agreement extend to "end users" meaning any customers of the Client.

⁵³ Answering Affidavit above n 32 at para 84 (Record p533-534).

⁵⁴ Email from Katerina Parimon of InfoBip to Gareth Bray of Facebook, dated 1 June 2020, (Record p595-596).

⁵⁵ Transcript (18 January 2021) above n 9 at p243-259.

NON-CONFIDENTIAL

[98] However, what is certain is that the applicants were of the view – and certainly not without good cause – that their agreement with InfoBip entitled them to conduct the business as they have been doing.

[99] On this basis we turn to consider whether the applicants have satisfied the elements of section 8(1)(d)(ii) and/or 8(1)(c).

Evaluation

[100] Section 8(1)(d)(ii) provides that it is prohibited for a dominant firm to refuse to supply scarce goods or services to a competitor *or customer* when supplying those goods or services is economically feasible.

[101] The applicants have established a *prima facie* case for WhatsApp's dominance in the OTT applications market in South Africa. We also note that the applicants are both customers and competitors of the dominant firm in the secondary market for government messaging services.

[102] We now turn to consider the remaining elements of section 8(1)(d)(ii).

Competitors or customers

[103] In SAA,⁵⁶ the Tribunal held that an abuse of dominance could be perpetrated in one market and the effect thereof could be experienced in another related market.

[104] Any uncertainty about the approach taken by the Tribunal in SAA has been resolved by the 2018 amendment which now includes a refusal to supply a "customer" of the dominant firm. The firm's dominance can now be considered with reference to the primary market, which we have identified as the market for OTT applications and in which WhatsApp is *prima facie* dominant.

⁵⁶ SAA above n 21.

NON-CONFIDENTIAL

- [105] The applicants, through the BSPs, are customers of WhatsApp.
- [106] In this case the applicants are also competitors of the respondents' authorised BSPs and potential competitors of the respondents in the mobile payments market.

Scarce goods or services

- [107] Is the WhatsApp app or platform a “scarce good or service” as contemplated in section 8(1)(d)(ii)?
- [108] In the European Union, technologies such as search engines and internet platforms have been treated as a “services” market. In the Online Intermediation Platforms Market Inquiry (“OIPMI”) draft terms of reference issued by the Commission, platforms (software products) are described as “services” in a digital economy.⁵⁷ Industry language also describes a platform-as-a-service model, which WhatsApp could notionally be said to do.
- [109] Integration or inter-operability between apps also requires significant resources.⁵⁸ Mobile apps, like any other app that runs over a computer, require software development. The more sophisticated the app the greater the capital and time required to develop it.
- [110] Mr Jordaan stated that he had invested R50million in developing the bespoke use case of his business on the WhatsApp platform.⁵⁹ Switching costs would thus be high, and it would take time for the applicants to find an alternative OTT with similar functionality to WhatsApp.

⁵⁷ See the Competition Commission's OIPME terms of reference 19 February 2021 above n 33.

⁵⁸ Miguel Rato and Nicolas Petit “Abuse of Dominance in Technology enabled Markets: Established Standards Reconsidered?” in European Competition Journal *Abuse of Dominance in Technology-Enabled Markets* April 2013(1) at p32-33.

⁵⁹ Supplementary Affidavit above n 40 at para 17 (Record p251).

NON-CONFIDENTIAL

- [111] A further point raised by the applicants is that of market penetration. They submitted that in order to set up a government interactive messaging service which could reach a large percentage of citizens that service would need to be rendered over an application that has significant market penetration i.e. you need a critical mass of users. This issue of market penetration becomes a highly relevant factor for services such as Covid-19 results and social grant applications in the context of the Covid-19 pandemic.
- [112] As stated above, which was not denied by the respondents, WhatsApp is the most widely used OTT smartphone messenger application in South Africa, with 58% of all South African mobile phone owners using the application as of February 2020 and 89% of all internet users in South Africa between the ages of 16 and 64 reporting having used WhatsApp in January 2020.
- [113] Whether OTT apps are considered as goods or services under section 8(1)(d)(ii), what is certain is that they certainly cannot be easily duplicated without significant capital investment and therefore can be considered as “scarce” or hard to come by.

Economic feasibility

- [114] A further requirement of section 8(1)(d)(ii) provides that the supply must be economically feasible.
- [115] The respondents have not suggested that the supply to the applicants is not economically feasible on the basis that the applicants have poor creditworthiness, or that the WhatsApp platform is under some capacity constraint that limits its ability to supply.⁶⁰

⁶⁰ See Sutherland & Kemp *Competition Law of South Africa* at para 7.13.7. See also Richard Whish and David Bailey *Competition Law* 9th Ed (Oxford University Press, 2018).

NON-CONFIDENTIAL

Refusal to supply

[116] The applicants allege that the respondents seek to discriminate against them while permitting other players to do exactly what it requires the applicants to not do – namely, require each of its clients to acquire their own WABA – because it considers the applicants as a competitive threat in the market for government messaging services, or a potential competitor in the market for mobile payment solutions.

[117] In support of the discrimination allegation, the applicants point out that–

117.1 There are many Independent Service Vendors (**ISV's**) who also service multiple clients on one WABA account and yet these ISV's have been offered an amnesty. The First Applicant, on the other hand, has been threatened with off-boarding;

117.2 The respondents own BSP's have rendered services to government departments over one WABA account and yet the respondents have permitted this; and

117.3 There are at least two entities providing services to government departments who do not have their own WABA.

[118] We deal with each of these in turn.

ISVs

[119] One of the issues which the applicants raised in relation to the selective application by the respondents of WhatsApp's policies and procedures was the ISV Amnesty Programme ("**the ISV Amnesty Programme**"). A copy of Frequently Answered Questions ("**FAQ's**") regarding the ISV Programme were attached as "**RA5**" to the Replying Affidavit.⁶¹

⁶¹ Record p758.

NON-CONFIDENTIAL

[120] The applicants ultimately did accept that they do not qualify for the ISV amnesty programmes but point to it as an example of the inconsistent manner in which the respondents apply the WhatsApp rules, offering some an amnesty while treating the applicants with an iron fist.

BSP's

[121] One of the examples of the respondents' differential treatment of GovChat vis-à-vis other users of the WhatsApp Business API relates to the manner in which it has dealt with Praekelt and others rendering services to government entities.

[122] When the Covid-19 epidemic started, Praekelt established a WhatsApp service for the NDOH.⁶²

[123] A Covid-19 social relief of distress grant was announced during lockdown in South Africa. This grant of R350 per month for a six-month period is administered by the DSD and SASSA. Under the initial stages of lockdown, people could not travel to SASSA offices or post offices to apply for the social relief of distress grant.

[124] SASSA asked the NDOH whether it could use the NDOH's WhatsApp line for the social relief of distress grant application process.

[125] An arrangement was entered into between Praekelt, SASSA and the NDOH in terms of which, for a short trial period, citizens would be able to apply for the social relief of distress grant using the NDOH's WhatsApp number. As set out in the Supplementary Founding Affidavit, it does not appear that WhatsApp or Facebook raised any objection to the use of the NDOH's WhatsApp number by SASSA, despite the respondents' repeated assertions that key terms of its

⁶² This WhatsApp service provides the following: COVID-19 HealthAlert, which "disseminates accurate, timeous information to the public via WhatsApp"; COVID-19 HealthCheck, which "helps assess risk, allowing early detection, mapping and efficient management of health cases and resources"; and HealthWorkerAlert, which "provides psychosocial support and up to date information for health workers on the frontline" (Supplementary Affidavit above n 40 at para 19, Record p252).

NON-CONFIDENTIAL

service are (1) that each government department must be vetted before it can be on-boarded onto the WhatsApp Business API; and (2) that each government department must have its own WABA account.

- [126] As discussed earlier, Praekelt also provides the NDOH with a platform known as “MomConnect”. In much the same way the respondents did not raise any difficulties with Praekelt using an NDOH WhatsApp number for a SASSA functionality.
- [127] Another example cited by the applicants involve Telkom Pay, a digital wallet service operated by Telkom Ltd via WhatsApp that requests and collects ID numbers via WhatsApp. This, on the face of it, is also in contravention of WhatsApp’s terms of use which the respondents claim was being contravened by GovChat, namely that personally identifiable information should not be shared or collected via WhatsApp.
- [128] Aviro Health, a health-tech start-up, has partnered with the Western Cape Government’s Department of Health to create an automated chatbot service via WhatsApp to deliver chronic medication. The gathering of such data by Aviro Health over WhatsApp is what was said by the respondents to be in contravention of WhatsApp’s terms of use.
- [129] Internet Filing has partnered with the City of Tshwane to facilitate engagements between residents and the municipality. Through an “e-Tshwane” WhatsApp service, ratepayers are able to view and pay their bills and request application forms for various services (as well as access specific links and obtain contact information). This too is, on the face of it, in contravention of WhatsApp’s terms of use in that the e-Tshwane WhatsApp number is owned and operated by Internet Filing and not the City of Tshwane. This kind of arrangement (for the benefit of a third party which does not have its own WABA) is in fact given as a fundamental reason by the respondents for “off-boarding” GovChat from the WhatsApp platform.

NON-CONFIDENTIAL

[130] The respondents did not deny any of the applicants' allegations regarding Praekelt, nor did Mr Praekelt depose to an affidavit confirming or disputing the above facts.

[131] Ms Fox, when she explained [CONFIDENTIAL].⁶³

[132] She referred to the [CONFIDENTIAL].⁶⁴ Ms Fox submitted [CONFIDENTIAL].

[133] We note here that in this case the respondents do in fact know who the applicants' government clients are – having been provided with that list by the applicants themselves.

[134] What then do we make of the direct approaches to the customers of the applicant made by the respondents?

Direct approach to customers

[135] However, the respondents also went one step further: they made direct contact with GovChat's customers, to the exclusion of GovChat:

135.1 On 13 November 2020, Facebook wrote to the Honourable Lindiwe Zulu informing her that WhatsApp would be closing down GovChat/#LetsTalk's service on 16 November 2020 "*due to the service being in non-compliance with WhatsApp's terms of service*". The letter also indicated that Facebook was willing to and desirous of "*work[ing] directly with the Government of South Africa who wish to establish their own WhatsApp Business Account(s)...*".⁶⁵

135.2 On 16 November 2020, the day on which Facebook had threatened to off-board GovChat, and the day of the Tribunal's prehearing, Ms Nomonde Gongxeka-Seopa of Facebook met with the COGTA. At this

⁶³ Transcript (18 January 2021) above n 9 at p259-260.

⁶⁴ Transcript (18 January 2021) above n 9 at p260-261.

⁶⁵ Supplementary Affidavit Annexure "SFA3" (Record p301).

NON-CONFIDENTIAL

meeting Facebook informed the attendees that GovChat had violated WhatsApp's terms of service. Facebook suggested that it enter into a direct agreement with COGTA via an "approved" BSP. These "approved" BSP's that COGTA could choose were, InfoBip, Clickatell and Praekelt. Facebook indicated that Praekelt is its "*social impact partner*" and referred to work Praekelt does with the NDOH. Facebook informed COGTA that COGTA had a three-week deadline (ending on 4 December 2020) within which to conclude the WABA application process.⁶⁶

135.3 There has been direct correspondence between Ms Gongxeka-Seopa and Mr Linton Mchunu (Acting Director General: DSD), Ms Lumka Oliphant and Mr Abram Phahlamohlaka of the DSD enclosing a list of authorised BSP's.⁶⁷

[136] The applicants had raised these issues in a supplementary affidavit. While the respondents do not deny these direct approaches, the explanation provided by Mr Ben Supple in his answering affidavit seems to suggest that the respondents were motivated by a concern that the applicants were playing a delaying game by undertaking in correspondence to migrate these government departments but not doing anything about it.⁶⁸

[137] While the respondents might have felt such a concern, they have not explained why in those communications and meetings with GovChat's clients they did not disclose the fact that the applicants had brought this application at the time, and had lodged a complaint with the Commission, thus challenging the WhatsApp's terms and conditions from a competition law perspective.

[138] It is worth noting that in the communications with the different government departments, the respondents put forward their own BSP's as being authorised to render services on the WhatsApp platform.

⁶⁶ Supplementary Affidavit above n 40 at para 42 (Record p260).

⁶⁷ Second Supplementary Affidavit Annexure "EJ2" (Record p448-451).

⁶⁸ Answering Affidavit above n 38 at paras 119-122 (Record p543-544).

NON-CONFIDENTIAL

- [139] The examples above show that the respondents have not consistently applied WhatsApp's terms and conditions, but rather selectively applied them. In the case of GovChat, they have applied the rules to justify the decision to off-board it and have then approached GovChat's government clients, offering them the WhatsApp services through their own authorised BSP's.
- [140] In our view, the above examples of selective application of the WhatsApp terms and conditions or business rules demonstrate that the respondents seem willing to deviate from their own rules in favour of their own BSPs rendering services to government departments.
- [141] This, taken together with the direct approach to the applicants' government clients, demonstrates, at least on a *prima facie* basis, that the respondents seek to foreclose the applicants from that market.

Anti-competitive effects

- [142] Finally, as indicated above, a refusal to supply is a rule of reason prohibition and the anti-competitive effects can be established by harm to consumer welfare evidenced by facts and inferences from proven facts. The foreclosing effects must also be substantial.
- [143] Recall that the applicants alleged that the respondents (or rather Facebook) utilise an '*open first-close later*' strategy through the inconsistent application of the WhatsApp business rules. The essential allegation is that the respondents have sought to off-board the applicants because the applicants pose potential competitive threat to them in the government messaging services and/or mobile payment solutions markets; all the while permitting other (self-affiliated) users of its platform to continue functioning in those markets.
- [144] The conduct complained of could be characterised as WhatsApp (a dominant firm in the OTT applications market) preferring its own authorised BSP over a

NON-CONFIDENTIAL

competitor to its BSP in the market for government messaging services, or a potential competitor in the mobile payments market.

- [145] From a competition law perspective, such discriminatory or selective conduct on the part of a dominant firm in the upstream input market (usually a vertically integrated firm) against competitors or potential competitors in a downstream services market could amount to a constructive refusal to supply with the downstream competitor on the same terms and conditions as it treats its own subsidiary or authorised dealer in that market, in contravention of section 8(1)(d)(ii).⁶⁹
- [146] In *Telkom*⁷⁰, the Tribunal opined about how in competition law, a dominant firm's requirement that a downstream competitor accede to unreasonable conditions in order to obtain supply could nevertheless still amount to a refusal to supply. This is sometimes referred to as a constructive or effective refusal to supply, because the conditions of supply are so burdensome or were aimed to extract concessions which it would otherwise not be able, or so unreasonable as to render the purchase of the input uneconomical. For sectors where the accuracy and currency of data are critical, even a slight delay or degradation in quality in the provision of telecommunications infrastructure could amount to a constructive or effective refusal.
- [147] Even if WhatsApp is not vertically integrated with its BSPs, it has authorised them to render services to third party clients such as government departments and thus has a vertical relationship analogous to that of a vertically integrated firm. Indeed, this fact was confirmed by the respondents in their direct approach to the applicants' customers (discussed above) where it was stated that the only authorised BSPs of WhatsApp that can render services to government departments were InfoBip, Praekelt and Clickatell.

⁶⁹ See Whish & Bailey above n 65 at p724, on refusal to supply as a vertical foreclosure strategy.

⁷⁰ *Competition Commission v Telkom SA Ltd* (Case No. 11/CR/Feb04, dated 7 August 2012) [2012] 2 CPLR 334 (CT).

NON-CONFIDENTIAL

- [148] The respondents in turn have not put up any evidence of pro-competitive efficiency gains for off-boarding the applicants.
- [149] It bears mentioning that the respondents did invite the applicants to apply to become an authorised BSP.⁷¹ The applicants elected to do so through a sister company called Synthesis. The explanation provided by the applicants is that they elected to do so because the applicants are small niche businesses and do not themselves have the technical capabilities to become an authorised BSP. The application was however denied by WhatsApp.
- [150] The applicants nevertheless submit that this invitation was made in bad faith, and that the respondents never intended to award them with the status of a BSP.
- [151] In any event very little information was given by the respondents for the rejection of the application which suggests to us that this would best be addressed in the course of an in-depth investigation by the Commission.
- [152] In our view the applicants have, *prima facie*, satisfied the requirements of section 8(1)(d)(ii).

Conclusion on prohibited conduct

- [153] In conclusion, we find that the applicants have established a *prima facie* case of prohibited conduct on the part of the respondents in that the respondents' selective application of its rules against the applicants amounts to an effective refusal to deal. The applicants have *prima facie* satisfied the requirements of section 8(1)(d)(ii).
- [154] Our assessment above, while done in the context of section 8(1)(d)(ii) would also be relevant for purposes of section 8(1)(c).

⁷¹ Founding Affidavit Annexure "FA17" (Record p174).

NON-CONFIDENTIAL

- [155] The applicants have thus also made out a *prima facie* case of exclusionary conduct and anti-competitive effects as required in section 8(1)(c).
- [156] The respondents on the other hand have not provided any evidence of pro-competitive gains to off-set the *prima facie* anti-competitive effects.
- [157] During argument, the applicants submitted that the threat to off-board (refusal to supply) and the direct approach by Facebook to GovChat's customers is analogous to the strategy adopted by Telkom Ltd, during its monopoly days, against internet service providers with whom it competed in the downstream market.⁷² This kind of strategy could also be viewed through the lens of 8(1)(d)(i) where customers are induced by a dominant firm not to deal with its competitors. Having arrived at a conclusion that the applicants have made a *prima facie* case of a contravention of 8(1)(d)(ii) and/or 8(1)(c) there is no need for us to make any determination in this regard.

Irreparable harm and the balance of convenience

- [158] We turn now to consider the remaining grounds in section 49C.
- [159] In *Nedschroef*⁷³ it was observed that section 49C starts off by making the threshold requirement that the granting of the order is "reasonable and just' and then requires that the Tribunal has regard to the constituent factors which must again be balanced and weighed through the prism of what is "reasonable and just".⁷⁴
- [160] Section 49C therefore confers a discretion on the Tribunal to grant interim relief having regard to what is reasonable and just in the circumstances. The three legs of the inquiry are however considered holistically. Thus, a weak case on

⁷² Transcript (13 January 2021) above n 2 at p81-83; referring to the decision in *Telkom* above n 75.

⁷³ *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd and Others* (95/IR/Oct05) [2006] ZACT 7 (1 February 2006).

⁷⁴ *Nedschroef* at para 24 (our emphasis).

NON-CONFIDENTIAL

say irreparable harm may be counterweighted by a very strong case on the prohibited conduct.⁷⁵ And *vice versa*, a weak case on prohibited conduct may be counterweighted by a strong case on irreparable harm.

- [161] The respondents argue that the applicants have not made out a case as to why they could not switch to alternative messaging channels such as SMS or USSD and for this reason ought not to succeed in the relief sought. We understand this argument to apply to both the issue of anti-competitive effects and irreparable harm.
- [162] While the applicants conceded that it had not yet investigated the business rules of WeChat or similar OTT apps, it submitted that it had invested a considerable amount of money in developing the GovChat and #LetsTalk services over the WhatsApp platform. Furthermore, it has rendered these services to government departments during the Covid-19 pandemic on a *pro bono* basis.
- [163] We agree that switching to another OTT application would not only involve more capital and time but could also result in less reach for members of the public who use these critical services. The dominance of WhatsApp allows for network effects and a wider reach for messaging during a very critical time.
- [164] Recall that GovChat currently renders two critical services to government related to the Covid-19 pandemic being (1) assisting the NDOH with Covid-19 education, symptom tracking and testing; and (2) assisting the DSD and the SASSA with enabling citizens to apply for distress grants.
- [165] Members of the public who rely on GovChat's platform for assistance pertaining to distress grants and Covid-related information will be deprived of access to these critical services during the Covid-19 pandemic if it was off-boarded from

⁷⁵ *Replication Technology Group (Pty) Ltd v Gallo Africa Ltd* [2008] 1 CPLR 77 (CT).

NON-CONFIDENTIAL

the WhatsApp platform, pending the outcome of the complaint lodged with the Commission.

[166] The refusal to supply by off-boarding will certainly result in an anti-competitive outcome. The applicants will no longer be able to participate in the government messaging services over OTT market and potentially the mobile payment solutions markets.

[167] We cannot conceive of any real prejudice which the respondents will suffer during the period of our order, pending the outcome of the Commission's investigation.

[168] We find that the balance of convenience strongly favours the applicants.

Conclusion

[169] In considering whether the balance of convenience is in favour of granting the relief sought in this interim relief application, we have looked at all the factors holistically.

[170] We find that the applicants have established a *prima facie* contravention of section 8(1)(d)(ii) and/or 8(1)(c) and have shown that the balance of convenience favours the granting of interim relief to avoid serious and irreparable harm to the public at large in a very critical time of the Covid-19 pandemic.

[171] The applicants have spent a considerable amount of time and capital developing the technology behind the GovChat platform. If GovChat is off-boarded from the WhatsApp Business API, it will be seriously prejudiced because it will take time for it to switch to another OTT, without any certainty that it would be able to reproduce the same functionality of WhatsApp.

NON-CONFIDENTIAL

- [172] The applicants have also demonstrated innovation and agility, in the government messaging space over the WhatsApp platform, moving into the space during a critical time for government in the Covid-19 pandemic. Off-boarding the applicants, would result in a loss of this innovation.
- [173] GovChat as a service provider to government has been agile and responsive to the needs of citizens by creating solutions (use cases) that grant them access to indispensable social services and health data during the life-threatening Covid-19 pandemic.
- [174] Contrary to common law courts which grant relief to essentially protect private interests, the Tribunal grants relief that is in the public interest in its mandate to promote competition.⁷⁶ We are of the view that the balance of convenience favours the applicants because they will suffer irreparable harm if off-boarded, which will ultimately negatively impact public interest.
- [175] In this regard we make the observation that even if the applicants had made out a weak case of a contravention of section 8(1)(d)(ii) and/or 8(1)(c), the balance of convenience would still favour the granting of the relief simply because they provide an invaluable service to both government departments and citizens alike.
- [176] If the relief sought was not granted and the applicants were off-boarded, this will result in adverse consequences not only for the applicant but also the public at large.
- [177] Accordingly, we find that the applicants should succeed in obtaining interim relief against the respondents as they have satisfied the requirements of section 49C of the Act.

⁷⁶ *Business Connexion* above n 15 para 21, which in relevant portion reads:

“The need for intervention is a function of the probability of serious or irreparable damage occurring, if no intervention is ordered by the Tribunal before it can make a final determination as to whether the alleged prohibited practice has taken place. It is the damage to the competitive position of the applicant that the prohibited practice may cause that marks out this enquiry. Other forms of damage to the applicant are not relevant because the Act’s purpose is to maintain and promote competition in the market.”

NON-CONFIDENTIAL

Relief

- [178] The applicants have asked for an interdict restraining the respondents from off-boarding them from their WABA either for a period of six months; or pending the conclusion of a hearing in the alleged prohibited practices that are the subject of their complaint to the Commission, whichever occurs first.
- [179] In the course of the hearing, the matter of an interim arrangement pending the outcome of our decision was discussed.⁷⁷ Throughout the proceedings, the Tribunal afforded the parties multiple opportunities to arrive at mutually agreeable interim arrangements in the period pending the Tribunal's determination of this interim relief application – we called this the “interim-interim arrangement”. The parties were unable to do so.
- [180] The Tribunal, after considering their respective submissions, granted an “interim-interim” order on 21 January 2021 in terms of which the respondents were interdicted from off-boarding the applicants and from approaching the applicants' clients for purposes of achieving the same outcome as off-boarding the applicants. The applicants, on the other hand, were interdicted from loading any new clients onto the existing WABA and from expanding or providing new services (use cases) to the existing clients.
- [181] This interim-interim arrangement has been in place since then and is a matter of public record. In light of the fact that this very application seeks interim relief pending the outcome of a hearing in the alleged prohibited practice of six months (whichever comes first), it is our considered view that such interim relief should include the existing arrangements that are in place between the parties in the interests of providing certainty and continuity to the parties and customers alike. We have accordingly incorporated the elements of the interim-interim arrangement in our order.

⁷⁷ Transcript (18 January 2021) above n 9 at p282-286.

NON-CONFIDENTIAL

[182] As to the issue of costs, the respondents demonstrated a co-operative stance throughout these proceedings. Accordingly, we have decided against granting an order of costs.

[183] We therefore make the following order.

NON-CONFIDENTIAL

ORDER:

The application for interim relief in terms of section 49C of the Act is hereby granted as follows:

- [1] The respondents are interdicted and restrained from off-boarding the applicants from their WhatsApp Business Account (“WABA”) pending the conclusion of a hearing into the applicants’ complaint lodged with the Commission or 6 (six) months of date hereof, whichever is the earlier.
- [2] The respondents shall not engage in any conduct that directly or indirectly undermines the applicants’ relationships with its clients for purposes of achieving the same outcome as off-boarding the applicants.
- [3] The applicants shall not on-board any new clients or users to the WABA.
- [4] In relation to existing clients or users on the WABA, the applicants shall not launch, expand or sell any new use-cases to these clients.
- [5] There is no order as to costs.

11 March 2021

Ms Yasmin Carrim

Date

Mr Andreas Wessels and Professor Imraan Valodia concurring.

Tribunal Case Managers Mpumelelo Tshabalala, Kgothatso Kgobe and Lumkisa Jordaan

For the applicants: Adv Paul Farlam SC, assisted by Adv Luke Kelly, instructed by Daryl Dingley, Shawn van der Meulen and Pooja Dela of Webber Wentzel attorneys.

For the respondents: Adv Jerome Wilson SC, assisted by Jonathan Berger, instructed by Derek Lotter and Claire Reidy of Bowmans attorneys.