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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no. : IR194Mar22

In the *interim relief application* between:

eMedia Investment Proprietary Limited	Applicant
and	
MultiChoice Proprietary Limited	First Respondent
Competition Commission of South Africa	Second Respondent

Panel:	Ms Mondo Mazwai (Presiding Member)
	Mr Enver Daniels
	Prof Liberty Mncube
Heard on:	25 and 26 April 2022
Order issued on:	31 May 2022
Reasons issued on:	01 July 2022

REASONS FOR DECISION

Introduction

1. The applicant, eMedia Investments (Pty) Ltd ("eMedia"), seeks interim relief, in terms of section 49C of the Competition Act, 89 of 1998, as amended ("the Act") in relation to a decision by the first respondent's, MultiChoice (Pty) Ltd ("MultiChoice") decision to terminate a contract between itself and eMedia, in terms of which MultiChoice acquired, marketed and distributed certain eMedia television channels on its (MultiChoice's) DStv platform.

2. eMedia alleges that MultiChoice's conduct constitutes an abuse of a dominant position in contravention of section 8(1)(d)(ii) and/ or 8(1)(c) of the Act. It has filed a complaint with the Commission.

3. eMedia seeks, *inter alia*, an order interdicting Multichoice from removing four channels: 1) eTv Extra; 2) eToonz; 3) eMovies; and 4) eMovies Extra ("the discontinued channels) from the bouquet of channels on the DStv platform, pending the final determination of a complaint filed by eMedia with the Competition Commission ("the Commission"), or for a period of six months, whichever occurs first.

4. The Commission is cited as the second respondent for its interest in the matter.[1] eMedia does not seek any relief against the Commission.

5. We decided, after hearing the parties, to not grant the interim relief sought by eMedia and issued our order on 31 May 2022.

6. Our reasons for decision follow.

[1]See *Schering (Pty) Ltd v New United Pharmaceutical Distributors (Pty) Ltd* (11/CAC/Aug01) at p8–9 and *Norvatis SA (Pty) Ltd v New United Pharmaceutical Distributors (Pty) Ltd* (1) [20012002] CPLR 74 (CAC) (07/CAC/Dec00) read with *American Soda Ash Corporation and Another v Competition Commission of South Africa and Others* (12/CAC/DEC01) [2002] ZACAC 5 (24 October 2002) at para 4 which confirm that the lodging of a complaint with the Commission is a jurisdictional prerequisite for the consideration of an application for interim relief.

Procedural background

The interim relief application

7. On 17 March 2022, eMedia submitted a complaint against MultiChoice to the Commission and instituted interim relief proceedings before the Tribunal.

8. eMedia brought the interim relief application on an urgent basis. It provided in the notice of motion that if MultiChoice intended to oppose the application, it should file its Answering Affidavit on 22 March 2022, and requested the Tribunal to issue directives for the further conduct of proceedings. In subsequent correspondence to the Tribunal, it requested the Tribunal to hear the matter on 29 March 2022, prior to the contract end date of 31 March 2022.

Pre-hearing proceedings

9. On 22 March 2022, the Tribunal held a pre-hearing.

10. At the pre-hearing, MultiChoice undertook to continue broadcasting the "discontinued channels" until 31 May 2022 or until the date of the Tribunal's order, whichever came first, in order to accommodate the filing of the necessary pleadings and conclusion of the hearing and decision by the Tribunal.

11. In light of the undertaking, the Tribunal determined a timetable for the further conduct of the proceedings, which the parties duly complied with. On the eve of the hearing Multichoice filed an application for leave to file a Further Supplementary Affidavit regarding capacity on its DStv platform, which was the subject of much contestation during the hearing. This was preceded by the filing of a Supplementary Affidavit by Multichoice, two days before eMedia was due to file its heads of argument. The application for leave to file the Further Supplementary Affidavit, as well as the Supplementary Affidavit were dispensed with by agreement between the parties prior to the commencement of proceedings since eMedia decided not to oppose the application.

12. It bears mention that both parties unusually so in interim relief proceedings, engaged economic experts who filed economic expert reports. Mr Kalyan Dasgupta (Director of Berkeley Research Group) filed an economic expert

report for eMedia, and Mr Stephanus Malherbe (Chair of Genesis Analytics) for Multichoice. The expert reports were helpful, however, given the nature of interim relief proceedings, we did not have the benefit of oral evidence from the experts on the complex economic issues that arise in this matter as is the case in complaint referral proceedings.

The hearing

13. The hearing of the interim relief application took place on 25 and 26 April 2022.

The order and subsequent events

14. On 31 May 2022, the Tribunal issued its Order dismissing the application.

15. On 31 May 2022 and following the Tribunal Order, eMedia notified the Tribunal that it wished to exercise its appellate rights and requested the Tribunal to provide its reasons as soon as possible. These reasons are provided on an expedited basis.

Relevant factual background

How is the industry structured?

16. The first (upstream) level of the supply chain is the production of Audio Visual (AV) content and entails the creation and recording of content (sports, films, documentaries, live events, shows etc.).

17. Production is undertaken through the following:

    17.1. in-house production or commission of the content from individual producers for internet use on broadcasters' own TV channels or Video-On-Demand ("VOD") service; and

    17.2. the production of content by non-broadcasting entities in order to sell this content to third parties (such as TV broadcasters or other AV service providers).

18. The next level is the wholesale provision of channels by channel providers.

19. Thereafter is the wholesale provision of technical platform services level.

20. For the channels and AV content to reach end-consumers, they must be placed on a distribution platform such as the traditional broadcasting mechanisms, namely, Direct-to-Home (DTH), and the Digital Terrestrial Television (DTT) which are used to provide free-to-air and pay TV services. This also includes internet based platforms such as Over-the-Top (OTT) services.

21. Last is the provision of retail services to end-consumer level. Retail AV service providers make use of broadband internet infrastructure or mobile broadcasting platforms to distribute content to consumers on a paid or free basis. They offer packages of linear AV services (channel) and/or non-linear AV services (VOD) to end-consumers.

22. At the retail level:

    22.1. eMedia provides analogue terrestrial television services (e.tv), a free-to-air DTT offering, a free-to-air multi-channel DTH service (OpenView) and an OTT service (eVOD), which has both free and paid-for options.

    22.2. MultiChoice provides a subscription DTH service (DStv) (which is also available over the internet (DStv Streaming)), and both subscription and free offerings of its OTT service (Showmax). M-Net provides a subscription OTT service.

    22.3. StarTimes provides a subscription DTH service (StarSat) and an OTT service (StarTimes On) which offers paid-for and free options.

    22.4. The SABC provides analogue and DTT services (SABC 1,2 and 3) and uses OTT platforms including YouTube, Viu and its website to distribute its content free.

    22.5. Netflix, Amazon, Apple, YouTube, Vodacom, Viu, DEOD and a vast number of other players provide OTT services, on either a subscription or free basis.

eMedia's activities

23. eMedia and its subsidiaries are a South African media group. It operates as:

23.1. a content producer, producing eNCA, a 24-hour news channel and the eNuus bulletin, a daily half-hour Afrikaans bulletin and general entertainment content such as originals like Atlantis, Housewives, Piet's Sake, Is'phindiso and Surviving Gaza;

23.2.a content aggregator or channel provider packaging eNCA and several entertainment channels, including eTV, eTV Africa eExtra, eToons, eMovies, eMovies Extra, eReality, Sports and Rewind; and

23.3.a free-to-air broadcaster, broadcasting the eTV channel by a way of analogue terrestrial signal (which will soon be replaced by its multi-channel DTT offering after analogue switch-off) and the Openview bouquet of channel by way of satellite. At the retail level, eMedia makes its content available to end consumer via analogue, DTH and OTT distribution technologies.

24. The channels created by eMedia are supplied to third parties and to its own TV broadcasting and VOD operations.

25. eMedia earns revenues from (i) selling of rights to receive, market and distribute their channels; and (ii) selling advertising space on its channels as well, as from operating as an agent on behalf of third-party channel providers for the sale of advertising space on their channels.[2]

MultiChoice's activities

26. MultiChoice is a South African subscription broadcasting services company. It also operates as:

26.1. a producer (through M-Net and Superport) and acquirer of AV content;

[2] MultiChoice's Supporting Affidavit, p15 of 52, para [9.2.2].

26.2. a content aggregator, packing its own movie, entertainment, and sport channels. MultiChoice's movie and entertainment M-Net, M-Net movies (4 channels), Mzantsi Magic Bioskop, Mzantsi Wethu and Mzantsi Music; and

26.3.a broadcaster, through DStv, a subscription broadcasting service and through M-Net, terrestrial subscription broadcasting service.

27. MultiChoice procures content (from third party channel providers and produces its own content) as an input into its retail packages.

28. MultiChoice makes use of various technologies for the distribution of its channels and content – OTT, DTT, and DTH.

Relationship between eMedia and MultiChoice

29. Both eMedia and MultiChoice are vertically integrated throughout the value chain. The commercial agreements between them are set out below.

2007 Agreement

30. eMedia has since 2007, supplied certain packaged television channels to MultiChoice. These channels (eNCA and the eNuus bulletin) were included in packages of channels distributed by MultiChoice as part its DStv service. Multichoice paid a fee to eMedia.

31. The 2007 Agreement was replaced by the 2017 Agreement discussed briefly below.

2017 Agreement

32. In 2017, MultiChoice and eMedia entered into a Commercial and Master Channel Distribution Agreement ("2017 Agreement"), which governed the

supply of eMedia's channels to MultiChoice, from 2017 to 31 March 2022, for distribution by MultiChoice on its DSTV Platform.[3]

33. Prior to this, MultiChoice had previously acquired the rights to distribute the eNCA and the eNuus Bulletin channels (in the 2007 agreement) and the e.tv. Africa channel (since December 2010) on a non-exclusive basis.

34. In terms of the 2017 agreement, eMedia granted MultiChoice the right to receive, market and distribute the following:

34.1. the eNCA channel on an exclusive basis in the Southern Africa territory;

34.2. the eNuus Bulletin on an exclusive basis in the South Africa territory;[4]

34.3. the eTV Africa channel on a non-exclusive basis in the rest of Africa; and

34.4. the discontinued channels (eExtra, eToons, eMovies, and eMovies Extra) on a non-exclusive basis in South Africa.

35. For these rights, MultiChoice paid eMedia a composite annual fee of [redacted] which increased based on the South African consumer price index on each anniversary of the agreement.[5] [redacted]

36. At the time of the 2017 agreement, the eExtra, eMovies and eToons channels had been distributed by eMedia on its OpenView service since October 2013, and the eMovies Extra channel had been distributed on OpenView since 2016. The eExtra channel had been distributed on StarSat since the end of 2015.

<u>The 2022 Agreement</u>

37. In light of the termination of the 2017 agreement, MultiChoice and eMedia engaged in negotiations with the possibility of extending the commercial

[3] Annexure E3 to the Founding Affidavit, a copy of the 2017 Agreement, p70 to 115.
[4] Annexure E3 to the Founding Affidavit, a copy of the 2017 Agreement, p10 to 13, para [3].
[5] Annexure E3 to the Founding Affidavit, a copy of the 2017 Agreement, p17, para [5].

relationship between them. The negotiations culminated in the conclusion, on 25 February 2022, of a Channel Distribution Agreement ("2022 Agreement").

38. In terms of the 2022 agreement, eMedia granted MultiChoice the rights to receive, market and distribute the eNCA channel and the eNuus bulletin. MultiChoice acquired the rights for another [redacted] for an annual fee of [redacted] again on an exclusive basis. [redacted]

The 2022 Contract negotiations

39. According to eMedia, at the first meeting to discuss the new agreements in November 2021, Mr Hamburger stated that MultiChoice was no longer willing to broadcast the discontinued channels; and it would only be willing to carry the eNCA channel and the eNuus bulletin, if granted exclusivity to do so.

40. Subsequent to the meeting, on 30 November 2021, eMedia offered the discontinued channels to MultiChoice as "added value" to its new content offering. This meant that no fees would be payable for the discontinued channels.[6] It proposed fees of [redacted] for eNCA and eNuus on a non-exclusive basis.[7] On the same day, MultiChoice rejected the non-exclusive offer, reiterating that MultiChoice was not willing to carry the discontinued channels and making it clear that eMedia's proposed fees were too high.[8]

41. On 01 December 2021, MultiChoice responded to eMedia's offer indicating that it was prepared to offer [redacted] per annum for a [redacted] for an exclusive deal for the eNCA and eNuus program.[9]

42. On 07 February 2022, MultiChoice and eMedia, agreed to the amount of [redacted] per annum for the exclusive rights to receive, market and distribute the eNCA channel and the eNuus bulletin with a [redacted] uplift annually in fees. The

[6] Founding Affidavit, p16 of 48, para [40].
[7] Founding Affidavit, p16 of 48, para [41].
[8] Pleading Bundle, p122 of 855.
[9] Pleading Bundle, p121 of 855.

discontinued channels along with the eTV Africa channel (not SA) will terminate at the end of March 2022. [redacted][10]

Recent Industry developments

43. The contract end date, 31 March 2022, coincided with two other developments in the industry relating to Must-Carry Regulations and the switch from analogue to digital terrestrial television, which are relevant in these proceedings.

Must Carry Regulations

44. The Must-Carry Regulations, published in terms of section 60(3) of the Electronic Communication Amendment Act, 36 of 2005 ("ECA"), requires the Independent Communications Authority of South Africa ("ICASA") to prescribe regulations regarding the extent to which subscription broadcasting services Must-Carry, subject to commercially negotiable terms, the television programmes provided by a Public Broadcast Service ("PBS") license'[11].

45. The Must-Carry Regulations are driven by a central public interest principle of universal access to ensure that PBS programming is available to all citizens, targeting those citizens that use Subscription Broadcasting Services ("SBS") as their means of access to television.[12] According to ICASA, the rationale for the Must-Carry Regulations is to ensure universal access to public broadcasting services.

Analogue switch off

46. The DTT migration process requires that South Africa migrate from analogue television to digital television, in line with a global technology enhancement initiative that aims to leapfrog countries into digital domains.

[10] Pleading Bundle, Annexure E10, p134 of 855.
[11] ICASA Must Carry Regulations published under notice number 1271, Government Gazette number 31500, 10 October 2008 ("the Must Carry Regulations")
[12] ICASA Findings and Positions Document On The Review Of The ICASA MUST CARRY REGULATIONS, 2008, published 26 March 2021, para 2.32 – 2.34

47. The implication of the Analogue switch-off date is that South African consumers who are still receiving television services directly from an Aerial/Antenna that gets mounted on a pole and do not have set-top box or smart TV set, will have to find themselves a set-top box or a smart TV to be able to receive digital television.

48. The digital migration agenda was due to take effect on 31 March 2022. It has been delayed until 30 June 2022. This has implications for competition in the sector because it delays the entry of new players and consumer benefits.[13] Because of the current non-encryption policy, DTT services will have little impact on satellite-based subscription television services.

49. Analogue switch-off will not affect consumers who are already receiving television services through DStv, OVHD, Telkom-One, StarSat and any other streaming platforms or have a digital TV.

eMedia's case

50. eMedia submits that MultiChoice has, without explanation, refused to renew the agreement in terms of which the discontinued channels were distributed by Multichoice since 2017, or to enter into a similar agreement.

51. eMedia's submission is that the discontinued channels are some of the most popular channels on DStv, with two of these four channels (eExtra and eMovies Extra) falling within the top-ten most popular channels watched on DStv. Further, eMedia is of the view that MultiChoice's decision is motivated by anti-competitive objectives: firstly, a desire to exclude some of the most popular immediate entertainment channels from the DStv platform and thereby undermine eMedia's ability to broadcast and produce rival content in competition with DStv's own content channels. Secondly with the intention of

[13] Digital television offers consumers: (1) improved free-to- air Services such as more channels, compared to current 4 channels on analogue (SABC1,2,3 and eTV) on a free-to air. Consumers will be able to receive 12 Television channels on DTT.; and (2) improved pay and subscription services. Compared to previous 2 channels on analogue Pay TV (Mnet & CSN), consumers will receive 14 TV channels on pay DTT.

harming eMedia's existing business, and to ensure that eMedia is unable to grow its basic satellite service so that it could potentially in time become a more competitive constraint on MultiChoice's DStv platform.

52. eMedia submits that MultiChoice's decision is perfectly timed in that MultiChoice sought to "switch-off" the channels on the very same day that the analogue switch-off was to occur (31 March 2022), and in circumstances where MultiChoice knew that eMedia's business would take a significant hit from the loss of the free-to-air broadcasting audience as from the date of analogue switch-off.[14]

53. In its Founding Affidavit, eMedia refers to various effects that will be experienced if the channels are removed from the DStv platform. eMedia's principal case is firstly that, in the basic satellite services market, the removal of the channels from the DStv platform has the potential to reduce eMedia's ability to generate revenue and also reduces its ability to put money back into the business and improve the quality of its fledgling Openview's offering.[15] Secondly, the removal of the channels will also result in the loss of viewership to the tune of at least [redacted] of the foreclosed channels on the DStv platform. This will be compounded by the switch to digital terrestrial television due to commence on 31 March 2022 (at the time of the hearing, this had been delayed until 30 June 2022).

54. According to eMedia, unless the relief sought in this application is granted, the effect of MultiChoice's decision will be to materially weaken, if not remove, the only competitive constraint which MultiChoice faces as a broadcaster in the basic satellite market. It will lead to harm in the form of loss of channels and harm to consumers. It will also exclude eMedia from the channel provider market and harm its business, to the clear benefit of MultiChoice as a competitor in this market.

[14] Founding Affidavit, para 21.
[15] Founding Affidavit, para 26

MultiChoice's case

55. Multichoice submits that, prior to the expiry of the 2017 Agreement on 31 March 2022, it reviewed the contribution that the various (discontinued) channels and the eNuus bulletin were making to its business.[16]

56. This review was done in light of MultiChoice's commercial objectives which are:

    56.1. to ensure that the content and the mix of channels in the DSTV packages would be sufficiently appealing and distinctive to provide value for current subscribers and drive new subscriptions;

    56.2. to reduce content that is available for free on other services, available across multiple channels on the DSTV services, and repeat programming, which is the subject of ongoing subscriber complaints;

    56.3. to make prudent and optimal use of the scarce bandwidth available for the DSTV service.[17]

57. After reviewing the contribution that the various channels were making to its business, Multichoice concluded that the acquisition of exclusive distribution rights in respect of the eNCA channel and the eNuus bulletin for [redacted] accorded with it commercial imperatives. However, the acquisition of the rights to receive, market and distribute the discontinued channels for another five years did not accord with its commercial imperatives.

58. According to MultiChoice, the discontinued channels do not offer the best value proposition to DStv subscribers or contribute to MultiChoice's ability to differentiate its ability to retain subscribers and drive new subscriptions. Furthermore, the discontinued channels are also available for free on Openview and eMedia's free-to-air service or DTT service. Furthermore, eExtra is available on all three packages in the StarSat service and the programmes on eChannels are broadcast across several eMedia channels.

[16] Answering Affidavit, p4 of 239, para [6].
[17] Answering Affidavit, p11 of 239, para [18] to [19].

59. MultiChoice also states that these discontinued channels [redacted] for MultiChoice, and they take up bandwidth which MultiChoice wishes to use for channels which will advance its commercial objectives. These deficiencies, according to MultiChoice, are not offset by the discontinued channels' performance on the DSTV service.

60. MultiChoice submitted that the relief sought represents a fundamental and drastic intrusion on the right of MultiChoice to design and package its own products in a manner that it regards, in its own commercial judgment, as optimal for its own subscribers.

Our approach

61. We approached the interim relief application through the prism of three principles which we considered sacrosanct. The first is that, as a principle, while firms are entitled to decide which firms to do business with, and on what terms, this is not unfettered, and is subject to certain limitations under competition law. This is particularly so for dominant firms.

62. This take us to the second principle as set out by the CAC is BCX/Vexall which states that the evidence of a prohibited practice is not concerned with the rights of the applicant but the competitive position of competitors in the market, judged against the regulatory criteria of the prohibited practices defined in chapter 2 of the Act.

63. The third principle is set out in the Constitutional Court judgement in Mediclinic which states that: *"Institutions created to breathe life into these critical provisions of the Act must therefore never allow what the Act exists to undo and to do, to somehow elude them in their decision-making process. The equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or favourably must always be allowed to enjoy their pre-ordained and necessary pre-eminence. The legitimisation through legal sophistry or some right-sounding and yet effectively inhibitive*

jurisprudential innovations must be vigilantly guarded against and deliberately flushed out of our justice and economic system."[18] (our emphasis)

Section 49C: Interim Relief

64. The Tribunal's approach in adjudicating interim relief applications is set out 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;*
> *(ii) the need to prevent serious or irreparable damage to the applicant; and*
> *(iii) the balance of convenience."*

65. 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. If the applicant fails to establish a prima facie right, then the enquiry ends there. [19]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.[20] In this instance the applicants seek interim relief pending the outcome of the Commission's investigation into their complaint.

66. Our approach to applications for interim relief was set out in *York Timbers* 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*

[18] Competition Commission of South Africa v Mediclinic Southern Africa and Another (CT 31/20) [2021] ZACC 35 (15 October 2021) at para 7.

[19]Africa People Mover (Pty) Limited v Passenger Rail Agency of South Africa and others (IR028May19) at 70-71.

[20] We note the Competition Appeal Court ("**CAC**")'s caution in *BCX* that this comparison to a High Court interim interdict should not be taken too far (at para 21).

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.

If the applicant has succeeded in doing so we then consider the "doubt' leg of the enquiry. Do the facts set out by the respondent in contradiction of the applicant's case raise serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed"[21] *(Own emphasis)*

67. Once a prima facie right has been established, we are required to determine if the applicant will suffer irreparable harm absent interim relief and consider the balance of convenience between the parties.

68. As the Tribunal held in *Gallo Africa* in weighing up the requirements in section 49C one factor may be stronger than the other.[22] Thus, we must consider the three factors as a whole and determine whether it is just and reasonable to grant the relief sought. [23] Even if all the requirements for interim relief are satisfied, the Tribunal is vested with an overriding discretion to refuse an application for interim relief if it is not reasonable and just to grant such relief.[24]

69. The CAC in *BCX* points out that prohibited practices in chapter two of the Act are concerned with practices that affect markets, a market or a segment of the market. Specifically, Unterhalter AJA states that:

[21] *York Timbers Limited v South African Forestry Company Limited* (15/IR/Feb01) [2001] ZACT 19 (9 May 2001) ("*York Timbers"*) at paras 64-5.

[22] *Replication Technology Group (Pty) Ltd v Gallo Africa Limited* (92/IR/Sep07) [2007] ZACT 99 (10 December 2007) ("*Gallo Africa*") at para 17.

[23] See also, *National Association of Pharmaceutical Wholesalers and 8 Others v Glaxo Wellcome (Pty) Ltd* (29/CAC/JUL03) ("*Glaxo 2003*") at para 8; *Natal Wholesale Chemists (Pty) Ltd and Astra Pharmaceuticals (Pty) Ltd* (98/IR/Dec00) [2001–2002] CPLR 363 (CT) at para 34; and *York Timbers* at para 13.

[24] See Replication Technology Group (Pty) Ltd v Gallo Africa Ltd (92/IR/Sep07) at 13, endorsed by the CAC in National Association of Pharmaceutical Wholesalers and others v Glaxo Wellcome (Pty) Ltd (29/CAC/Jul03) at 8 and Business Connexion (Pty) Limited v Vexall (Pty) Limited and another at 19.

"Unlike disputes in private law which, for the most part, concern the rights enjoyed and duties owed by individuals to one another, prohibited practices in chapter 2 concern the conduct of firms and their effect on competition in the market. Even those practices that are not defined by reference to their effects are nevertheless rendered unlawful by reason of their presumptive harmful effects upon competition. As a result, interim relief granted by the Tribunal has effects upon the state of competition in the market. Second, when the Tribunal grants an interim relief order, it is not a status quo order. The order requires that the respondent firm desist from the prohibited practice (in whole or in part). The purpose of the order is to alter the competitive relationship between firms in the market. If the interim order is to be effective, it is intended to permit of competition taking place in the market that has hitherto not taken place. That may have effects within a market or across markets, and may affect different market participants: customers, competitors and suppliers. When the Tribunal grants an interim order it alters the status quo in the market and is intended to change the way firms compete in the market, with consequences that may well resonate within and between markets."[25]

70. The CAC in *BCX* emphasizes that the Tribunal is empowered to regulate how competition in the market is to take place for a limited period when it states that:

"An interim relief order under the Act does not provide a remedy to permit a person claiming a right to enjoy the exercise of that right until the right is finally determined. Rather, the Tribunal is empowered to regulate how competition in the market is to take place for a six or twelve month period. That is a different competence to that of a court adjudicating a dispute of right; it is a regulatory competence to decide whether the state of competition in the market must endure, notwithstanding the evidence that a prohibited practice is taking

[25] *BCX* at para 17.

place, or whether the Tribunal should order a change."[26] *(own emphasis)."*[27]

71. The relief sought in the current proceedings, according to eMedia, is a "status quo order", seeking to preserve the current position in the market for a limited period, pending the finalisation of the complaint. As we discuss later, there is a dispute between the parties about what the status quo means in this case. eMedia says it is the renewal of the discontinued channels post 31 March 2022, while MultiChoice says it is the non-renewal of the discontinued channels post 31 March 2022.

Section 8 of the Act

72. eMedia submits that MultiChoice's conduct contravenes section 8(d)(ii), alternatively section 8(1) (c) of the Act.[28]

73. 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.

74. 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 a competitor or customer when supplying such goods or services is economically feasible.

75. 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 subparagraph (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, participating in or expanding within, a market."*[29]

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[26] *BCX* at para 18.
[27] *BCX* at para 18.
[28] Founding Affidavit at p30.
[29] Section 1(1) of the Act.

76. In both section 8(1)(d)(ii) and 8(1)(c), the requirement of a substantial anti-competitive effect is met either (i) if there is "*evidence of actual harm to consumer welfare*" or (ii) *"if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals".* However, the provisions of section 8 of the Act are limited to conduct by a dominant firm.

77. Under section 8(1)(d), once the elements of section 8(1)(d) are satisfied the competitive harm is presumed and the onus shifts to the respondent to demonstrate that the effects are outweighed by pro-competitive gains. However, under section 8(1)(c) an applicant or complainant must show the elements of the exclusionary conduct as well as the effects.[30]

78. eMedia is therefore required to satisfy the critical elements of the section on a *prima facie* basis namely that MultiChoice is a dominant firm and that the conduct complained of has exclusionary effects. In terms of 8(1)(d)(ii) if the elements are satisfied, the onus shifts to MultiChoice to show that the pro-competitive gains outweigh the anti-competitive effects of the act. In terms of section 8(1)(c) eMedia has the onus of showing this.

Is there prima facie evidence relating to the alleged prohibited practice?

Relevant Market and Dominance

79. An assessment of a firm's dominance is usually done with reference to the market within which it functions.[31]

80. Section 7 of the Competition Act provides that:

> "*A firm is dominant in a market if –*
> *(a) it has at least 45% of that market;*

[30] *Competition Commission v South African Airways (Pty) Limited* (18/CR/Mar01) para 134 and 135
[31] See the definition of market power in section 1(1) of the Act and the CAC's recent decision in *Babelegi Workwear And Industrial Supplies CC v The Competition Commission of South Africa* (186/CAC/JUN20) [2020] ZACAC 7 (18 November 2020).

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

81. eMedia referred to several markets in its Founding Affidavit and in its Heads of Argument, including a market for: (1) the provision of television broadcasting services which are received by way of decoders and set-top boxes[32]; and (2) the provision of broadcasting services to channel providers, which is the means by which such services are distributed to viewers.[33]

82. Furthermore, eMedia mentions that MultiChoice and eMedia are competitors in the market for the provision of channels which are not premium (i.e., not mainstream sports or the latest Hollywood movies),[34] and which typically have a strong local content and flavour.[35][36]

83. eMedia also points out that MultiChoice and eMedia are competitors in the market for the provision of basic satellite television services.[37] MultiChoice has the DStv platform, and in particular competes with eMedia in the lower "tiers" of DStv, through which South Africans can access select DStv programmes for as little as R29 per month and a once-off R399 decoder and dish installation cost. eMedia competes with MultiChoice through the OpenView platform, which has a once-off cost of R599 and no monthly subscription fee.

84. eMedia states that MultiChoice is dominant in the markets for: (1) the provision of television broadcasting services at 72% of the market shares; (2) the provision of broadcasting services to channel providers; and (3) the basic satellite services at 65% of the market share.[38]

[32] Founding Affidavit, para 14, p11 and eMedia Heads of Argument para 3.2.
[33] Founding Affidavit, para 14, p11 and eMedia Heads of Argument, para 3.2.
[34] Founding Affidavit, para 103, p39.
[35] eMedia Heads of Argument t, para 3.1.

[37] eMedia Heads of Argument, para 3.4.
[38] Openview has a share of about 35% and StarSat has a share of about 5%.

85. For the purpose of this application only, MultiChoice concedes dominance in the market for the provision of basic satellite television services.[39]

86. MultiChoice points out that the concession on dominance does not take eMedia's case any further. MultiChoice notes that eMedia's theories of harm relate to the markets for: (1) channel supply; (2) advertising; and (3) basic satellite television services. It argues that it does not compete in the 'channel supply market' as the channels it produces are only for its own use. Further, it states that eMedia has not attempted to describe or define a relevant advertising market within which the effects of the alleged conduct take place.

87. We therefore assume the basic satellite television services market to be the relevant market for purposes of our decision since this is the only market on which the parties agree, MultiChoice has conceded dominance in this market.

88. We now turn to consider the remaining elements of section 8(1)(d)(ii) and/or 8(1)(c).

Refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible

89. 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.

90. The following cumulative conditions apply in order to establish whether the alleged conduct is an exclusionary act as defined in section 8(1)(d)(ii): (1) there is a refusal to supply goods or services to a customer or competitor; (2) the refusal to supply is in respect of scarce goods or services; (3) it is economically feasible to supply.

[40] Founding Affidavit, para 114. p42; eMedia Heads of Argument para 5; 20;44; 58; 100; 103; 13; and 179.

Condition 1: Refusal to supply goods or services to a customer or competitor

91. In general, we note that the concept of refusal to supply includes not only situations in which there is an actual refusal to supply but also situations in which there is a 'constructive' refusal to supply (for example, situations in which the dominant firm makes a supply offer on unreasonable terms).

92. There is a dispute between eMedia and MultiChoice as to the classification of the relationship between them.

93. eMedia argues that MultiChoice has refused to supply broadcasting services to it[40] Alternatively, MultiChoice has refused to carry the discontinued channels[41] eMedia also characterises MultiChoice's behaviour as one in which MultiChoice has refused access to the DStv platform[42] In this regard, eMedia states that "access to the DStv platform" is simply another way of saying "access to broadcasting services provided by [43][44]

94. MultiChoice argues that under the ECA, the provision of a 'broadcasting service' involves the provision of a service to the public and not to channel providers such as eMedia.[45] MultiChoice further argues that it does not provide broadcasting signal distribution services to third parties as defined in the ECA.[46]

95. MultiChoice also disagrees with eMedia's classification of the relationship between them.[47] It points out that it acquires from channel providers such as

[40] Founding Affidavit, para 114. p42; eMedia Heads of Argument para 5; 20;44; 58; 100; 103; 13; and 179.
[41] eMedia Heads of Argument para 19; 26; 39; and 175. Replying Affidavit of Kalyan Dasgupta para 49 and 50, p810 and p811.
[42] Founding Affidavit, para 120. p44

[44] eMedia's Replying Affidavit, para 62, p760.
[45] It points to the Electronic Communications Act, 36 of 2005 (the ECA) to support its argument. In the ECA, *'broadcasting'* is defined as *'any form of unidirectional electronic communications intended for reception by – (a) the public; (b) sections of the public; or (c) subscribers to any broadcasting service'* while *'broadcasting service' means 'any service which consists of broadcasting and which service is conveyed by means of an electronic communications network'*.
[46] Again, it points to the ECA where broadcasting signal distribution services defined as *'the process whereby the output signal of a broadcasting service is taken from the point of origin, being the point where such signal is made available in its final content format, from where it is conveyed, to any broadcast target area, by means of electronic communications, and includes multi-channel distribution'*.
[47] MultiChoice's Answering Affidavit, para 100, p469/

eMedia, the rights to receive, market and distribute channels as an input into its own–product - the DStv packages - which it retails to subscribers according to its licence. eMedia says this is a contrived argument.

96. In essence eMedia's argument is that MultiChoice is engaging in economic exchange with eMedia (and others)[48] and this exchange can be viewed as either acting as a purchaser of eMedia's (and others') content/channels or as a distribution platform (broadcasting service) for eMedia (and others) through which eMedia's content/channels (and that of others) reaches consumers and ultimately advertisers.[49] eMedia also contends that at the core of MultiChoice's business is its broadcasting licence. It is that licence which enables it to provide broadcasting services to customers and suppliers alike.

97. eMedia alleges that the role of MultiChoice as a distribution platform provider is explicitly recognised in the Must-Carry Regulations. It points us to Regulation 4(4) which states that *'the SBS licensee must bear the costs of carriage of the television programmes of the PBS Licensee on its distribution platform in compliance with these regulations.'* According to eMedia, the 2017 Agreement explicitly recognised the "distribution obligation" of MultiChoice under the agreement, which gives rise to an obligation on MultiChoice to broadcast the channels for the duration of the agreement.

98. MultiChoice disputes eMedia's interpretation of the Must-Carry Regulations. It submits that these Regulations , require ICASA to prescribe regulations regarding the extent to which subscription broadcasting services licensees must carry the television programmes provided by a public broadcast service licensee, such as the SABC.

Our Assessment

99. Usually in refusal to supply cases, there is a common starting point about what the service is, however, in this case there is a dispute between the parties

[48] Dasgupta Reply, para 6, page 784.

[49] Dasgupta Reply, para 6, page 784.

regarding what the service to be supplied is. The Tribunal has previously noted that: '*In interim relief proceedings where, without the benefit of the Commission's investigation, the views of the parties are all that the Tribunal has to rely upon, the effect of the inability of the parties to establish the relevant market is particularly debilitating*.'[50] (Our emphasis)

100. eMedia says the service is access to the DStv platform while MultiChoice says the service is the provision of a broadcasting service to the public and not to channel providers such as eMedia. MultiChoice relies on the definition of broadcasting services in the ECA that broadcasting is '*any form of unidirectional electronic communications intended for reception by – (a) the public; (b) sections of the public; or (c) subscribers to any broadcasting service.*' It is not clear whether the technical definitions of a broadcasting service would be the same as determining a relevant service under competition law.

101. ICASA has concluded that section 60(3) of the ECA[51] which deals with the obligation to carry public broadcasting service programmes applies to the public broadcaster , does not apply to free-to-air licensees, and that such an interpretation would require legislative amendment.[52]

102. In light of this dispute regarding what the relevant service is or is not under the ECA, and absent a full investigation this dispute cannot be regarded as a dispute of fact that is unconvincing, or contradictory as held in York Timbers but is a dispute that casts serious doubt on a material fact regarding what constitutes a service.

103. This is because the dispute on what the service is, is not only a dispute between the parties in respect of which we can take a view. In these interim relief proceedings, and without the benefit of a full investigation for competition law purposes, we cannot second guess ICASA's determination regarding the

[50] DW Integrators CC v SAS Institute (Pty) Ltd [1999–2000] CPLR 191 (CT) at para 23.
[51] Section 60 (3) of the ECA states that "The Authority must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee."
[52] Reasons Document Must Carry Amendment Regulations, 2022, published in March 2022, para 3.8.4

extent to which SBS must carry the television programmes provided a PBS licensee under section 60(3) of the ECA. This is a matter that can best be determined following a full investigation on these issues.

104. We now turn to the economic theories of refusals to supply and note that, the category of conduct in which *"a firm refuses to supply scare goods or services to a competitor or customer when supplying those goods or services is economically feasible"* encompasses several distinct fact patterns, and of which there are variations.

105. The standard fact pattern involves a category of refusals to supply which in economics are called "vertical refusals to supply" and include situations in which the dominant firm: (1) refuses to supply inputs to firms who are in competition with its own downstream business, i.e., (downstream) competitors; or (2) refuses to supply downstream firms with whom it does not compete, i.e., customers.

106. In the first example, the dominant firm is vertically integrated. It consists of an upstream division which produces an input and a downstream division which produces or sells the final product. A non-integrated downstream firm (downstream competitor) attempts to compete with the vertically integrated firm. However, the downstream competitor requires the upstream input, and seeks to purchase it from the integrated dominant firm. A dispute arises when the integrated firm outrightly refuses to supply to the downstream competitor.

107. One version of eMedia's argument is that this case is similar to most refusal to supply cases, which relate to concerns that a vertically integrated firm which is dominant in an upstream market is refusing to supply an existing or a new customer in a downstream market in which it is also present.[53] eMedia then argues that MultiChoice is dominant in the market for basic satellite services (downstream market) and that MultiChoice is a significant content rights owner, content producer and aggregator of its own (upstream market). It is important to note that both MultiChoice and eMedia are vertically integrated, as they

[53] eMedia Heads of Argument para 171

develop and aggregate content. MultiChoice develops content for its own use while eMedia develops content for both its own use and supplying the downstream market. They also both provide basic satellite television services.

108. In this version, according to eMedia, MultiChoice has outrightly refused to supply access to the DStv platform to eMedia, even when it has been offered the discontinued channels at a zero price. We note that this appears not to be the case as MultiChoice has partially renewed the 2017 Agreement. Recall that in February 2022, MultiChoice and eMedia agreed to an amount of [redacted] for an exclusive right to receive, market and distribute the eNCA channel and eNuus bulletin with a [redacted] uplift annually in fees.

109. MultiChoice responds by stating the at DStv buys content and then it integrates that content into its own product which it then sells for a fee to its subscriber base. MultiChoice argues that it does not compete in the channel supply market as the channels it produces are for its internal own use.[54] In our view, without an assessment of the market dynamics (both from a demand and supply side) and firms' incentives, it is difficult to assess the competitive constraints faced by a firms, in particular whether self-supply of content is in the same market as the supply of content broadly.

110. This is because on the face of it, eMedia appears to be a seller of content to MultiChoice. On a cursory reading of section 8(1)(d)(ii) it is difficult to conceive of MultiChoice's non-renewal of the contract for the purchase of eMedia's content as a refusal to supply an input. We note however, that this argument by MultiChoice obfuscates the issue raised by eMedia which is the refusal by MultiChoice to supply e-Media with broadcasting services. Without an assessment of the market dynamics (from a demand and supply perspective) and the incentives of firms, we cannot, even on a prima facie basis, find a refusal to supply an input by MultiChoice as contemplated in section 8(1)(d)(ii).

[54] Even if we were to assume that MultiChoice is a dominant purchaser of channels, monopsony power is not a matter we can decide on an interim relief basis, without the benefit of a full investigation. This argument, while raised in Dasgupta's economic expert Supporting Affidavit, was not pursued by eMedia in the proceedings.

We deal with eMedia's claim of a refusal to supply broadcasting services under the second fact pattern below (which deals more directly with eMedia's argument that it is a competitor of Multichoice, and Multichoice refuses to supply it as a competitor), and further under section 8(1) (c).

111. Still on eMedia's case of a vertical refusal to supply a customer downstream with an input upstream, eMedia likens MultiChoice's behaviour to that alleged in GovChat. In GovChat, the applicants, through the business service providers ("BSPs"), were customers of WhatsApp in the downstream market for OTT applications and in which WhatsApp was dominant upstream. The applicants were also competitors of the respondents' authorised BSPs and potential competitors of the respondents in the mobile payments market.

112. MultiChoice argues that it does not provide any 'service' which is comparable to the business messaging platform offered by WhatsApp for payment of a fee.

113. In our view, the facts in GovChat are distinguishable from the facts in this application. While the Tribunal observed that even if WhatsApp was not vertically integrated with its BSPs, it authorised them to render services and thus had a vertical relationship analogous to that of a vertically integrated firm. Further, WhatsApp agreed to supply but under terms that made it difficult for the applicants to compete with its' authorised BSPs.[55] In GovChat the applicants had no means of replicating the messaging system, while eMedia has its own means of distributing the discontinued channels, and seemingly certain alternatives (for example, eExtra is also distributed through StarSat). Furthermore, GovChat paid WhatsApp for the service whereas eMedia is not paying MultiChoice for the broadcasting service.

114. The second fact pattern involves a category of refusals to supply, which in economics are called "horizontal refusals to supply" and involves horizontal relationships in network markets. In a network market, customers may value a

[55] The essential allegation in GovChat was the respondents sought to off-board the applicants from the WhatsApp's paid business messaging platform or application programming interface, while permitting other users (own authorised BSPs) of its platform to continue.

product or service more highly, the larger the network is of users associated with that product or service.

115. Refusals to supply can arise in such markets when a larger network refuses to interconnect with a smaller network or provide access to its infrastructure to a smaller network. The concern in this setting is that the smaller network may not be able to survive if its members cannot communicate with those in the larger network.[56] Similarly, in this case, eMedia argues that because of DStv's dominant position, it is only through DStv that a channel can gain access to sufficient customers (what advertisers refer to as "eyeballs" and advertisers are more interested in viewership numbers and demographics) to remain viable.

116. On eMedia's argument that MultiChoice has refused carry the eMedia channels, MultiChoice states that it does not provide (nor does eMedia seek) access to the 'technical platform services' (encryption, electronic programme guides and the use of interactive technology and systems) that, as eMedia noted in its Founding Affidavit, Ofcom requires the UK satellite broadcaster Skynet to supply to channel providers.[57] In addition, ICASA concluded that, unlike in the UK where Skynet, was specifically obliged to carry commercial channels' programmes, this was not the case under the ECA.

117. The essence of eMedia argument is that it seeks to effectively compete with DStv through its own OpenView platform, which it says would be difficult without some of its content (the discontinued channels) being distributed through DStv.

118. The difficulty in assessing eMedia's case, outside of a full investigation arises when one considers MultiChoice's version that it does not sell rights to interconnect with DStv or access to the DStv platform to third party firms and is only required through the Must-Carry Regulations to carry SABC channels. Furthermore, ICASA has determined, in the Must-Carry Regulations that the

[56] A milder version of this concern is that the smaller network will be a far less effective rival to the larger network without interconnection. These issues arise in markets with either direct or indirect network effects.
[57] Founding Affidavit, para 17, p12

regulations apply only to the SABC in order to achieve universal access. Specifically, it determined that the Must-Carry obligation does not apply to eMedia.

119. For the reasons set out above eMedia has not, prima facie, established that MultiChoice's behaviour can be said to be a horizontal refusal to supply.

120. The third fact pattern involves a category of refusals to supply involving a termination of an existing supply arrangement. In this example, the dominant firm has in the past found it in its interest to supply an input to one or more customers which suggests that it considered it efficient to engage in such a supply arrangement. As indicated eMedia says that MultiChoice has been providing services to it since 2007 (and in the case of the discontinued channels since 2017). It argues that MultiChoice's decision concerning the discontinued channels amounts to a termination of an existing supply arrangement.

121. A refusal to supply can take the form both a refusal to start supplying de novo, as well as a unilateral termination of an ongoing supplying arrangement. In this case, the 2017 agreement ended in March 2022. It did not contain a renewal clause. Prior to the lapsing of the 2017 Agreement, eMedia and MultiChoice engaged in contract negotiations which culminated in the 2022 agreement.

122. It is noteworthy that MultiChoice concluded a new agreement following the end of the 2017 Agreement.

123. eMedia argues that DStv is a distribution platform (broadcasting service) for eMedia through which its content/channels reach consumers and ultimately advertisers. Further it states that placing an obligation on a dominant firm to allow access to its infrastructure would enhance competition, a dominant firm's refusal to provide access inhibits effective competition.[58] .

124. On the evidence before us, eMedia has not established a prima facie case that there is a refusal to supply a 'service' to it, either as a customer or competitor.

[58] Founding Affidavit, para 106, p41

Where serious doubt has been cast on the applicant case as set out in in *York Timbers*, we cannot decide the issues in dispute in interim relief proceedings.[59]

Condition 2: the refusal to supply is in respect of scarce goods or services

125. eMedia and MultiChoice disagree on whether 'basic satellite television services' are a scarce service.

126. eMedia argues that the DStv platform is a scarce broadcasting service in South Africa (because there are no other equivalent platforms given its dominance) and there is no other way for eMedia to access DStv's 8.9 million subscribers other than through broadcasting content on the DStv platform. In addition, eMedia argues that the DStv platform "cannot be easily duplicated without significant capital investment" and is accordingly "scarce" or hard to come by.

127. MultiChoice's version is that a service which a firm can self-provide cannot be a 'scarce service" as contemplated in by section 8 (1) (d) (ii). It states that discontinued channels are also broadcast free-to-air on eMedia's DTT offering and on OpenView. It states that OpenView has grown and continues to grow. Further, it points out that eExtra has been included in all the packages on the StarSat subscription satellite television service since 1 April 2017.

128. In reply eMedia argues that MultiChoice misunderstands the test set in GovChat since in GovChat, the Tribunal acknowledged that even when there were "alternatives" to WhatsApp such as WeChat, Facebook Messenger, and Snapchat, this did not mean that WhatsApp was not a scarce service, given its entrenched market position in South Africa.

Our Assessment

129. The question of whether a good or service can be considered "scarce" requires us to consider whether (1) it is either impossible or prohibitively expensive to duplicate the services, (and therefore the cost of duplicating the alleged service constitutes a barrier to entry) or (2) there are effective

[59] York Timbers paras 64-5.

substitutes for the service. In other words, there must be no actual or potential "viable alternatives" to the dominant firm's service that customers or competitors in the downstream market can rely on or the cost of such alternatives is not easily duplicated without significant capital investment.

130. In GovChat, the Tribunal noted that the services at issue could not *"be easily duplicated without significant capital investment"* and because of this, could be considered as "scarce" or hard to come by.[60] While the Tribunal considered substitutes, it found that in the context of communication during the height of the covid pandemic, there was no other way to replicate the Facebook service without significant cost.

131. We are also persuaded by MultiChoice's argument. While in GovChat the applicants could not self-provide the service, eMedia is able to self-provide, in addition to other alternatives such as StarSat and OTT services. Furthermore, as indicated, GovChat is distinguishable since it concerned the supply of a service (over which there was no dispute) and relating to the covid pandemic.

132. Deciding whether a service is scarce a fact-specific and complex exercise that requires, *inter alia*, a full understanding of the market environment, switching costs that customers would incur in order access alternatives, and the likely future market evolution. It is also often difficult to distinguish situations in which customers simply have a strong preference for the DStv platform from situations in which customer objective considerations render their choice unavoidable. These matters would best be dealt with in an in-depth investigation and with the benefit of oral testimony which can be tested through cross-examination.

133. For the reasons set out above, eMedia has not based on the evidence currently before us, established on prima facie basis, that 'basic satellite television services' are scarce.

[60] GovChat para 112

Condition 3: it is economically feasible to supply

134. It bears mention that during the proceedings the issue of MultiChoice's capacity was hotly debated, with eMedia accusing MultiChoice of conjuring up capacity as a reason for the non-renewal of the discontinued channels. Multichoice denies this and states that it has never claimed to be capacity constrained. We deal with this later.

135. eMedia argues that it is economically feasible for MultiChoice to supply the broadcasting service (allow it access to the DStv platform). It would cost MultiChoice nothing and it faces no constraint as to the number of channels on DStv.[61]

136. MultiChoice argues that it wishes to use the scarce bandwidth currently used by the discontinued channels to introduce channels that, in its business judgment, will better advance its commercial objectives. It argues that the need to do so arises because it faces a significant and escalating threat from unregulated global OTT operators, which have significant competitive advantage over traditional operators, particularly because they face none of the costs associated with providing traditional services.

137. It further says the inclusion of the eMedia discontinued channels in the DStv packages is not consistent with its growth strategy. MultiChoice mentions in addition that under the Must-Carry Regulations, it has to carry three SABC channels.

138. eMedia challenges this argument by stating that if channels are supplied at no cost, and absent capacity constraints, even the presence on DStv of unpopular channels does DStv no harm. Therefore, MultiChoice's growth strategy argument makes no sense. In this case, argues eMedia, the discontinued channels are not unpopular; they are amongst the top-viewed channels on the DStv platform.

[61] Founding Affidavit, para 18, p 12.

139. On the fact that the discontinued channels are popular on the DStv service, there is no serious dispute between eMedia and MultiChoice. However, MultiChoice responds by stating that it is not correct that it incurs no costs in broadcasting discontinued channels, it argues there are opportunity costs. For example, the eMedia discontinued channels take up bandwidth on the satellite with opportunity cost implications for the carriage of each channel. It states that it [redacted] of the discontinued channels and its distribution does not drive subscriptions to DStv as the discontinued channels can be viewed for free on Openview.

Our Assessment

140. During the hearing MultiChoice conceded that it has spare capacity. In fact, it has space for four additional channels on the IS-20 satellite and space for an additional ten channels on the IS-36 satellite. Discounting from that the space reserved for three SABC channels under the new Must Carry Regulations, there is space for eleven additional channels.

141. However, MultiChoice says it plans to use the space available for an additional eleven channels for its own growth plans in the next five years. It argues that the curation of packages requires careful and expert editorial discretion, and it has exercised its discretion not to include the discontinued channels in the DStv packages for the next five years, in line with its growth strategy. We have no evidence before us that contradicts the latter's growth plans in the next five years. This is a matter best dealt with in an in depth investigation, and the benefit of oral evidence that can be subjected to cross-examination. While the issue of capacity has now been clarified, the difficulty of deciding this case in interim relief proceedings is that there is nevertheless still a dispute (as outlined above) on the service to be supplied and whether it is a scarce service.

142. Despite the fact that there is an agreement between the parties on dominance in the basic satellite television services market, there is still a disagreement on what comprises basic satellite television services.

143. Given the dispute between eMedia and MultiChoice on the 'service' in question, the exercise of evaluating whether for such a 'service' it would be economically feasible to supply would best be addressed during an in-depth investigation by the Commission. This is because this issue is intricately linked to the definition of the relevant service and understanding the market dynamics. Since, as indicated earlier, there is a dispute between the parties regarding the definition of the relevant service and through an investigation it will have to be established that MultiChoice's decision in reality amounts to a refusal to supply, which is complex in this case, we cannot determine this with precision in an interim relief proceeding.

144. We note that MultiChoice, unfortunately, was not forthcoming regarding the issue of its capacity and its submissions on capacity evolved significantly over time. We shall also deal with this aspect below under the consideration of an appropriate costs order.

Anticompetitive effect

145. A dominant firm may not engage in the exclusionary act of refusing to supply scare goods or services to a competitor or customer when supplying those goods or services is economically feasible unless it can show that the anticompetitive effect of that exclusionary act outweighs its efficiency or pro-competitive gain.

146. Based on the evidence set out above, eMedia has not, on prima facie evidence, established that there has been a refusal to supply scarce services to a customer or competitor when it is economically feasible to do so. In these circumstances, we do not consider it necessary to evaluate whether efficiencies outweigh the anticompetitive effect of the exclusionary act as required under section 8(1)(d)(ii).

147. Next, we consider whether MultiChoice has engaged in an exclusionary act as described in section 8(1)(c).

Section 8 (1) (c) Engage in an exclusionary act whose anti-competitive effect outweighs its efficiency or other pro-competitive gain

148. An 'exclusionary act' is defined as 'an act that impedes or prevents a firm from entering into, participating in or expanding within a market'.

149. eMedia's case under section 8 (1) (c) is that MultiChoice has refused to supply access to the DStv platform to eMedia, even when MultiChoice has been offered these discontinued channels free of charge and in circumstances where there is an existing relationship between the parties. This according to eMedia is an exclusionary act.

150. MultiChoice disagrees with eMedia. It says that eMedia's case ought to fail because MultiChoice's non-renewal of the clause to acquire and distribute the discontinued channels is not an exclusionary act. MultiChoice argues that the non- renewal does not impede or prevent eMedia from entering into, participating in, or expanding within any of the markets which it has identified. Further, MultiChoice says that eMedia will continue to be able to reach viewers and advertisers for the discontinued channels by way of a range of other means, including its own Openview, eVOD and DTT services.

151. eMedia disputes MultiChoice's argument by stating that advertisers are most interested in viewership numbers, demographics and DStv is more than three times the size of Openview. eMedia states that DStv delivers more viewers of similar demographic than Openview can do (for the same channel} simply on account of its subscriber numbers.

152. eMedia maintains that MultiChoice's decision (refusing to renew the clause to acquire and distribute the discontinued channels on the DStv platform) is motivated by anti-competitive objectives, as discussed below.

Loss of revenue and profit arguments

153. eMedia alleges that MultiChoice is motivated by the intention to harm eMedia's existing business, and to ensure that eMedia is unable to grow its basic satellite

service such that it could potentially in time become a more competitive constraint on MultiChoice's DStv.

154. eMedia alleges that the effect of MultiChoice's decision in the basic satellite market is to reduce eMedia's potential to generate revenue and this reduces its ability to put money back into the business and improve the quality of its fledgling Openview's offering. eMedia sells advertising slots on the eMedia channels on the basis that the channels will be broadcast on DStv, OpenView, OTT (because of technological constraints eMovies cannot be broadcast on OTT) and StarSat (only eExtra is broadcast on StarSat); and customers buy the slots on that understanding.

155. Further, it states that without this investment, Openview cannot hope to become a realistic competitive constraint on DStv. In other words, depriving eMedia of an important source of revenue at this critical time will materially impair eMedia's ability to continue broadcasting the four channels and to continue investing in content and will also reduce the (already weak) competitive constraint that OpenView imposes on DStv currently.

156. eMedia argues that currently [redacted] of viewers watch the discontinued channels on DStv, thus the foreclosure results in an immediate [redacted] loss of revenue from these channels, equating to about [redacted] This is based on the status quo continuing post 31 March and the counterfactual being that eMedia shuts down on the discontinued channels.

157. In addition, eMedia argues that the analogue switch off will mean that the discontinued channels' contribution to total revenue will increase as a proportion of total revenue. e.Tv's advertising revenue will likely reduce significantly since half of e.Tv's viewers use analogue signal to watch the channel. This means that the estimated loss of revenue of [redacted] (based on the discontinued channels' contribution to eMedia's revenue) is likely to increase substantially following switch-off.

158. MultiChoice's argues the revenue loss of about [redacted] estimated by eMedia is flawed because it is based on an inappropriate counterfactual which

assumes that eMedia will not adjust following MultiChoice's decision. eMedia's status quo is that eMedia would continue supplying the discontinued channels to MultiChoice.

159. MultiChoice argues that the appropriate counterfactual is the non-renewal of the agreement since no renewal is provided for in the 2017 agreement. On that counterfactual, following the non-renewal of the agreement to acquire the discontinued channels, eMedia would adjust immediately improve its cashflow by [redacted] per year by ceasing the two longstanding channels that were already [redacted] per year under the status quo. MultiChoice argues that once this is considered the picture changes and in the counterfactual eMedia would still be earning a profit of [redacted] per annum from its channels. On MultiChoice's counterfactual, eMedia's profits would reduce by only be [redacted] from [redacted]

160. eMedia's response is that MultiChoice has not taken into account issues like third party-contracts; job losses; reputation; and subsidies from the discontinued channels.

161. On the argument relating to eMedia's estimated loss of advertising revenue (approximately [redacted] MultiChoice points out that a mere loss of revenue is not sufficient to establish anti-competitive effects. It argues that what eMedia needs to show is that this revenue loss will materially lessen the competitive constraint that Openview imposes on MultiChoice in a relevant market. It suggests that it is improbable that the DStv advertising revenue, which comprises a modest [redacted] of eMedia's total advertising revenue and an even more modest [redacted] of eMedia's total revenue, is required or able to sustain Openview. MultiChoice further disputes eMedia's allegation that the loss of revenue exceeds the [redacted] (which assumes that a loss in revenue is proportional to the channels' viewership that occurs via the DStv platform). It states that eMedia ignores the potential for Openview to gain subscribers and that there is no evidence showing that any potential reduction in advertising revenues will result in foreclosure of Openview.

Loss of channels arguments

162. eMedia alleges that MultiChoice's decision is motivated by a desire to exclude some of the most popular immediate entertainment channels from the DStv platform and thereby undermine eMedia's ability to broadcast and produce rival content in competition with DStv's own content channels.

163. MultiChoice responds by stating that there is no evidence that MultiChoice's decision not to acquire distribution rights to the discontinued channels would have any significant impact on competition for the supply of content. It points out that eMedia's suggestion that MultiChoice may have an incentive to (a) reduce competition in the wholesale 'channel supply market' or (b) favour its own channel is particularly implausible given that: (1) it does not even compete in the wholesale 'channel supply market', as the channels it produces are only for its own use; (2) such a strategy would put it at risk of losing a significant number of subscribers and revenue (if it simply removed valued content); (3) it intends to replace the eMovies, eMovies Extra and eToonz channels with other 'third-party' channels. For this reason, it can hardly be suggested that the purpose of removing the discontinued channels is to divert eyeballs to MultiChoice's own content, when it will replace those channels with other 'third-party' channels; and (4) its conduct is simply an ordinary periodic change to its content offering in order to improve the content slate and overall value of its DStv packages.

164. MultiChoice argues that given the growth of Openview, as well as other routes to market for its products including StarSat, and eMedia's own DTT and OTT services, the survival of the discontinued channels is not dependent upon their inclusion in the DStv packages. It states that the discontinued channels were all established prior to the 2017 agreement with MultiChoice and without any agreement in place regarding their inclusion on DStv and that it is self-serving for eMedia to suggest now that the future of the discontinued channels, Openview, and indeed eMedia, is dependent on the inclusion of the discontinued channels in the DStv packages.

165. eMedia acknowledges that [redacted] as a result of supplying the discontinued channels to MultiChoice.[62] It states that, after their removal from DSTV, and in order for the channels to remain commercially viable, [redacted] This will reduce the attractiveness of the OpenView platform, and further harm consumer welfare.

166. MultiChoice responds by stating that the fact that the eMedia discontinued channels alleged to be most [redacted] – rely the least on DStv for their audiences, suggests [redacted].

167. MultiChoice argues that an abuse of dominance cannot be found where a loss of competition arises as a result of factors unrelated to the conduct of the dominant firm, it argues that the ability or inability of the discontinued channels to access customers efficiently has little to do with their inclusion in the DStv packages. The success of the discontinued channels (in the case of eExtra) or lack thereof (in the case of eMovies, eMovies Extra and eToonz) is dependent

[62] Heads para 187

on exogenous factors quite unrelated to their inclusion in DStv's packages, and accordingly cannot be attributed to any conduct on the part of MultiChoice.

168. According to MultiChoice, the more successful eExtra channel does not require to be broadcast on DStv in order to be a competitive constraint in the channel supply market. It alleges that eExtra *would continue* as a competitive constraint after its removal from DStv, with profits of [redacted]

169. eMedia also alleges that the removal of its channels from DStv will result in viewers (and thus advertisers) switching to MultiChoice's own channels in similar genres and this will the result in MultiChoice raising the prices.[63]

170. MultiChoice responds by saying that eMedia has not provided a substantive assessment or evidence in support of these claims. MultiChoice argues that the unsuccessful nature of eMovies Extra, eMovies and eToonz is inconsistent with, and destructive of, eMedia's suggestion that they play an important role in constraining competition in the advertising market. It further states that long-standing channels that cannot attract enough advertising revenue to cover their costs (or, as in the case of eToonz, only just do so), despite being available on both large satellite platforms, cannot be regarded as an effective or material constraint on rival providers of advertising services.

171. .MultiChoice also argues that it will be unable to increase advertising prices as a result of the removal of the discontinued channels from its retail packages because of the following: (1) advertisers have a broad array of options available to them when seeking to reach consumers, particularly given the development of the broadband ecosystem and the rapid growth of internet advertising; (2) focusing on a narrower traditional 'TV advertising market', there is unlikely to be a reduction in competition for advertising revenue; (3) while eMedia contends that the loss of carriage of the discontinued channels on DStv would lead to a proportionately higher loss in advertising revenue, eMedia has not provided any evidence in support of this claim; and (4) even if eMedia were to lose advertising revenue as a result of no longer being carried on DStv, there

[63]Founding Affidavit, 25, p16]

is no evidence that MultiChoice itself would capture all or even a significant proportion of the advertising revenue as is claimed by eMedia.

Timed to coincide with the date of analogue switch-off argument

172. eMedia alleges that MultiChoice's decision to non-renew the clause to acquire and distribute the discontinued channels is timed to coincide with the date of analogue switch-off (which was 31 March 2022 and currently set for 30 June 2022), in circumstances where MultiChoice knows that eMedia's business would take a significant hit from the loss of the free-to-air broadcasting audience as from the date of analogue switch-off.

173. In response, MultiChoice argues that this theory is not supported by facts. It says that it had legitimate commercial reasons for its decision not to renew the discontinued channels clause when the 2017 Agreement reached the end of its five-year fixed term. It argues that based on the same commercial objectives, it decided to acquire distribution rights in respect of eNCA and the eNuus bulletin (for an annual fee of [redacted] and with [redacted] for the next five years. eNCA and eNuus met its commercial Objectives while the discontinued channels did not.

Consumer harm arguments

174. On the consumer welfare harm in summary, eMedia alleges that MultiChoice's decision will result in significant harm to the consumers and the market. This harm includes: (1) harm stemming from the inability of consumers to access eMedia channels on the DSTV platform; (2) harm arising from a reduction in the quality and variety of channels available to consumers across all platforms as a result of the reduction in the quality of content on eMedia's foreclosed channels; and (3) harm to consumers and the market from the diminution of competition between platforms.

175. MultiChoice responds by arguing that the consumer harm allegations are based on incorrect assumptions that the DStv offering will not be enhanced with channels which provide greater value. MultiChoice argues that given the

competition posed by Openview, if MultiChoice were to remove valued content in favour of less valued content, it would risk losing a significant number of subscribers and revenue. In addition, MultiChoice argues that inasmuch as eMedia suggests that consumers will suffer harm arising from (1) a reduction in the quality and variety of channels available across all platforms as a result of the reduction in the quality of content in the discontinued channels; and (2) the diminution of competition between platforms, eMedia has failed to demonstrate that either of these consequences would follow from the removal of the discontinued channels from the DStv service.

Our Assessment

176. We were not persuaded, on the evidence before us that the non-renewal of the discontinued channels has, prima facie, had an anticompetitive effect as contemplated in section 8(1)(c). At the heart of eMedia's case of prohibited practice is the harm it will suffer and the harm to consumer welfare.

177. The Tribunal has previously observed that an anti-competitive effect could manifest itself in two ways. Either there is direct evidence of an adverse effect on consumer welfare or evidence that the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals.[64]

178. The CAC in Computicket noted that the assessment of anticompetitive effects requires us to compare the actual and likely future situation in the relevant market (with the dominant firm's conduct in place) with an appropriate counterfactual, or with another realistic alternative scenario.[65]

179. Firstly, there is nothing on the evidence currently before us to suggest that the end-date (31 March 2017) was related in any way to the digital migration date. The five-year period of the agreement happens to have ended on the same

[64] *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept 06) [2010] ZACT 13 (17 February 2010) at paras 143 and 183 and *South African Airways (Pty) Ltd v Comair Ltd and Another* 2012 (1) SA 20 (CAC) at paras 105-106 and also endorsed in Computicket (PTY) LTD v Competition Commission of South Africa (170/CAC/Feb19) [2010] ZACAC 4, para 18.
[65] The CAC in Computicket para 37 (also referencing EC Guidelines on the Commission's enforcement of priorities in applying Article 102 at para 21).

date (31 March 2022) initially announced independently by the Minister of Communications on 28 February 2022 for the switch to digital migration.

180. eMedia tried to argue that the switch to digital migration will deal a further blow to it since it will not be able to reach non-analogue viewers. However, eMedia provided no evidence of the size of the DTT market that will not be able to access the discontinued channels.

181. Secondly, given the absence of a renewal clause in the 2017 agreement, it appears plausible to us that eMedia would have to adapt and adjust in a counterfactual world in which its negotiations with MultiChoice fail. The adjustments could include ceasing with [redacted] even as they are included in the DStv packages. eMedia does not dispute that [redacted]

182. Also recall that at the time when the 2017 agreement was concluded, three of the eMedia discontinued channels (eExtra, eMovies and eToonz) had been broadcast on eMedia's Openview service since 2013; eMovies Extra had been broadcast on Openview since 2016; and eExtra had also been broadcast on StarSat since the end of 2015. This suggests to us that eMedia has in the past adapted to the market circumstances and ensured that the relevant channels are available for consumers. Furthermore, there is a debate between the parties regarding other alternatives in the market such as OTT, VoD and others. This dispute cannot be resolved in these interim relief proceedings, without the benefit of oral evidence following a full investigation.

183. Thirdly, regarding the loss of revenue, the best-case scenario for e-Media is that it will lose [redacted] in advertising revenue if the discontinued channels are not renewed. As discussed above, eMedia alleges that the advertising revenue contributes inter alia to reinvesting in its business to become competitive. eMedia alleges that on average it makes a net profit before tax of approximately [redacted] It alleges that the estimated loss of profit resulting from MultiChoice's conduct of about [redacted] is more than [redacted] of the group's total profit.

184. In our view, eMedia has not prima facie established on the evidence before us that the loss in revenue will result in harm to competition in the market rather than financial harm to itself. In BCX, the CAC held as follows:

> *"The evidence of a prohibited practice, as I have sought to explain, is not concerned with the rights of the applicant but the competitive position of competitors in the market, judged against the regulatory criteria of the prohibited practices defined in chapter 2 of the Act."*[66] (our emphasis)

185. Without more, i.e., prima facie evidence of competitive harm, it is difficult in interim relief proceedings to conclude that the loss alleged by eMedia extends beyond financial harm. There is no prima facie evidence before us that the reduction in advertising revenue and in profits will result in competitive harm in the market and there is a dispute on the alternatives (counterfactual) that eMedia has, absent the renewal of the agreement on the discontinued channels.

186. Whether or not the effects of the non-renewal of the agreement concerning the discontinued channels is likely to result in anticompetitive foreclosure depends on a number of factors, including: (1) the conditions on the relevant market; (2) the position of MultiChoice's competitors (this underscores the importance of competitors for effective rivalry); (3) the position of customers or content providers; (4) the extent of the allegedly abusive conduct; and (5) possible evidence of actual foreclosure (this would be the case if the conduct has been in place a sufficient period of time, the market performance of MultiChoice's competitors may provide direct evidence of foreclosure). On all of these, except for dominance by MultiChoice in the basic satellite broadcasting services market, there is a dispute between the parties. Even on a prima facie basis, the evidence on the above factors has been limited. This exercise may better be addressed in the course of an in-depth investigation by the Commission.

187. In addition, our view is that MultiChoice's non-renewal of the clause to acquire the discontinued channels does not in itself constitute prima facie evidence of

[66] BCX para 20

anticompetitive foreclosure. Anticompetitive foreclosure (complete and partial foreclosure) may arise if MultiChoice's conduct is likely to have an anticompetitive effect on competition in the market.

188. Fourth, on harm to consumers, if MultiChoice where to introduce new and improved channels or content for which there is consumer demand, as it clams it will, then many of eMedia allegations on consumer harm would fall away. Unfortunately, on both sides, the evidence has been limited. MultiChoice has alleged, but not provided evidence of the channels it intends to replace eMedia's channels with. As discussed above, while there is no serious dispute that the foreclosed channels are popular, [redacted]

189. Evaluating the effect of MultiChoice's decision on consumer welfare requires us to evaluate whether, for consumers, the negative consequences of MultiChoice's decision not to renew the discontinued channels outweigh over time the consequences of imposing an obligation to renew or acquire the channels. In this case because of the absence of any prima facie evidence, this exercise would best be addressed in the course of an in-depth investigation by the Commission.

Conclusion on prohibited practice

190. Based on the evidence set out above, there is insufficient evidence of any of the alleged restrictive practices to establish a prima facie case of a prohibited practice on the part of MultiChoice.

191. After assessing evidence relating to a prohibited practice, 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.[67] We proceed below to consider the other two steps.

192. MultiChoice submitted that once there is no evidence of a prohibited practice, then there is no need to consider the other two factors. eMedia while not differing with this, placed reliance on the same factors for a prohibited practice and irreparable damage.

193. The Tribunal has held that it would be "extremely reluctant" to grant interim relief in the absence of convincing evidence of a prohibited practice[68] and has dismissed applications for failing to provide prima facie evidence of a prohibited practice without even considering the remaining factors.[69]

Irreparable harm

194. Section 49C confers a discretion on the Tribunal to grant interim relief having regard to what is reasonable and just in the circumstances. This exercise should be done holistically, with each consideration balanced against each other in that "*it is possible that interim relief will be granted even where the applicant's case on one of these requirements is not strong*."[70]

195. The CAC in *BCX* stated as follows on the serious or irreparable damage evaluation:

> *"The need for intervention [under s49C] 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*

[68] *York Timbers at para 101 where the Tribunal held as follows: "We have dwelt on the evidence relating to the alleged restrictive practice and found none. While we are not told how to balance, how to 'have regard to' the three factors specified in section 49C of the Act we would, regardless of the prospect of damage or of the balance of convenience, be hard pressed to grant interim relief in the absence of evidence of a restrictive practice." See, also, Msomi t/a Minnie Cigarette Wholesalers v British American Tobacco South Africa (Pty) Ltd [2002] ZACT 49 (30 August 2002) at para 13 where the Tribunal held that, because the applicants in that case had not made out a prima facie case though open to some doubt, it was not necessary for the Tribunal to deal with the remaining requirements of irreparable harm and the balance of convenience.*

[69] Trudon (Pty) Ltd v Directory Solutions CC 2010 JDR 1235 CAC, para 39.

[70] *BCX* at para 20 read with *Gallo Africa* at para 17.

applicant are not relevant because the Act's purpose is to maintain and promote competition in the market."[71] (our emphasis)

196. First, the harm eMedia alleges is the harm to eMedia in the form of lost advertising revenue and harm to its business. In response, MultiChoice argues that there will be no substantial loss of advertising revenue in the six-month period which is pertinent to the relief sought. It points out that a mere loss of revenue is not sufficient to establish anti-competitive effects.

197. Second, the harm eMedia alleges is that it will suffer significant reputational harm and loss of goodwill. The discontinued channels' viewers on DStv will switch to other channels on DStv and many of them will be lost to eMedia. MultiChoice responds by contending that eMedia has had five years within which to generate goodwill in the discontinued channels among DStv viewers. It states that if the discontinued channels are as valued by DStv viewers as eMedia contends, those viewers (1) will return to viewing the discontinued channels if they are reinstated; or (2) will continue to view the discontinued channels on eMedia's DTT service or on its Openview service, upon a once-off purchase of an Openview decoder. Furthermore, MultiChoice argues that eMedia has given no reason why MultiChoice should have an obligation to develop the brand and enhance the goodwill of a competitor. It argues that it is unclear on what basis eMedia claims that loss of goodwill is a cognisable anti-competitive effect, rather than a mere pecuniary loss to eMedia.

198. Third, the harm eMedia alleges is that DStv's refusal to broadcast the discontinued channels will negatively affect eMedia's offering on the OpenView platform, further decreasing consumer welfare. MultiChoice argues that eMedia has failed to demonstrate what the consequences would be of the removal of the discontinued channels from the DStv service. MultiChoice argues that given the growth of Openview, as well as other routes to market for its products including StarSat, and eMedia's own DTT and OTT services, the survival of the discontinued channels is not dependent upon their inclusion in the DStv

[71] *BCX* at para 21.

packages. It states that the discontinued channels were all established prior to the 2017 agreement with MultiChoice and without any agreement in place.

199. Fourth, the harm eMedia alleges is the detriment to DStv subscribers, who will now no longer be able to view the foreclosed channels on MultiChoice. MultiChoice responds by arguing that the consumer harm allegations are based on incorrect assumptions that the DStv offering will not be enhanced with channels which provide greater value. MultiChoice argues that given the competition posed by Openview, if MultiChoice were to remove valued content in favour of less- valued content, it would risk losing a significant number of subscribers and revenue.

200. Lastly, the harm eMedia alleges is that DStv's refusal to broadcast the discontinued channels will have a very significant effect on eMedia's overall business and the viability of OpenView as a potential competitor to DStv.

201. [redacted]

202. MultiChoice argues that in January 2022 eMedia knew that its contractual relationship with MultiChoice was due to end on 31 March 2022, and that unless the discontinued channels clause was renewed, the discontinued channels would no longer be aired on DStv. Further, it says that it had communicated its decision not to renew the discontinued channels clause in November 2021 and Mr Lee confirmed, in an email of 26 January 2022, that eMedia accepted that MultiChoice would not take any more of its channels. [redacted]

Our Assessment

203. In *Normadien Farms,* the Tribunal noted that: *"At no point does the applicant seriously allege that the conduct of the respondent threatens its continued*

existence or call into question its viability. Rather, what the applicant complains of is commercial harm and, as aforesaid, that is entirely insufficient. On the favourable reading of the applicant's case, the harm it suffers is paying more than it might otherwise pay."[72] (our emphasis)

204. In our view, eMedia has demonstrated commercial harm to itself arising from MultiChoice's decision not to renew the clause to acquire and distribute the discontinued channels. However, just as commercial harm is not sufficient to establish anti-competitive effects, commercial harm also does not suffice to establish irreparable damage for the purposes of an interim interdict.

205. Furthermore, there is a dispute on the extent of commercial harm. eMedia quantifies this to be about [redacted] in pre-tax profits, while Multichoice says it is about [redacted] The best-case scenario for eMedia is about [redacted] in pre-tax profits. Without the benefit of oral evidence and a full investigation by the Commission, we cannot determine if this harm is significant. This is assuming that the commercial harm is linked to competitive harm, which as we have discussed, eMedia has not demonstrated on a prima facie basis.

206. As the CAC held in BCX, the granting of an interim order is concerned with "*damage to the competitive position of the applicant...Other forms of damage are not relevant".*

207. It is also relevant that ICASA has determined, in the Must-Carry Regulations that the regulations apply to the public broadcast service provider in order to achieve universal access. It specifically determined that this obligation does not apply to free-to-air licensees. We considered that, granting interim relief, without the benefit of a full investigation and implications of the regulations on the state of competitiveness in the market as whole, may unduly alter the state of competition in the market in favour of eMedia to the exclusion of other competitors in the market, such as StarSat. This would not be consistent with the Tribunal's powers to intervene to prevent damage to competition in the

[72] Normandien Farms (PTY) LTD v Komatiland Forests (PTY) LTD (case no: 018507) at 41.

market as a whole, rather than damage to a competitor. In any event, eMedia has not provided sufficient evidence to demonstrate that competition will suffer.

208. For the reasons set out above, eMedia has not on the evidence before us demonstrated, *prima facie*, that its ability to remain as a viable competitor with the market will be seriously or irreparably threatened.

Balance of convenience

209. In Gallo Africa, the Tribunal noted that: *"Section 49C(2)(b) properly construed does not require that each of the listed factors be independently and separately satisfied. before interim relief is granted. In National Wholesale Chemists (Pty) Ltd and Astral Pharmaceuticals (Pty) Ltd et al,4 also an application for interim relief, we held that in terms of section 49C(2)(b) the Tribunal is not required to establish that each of the requirements has been established in isolation, but must rather consider all the factors listed in section 49C(2) as a whole to see whether a case for interim relief has been established. That is, a weak case on, say, irreparable harm may be counterweighted by a very strong case on the balance of convenience or particularly persuasive evidence of prohibited practice."*[73] *(own emphasis)*

210. eMedia argues that given the prejudice that eMedia will suffer if the interim relief is refused, MultiChoice has pointed to no actual prejudice that it will suffer: (1) the broadcasting will not cost it anything; (2) there is no opportunity cost, because MultiChoice has the capacity to broadcast dozens more channels without constraint; (3) the interdict is for a short duration and, during this time, MultiChoice and the public at large will get the benefit of eMedia's popular programmes on its platform; (4) there will be no harm to the competitive position of MultiChoice during the intervening period; (5) MultiChoice will not face any immediate capacity constraints; and (6) eMedia has tendered to make payment of any damages proven by MultiChoice to have been suffered by MultiChoice

[73] Replication Technology Group (PTY) LTD v Gallo Africa Limited{2008] 1 CPLR (CT) para 17

should this interim interdict be granted and the complaint is later dismissed by the Tribunal.

211. On the other hand, MultiChoice argues that requiring it to continue to carry the discontinued channels on its DStv packages would represent a drastic and extreme intrusion on MultiChoice's commercial autonomy and contractual freedom, with far-reaching effects on its business strategy, its competitive relationship with eMedia, and its competitive positioning generally. Further, it argues that this would also encroach on MultiChoice's right to freedom of expression under s 16(1) of the Constitution, which entitles it to decide for itself what content to include in its DStv packages, and its constitutional right not to be deprived of property under s 25(1) of the Constitution, inasmuch as it would limit the resources available to MultiChoice to expend on its chosen content for its DStv packages.

212. MultiChoice argues that eMedia's tender to '*make payment of any damages proven by MultiChoice to have been suffered by MultiChoice'* should this interim interdict be granted, and the complaint is later dismissed by the Tribunal is meaningless. It states that it is meaningless because eMedia points out in respect of its own alleged harm, which it says it would never be able to quantify, '*[g]iven the volatility in the market currently, it will be impossible to fully quantify what eMedia's advertising revenue would have been had MultiChoice not refused to broadcast the foreclosed channels*'. Lastly, MultiChoice contends that harm that the interim relief would cause to MultiChoice significantly outweighs any harm that could be occasioned to eMedia.

Our Assessment

213. The CAC in *BCX* clarified the balance of convenience consideration:

> *"[T]he balance of convenience in s49C is a direct borrowing from the common law. It weighs the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is granted. This requires an equitable reckoning as to <u>who bears the greater burden of error.</u> If the interim order is granted and no case is*

ultimately established to prove the alleged prohibited practice, what prejudice will have been suffered by the respondent, and how might that prejudice be mitigated? So too, if the interim order is refused and the prohibited practice is ultimately proven, what prejudice will the applicant suffer in the interim. Here too, the currency of prejudice is reckoned by recourse to the consequences for the competitive positioning of the parties in the market. A respondent that is required to desist from conduct that gives it a legitimate competitive advantage suffers prejudice. An applicant that is required to endure an unlawful competitive disadvantage also suffers prejudice. How to weigh prejudice in the balance is a difficult task."[74] (our emphasis)

214. MultiChoice urges the Tribunal not to interfere with its "*competitive advantage*" that stems from its commercial autonomy, its contractual freedom, its constitution rights. , this is balanced against eMedia that would, without the interdict, suffer a commercial harm from being unable to supply content to MultiChoice and that content not being carried on the DStv platform.

215. As indicated by the CAC in BCX, a party's private rights and constitutional are not without limitation. Where the exercise of these rights affects the state of competition in the market, intervention through interim relief may be warranted. Although eMedia enjoys the same constitutional rights as those asserted by Multichoice, eMedia has not demonstrated harm to competition. For the reasons discussed, based on the evidence before us in this application we found no prima facie basis to conclude that the non-renewal of the agreement concerning the discontinued channels will result in foreclosure or consumer harm.

216. We note that ICASA has determined, in the Must-Carry Regulations that the regulations apply to the public broadcast service provider in order to achieve universal access. It specifically determined that this obligation does not apply to eMedia. Granting interim relief, without the benefit of a full investigation and implications of the regulations on the state of competitiveness in the market as

[74] *BCX* at para 22.

whole, may unduly alter the state of competition in the market in favour of eMedia to the exclusion of other competitors in the market, such as StarSat. This would not be consistent with the Tribunal's powers to intervene to prevent damage to competition in the market as a whole, rather than damage to a competitor.

Costs

217. Both parties sought costs against each other.

218. Section 57(1) provides that each party participating in a hearing must bear its own costs.

219. Section 57(2) provides the Tribunal with power to award costs against an unsuccessful party in a complaint referral. [75]

220. While MultiChoice is the successful party in these proceedings we have decided not to award costs in its favour. In BCX the CAC considered whether it was competent to award costs in interim relief proceedings since such an award is a final order. While it did not exclude this competence, it held that costs should be determined after the conclusion of the hearing on the merits if the complaint is referred to the Tribunal (by the Commission, or the complainant in the case of non-referral by the Commission). The CAC concluded that a costs order was not warranted because no reasons were given for the cost order.

221. We have decided not to award costs in favour of Multichoice. This is because of the large number of disputed issues between the parties including the issue of MultiChoice's capacity. As noted above, MultiChoice has not been transparent in dealing with capacity on its bandwidth. Its version on capacity evolved over the period of the proceedings. Initially it suggested that it was capacity constrained, which later changed to being partially capacity constrained until on the eve of the hearing, changed to having certain capacity. MultiChoice's explanation is that it had not been called upon to deal with its

[75] *BCX* at para 33.

overall capacity issues and it merely responded to eMedia's understanding of MultiChoice's capacity on the papers before us.

222. We do not accept the latter explanation provided. Multichoice was advised by experienced competition lawyers and should have appreciated the importance of the Tribunal's truth-seeking functions and played open cards with the Tribunal. We view the lack of transparency with a dim light, and according have decided to not award costs regardless of the ultimate outcome of the complaint referral if the matter is referred.

Conclusion

223. In light of the evidence before us, we found that eMedia has not made out a *prima facie* case of a prohibited practice. Furthermore, eMedia's evidence on irreparable harm, in our view, largely related to evidence of financial harm to itself but insufficient as evidence of competitive harm in the relevant market. Accordingly, in the exercise of our discretion we concluded that it was not reasonable and just to grant the interim relief in favour of eMedia.

224. For the reasons above, there was no cost order.

Ms Mondo Mazwai

Prof Liberty Mncube

Mr Enver Daniels concurring

01 July 2022
Date

Tribunal case managers:	Camilla Mathonsi and Sinethemba Mbeki
For the Applicant:	Adv Tembeka Ngcukaitobi SC, Adv Max du Plessis SC, Adv Gavin Marriott and Adv Sarah Pudifin-Jones instructed by Nortons Inc.
For the First Respondent:	Adv Michelle Norton SC, Adv Jerome Wilson SC and Adv Michael Mbikiwa instructed by Webber Wentzel
For the Second Respondent:	Hugh Dlamini, Nelly Sakata, and Luke Rennie