IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: IR165Nov20

In the matter between:

GOVCHAT PROPRIETARY LIMITED	First Applicant
HASHTAG LETSTALK PROPRIETARY LIMITED	Second Applicant
and	
FACEBOOK INC.	First Respondent
WHATSAPP INC.	Second Respondent
FACEBOOK SOUTH AFRICA PROPRIETARY LIMITED	Third Respondent

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A INTRODUCTION

(i) GovChat and its services

1. The applicants have developed a digital platform that facilitates communication between government and citizens (the '**GovChat platform**').[1] The GovChat platform was conceptualized and developed as a way for South Africans (and particularly the millions living in poverty and in other conditions which demean their dignity) to engage with government directly in an attempt to ensure that their rights, including access to adequate health care and social security, are protected.[2] The need for such an engagement, and for a free and accessible way to communicate with and receive messages from government, has become all the more pressing in the light of the COVID-19 pandemic and the health and social problems which it has wrought. It would not be an overstatement to say that the GovChat platform has become indispensable both for the countless South Africans whose already tough existence is plagued by poor service delivery and inadequate social security provisions, and the South African government, which is constitutionally obliged to ensure that the rights guaranteed in the Constitution are respected, protected and promoted.

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[1] Record: FA, p 12, para 19 *et seq*.

[2] As the Constitutional Court noted in *Soobramoney v Minister of Health (Kwazulu-Natal*) 1998 (1) SA 765 (CC) para 8: "*We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.*"

2. The GovChat platform operates via WhatsApp, a popular freeware digital messaging service operated by the second respondent ('**WhatsApp**').[3] WhatsApp is owned and controlled by the first respondent ('**Facebook**'), the largest social media company in the world.[4] WhatsApp is the most widely used smartphone messenger application in South Africa.[5]

3. As mentioned, GovChat's platform presently fulfills a vital role in connecting the government with citizens in relation to a range of matters. It began as a service which allowed government and citizens to communicate directly to improve basic service delivery.[6] However, with the onset of the COVID-19 pandemic, the focus of the GovChat platform shifted to assist government. The GovChat platform presently assists government with COVID-19 education and awareness, symptom tracking, the provision of test results, and the processing of applications for urgent social relief grants.[7]

4. The success of the GovChat platform in assisting government to connect with citizens during the first "wave" of the COVID-19 pandemic in South Africa was well documented in the mainstream media during the period between March 2020 and July 2020.[8]

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[3] Record: FA, p 9, paras 6-7.

[4] Record: FA, p 9, paras 5-6; and FTC complaint ("RA7"), p 780, para 1; p 785, para 17 *et seq.* See too AA, p 517, para 6. The FTC notes that Facebook has approximately 3 billion users worldwide, and in the past year generated revenues in excess of 70 billion United States Dollars.

[5] Record: FA, p 13, para 20. (Not disputed in answer.)

[6] Record: FA, pp 12, para 19 *et seq.*

[7] Record: FA, p 18, para 36.

[8] See in this regard, Record: FA, pp 20-21, paras 40.1 to 40.5. *Daily Maverick*, *Business Da*y and *IT Web* (four times), all published articles detailing the successes of GovChat's service.

5. The GovChat platform received more than 2 million applications for social relief grants within the first week of launching this service. Since then, it has assisted approximately 5.5 million citizens, and has to date processed approximately 270 million messages.[9] It currently facilitates between 400 000 and 600 000 messages a day between government and citizens.[10] This has won it praise not only in the mainstream media, but also from the Deputy Consul-General at the United States Consulate in Cape Town who lauded its "key role" in supporting government and citizens during the pandemic via a US-based platform – i.e., via WhatsApp.[11]

(ii) <u>The WhatsApp Business API, and Facebook's control thereof</u>

6. In order to render these services, the GovChat platform relies on access to WhatsApp's "Business API". The Business API (application programming interface) provides third parties such as the first applicant ('**GovChat**') with a "bridge" to access WhatsApp's network.[12] In short, the WhatsApp Business API allows for the "onboarding" of third parties such as GovChat onto WhatsApp's

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[9] Record: FA, p 21, para 39. (As at the time of the founding affidavit, over 250 million messages had been processed.)

[10] Record: FA, p 54, para 91.2.

[11] The Deputy Consul-General, Mr Stevens, *inter alia* stated the following regarding GovChat (in an email to Facebook's Mr Supple in August 2020) [Record: "FA12", pp 124-125]: *"The impact of GovChat on South African citizens is significant. With approximately 5.5 million users and over 200 million messages, it is allowing citizens to advocate directly for service delivery improvements and forcing more transparency into South Africa's civil society and governance. During the COVID-19 pandemic, GovChat has played a key role in supporting citizens in locating COVID-19 testing facilities and receive[ing] their test results. GovChat also digitized the South Africa Social Security Agency's frequently asked questions about COVID-19 relief grants to share information and alleviate demand on the Agency's call center. With the South African Human Rights Commission, GovChat's platform allows students, teachers, and parents to share information about schools' preparedness to resume in-person learning".* Mr Stevens also added that: "*We are equally proud that GovChat uses and showcases U.S. technology platforms like WhatsApp. The contribution of U.S. government investment and a U.S. private sector platform are critical to GovChat's operations*".

[12] Record: AA, p 523, para 36 read with annexure "BES2" at p 559.

messaging network to enable those third parties to render downstream services to WhatsApp users.[13] But for access to WhatsApp's network, these services would otherwise not be capable of being rendered at all (or at the very least not to a degree of scale that would make them viable).[14]

7. Facebook and WhatsApp control access to the Business API in two ways. First, they do so through a web of different terms, conditions and policies (contained in different documents which are unilaterally updated by Facebook from time to time and without notice[15]). Second, they control access by requiring third parties such as the applicants to deal only through accredited "Business Service Providers" (referred to as "**BSPs**") (themselves subject to constantly changing and onerous terms[16]), which contract with WhatsApp and/or Facebook, and act as gatekeepers to WhatsApp's Business API.[17]

(iii) <u>Recent U.S. anti-trust suits against Facebook</u>

8. Facebook's control over the WhatsApp platform (and in particular the manner in which it can and does foreclose access to this and other platforms which it controls) is presently the subject of landmark anti-trust enforcement proceedings launched in the United States on 9 December 2020.[18]

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[13] Ibid. See too Record: FA, p 14, para 22.

[14] Record: SFA, p 288, paras 102-103.

[15] Record: RA, pp 693-695, paras 31-34. The various terms and policies, in their current iterations, are attached to the respondents' answering papers at Record: pp 560 to 590 ("BES4" to "BES10").

[16] Record: RA, p 695, para 35; pp 758-764 ("RA5").

[17] Record: AA, p 523, para 36.

[18] Record: RA, pp 727-728, para 110. The FTC complaint is at Record: pp 780-832 ("RA7"); the complaint by the US States is at Record: pp 833-908 ("RA8").

9. The two anti-trust suits against Facebook in the United States have been brought by the Department of Justice / Federal Trade Commission and the Attorneys General of nearly every state in the nation.[19] It has *inter alia* been contended in those complaints that Facebook's actions form part of a pattern of troubling, illegal and anti-competitive behaviour by an overwhelmingly dominant firm, which includes buying, bullying or killing potential rivals or perceived future competitors, in case these new emerging entities siphon users, and thus also profits, away from Facebook's core social service. The complaints in those two American anti-trust suits (which are apparently the result of eighteen months of investigation) are very instructive for present purposes. They cite numerous examples of conduct that is uncannily similar to what the respondents have been doing to GovChat, and also refer to threats by Mr Zuckerberg (who is the Founder, Chairman and Chief Executive Officer of Facebook) to quash perceived competitors.[20] The applicants' pending complaint – which was brought before those U.S. suits were instituted and without knowledge of the allegations which would be made therein – is thus fortified by the anti-trust complaints against Facebook in the U.S.A.[21]

10. Those U.S. anti-trust suits detail, for example, a pattern of conduct and deliberate strategies that are labelled: (a) "*buy or bury*" and; (b) open first–closed later. The first strategy is self-explanatory. The latter approach refers to how Facebook first opened its platform to developers so that Facebook's user

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[19] Ibid.

[20] See, for example, the US States' complaint at Record: p 838, para 4; p 860, para 98 *et seq*; p 841, para 14 *et seq*.

[21] Record: RA, p 683, para 11.2.1.

base would grow and users would engage more deeply on Facebook by using third party services; but then later, when some of those third-party services appeared to present competitive threats to Facebook's monopoly, changed its practices and policies to close the application programming interfaces and either limit or remove the third party's access to the Facebook platform.[22] That has obvious resonance in the present context.[23]

11. In the Federal Trade Commission ('**FTC**') proceedings, it is alleged that Facebook acquired WhatsApp[24] to neutralize it as a competitive threat (WhatsApp having been identified globally as a highly popular and widely used messaging platform) and that it has engaged in a *"course of anticompetitive conduct spanning years"* which is alleged to have taken the form *inter alia* of the *"the imposition and enforcement of anticompetitive conditions on access to APIs in order to suppress and deter competitive threats"*.[25] The FTC also charges that Facebook has abused its dominance by, among other things, enforcing *"anticompetitive conditions by terminating access to valuable APIs [which] hinders and prevents promising apps from evolving into competitors that could threaten Facebook's personal social networking monopoly".*[26]

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[22] Record: FTC complaint, p 841, para 14 *et seq*.

[23] Record: RA, pp 683-684, para 11.2.2.

[24] The FTC states as follows as regards WhatsApp: "*Launched in November 2009, WhatsApp's distinctively strong user experience and top-grade privacy protection had fueled stellar growth. By February 2014, WhatsApp had approximately 450 million monthly active users worldwide and was gaining users at a rate of one million per day, placing it "on a path to connect 1 billion people*." [Record: FTC complaint, p 813, para 113]

[25] Record: FTC complaint, p 800, para 71c.

[26] Record: FTC complaint, p 787, para 26.

(iv) <u>Overview of the interim relief application</u>

12. At the heart of the present application is Facebook's threat to "offboard" the GovChat platform from WhatsApp's Business API – thereby immediately extinguishing GovChat's ability to render services to government and citizens at the height of the second wave of the Covid-19 pandemic in South Africa, and effectively forcing the applicants out of business.[27]

13. It was this threat which caused the applicants to launch the present application in terms of section 49C of the Competition Act, 89 of 1998 ('**the Act**') to maintain the status quo by temporarily restraining Facebook and WhatsApp from terminating GovChat's access to WhatsApp's Business API pending the determination of a complaint submitted to the Competition Commission ('**the Commission**') or for a period of 6 months, whichever occurs first.[28] A complaint has been duly lodged with the Commission for investigation.[29]

14. It is now well established that the Competition Tribunal ('**the Tribunal**') is empowered in terms of section 49C of the Act to grant interim relief of this nature where it is "*reasonable and just to do so*" having regard to the following three factors which must be weighed together:[30] (a) whether there is a *prima facie*

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[27] Record: SFA, p 51, para 86.16.

[28] Record: NOM, p 2, para 2.

[29] Record: pp 60-86 ("FA1"). (The complaint was lodged on 20 November 2020, as the CC1 Form indicates.)

[30] Section 49C(2)(b) of the Act reads as follows:

"*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 harm to the applicant; and

(iii) the balance of convenience."

case of a contravention of the Act;[31] (b) whether there is a reasonable apprehension of irreparable harm to competition; and (c) whether the balance of convenience favours the granting of interim relief.[32]

15. It is important to emphasize that, in cases for interim relief, the Tribunal's role differs from that of an ordinary High Court. The Competition Appeal Court ('**CAC**') has held that, unlike a common law court, which grants relief to the private litigant, the Tribunal grants relief that is in the public, not private interest.[33]

16. In this case there is no real disputation by the respondents that the offboarding of the GovChat platform from WhatsApp's Business API will cause irreparable harm, both to the applicants and to the users of the GovChat platform. The respondents have merely devoted four paragraphs, and less than a page, to this issue, at the end of their answering affidavit.[34] The vast majority of the applicants' allegations on this score have thus been left unaddressed and uncontroverted.

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[31] Section 49C(3) of the Act provides that the "*standard of proof*" will be the same as in a High Court interim interdict application, and in such High Court applications, a *prima facie* right, or *prima facie* prospects of success, will suffice.

[32] See, for example, the Tribunal's decision in *York Timbers Ltd v South African Forestry Company* Ltd 15/IR/Feb01 from para 38. See, too, *National Association of Pharmaceutical Wholesalers v Glaxo Wellcome (Pty) Ltd* 68/IR/Jun00 par 147 (regarding the requirement to demonstrate a reasonable apprehension of harm); and *South African Raisins (Pty) Ltd v SAD Holdings Ltd* 04/IR/Oct/1999 at 4 (regarding balance of convenience, and that where the applicant may lose its business the balance of convenience will generally be in its favour).

[33] *Glaxo Wellcome (Pty) Ltd & Others v Terblanche NO & Others* (03/CAC/Oct00) [2001] ZACAC 2 (5 September 2001). See too: *Glaxo Wellcome (Pty) Ltd v Terblanche NO* 03/CAC/Oct00.

[34] Record: AA, paras 172-175, p552. See Record: RA, p 680, para 10.

17. The respondents' avoidance of that key issue is both telling and unsurprising. For harm to the applicants, as well as the public at large, is manifest. The applicants will be forced to exit the market having spent in excess of R50 million developing the technology behind the GovChat platform[35], and the public who use GovChat's platform, and who rely on it for assistance (both for distress grants and COVID-19 related information), will be deprived of access to these critical services during a period of resurgence of COVID-19 and fresh "lockdowns".[36] If the GovChat platform is offboarded, consumers will be deprived of the benefits of the GovChat platform operating in the market as it will no longer be able to compete in the market for the provision of these services.[37] Simply put, an important service provider during a pandemic that has caused incalculable economic and physical hardship will be eliminated from the market, thereby limiting the ability of users to access indispensable social services and health data. Competition harm, which is contrary to the public interest, is self-evidently established.

18. The respondents' only real response to the clear irreparable harm that will result is to contend that the prejudice and harm arising from the offboarding of the

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[35] SFA, p 251, para 17. Not only is there no viable alternative to WhatsApp which allows communication between government and citizens in anything approaching the same manner and scale as at present, but GovChat has been designed to interact with citizen users through a WhatsApp API [Record: RA, pp 680-681, paras 10.2-10.3].

[36] The applicants set out in detail the irreparable harm that will result if the GovChat platform is offboarded at, for example, Record: FA, pp 54-56, paras 91.1-91.6.

[37] The applicants have explained in various places in the founding papers that, if the GovChat platform is offboarded from the WhatsApp Business API, the applicants will be forced to exit the market given the absence of any other viable messaging platform. See, for example, Record: FA, p 51, para 86.16; SFA, p 84, para 8.16.

GovChat platform is *"entirely of [the applicants'] own making"*, a contention which has no anchor in the evidence.[38]

19. There is similarly no real disputation that the respondents will suffer little to no prejudice if the *status quo* is preserved pending the outcome of the Commission's complaint. There are no financial implications for the respondents (the applicants tender to continue to pay for access to the WhatsApp Business API as before), and the respondents raise no other credible reasons why GovChat should not be permitted to continue accessing the WhatsApp Business API while the Commission undertakes its investigation.

20. The respondents raised vague murmurings for the first time in their answering affidavit about not having insight into the applicants' *"data policies"*, without raising any specific concerns in this regard. The applicants have in any event addressed the issue of data security comprehensively in reply,[39] and put paid to any suggestion that the applicants have reason for genuine concern. The respondents also complain in their answering affidavit that they are prejudiced by in effect being ordered to grant a "compulsory license" to the applicants to access WhatsApp.[40] However, it is not explained how the preservation of interim access to the WhatsApp Business API on the same commercial terms amounts to the ordering of a prejudicial "compulsory license" that would not be competent or indeed appropriate relief in the circumstances.

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[38] AA, p 544, para 126.

[39] Record: RA, pp 719-722, paras 87-92.

[40] Record: AA, p 553, para 181.

21. The case therefore ultimately turns on whether the applicants have demonstrated that there is *prima facie* evidence that the respondents' proposed (and threatened) conduct – namely offboarding the GovChat platform from WhatsApp's Business API and thereby foreclosing the applicants from the market – contravenes the provisions of sections 8(1)(b), 8(1)(d)(ii) and/or 8(1)(c) of the Act.

22. It is trite that the Tribunal approaches the enquiry into whether there has *prima facie* been unlawful activity in the same way as the High Court deals with the *prima facie* right requirement in interim interdicts.[41] The Tribunal (like the High Court) thus takes the facts alleged by the applicants, together with the facts alleged by the respondents that the applicants cannot dispute, and considers whether having regard to the inherent probabilities, the applicants should on those facts establish the existence of a prohibited practice at a hearing into the complaint referral. In other words, the Tribunal does *not* require the applicants to establish a contravention of the Act on a balance of probabilities. It merely requires *prima facie* evidence of a contravention, which may be open to some (but not serious) doubt.[42]

23. It should also be emphasized that the Tribunal does not require proof of all three requirements in section 49C(2) in isolation but considers them holistically.[43] In

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[41] As regards the High Court's approach to the "*prima facie* right" criterion, see e.g. the much-cited decision in *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others* 2001 (3) SA 344 (N) at 353H-I.

[42] See *York Timbers Limited v South African Forestry Company Limited* (15/IR/Feb01) [2001] ZACT 19 (9 May 2001) from para 62 et seq.

[43] *Natal Wholesale Chemists (Pty) Ltd v Astra Pharmaceuticals (Pty) Ltd and Others* (98/IR/Dec00 (March 2001); *York Timbers Ltd v South African Forestry Company* (15/IR/Feb01) at 13; *Anchor Zedo Outdoor CC v Passenger Rail Agency of South Africa* (017616) para 16.

Natal Association of Pharmaceutical Wholesalers the Tribunal held, for example, that *"[i]n this scheme, a strong showing on some factors – say harm and the balance of convenience – may conceivably counterbalance a poor showing on another factor, say the evidence relating to the alleged restrictive practice".*[44]

24. We submit that the applicants have made out at least a *prima facie* case that Facebook and/or WhatsApp has contravened one or more provisions of the Act. When weighed together with requirements to demonstrate irreparable harm and that the balance of convenience favours the relief sought, the applicants are entitled to an order in terms of section 49C of the Act.

25. Before turning to deal in greater detail with the relevant factual background and the contraventions of the Act, we make certain preliminary observations about the respondents' answering affidavit which we submit are relevant to the manner in which the Tribunal determines this application (and which have particular bearing on whether it can be said that *prima facie* the applicants have established the existence of a contravention of the Act).

B THE RESPONDENTS' ANSWERING AFFIDAVIT

26. As noted in the applicants' replying affidavit,[45] what is immediately striking about the respondents' answering affidavit is how many allegations in the founding

[44] Reported on SAFLII as *Pharmaceutical Wholesalers and Glaxo Wellcome (2)* (68/IR/JUN00) [2003] ZACT 37 (18 June 2003) at para 145. See, too, the Tribunal's *Handbook of Case Law* (Carrim and Ndlovu) Version 1: 2019/2020.

[45] Record: RA, p 677, para 7.

papers are not addressed at all, and thus stand unchallenged. The allegations which have been left uncontroverted (and even unqualified) include a number of allegations which are fundamental to the applicants' case. We have already adverted to the absence of any real disputation on the question of "serious or irreparable harm". The "balance of convenience" criterion is also barely touched on in the answering affidavit.[46] Other particularly notable examples of the respondents' avoidance of important allegations are set out below.

27. **First**, although the respondents criticise the applicants for defining the market too narrowly and contending that WhatsApp is a dominant firm for purposes of section 7 of the Act, they do not dispute allegations such as the following:

27.1. Facebook is overwhelmingly dominant in the provision of social media and messaging services globally, with billions of active users worldwide.[47]

27.2. WhatsApp is overwhelmingly the messaging application of choice in South Africa – with 58% of all mobile phone users making use of the application as of February 2020 and 89% of all internet users in South Africa between the ages of 16 and 64 reporting having used WhatsApp in January 2020.[48] WhatsApp is accordingly the most widely used

[46] It is merely cursorily addressed in a few paragraphs at the end of the affidavit – Record: AA pp 552-553, paras 176-182.

[47] Record: FA, p 44, para 85.1. This is not disputed or even addressed in the respondents' answering affidavit.

[48] These facts are set out in the applicants' founding papers at Record: FA, p 13, para 20; & p 45, paras 85.2 and 85.3; SFA, pp 286-287, paras 101.1 and 101.2, and not addressed in the respondents' answering affidavit. Also not addressed is the allegation that "*competitor messenger apps such as WeChat [have] only 15% usage*" (FA, p 45, para 85.2).

smartphone messaging application in South Africa, and thus necessarily has a (more than) sufficient share of the market for smartphone messaging applications for WhatsApp to be considered dominant for purposes of section 7 of the Act.

27.3. WhatsApp has a number of significant competitive advantages over rival messaging applications in the South African context which give it market power, namely that: (a) 80% of new Android devices come pre-installed with WhatsApp; (b) poorer consumers would not use data to "switch" to alternative downloadable messaging applications, and (c) cheaper smartphones, which have limited storage capacity, are generally not able to accommodate more than one messaging application and it is highly unlikely that consumers would delete WhatsApp and use their data to download a competitor application.[49]

28. These allegations, which were highly significant for the dominance analysis, were squarely raised in the applicants' founding papers, yet were not dealt with, let alone seriously disputed, by the respondents or by RBB Economics in their report which accompanied the respondents' answering affidavit.[50]

29. Related to this failure to dispute WhatsApp's overwhelming reach as a smartphone messaging application in South Africa (and indeed globally) is the fact that the respondents (and RBB Economics) have essentially contented

[49] These facts are set out in the applicants' founding papers at Record: FA p 48 para 86.5; SFA, p 287, paras 101.3 to 101.5 and are also not addressed in the respondents' answering affidavit.

[50] Record: pp 657-672.

themselves, when attempting to suggest that WhatsApp is not dominant for purposes of the Act (and does not control an essential facility), with alleging that this can be inferred from the presence of other messaging applications in the market, including the likes of Skype, Telegram, Houseparty, WeChat, Zoom and others which are downloadable via the Apple or Google Android platforms.[51]

30. Simply listing significantly smaller rival messaging applications cannot, however, assist the respondents. For the respondents do not explain how those applications are in fact substitutes for WhatsApp and the WhatsApp Business API in terms of their penetration or, importantly, the technology which allows third parties such as GovChat to offer sophisticated (and private) chatbots which facilitate *inter alia* the processing of downstream services such as receiving social grant applications.

31. **Second**, the respondents notably do not dispute the allegations contained in the founding papers that representatives of Facebook South Africa arranged meetings with government representatives (also attended by representatives of Facebook such as Mr Supple), including after the launch of this application, and that: (i) during these meetings they advised government representatives that the GovChat platform would be "offboarded" from WhatsApp, while failing to disclose that GovChat had launched this application challenging Facebook's

[51] Record: AA, pp 520-521, para 25; p 546, para 132; RBB report at pp 667-668.

conduct; and (ii) they did so in an attempt to get government to deal directly with Facebook to the exclusion of the applicants.[52]

32. Nor do the respondents deal with the applicants' assertion that it was only when GovChat recently emerged as a major service provider to government (and after favourable media exposure highlighting its successes) that Facebook sought to restrict GovChat and ultimately offboard it from WhatsApp, while at the same time seeking to meet on various occasions (and seemingly with great haste) with government representatives to persuade them to deal directly with Facebook.

33. **Third**, the respondents do not address, or thus dispute, the allegations in the founding papers[53] that Facebook itself has ambitions to render payment processing services in future via WhatsApp (as it is doing in other emerging markets such as Brazil and India), and that it has ambitions to *inter alia* use WhatsApp to distribute payments on behalf of government – thereby potentially placing it in competition with the GovChat platform.

34. **Fourth**, the respondents – despite being expressly invited to do so[54] – chose not to take the Tribunal into their confidence and disclose the nature of Facebook's commercial relationship with Praekelt Consulting (Pty) Ltd ('**Praekelt**'), a BSP that was instrumental in onboarding the GovChat platform

[52] The applicants raised these issues squarely in the founding papers. See Record: SFA, p 260, paras 42-43; SFA (2), pp 430-435, paras 10-16. The respondents do not deal with these allegations in their answering affidavit.

[53] SFA, pp 270-278, paras 65-83.

[54] Record: SFA, p 279, para 87.

onto the WhatsApp Business API, or to dispute various allegations relating to Praekelt. Instead of taking up the applicants' invitation, the respondents elected simply to assert that there is not an *"inappropriate"* commercial relationship between Facebook and Praekelt[55], without addressing any of the allegations, raised squarely in the founding papers, and thus without for example disputing that:

34.1. Praekelt also offers government messaging services via WhatsApp's Business API (and is thus a competitor or at very least a potential competitor to GovChat);[56]

34.2. Facebook had a hand in Praekelt's proposal to the Presidency that a WhatsApp line developed and administered by Praekelt be used to facilitate the implementation of the Early Childhood Development stimulus package (a R500,000,000 package administered by the Department of Social Development);[57] and

34.3. Praekelt would be permitted by Facebook to utilise MomConnect (an initiative of the Department of Health – i.e., a different government department) to operate the WhatsApp service,[58] despite Facebook now

[55] Record: AA, p 520, para 21.

[56] Record: SFA, pp 252-280, paras 19-89. In these paragraphs the applicants deal extensively with the competitive overlaps between them and Praekelt / Facebook. The respondents elected not to engage with these allegations at all.

[57] Record: SFA, p 259, para 38.

[58] Record: SFA, p 257-258, para 37 (including sub-paragraphs).

claiming that each government department is required to have its own WhatsApp Business Account.[59]

35. What is more, even the little that is said about Praekelt is effectively unsubstantiated hearsay evidence.

C RELEVANT BACKGROUND FACTS

(i) GovChat and #LetsTalk

36. The first applicant (GovChat) developed an initial iteration of the GovChat platform during 2018.[60] As noted, it did so in conjunction Praekelt, a BSP accredited by Facebook as a gatekeeper for the WhatsApp Business API.

37. Praekelt was contracted by GovChat to develop a "chatbot" to operate via WhatsApp that could be used facilitate communications between government and citizens around service delivery issues, such as, for example, water and electricity faults, potholes, and the like.[61] Praekelt was also contracted to "onboard" the GovChat platform onto WhatsApp's Business API, which Praekelt was able to do given its status as a Facebook BSP.[62]

38. The respondents contend for the first time in their answering affidavit (despite taking issue with the GovChat platform operating on WhatsApp's Business API as far back as 31 July 2020) that GovChat operated on WhatsApp via Praekelt

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[59] See, specifically, Record: SFA, p 258, para 37.4.

[60] Record: FA, p 13, para 21.

[61] Record: FA, pp 13-14, paras 21-22

[62] Record: FA, p 14, para 22.

on a *"limited test account"*.[63] This allegation (which is made on various occasions in the answering affidavit, though never substantiated with any documentary evidence[64]) is seemingly deployed by the respondents to bolster a central pillar of their defence: that GovChat was not ever truly "onboarded" onto WhatsApp.

39. As noted, the respondent's new allegation that GovChat supposedly only had a "test account" is not however supported by a single contemporaneous document (or thus by even a shred of contemporaneous documentary evidence). It is also undermined by statements made by Mr Gustav Praekelt, who on 16 January 2019 (four months after GovChat launched its service on WhatsApp's Business API) wrote to Mr Eldrid Jordaan (GovChat's CEO) and Ms Tandi Haslam (a director of the second applicant) and stated that "*[i]t was great to talk through the future vision of the GovChat platform and getting it commercially launched*".[65] It is highly improbable that Mr Praekelt would have made such remarks about the "commercial launch" of GovChat's platform if it was indeed merely operating on a "test account" with a limited lifespan. It can also confidently be accepted that GovChat was not advised at the time that its access was supposedly only provisional: for it is inconceivable that GovChat would have spent in excess of R50 million that it received in funding to develop the GovChat platform had it been advised by the respondents or Praekelt that

[63] Record: AA, p 537, para 96.

[64] See, for example: Record: AA, p 529, para 62; p 532, para 73; p 573, para 96; p 538, para 101.

[65] Record: RA, p 690, para 23; p 752 ("RA3").

its access to the WhatsApp Business API had been granted on a limited test basis.[66]

40. Praekelt in fact advised GovChat of something different, at the end of 2018: namely, that WhatsApp (Facebook) had *"clamped down"* on Praekelt servicing clients other than those engaged in *"strictly non-profit work"* and that GovChat's platform would accordingly have to be migrated to a different BSP (Nexmo).[67] (Notably, no mention was made of any "test account". Nor was there any suggestion that, after GovChat's WhatsApp account was moved to the different BSP (Nexmo), the service or offerings would change in any way.). Mr Jordaan, responded on behalf of GovChat, indicating that GovChat had commenced the process of registering to become an NPO (thereby potentially removing the obstacle that Facebook had put up to Praekelt servicing GovChat).[68] He asked that this development be considered by Praekelt but received no response.[69]

41. The respondents seek to make something of the fact that GovChat switched from Praekelt to a different BSP. Mr Supple states in the answering affidavit that, although he is *"not fully privy to the arrangements between Praekelt and GovChat"*, he *"understands"* that GovChat *"did not promptly migrate their account but instead engaged in months of delay"*, before GovChat's account with Praekelt was "*disconnected on 5 September 2019*".[70] Mr Supple does not

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[66] Record: SFA, p 251, para 17; RA, p 690, para 24.

[67] Record: RA, p 691 para 26; pp 756-757 ("RA4") (email from Praekelt's Mr Morgan Collett dated 10 December 2018 to GovChat's Mr Eldrid Jordaan).

[68] Record: RA, p 691, para 26, pp 755-756 ("RA4") (email from Mr Eldrid Jordaan to Renzo at Praekelt dated 20 February 2019).

[69] Record: RA, p 691, para 26, read with Mr Jordaan's email dated 20 February 2019 p 755.

[70] Record: AA, p 529, para 62.

identify the source of his *"understanding"* and does not attach any documentation to support his allegations, and there is also no confirmatory affidavit filed on behalf of anyone employed at Praekelt. Mr Supple's allegations in this regard thus constitute impermissible hearsay. As confirmed by Mr Jordaan, who was privy to GovChat's dealings with Praekelt and can thus give direct (and admissible) evidence on this score, the reality is quite different. What actually happened was that GovChat elected to terminate its relationship with Praekelt in July 2019, and transferred its account to InfoBip in that month.[71] It did so because of concerns that its development partner, Synthesis Software Solutions (Pty) Ltd ('**Synthesis**'), had about the infrastructure that Praekelt had developed for GovChat. Synthesis established that the foundation, architecture and functionality of the "back-end" of the GovChat platform, which had been developed by Praekelt, was questionable.[72] GovChat accordingly appointed Synthesis to take over this development function.[73]

42. GovChat thereafter applied in August 2019 for a WhatsApp Business Account ('**WABA**') via two BSPs, InfoBip and Clickatell.[74] It applied via two BSPs because the GovChat platform (then being further developed by Synthesis) was still in a development stage, and it was still being established which of the two BSPs were best suited to meet GovChat's needs.[75]

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[71] Record: RA, p 691, para 27 read with the email chain referred to above at p 755 *et seq.* and p 608 *et seq*.

[72] Record: RA, p 712, para 69.

[73] Record: RA, pp 691-692, para 27.

[74] Record: RA, p 711, para 68.

[75] Record: RA, p 712, para 69.

43. The respondents contend that these applications were rejected by Facebook "*on a number of occasions*", allegedly "*for reasons of non-compliance with WhatsApp's terms and requirements*".[76] However, yet again, the respondents do not refer to any contemporaneous documentation in support of this allegation. GovChat maintains that it was never informed of any such rejections.[77] And there is no evidence to suggest that it was. In fact, GovChat had followed up with InfoBip and Clickatell (who dealt directly with Facebook and WhatsApp) and was simply advised that the applications were in a "government queue".[78] GovChat heard nothing further thereafter.[79]

44. In order to keep its public and private sector customers separate (given the complications that can arise from government work), GovChat incorporated the second applicant **(**'**#LetsTalk**'). It was created for purposes of offering the same service to commercial entities as GovChat offers to governments,[80] in a separate, wholly-owned contracting entity.

45. Importantly, this did not mean that #LetsTalk would not operate in the public sector at all. Mr Jordaan confirms that its business model has always been to serve business and the public sector, although its focus was intended to be on commercial entities.[81] The idea behind the incorporation of #LetsTalk was to

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[76] Record: AA, p 518, para 14. See also paras 76, 86, 94 and 152 (pp 532, 534, 536 and 549).

[77] Record: RA, p 711, para 68.

[78] Record: RA, p 711, para 68.

[79] Ibid.

[80] Record: FA, p 16, para 26.

[81] Record: RA, p 713, para 71. Mr Eldrid states that "*[o]ne of the reasons why it was decided that a separate contracting entity should be created was because the name 'GovChat' suggests an entity which is (solely) involved in government-related work. It was consequently deemed more appropriate for a different entity – with a different name – to contract with commercial counterparties*."

duplicate GovChat's technology in order to create a platform that could service not only government institutions, but also corporate, commercial and international bodies.[82] (The name "GovChat" implies a limited purpose.)

46. GovChat and #LetsTalk ultimately selected InfoBip as the preferred BSP to handle the process of onboarding onto WhatsApp's Business API, and InfoBip facilitated the opening of a WABA for #LetsTalk. Contrary to the narrative advanced by the respondents in their answering affidavit, there is no evidence that there was anything untoward about the creation of #LetsTalk, or that GovChat attempted to conceal its existence to covertly access WhatsApp's Business API.[83] The allegation by Mr Supple that the applicants set out to deliberately mislead Facebook about the relationship between #LetsTalk and GovChat – a theme that is fundamental to the respondents' contention that the decision to "offboard" the GovChat platform was justified – is therefore baseless.

47. The respondents' narrative on this score is fatally undermined by *inter alia* the following facts:

    47.1. **First**, both GovChat and #LetsTalk were named parties to an agreement with InfoBip ('**the InfoBip agreement**').[84] The InfoBip agreement includes GovChat as a party (together with #LetsTalk and

[82] Record: RA, p 713, para 72.

[83] See for example Record: AA, para 80, p533, where Mr Supple says he "*subsequently learned*" that #LetsTalk is associated with GovChat.

[84] A copy of which has been provided to the respondents' legal representatives under a confidentiality regime and which will also be provided to the Tribunal on a confidential basis. See Record: RA, p 714, para 76.1.1.

InfoBip) and also records that GovChat (referred to as the "*integrator*") is "*in business with [#LetsTalk] and will be paying INFOBIP for services rendered by INFOBIP to [#LetsTalk]".*

47.2. GovChat understood from interactions with InfoBip that the InfoBip agreement was supplied to Facebook and had been reviewed by Facebook.[85] It was also sent directly by GovChat to Facebook's Mr Ben Supple under cover of a letter of 2 August 2020, which similarly records GovChat's understanding that it would have previously been supplied by InfoBip to Facebook.[86] When the #LetsTalk WABA was approved, it was reasonable for GovChat to infer that Facebook had seen – and approved – a draft of the InfoBip agreement, including what was stated on the first page thereof about the relationship between GovChat and #LetsTalk, and that Facebook was fully aware that GovChat would utilise #LetsTalk's chatbot.

47.3. **Second**, InfoBip, as the BSP and the party responsible for communicating with Facebook on GovChat's and #LetsTalk's behalf, had no difficulty with the relationship between GovChat and #LetsTalk, or the services rendered on behalf of government via #LetsTalk's access to WhatsApp's Business API.

47.4. For example, in the email chain attached to the respondents' answering affidavit as "BES13", InfoBip responds to Mr Bray's query about

[85] Record: RA, p 715, para 76.1.2.

[86] Record: FA, annex "FA6", pp109ff (also AA, annex "BES20", pp608ff).

#LetsTalk by saying that: "*Its an awesome project – Social Grants and Unemployment Funds are serviced through Govt Chat* [*sic*] *that serves millions of people to register and check their status*".[87] InfoBip – which had applied for the #LetsTalk WABA – clearly did not consider that GovChat's involvement was something to hide.[88]

47.5. **Third**, contrary to what the respondents have suggested, there was nothing untoward about the fact that (a) the #LetsTalk WhatsApp account contained a link to GovChat's privacy policy, and (b) a LinkedIn post showed GovChat's logo and not that of #LetsTalk.[89] (Mr Supple baselessly alleges that the #LetsTalk logo had been *"photoshopped"* out.) Neither facet is material, let alone supportive of the respondents' unfounded narrative.

47.5.1. First, as the applicants pointed out in response (and as demonstrated above), there was never any intention to hide the relationship between #LetsTalk and GovChat (the former being a subsidiary of the latter), and the fact that #LetsTalk had a link to the extensive privacy policy of its parent company, GovChat – something which is not unusual for a wholly-owned subsidiary.[90]

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[87] Record: p 595.

[88] Record: RA, p 713, para 73.

[89] Record: AA, p 534, para 86.

[90] Record: RA, p 716, paras 78-80.

47.5.2. Second, there is absolutely no basis for the contention that Mr Jordaan deliberately (through Photoshop) manipulated a LinkedIn post to mislead. The post explicitly identifies GovChat and includes the #LetsTalk logo, something entirely consistent with them operating together (as affiliated companies), and inconsistent with an intention to mislead. Moreover, there was no alteration of a digital image, whether by way of "photoshopping" or otherwise (and it is disturbing that a scurrilous allegation of that kind would be made by Facebook). As Mr Jordaan explained, the number appearing on the post had been saved under the display name "GovChat" (the parent company): hence the name "GovChat" being displayed; while the logo, which like any profile picture on WhatsApp is set by the user itself, featured #LetsTalk as it had provided the chatbot technology.[91]

48. Every aspect of Facebook's thesis is misplaced. It ignores the interposition of InfoBip, which had been fully informed of the relationship between GovChat and #LetsTalk, and had no reason at all to mislead Facebook; it incorrectly proceeds from the premise that GovChat had been informed that its own applications for a WABA had been rejected (and that it thus believed that it would have to attempt to be "onboarded" using subterfuge); and the indicia of an attempt to mislead on which it relies are nothing of the sort, and instead entirely innocent.

[91] Record: RA, p 717, para 82.2.

49. The improved GovChat platform went live on 1 March 2020 via #LetsTalk's WABA.[92] This was shortly before South Africa first entered a hard "lockdown" on 26 March 2020. When South African entered lockdown, #LetsTalk's focus shifted to fulfill COVID-19 related functions in response to the COVID-19 pandemic. It was well positioned to do so given that GovChat had an existing relationship with the Department of Cooperative Governance and Traditional Affairs ('**COGTA**') because it was developing a service for government, primarily for COGTA.

50. GovChat and #LetsTalk then diverted resources to assist the South African government in responding to the crisis. Its responsiveness ultimately resulted in President Ramaphosa announcing #LetsTalk as the exclusive source for COVID-19 test results.[93]

51. The COVID-19 pandemic was unforeseen when #LetsTalk was established, and it was thus not contemplated that this entity would be used for such purposes, and more particularly would be involved in assisting COGTA, the Department of Social Development and the Department of Health during the pandemic. #LetsTalk and GovChat were, however, willing and able to assist when the crisis arose, and have performed invaluable services which Facebook now seeks to discontinue.

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[92] Record: FA, p 18, para 36. See, too, Mr Jordaan's letter to Mr Supple dated 13 August 2020 at p 557.

[93] Record: FA, para 38.1, p19.

(ii) <u>Facebook's threats to off-board the GovChat platform</u>

52. On **<u>31 July 2020</u>**, GovChat received an email from InfoBip advising that Facebook had claimed that GovChat was in breach of WhatsApp's terms of use because, according to Facebook (which would not provide any further detail to InfoBip), GovChat had *inter alia* been "*onboarded under the display name "#LetsTalk" rather than their actual entity name ("GovChat"). This entity does not fall within the current restrictions applicable to government use of our services*".[94] InfoBip was advised that Facebook would terminate access to the WhatsApp Business API less than a week later on 6 August 2020.[95]

53. GovChat responded comprehensively on **<u>2 August 2020</u>**.[96] In this response Mr Jordaan firmly rejected Facebook's assertions that GovChat had been deceitful. He referred to and attached the InfoBip agreement, detailed the history of GovChat and #LetsTalk, and explained the irreparable harm that would result if Facebook were to follow through with its threat to "offboard" the GovChat platform. In addition, Mr Jordaan reiterated that the applicants believed that they were operating within the respondents' terms of use.[97] He concluded by stating that *"if in fact we are operating outside the terms of use parameters, we think it appropriate and fair that we are duly informed of those*

[94] Record: p 107 ("FA5").

[95] Ibid.

[96] Record: FA, p 23, para 43; pp 109-114 ("FA6").

[97] Record: p 113.

parameters, where we have strayed and be given a chance to remedy the problem".[98]

54. Various correspondence was exchanged between GovChat and Facebook between **3 and 5 August 2020**.[99] GovChat was understandably anxious about the imminent threatened offboarding on 6 August 2020 and sought clarity on Facebook's stance.

55. Facebook's Mr Ben Supple responded substantively via email on **6 August 2020** (i.e., the same day as the threatened off-boarding). He stated in the email that the WhatsApp Business API was a *"new, beta project intended for private enterprise clients"*; that Facebook required *"government entities to apply directly to use [WhatsApp's] service"*; and that GovChat had applied for a WABA under a *"new name ("#LetsTalk"), obscuring the fact that the requestor was the same business and business model we had previously rejected"*.[100] Mr Supple advised that the off-boarding date would be suspended until 17 August 2020.[101]

56. These "reasons" had never been previously communicated to the applicants. Moreover, as noted above, the relationship between GovChat and #LetsTalk was explicit in the InfoBip agreement, and GovChat had received no communication that its WABA account applications had been rejected.

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[98] Ibid.

[99] Record: pp 115-118 ("FA7").

[100] Record: p 119 ("FA8").

[101] Ibid.

57. Mr Jordaan thereafter sought to engage with Mr Supple directly. Having been unable to do so, on **13 August 2020** Mr Jordaan addressed a letter to Mr Supple containing further information about the applicants and enclosing relevant documentation.[102]

58. Mr Supple responded via email on **15 August 2020**.[103] He now raised different reasons why the GovChat platform should be off-boarded. He claimed that *"[GovChat's] services violate [WhatsApp's] business terms and product policies in several respects*" and stated that the *"foremost issue"* use was "*the current structure of [GovChat's] messaging services*" through which "*[GovChat] make[s] WA Business messaging available to third parties*". Mr Supple claimed that the GovChat platform contravened WhatsApp's Business Terms of Service, and in particular a "*restriction*" that: *"Except as otherwise permitted by WhatsApp in writing, Company must not directly, indirectly, or through automated or other means: (a) distribute, sell, resell, or rent our Business Services to third parties"*.[104] (It was stated that these terms are "*incorporated into [Facebook's] WhatsApp Business Solution Policy, which are referenced in [GovChat's] contract with InfoBip in the section under WhatsApp*".) Mr Supple also repeated that it was Facebook's position that GovChat's government clients would have to deal directly with Facebook / WhatsApp.[105] He concluded by indicating that Facebook would *"pause enforcement actions"*, and required the applicants to provide a list of information and documents by 31 August 2020,

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[102] Record: pp 126-166 ("FA13").

[103] Record: pp 167-168 ("FA14").

[104] Record: p 167.

[105] Ibid.

including the identities of the applicants' clients, and copies of all contracts which GovChat had concluded with government entities.[106]

59. Following this, the applicants' representatives engaged with Facebook's local and foreign representatives on a number of occasions.

59.1. On **21 August 2020**, Facebook's Mr Bray invited GovChat to apply to become a BSP and enclosed documentation containing the relevant criteria.[107]

59.2. On **25 August 2020**, Mr Jordaan sent a detailed email to Facebook's South African representative, Ms Gongxeka-Seopa, attaching documentation that had been requested by Mr Supple in his email of 15 August 2020 (including GovChat's contracts with its government clients).[108]

59.3. On **3 September 2020**, Synthesis (GovChat's development partner and wholly owned subsidiary of GovChat's largest outside shareholder) applied to Facebook to become a BSP.[109] (GovChat did not ultimately apply to be a BSP itself, given that it was a small business with limited resources and its development partner Synthesis was in any event ideally placed to do so.)[110]

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[106] Record: p 168.

[107] Record: pp 174-176 ("FA17").

[108] Record: pp 177-178 ("FA18").

[109] Record: FA, pp 30-31, para 57 read with pp 188-189 ("FA19").

[110] See Mr Jordaan's letter to Mr Supple at Record: p 639 ("BES34").

59.4. On **4 September 2020**, Facebook summarily rejected Synthesis's application to become a BSP on the basis that it did not *"match the profile"* that Facebook was looking for in a new BSP.[111]

59.5. On **5 October 2020**, Mr Supple responded to Mr Jordaan's email of six weeks prior (i.e., the 25 August 2020 email enclosing the requested information and documentation).[112] Mr Supple thanked Mr Jordaan for "*providing the contract documents we requested relating to your agreements with various government agencies, as well as the documents describing the scope of your services"*. Nowhere in his email did he suggest (as was subsequently alleged in the respondents' answering affidavit[113]) that GovChat had failed to supply Facebook with all of the documentation requested, or that it had sought to mislead, obfuscate and delay.[114] Indeed, his email was to the contrary.

59.6. The gist of Mr Supple's email was that the *"current structure"* of GovChat's business was in conflict with WhatsApp's terms of use which, according to him, require that each government department or entity utilising the GovChat platform would be required to open their own WABA (i.e., deal directly with Facebook / WhatsApp). He also indicated that #LetsTalk would no longer be able to engage in any messaging services on behalf of *"any government agencies or other*

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[111] Record: FA, p 31, para 57; p 190 ("FA20").

[112] Record: FA, pp 31-32, para 59; pp 197-198 ("FA22").

[113] Record: AA, p 540, paras 107-108.

[114] Record: RA, pp 703-705, paras 50-55.

third parties" – i.e., that the GovChat platform could no longer operate via WhatsApp's Business API. He concluded by noting that once the relevant government entities had established a direct relationship with Facebook / WhatsApp, they could continue to work with GovChat as a *"strategic advisor"*. In sum, Mr Supple was clear that the applicants would henceforth be denied access to the WhatsApp Business API.

59.7. A virtual meeting between parties' representatives took place on **6 October 2020**. GovChat indicated during the meeting that it would engage with the relevant government entities about opening their own WABAs.[115] (As pointed out in reply,[116] this commitment from GovChat was not an admission or recognition that GovChat was in breach of WhatsApp's terms, or that WhatsApp was entitled to insist that each government department have its own WABA; but was instead a manifestation of a willingness by GovChat, in good faith, to work with Facebook to make any necessary and appropriate changes to GovChat's operating model in the light of Facebook's complicated regulatory framework and consequently changing terms and requirements. Pragmatism clearly warranted GovChat attempting to ward off Facebook's off-boarding threats, thereby avoiding the disastrous consequences for GovChat and the South African government and its citizens, if possible. It was only later that GovChat realised that Facebook was intent on off-boarding GovChat no matter

[115] Record: FA, p 33, para 60 read with pp 203-204 ("FA23").

[116] Record: RA, pp 701-702, paras 47-49.

what, and that Facebook's real motivation was not to facilitate the ongoing activities of GovChat, but rather to transition, and transfer, GovChat's business to itself and its selected partners.)

59.8. On **13 October 2020**, Mr Jordaan advised Ms Gongxeka-Seopa that GovChat had approached government representatives to schedule meetings to discuss Facebook's requirements.[117]

59.9. On **4 November 2020** (less than a month after Facebook required GovChat to procure that government departments deal directly with Facebook), Mr Supple emailed Mr Jordaan and stated that Facebook had not seen sufficient evidence that GovChat had sought to comply with WhatsApp's terms, and that the applicants' access to the WhatsApp Business API would be terminated with effect from **16 November 2020**.[118]

59.10. On **7 November 2020**, Mr Jordaan responded comprehensively to Mr Supple's email of 4 November 2020.[119] He set out the steps that the applicants had taken since 6 October 2020 to comply with Facebook's requirements. These steps included approaching COGTA and other government departments for meetings to explain that they would have to apply to Facebook directly to open WABAs, that COGTA would take over the WhatsApp number assigned to #LetsTalk (the number being

[117] See the email chain between Mr Jordaan and Ms Gongxeka-Seopa at pp 206-207 ("FA24").

[118] Record: FA, p 35, para 64; p 210 ("FA25").

[119] Record: pp 213, 215-218 ("FA27").

linked to the GovChat platform servicing citizens during the COVID-19 pandemic), and that GovChat would be partnering with an entity called 'Clickatell', an established BSP, with whom GovChat would contract as an Independent Software Vendor ('**ISV**').[120] Mr Jordaan also advised Mr Supple that, on 23 October 2020, GovChat's representatives had met with COGTA's representatives at the latter's National Office in Pretoria, and that the minutes of the meeting recorded *inter alia* that the COGTA would take over #LetsTalk's WhatsApp number (and GovChat would fund this transition), and that GovChat would assist COGTA in its application for a WABA.[121]

59.11. Mr Supple responded on **9 November 2020**.[122] He stated that Facebook did not support GovChat acting as an ISV and using Clickatell as its BSP (apparently on the basis that ISV's are *"restricted from participating in [Facebook's] government pilot program"*). He also poured cold water on GovChat's proposal that COGTA take over the #LetsTalk WhatsApp number (something which would be eminently sensible given that it is now known to and used by literally millions of South Africans) – claiming that transferring (or transitioning) of numbers was not permitted.[123] Mr Supple stated that if COGTA wished to *"use our platform"* it would have to *"communicate that interest to our regional policy team directly"*, and that Facebook would thereafter review that

[120] Record: pp 215-216.

[121] Record: p 216.

[122] Record: FA, pp 37-38, paras 69-70; p 219 ("FA28").

[123] Ibid.

request and present them with a list of BSP partners which they would be required to use to open a WABA and obtain a new WhatsApp number.[124] Mr Supple concluded by reiterating that the GovChat platform would be offboarded on 16 November 2020, and that Facebook's regional team would be available to *"ensure all government clients are aware of how they can apply to use our business messaging tools directly"*.[125]

59.12. Various correspondence between GovChat and Facebook followed,[126] and a conference call was held on **11 November 2020**.[127] Mr Supple remained adamant that the GovChat platform would be offboarded on 16 November 2020, and that COGTA could apply to Facebook directly to open a WABA, a process which he advised could take four weeks (i.e., which would extend well beyond 16 November 2020 and cause untold disruption to the critical services rendered via the GovChat platform).[128]

59.13. In a final attempt to avoid Facebook offboarding the GovChat platform, Mr Michael Sacks (the non-executive chairman of GovChat's funder) addressed a letter to Facebook's COO, Ms Sheryl Sandberg, on 11 November 2020, in which he requested an extension of time given that "*disconnecting the service on Monday [16 November 2020] will*

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[124] Record: p 219.

[125] Ibid.

[126] RA: FA, pp 38-39, para 72; pp 223-226 ("FA30").

[127] Record: FA, p 40, para 74

[128] Ibid.

cause immeasurable confusion to millions of South Africans and put departments of government in a hugely compromised position".[129] There was no response to that letter.

59.14. Mr Jordaan also sent a further letter to Facebook's Ms Gongxeka-Seopa on 13 November 2020,[130] requesting an undertaking not to terminate GovChat's access to WhatsApp for a period of at least one month, and in any event for no less time than would be required for COGTA and the Department of Social Welfare to be onboarded to WhatsApp through a BSP of their own choosing. That undertaking, too, was not forthcoming, and GovChat was accordingly compelled to launch the present application.

(iii) <u>Facebook's direct dealings with government</u>

60. As noted, the respondents do not dispute that, <u>after</u> the applicants launched this application, Facebook's Ms Gongxeka-Seopa contacted Mr Mchunu, the Acting Director-General of the Department of Social Development. A series of emails attached to the applicants' founding papers reveal the following:[131]

60.1. On Saturday, 14 November 2020 at 11h40 (some seven hours after this application was launched by the applicants at 04h45 on the same day) Ms Gongxeka-Seopa responded to an email Mr Mchunu sent her the

[129] Record: FA, pp 40-41, para 75; pp 227-228 ("FA31").

[130] Record: FA, p 41, para 77; pp 229-231 ("FA32").

[131] Record: SFA (2) pp 432-433, para 12; pp 448-451 ("EJ2").

previous day, in which he (Mr Mchunu) implored Facebook to provide GovChat with the time it needs to transition its services in a manner that Facebook deems compliant, rather than summarily offboarding the GovChat platform.[132]

60.2. In her response, Ms Gongxeka-Seopa sought to set up an urgent meeting with Mr Mchunu on 16 November 2020 – the date on which the hearing in this matter was originally scheduled – in order to *"discuss the next steps needed to quickly transition the services into compliance, while maintaining our right to suspend the unauthorised service that GovChat provides"*.[133] There is no mention in this email of the proceedings launched by GovChat seven hours earlier on the same day, and which had been served on Ms Gongxeka-Seopa by email.[134]

60.3. Having received no response from Mr Mchunu over the weekend, Ms Gongxeka-Seopa sent him a follow up email at 12h03 on 16 November 2020. This was some two hours before the pre-hearing meeting between the Tribunal and the parties was due to begin.[135] Again, there was no mention of the present application.

60.4. Mr Mchunu responded on 22 November 2020 and agreed to set up a meeting with Facebook. Ms Gongxeka-Seopa sent a further email to

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[132] The email from Mr Mchunu appears at Record: pp 233-234 ("FA34").

[133] Record: SFA (2), pp 432-433, para 12.1.

[134] Ibid.

[135] Record: p 449.

Mr Mchunu on 23 November 2020 in which she advised that, following engagements with Ms Lumka Oliphant (the spokesperson for the Department of Social Development), Facebook *"hope[s] the department now appreciates all the efforts that [Facebook] had put in place to get GovChat to comply, since August 2020"*. The email also indicated that the department *"might consider"* one of three BSP's: lnfoBip, Clickatell or Praekelt. No mention is made in the email of the pending application or, most importantly, the fact that Facebook had undertaken not to offboard the applicants pending the determination of this application.

61. Mr Jordaan has testified that on 20 November 2020, he received a telephone call from Ms Memela-Khambula, the CEO of SASSA. She informed him that Ms Oliphant had requested that an urgent meeting be set up between Ms Gongxeka-Seopa and SASSA.[136]

62. In the applicants' (supplemented) founding papers it was alleged that Facebook withheld the facts about this application from the relevant government departments in order to give the impression that GovChat's services would be imminently terminated and thereby place pressure on the departments to conclude relationships with Facebook without delay and to the exclusion of GovChat.[137]

[136] Record: SFA (2), p 434, para 13.

[137] Record: SFA (2), p 434, para 15.

63. Despite requesting an extension of time for the delivery of the answering affidavit in part on the basis of the filing of the supplementary affidavits, the respondents elected not to deal with these allegations and declined the applicants' invitation to deal in answer with precisely what they had represented to the government departments during these engagements.[138]

(iv) <u>Facebook's double standards</u>

64. Despite Facebook and WhatsApp claiming to enforce WhatsApp's terms of use on an equitable and non-discriminatory basis,[139] this is not the case in practice. In reality (and consistent with Facebook's conduct described in the anti-trust proceedings in the United States), Facebook selectively enforces WhatsApp's terms of use, seemingly when it wishes to exclude a potential threat from a relevant market. The following are examples of how Facebook / WhatsApp has selectively applied the terms it now relies on to offboard the GovChat platform from WhatsApp's Business API:

64.1. *First*, Praekelt was permitted to utilize a WhatsApp number assigned to the Department of Health to render services to the South African Social Security Agency (SASSA).[140] It will be recalled that GovChat's use of a similar arrangement with government was one of the grounds on

[138] Ibid.

[139] See, for example, Record: AA, p 550, para 161, as well as AA, p 521, para 26 and p 552, para 175.

[140] Record: RA, p 709, para 63.1, read with SFA p 253, paras 23-25, and pp 304-309 ("SFA5" and "SFA6"). This was also raised by Mr Jordaan in his letter to InfoBip, Facebook and WhatsApp dated 2 August 2020 ("FA6") [Record: p 109 *et seq* at p 112].

which Mr Supple initially claimed that Facebook had decided to "offboard" the GovChat platform from WhatsApp's Business API.[141]

64.2. *Second*, "Telkom Pay", a digital wallet service operated by Telkom via WhatsApp, requests and collects ID numbers via WhatsApp. This is, according to what Facebook has represented to the applicants, also in contravention of WhatsApp's terms of use – Facebook having claimed that there is a rule, which it (wrongly) claims was being contravened by GovChat,[142] that personally identifiable information should not be shared or collected via WhatsApp.[143]

64.3. *Third*, "Aviro Health", a health-tech startup, has partnered with the Western Cape Government's Department of Health to create an automated chatbot service via WhatsApp to deliver chronic medication. On Facebook's version, this is also in contravention of WhatsApp's terms of use in that health data is transmitted via WhatsApp.[144]

64.4. *Fourth*, Internet Filing (Pty) Ltd ("**Internet Filing**") has partnered with the City of Tshwane to facilitate engagements between residents and the municipality. Through an "e-Tshwane" WhatsApp service, ratepayers are able to view and pay their bills and request application

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[141] Mr Supple having claimed that each government department must purportedly have its own WABA.

[142] Contrary to what the respondents have alleged, GovChat does not collect identification numbers via WhatsApp [Record: RA, pp 742-743, para 143.1].

[143] Record: RA, p 709, para 63.2, read with RA, p 719, para 87.3 and p 720 para 88.3, and AA, p 536, para 92.

[144] Record: RA, p 709, para 63.3. This was also raised by Mr Jordaan in his letter to InfoBip, Facebook and WhatsApp dated 2 August 2020 ("FA6") [Record: p 109 *et seq* at p 112].

forms for various services (as well as access specific links and obtain contact information). This, too, is on Facebook's version in contravention of WhatsApp's terms of use in that the e-Tshwane WhatsApp number is owned and operated by Internet Filing and not the City of Tshwane.[145] This kind of arrangement (for the benefit of a third party which does not have its own WABA) was in fact given as a fundamental reason for "offboarding" the GovChat platform.

65. Despite GovChat, through Mr Jordaan, having expressly drawn Facebook's and WhatsApp's attention to the comparable services offered by Praekelt, Aviro Health and Internet Filing in its letter of 2 August 2020,[146] and Facebook having promised to revert with respect to the contents of that letter,[147] Facebook has never addressed these contradictions and anomalies.[148] Facebook has instead persisted in contending that GovChat has to be "offboarded" for purportedly infringing "rules" whose infraction is apparently being condoned in other instances. These objections have come despite the fact that GovChat's assistance to SASSA with regard to social relief of distress grant applications is essentially a continuation of the earlier arrangement between Praekelt, SASSA and the DOH (evidently acceptable to Facebook), which was discontinued when Praekelt wanted SASSA to provide it with information regarding its "*payment*

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[145] Record: RA, p 709, para 63.4. This was also raised by Mr Jordaan in his letter to InfoBip, Facebook and WhatsApp dated 2 August 2020 ("FA6") [Record: p 109 *et seq* at p 112].

[146] Record: p 109 ("FA6") and p 608 ("BES20").

[147] Record: AA, p 537, para 97; p 614 ("BES21"). Mr Jordaan responded to that email of 3 August 2020 from Facebook on 5 August 2020, requesting "*urgent feedback*" [Record: pp 115-116 ("FA7")].

[148] Mr Supple's letter of 5 August 2020 instead insisted that "*[w]e also require government entities to apply directly to use our service and to own/operate the WhatsApp Business Account*" [Record: pp 618-619 ("BES22")

capability" and the distribution of grant payments – which SASSA was uncomfortable with providing. (SASSA then approached GovChat, which agreed to assist SASSA immediately on a *pro bono* basis in addition to digitizing the grant application process).[149]

D *PRIMA FACIE* CONTRAVENTIONS OF THE ACT

(i) The relevant market(s) and dominance

66. The respondents accept that it is not the Tribunal's function in interim relief proceedings to arrive at a definitive finding as to the definition of the relevant market or markets.[150] This is consistent with the principle discussed above that in interim relief cases an applicant is only required to make out a *prima facie* case, not to establish its case on a balance of probabilities.

67. In this case the applicants have suggested that there is a primary market for "Over-The-Top" (OTT) messaging applications via smartphones in South Africa.[151] The existence of a market for OTT messaging applications via smartphones was recognized by the Competition Commission of India in *In Re: Harshita Chawla v. WhatsApp Inc. and Facebook Inc.*[152] The Indian

[149] Record: SFA, pp 252-256, paras 21-33.

[150] Record: AA, p 545, para 132 (where it is stated that "*it is not necessary to conclude on a precise market definition for purposes of this application*"). See in this regard, the Tribunal's decision in *The Bulb Man (Pty) Ltd v Hadeco (Pty) Ltd* Case No. 81/IR/Apr06 at para 27.

[151] Record: FA, p 43, para 82.2.

[152] Case 15 of 2020, accessible at http://cci.gov.in (referenced at Record: FA p 43 fn. 8).

Competition Commission found WhatsApp to be *prima facie* dominant in that market in India.[153]

68. The applicants also contend that there is a secondary market in South Africa for the provision of government messaging services. This market is presently served *inter alia* by the applicants, Praekelt, Aviro Health and Internet Filing (mentioned above). Furthermore, Praekelt and InfoBip recently announced a partnership to exploit commercial opportunities which compete with the services offered by the applicants via the GovChat platform.[154]

69. The respondents criticize the applicants' primary market definition (the answering affidavit does not address the secondary market) on the basis that it is too narrow.[155] However, nowhere in the respondents' answering papers is any attempt made to explain why this definition is in fact too narrow, or to propose an alternative "broader" definition.

70. As we noted earlier, a key pillar of the respondents' defence is the contention that WhatsApp is not a dominant firm and does not have any market power because there a *"plethora of other apps offering similar functionalities"*.[156] This is repeated in a report prepared by RBB Economics which was filed together with the answering affidavit, and which regurgitates much of what is stated in the answering affidavit, combining it with legal argument.[157] However, the

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[153] See para 88 of the Commission's decision.

[154] Record: FA p 44, para 83, pp 235-238 ("FA35").

[155] Record: AA, p 545, para 132.

[156] Record: AA, pp 545-546, paras 132-133.

[157] Record: pp 657-672 (Appendix to AA). As noted in the replying affidavit, "*the RBB report, despite being framed as an economics report, largely comprises legal argument and bald denials of the*

respondents do not dispute: (1) Facebook's overwhelming dominance as a social media and technology company;[158] and (2) that WhatsApp is the most widely used messaging application in South Africa with 89% of all internet users between the ages of 16 and 64 reporting having used WhatsApp,[159] and at least 58% of all mobile phone users having downloaded WhatsApp.[160] As noted, the respondents also do not dispute the various reasons why WhatsApp has an entrenched market position in South Africa, including the fact that WhatsApp comes pre-loaded on almost all Android smartphones;[161] that networks in South Africa offer WhatsApp "data bundles"; that cheaper Android devices have limited storage space and their users would be disinclined to delete the pre-loaded WhatsApp app in order to download and install a competing application; and that, in any event, poorer consumers are unlikely to consume valuable data on downloading competing messenger applications.[162]

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allegations contained in the applicants' founding papers. The RBB report is wafer-thin when it comes to economic analyses (which is virtually non-existent), and it does not even attempt to present an alternative, credible market definition to the one presented by the applicants, nor even begin to demonstrate that the respondents are supposedly not dominant firms." [Record: RA, p 723, para 96]

[158] Facebook has between 2.7 and 3 billion users. See Record: FA p 9, para, 5; Record: "RA7", p 780, para 1 (FTC complaint).

[159] As the applicants have also pointed out, the DataReportal Digital 2020 report on South Africa, has indicated that, in contrast with WhatsApp's 89% usage, WeChat had a usage of only 15% amongst people aged 16 to 64, while Snapchat, Skype and Viber had been used by only 28%, 26% and 9%, respectively, of people in that age group, and the other alternative messaging technologies suggested by Facebook are statistically irrelevant [Record: RA, p 726, para 105.1].

[160] See paragraph 27.2 above and the references cited there.

[161] According to the DataReportal Digital 2020 report on South Africa, as at January 2020, 84.9% of web traffic by mobile operating systems was from Android devices [Record: RA, p 726, para 105.4].

[162] See paragraph 27.3 above and the references cited there.

71. It is submitted that WhatsApp is thus at least *prima facie* a dominant firm as contemplated in section 7 of the Act.[163]

72. That conclusion is further supported by the fact that WhatsApp is able, unilaterally, to amend its business terms with no regard for whether its customers would find them acceptable, and in other words to adopt the view that, if a counterparty does not agree to the amended terms which it has imposed, the service will not be available to them. WhatsApp essentially has carte blanche to impose a convoluted and complex web of terms and conditions; amend them as it pleases without even notifying the users of its platform; and require full compliance with all terms, known and unknown, even where unilaterally amended terms are incompatible with the basis on which a user has committed itself to the platform and developed its offering and technology. It can even impose onerous new terms on a whim on the BSPs and ISVs with which it works.[164] As the applicants have pointed out, there can be no serious suggestion that a market participant that is able to unilaterally amend its terms of business so fundamentally on a take-it-or-leave-it basis does not possess considerable market power and enjoy a position of dominance.[165]

73. The FTC's anti-trust complaint against Facebook is also revealing as to WhatsApp's market power. The FTC alleges that Facebook acquired WhatsApp

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[163] Section 7 provides that: "*A firm is dominant in a market if – (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power*". The term *"market power"* is in turn defined in section 1 of the Act as meaning *"the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers*".

[164] See Record: RA, pp 695-696 paras 35-37.

[165] Record: RA, p 694, para 34; p 727, para 108.

to neutralize a competitive threat. Relevant extracts from the complaint include the following [our emphasis]:

> *"Facebook's fears soon focused on WhatsApp,* ***the leading OTT mobile messaging services provider and a significant competitive threat to Facebook Blue's personal social networking monopoly****. Launched in November 2009,* ***WhatsApp's distinctively strong user experience and top-grade privacy protection had fueled stellar growth. By February 2014, WhatsApp had approximately 450 million monthly active users worldwide and was gaining users at a rate of one million per day, placing it on a path to connect 1 billion people****".*[166]
>
> *…*
>
> *"Facebook first reached out to WhatsApp about a potential acquisition in November 2012; and it reached out again in February 2014, this time with more success.* ***On February 19, 2014, Facebook announced an agreement to buy WhatsApp for $19 billion. This valuation reflected the seriousness of the threat that WhatsApp posed to Facebook's personal social networking monopoly****."*[167]
>
> *"For the second time in two years, Facebook employees celebrated the neutralization of an existential competitive threat. In an instant message dated February 19, 2014, a Facebook manager noted approvingly:* ***"[W]orth it. Their numbers are through the roof, everyone uses them, especially abroad it [sic]. Prevents probably the only company which could have grown into the next FB purely on mobile ... [1]0% of our market cap is worth that****".*[168]

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[166] Record: FTC complaint ("RA7"), p 813, para 113. The FTC continued in para 114 (p 813) by stating that: "*Unlike other mobile messaging apps that had built a large user base in parts of Asia but had not made inroads in the West, WhatsApp had not only achieved vast scale in Asia and Europe, but was also building share in the United States. Unlike Apple's iMessage app, …. WhatsApp was available on all the major smartphone operating systems, positioning it as a credible threat to achieve significant cross-platform scale. …*"

[167] Record: FTC complaint, p 816, para 121.

[168] Record: FTC complaint, p 816, para 122.

74. We accordingly submit that there is at the very least a *prima facie* case that WhatsApp (itself controlled by an overwhelmingly dominant firm) is dominant in the primary and secondary markets contended for by the applicants.

(ii) <u>Section 8(1)(b) of the Act</u>

Legal principles

75. Section 8(1)(b) of the Act specifies that a dominant firm is prohibited from "*refus[ing] to give a competitor access to an essential facility when it is economically feasible to do so".* The denial of an essential facility is *per se* prohibited.[169]

76. The Act defines an "*essential facility*" as "*an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers*."[170]

77. In *Glaxo Wellcome (Pty) Ltd*, the CAC set out the requirements for establishing a contravention of section 8(1)(b):[171]

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[169] *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others* [2002] ZACAC 3 (Case no: 15/CAC/Feb02, 21 October 2002) at para 51.

[170] Competition Act s 1.

[171] *Glaxo Wellcome (Pty) Ltd supra* fn. 169 para 57. (The section was then numbered 8(b), but the wording was the same.) See also *K2012150042 (South Africa) (Pty) Ltd v Zitonix (Pty) Ltd* [2017] 2 All SA 232 (WCC) paras 106-110.

77.1. that the dominant firm refuses to give the complainant access to an infrastructure or a resource;

77.2. that the complainant and the dominant firm are competitors;

77.3. that the infrastructure or resource concerned cannot reasonably be duplicated;

77.4. that the complainant cannot reasonably provide goods or services to its competitors without access to the infrastructure or resource; and

77.5. that it is economically feasible for the dominant firm to provide its competitors with access to the infrastructure or resource.

78. In Europe, Article 102 of the TFEU[172] prohibits undertakings that hold a dominant position in an internal market from abusing their position. The European Court of Justice has held that a refusal to supply or to grant access to an essential facility may violate this provision.[173] In Europe, the courts have extended the prohibition to refusing to provide access to essential intellectual property rights. The starting point, however, is that on its own a dominant undertaking's refusal to grant access to its exclusive intellectual property is not prohibited: it must constitute an abuse of the dominant position.[174]

[172] Treaty of the Functioning of the European Union.

[173] Starting in *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* (6/73 and 7/73) para 25.

[174] *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co* (C-418/01) paras 34-35.

79. In *IMS Health*, the Court set out a variety of requirements which needed to be present:

79.1. First, that a dominant undertaking refuses to supply a product which is indispensable for carrying on the business in question;[175]

79.2. Second, that the refusal is preventing the emergence of a new product for which there is a potential consumer demand;[176]

79.3. Third, that the refusal is unjustified;[177] and

79.4. Fourth, that the refusal excludes any competition on a secondary market.[178]

80. The second requirement – i.e., the "new product requirement" – has been controversial. In cases not concerning access to intellectual property facilities, it need not be established.[179] In *Microsoft*, the General Court held that the new product requirement is not the "*only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article [102](b) EC*."[180] The Court adopted a less strict interpretation of the requirement: "*such prejudice may arise where*

[175] *Ibid* para 37, citing *RTE and ITP v Commission* (C-241/91 P and C-242/91 P) ("*Magill*") para 53.

[176] *IMS Health* para 38.

[177] Ibid.

[178] Ibid.

[179] *Microsoft Corp. v Commission of the European Communities* (T-201/04) para 116 citing *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* (C-7/97).

[180] Ibid para 647.

there is a limitation not only of production or markets, but also of technical development."[181]

81. A report produced for the European Commission authored by Crémer *et al*, titled *Competition Policy for the digital era*, opines that the new product requirement should not be imposed in data cases – those where a dominant firm is required to grant competitors access to data.[182] The European Commission has also confirmed that it will apply the general principles governing the essential facilities doctrine to dominant digital platforms. In response to a question in the European Parliament, Executive Vice-President Vestager said:[183]

> *"As regards competition law enforcement,* ***there can be no general approach of applying the so-called essential facility doctrine to dominant digital platforms.*** *The Commission applies the relevant theory of harm and the corresponding substantive test, based on the specific circumstances of each case, having regard to the specific conduct at stake and its economic context. The essential facility doctrine is just one of the possible theories of harm which the Commission can apply, notably when assessing the legality of a conduct consisting in a refusal to give access to a facility, which is deemed to be essential. As explained in the response of 2 May 2019 to Written Question E-000408/2019, the assessment of the relevance of this test and its concrete application require a detailed case-by-case analysis, taking into account, among other things,* ***the specific characteristic of the relevant facility and the economic context****."*
>
> [our emphasis]

[181] Ibid.

[182] Crémer et al *Competition Policy for the digital era* (2019) at 106-107 available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

[183] Answer given by Executive Vice-President Vestager on behalf of the European Commission Question reference: E-000595/2020 (31 March 2020) available at https://www.europarl.europa.eu/doceo/document/E-9-2020-000595-ASW_EN.html

82. In the United States, the Majority Staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law, released its report on its Investigation of Competition in Digital Markets during October 2020.[184] The Report records that the investigation:[185]

> *"uncovered several instances in which a dominant platform used the threat of delisting or refusing service to a third party as leverage to extract greater value or more data or to secure an advantage in a distinct market.* ***Because the dominant platforms do not face meaningful competition in their primary markets, their threat to refuse business with a third party is the equivalent of depriving a market participant of an essential input. This denial of access in one market can undermine competition across adjacent markets, undermining the ability of market participants to compete on the merits****."*
>
> [our emphasis]

83. The Report recommends that "*Congress consider revitalizing the 'essential* facilities' *doctrine*" and that "*[t]o clarify the law, Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm*" including *Trinko*."[186]

84. Thus, in addition to the fact that the legislature in South Africa has in section 8(1)(b) of the Act expressly codified the essential facilities doctrine in our law in

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[184] Majority Staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law *Report on Investigation of Competition in Digital Markets* (2020) available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

[185] Ibid at 397.

[186] *Ibid* at 398.

a manner that is broadly consistent with the position in Europe, there is a prevailing sentiment in Europe and the United States that dominant digital platforms are to be recognised in appropriate circumstances as being essential facilities to which access is required for competition to thrive in primary and secondary (adjacent) markets.

The facts

85. We submit that there is at least a *prima facie* case that the offboarding of the GovChat platform from WhatsApp's Business API would be found to contravene section 8(1)(b).

85.1. *First*, WhatsApp's Business API must necessarily qualify as "infrastructure" or a "resource" on a proper construction of the Act. It would be insensible and yield absurd results to interpret these terms in the context of the Act (and in a digital era) as applying only to traditional physical infrastructure or resources, such as ports, railways and telecommunications infrastructure.[187] It would also be out of step with the prevailing position in Europe and the United States. The respondents' contention to the contrary is thus unsurprisingly little more than a bare assertion.[188]

85.2. *Second*, having regard to the undisputed facts noted above, there are sufficient facts before the Tribunal in this case to find that *prima facie*

[187] On telecommunications infrastructure see *Competition Commission v Telkom SA SOC Ltd* (016865) [2013] ZACT 62 (18 July 2013).

[188] Record: AA, p 547, para 141.

the applicants and the respondents are competitors. Relevant in this regard is that: (a) Facebook (via WhatsApp) intends to offer downstream payment services in South Africa (as it has in other emerging markets);[189] and (b) Facebook's representatives moved with great haste to identify and thereafter form direct contractual relationships with GovChat's clients.[190] It is submitted that it is immaterial whether WhatsApp or its parent company, Facebook, is currently actively competing in the relevant market; it suffices that, as demonstrated in the applicants' affidavits, there is at least a *prima facie* case that they are willing, ready and able to do so.[191]

85.3. The respondents dispute that they are desirous of "*access[ing] the highly valuable social data currently generated by GovChat*".[192] As the applicants pointed out in reply, that denial is however belied not only by Facebook's business model (which is "*built on access to, and monetising, social and business data*"), as well as the undisputed value of the data collected by GovChat,[193] but also by Facebook's conduct elsewhere, and, for example, by:[194] (i) what is revealed in the recent

[189] Record: SFA, pp 268-276, paras 62-77.

[190] As noted, there is no denial of the allegations relating to Facebook's and WhatsApp's urgent overtures to the South African government, let alone an alternative explanation by the respondents of why they were engaging so fervently with government and what was discussed. There is thus, for example, no denial of the applicants' allegation that: "*the engagements between Facebook and government and the purported 'joint undertakings' delivered to the applicants on 24 November 2020 demonstrate that … the respondents intend to deal directly with GovChat's customers (demonstrating that GovChat is a competitor, or at least a potential competitor)*" [Record: SFA (2) p 440, para 30.1].

[191] A narrower interpretation of the term "*competitor*" in section 8(1)(b)(ii) would be overly formalistic and contrary to the apparent objective of the prohibition.

[192] Record: AA, pp 548-549, paras 148-151.

[193] Record: SFA, pp 277-278m, paras 78-83.

[194] Record: RA, pp 730-731, para 113.

U.S. anti-trust complaints about Facebook's acquisition and use of Onavo Mobile Ltd, a company whose network and application data monitoring tools were considered so valuable that Facebook's Chief Operating Officer described the acquisition of Onavo as "*the gift that keeps on giving*";[195] and (ii) the suit relating to the acquisition and use of this kind of information which Facebook is currently facing in Australia, where the Australian Competition and Consumer Commission (ACCC) has *inter alia* alleged that Facebook, through Onavo, "*collected, aggregated and used significant amounts of users' personal activity data for Facebook's commercial benefit*".[196] Also germane in this context are allegations in the class action complaint that was launched against Facebook in California in January 2020.[197]

85.4. ***Third***, there can be no question that WhatsApp and the WhatsApp Business API cannot reasonably be duplicated.[198] As noted, despite listing various potential "substitutes", the respondents have not been able to genuinely dispute that these substitutes (which apart from Snapchat, Skype, WeChat and Viber do not even feature in statistics for the most used social media platforms[199]) lack the functionality to host and operate sophisticated chatbot services which the applicants

[195] Record: p 873, lines 2-3 (para 147).

[196] Record: RA, pp 684-685, para 11.3.

[197] Record: SFA, pp 282-285, paras 93-94.

[198] Contrary to what the respondents have alleged, again without any real substantiation, at AA, para 142 [Record: pp 547-548].

[199] Record: RA, p 726, para 105.1.

rely upon to power the GovChat platform.[200] Furthermore, the level of market penetration that WhatsApp has in South Africa means that, if GovChat wants to reach and be accessible to the citizens of South Africa, it has to communicate with them on the platform which an overwhelming majority of South Africans use: namely, WhatsApp. No purpose would be served by providing the service on another messaging platform that is used (and also only reasonably able to be used) by a small percentage of the target market, even if it were potentially to be possible to eventually design an interface which permitted an inferior version of the service to be provided via another application.[201]

85.5. *Finally*, it is plainly *"economically feasible"* for Facebook / WhatsApp to provide the applicants with access to the Business API and there are no facts which have been put up before the Tribunal to suggest otherwise.[202]

(iii) Section 8(1)(d)(ii)

Legal principles

86. Before its amendment in 2018, section 8(1)(d)(ii) (then s 8(d)(ii)) only prohibited a refusal by a dominant firm to supply "*scarce goods*" to a "*competitor*".[203] After

[200] Record: RA, p 727, para 107.

[201] Record: RA, p 727, para 107.

[202] See Record: SFA, p 290, paras 110-112.

[203] Section 8(d)(ii) originally read as follows: "*It is prohibited for a dominant firm to … engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other*

its amendment, the prohibition was extended to include also refusing to supply "*scarce services*", as well as refusing to supply any such scarce goods or services to "*customers*".[204]

87. The Memorandum which accompanied the Competition Amendment Bill[205] introduced by the Minister of Economic Development in the National Assembly, sets out the rationale for extending the prohibition to include customers:

87.1. Paragraph 3.3.3 of the Memorandum explains that the ambit of prohibition should be widened to include not only competitors but also customers.

87.2. Paragraph 3.3.2 explains that the reference to "*consumers*" in the excessive pricing provision[206] should be amended so as to include a reference to "*customers*" as well because "*[i]t is not only consumers that should be protected from excessive prices, but all customers involved in commercial transactions*." The same reasoning applies in respect of the refusal to deal provision: it is not only competitors of a firm that should be protected from a dominant firm's refusal to supply scare

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pro-competitive gains which outweigh the anti-competitive effect of its act – … (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible."

[204] Section 8(1)(d)(ii) now prohibits a dominant firm from engaging in the following exclusionary act "*unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act": "(ii) refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible*".

[205] B 23-2018, available at https://static.pmg.org.za/B23-2018_Competition.pdf. In *Dykema v Malebane and Another* 2019 (11) BCLR 1299 (CC) para 67 fn. 63, the Constitutional Court noted that the traditional scepticism of using a statute's drafting history in its interpretation has begun to subside. As the Constitutional Court noted in *S v Makwanyane* 1995 (3) SA 391 (CC) paras 14-15 (where the debates and writings that informed the Constitution were considered), the rule which precluded reference to Parliamentary material has been relaxed in *inter alia* England, Australia and New Zealand.

[206] Section 8(*a*) before amendment and s 8(1)(*a*) after.

goods or services, but also all customers involved in the market (and in adjacent markets).

88. In order to establish a refusal to supply, a complainant must satisfy the following requirements.

88.1. ***First***, that the respondent is a dominant firm.[207]

88.2. Before the 2018 amendment – and the introduction of the prohibition of refusing to supply not only "*competitors*" but also "*customers*" – it was unclear whether the firm had to be dominant in the market for the supply of the scarce goods (the primary market), whether it had to be dominant in the downstream market and therefore compete with the firm that it refuses to supply (the secondary market), or whether it had to be dominant in both primary and second markets.[208]

88.3. In Competition *Commission and South African Airways (Pty) Ltd*,[209] the Tribunal held that it is not necessary to establish dominance in both markets:[210]

> *"[t]here is nothing in our Act that suggests that an abuse of dominance cannot be perpetrated in one market and the effect*

[207] As mentioned, section 7 of the Act, which defines when a firm is dominant in a market, provides that: "*A firm is dominant in a market if (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power*."

[208] Sutherland & Kemp *Competition Law of South Africa* (l/leaf) para 7.13.2.

[209] *Competition Commission and South African Airways (Pty) Ltd* [2005] ZACT 50 (18/CR/Mar01, 28 July 2005).

[210] *Ibid* para 36.

thereof be experienced in another related market. Any contrary interpretation would mean that a dominant firm could leverage its market power from one market into another, with impunity."

88.4. Any uncertainty has in any event been resolved by the 2018 amendment. As the prohibition now also includes a refusal to supply a "*customer*", the firm's dominance may be considered with reference to the primary market in which it supplies goods or services and thus where the complainant is its customer. The abuse of dominance in the primary market by refusing to supply a customer, will likely have an effect downstream in the secondary market, which the provision prohibits.

88.5. *Second*, it must be shown that the dominant firm refuses to supply the complainant.

88.6. *Third*, the complainant must be a refused competitor *or* (following the 2018 amendment) customer of the dominant firm. The effect of the amendment has been addressed above. That a refusal to supply a customer is also prohibited accords with EU law.[211]

88.7. *Fourth*, the dominant firm must refuse to supply goods *or* (following the 2018 amendment) services. Search and other internet platforms have

[211] See *United Brands Company v Commission of the European Communities* (case 27/76) paras 182-183. Compare *Instituto Chemioterapico Italiano SpA and Commercial Solvents* para 25: "*an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86*."

been treated as services making up a market by the competition authorities in Europe[212] and there is no reason why WhatsApp's Business API should not be considered a "service". The European Commission's merger decision concerning Facebook's acquisition of WhatsApp is useful in this respect.[213] It is worth quoting the European Commission's introductory analysis of the relevant market at length:[214]

> *"(13) The Transaction concerns consumer communications services. Consumer communications services are multimedia communications solutions that allow people to reach out to their friends, family members and other contacts in real time.*
>
> *(14) Historically, those services were developed and offered as software applications for personal computers ("PCs"). Gradually, they have shifted away from PCs towards smart mobile devices, in particular smartphones and tablets. Today, consumer communications services are one of the fastest-growing types of mobile apps ("consumer communications apps").*
>
> *(15) Consumer communications services can be offered as a stand-alone app (for example, WhatsApp, Viber, Facebook Messenger and Skype), or as functionality that is part of a broader offering such as a social networking platform (for example, Facebook or LinkedIn). Consumer communications services can be differentiated on the basis of various elements.*

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[212] See *Re Google Search Shopping* (AT.3940) [2018] 4 C.M.L.R. 12; [2017] 6 WLUK 540 (CEC) paras 154-190 (market for general search services) and paras 191-250 (market for comparison shopping services).

[213] *Facebook/WhatsApp* (Case M.7217, 3 October 2014).

[214] Ibid paras 13-18.

> *(16) First, as regards functionalities, consumer communications apps enable one-to-one and/or group real-time communication in various forms, such as voice and multimedia (text, photo or video) messaging, video chat, group chat, voice call, sharing of location, etc., although not all functionalities are available on all consumer communications apps (in particular, voice calls).*
>
> *(17) Second, certain consumer communications apps are available on only one operating system (so called "proprietary apps"), such as Apple's FaceTime and iMessage, while an ever-growing number of consumer communications apps are offered for download on multiple operating systems ("cross-platform apps"). For example, WhatsApp is available on a variety of mobile operating systems, including iOS, Android, BlackBerry 7 and 10, Windows Phone, and Nokia Series 40 (Asha) and 60 (Symbian). Likewise, Facebook Messenger currently runs on Android, iOS, BlackBerry, Windows Phone and certain Nokia Asha handsets.*
>
> *(18) Third, certain consumer communications apps are available for all types of devices, while others are not: for example, WhatsApp is only available on smartphones, but not on tablets and PCs, whilst Facebook Messenger is available on smartphones, tablets and PCs."*

88.8. ***Fifth***, the goods or services must be "*scarce*" – i.e., hard to come by.

88.9. ***Sixth***, the supply must be "*economically feasible*". In this regard, Sutherland and Kemp opine that a dominant firm:[215]

[215] Sutherland & Kemp *Competition Law of South Africa* para 7.13.7.

> *"should not be required to prejudice its ability to operate efficiently, to compete on the merits, or to exercise normal, commercial caution. Supply may not be economically feasible where the refused party has poor creditworthiness; where the capacity constraints of the respondent make it unviable; where the respondent chooses to supply only more regular customers in times of shortage; or where supply would create a shortage that would jeopardise the respondent's ability to operate profitably in the downstream market."*

88.10. *Finally*, as a refusal to deal is a rule of reason prohibition, it will only be prohibited if it has an anti-competitive effect. That can be established by evidence of actual harm to consumer welfare, or facts and inferences which show that the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals. [216] As the introduction to section 8(1)(d) indicates, where elements of subsection 8(1)(d)(ii) are satisfied, the onus shifts to the respondent to demonstrate that the effects of the anti-competitive conduct are outweighed by pro-competitive efficiency gains.[217]

[216] *South African Airways (Pty) Ltd supra* fn. 209 para 132, approved in *Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] ZACAC 4 (170/CAC/Feb19, 23 October 2019) paras 18-19 and *Competition Commission of South Africa v Media 24 (Pty) Limited* 2019 (5) SA 598 (CC) para 76.

[217] See, for example, *Competition Commission v Senwes Limited* (110/CR/Dec06) [2009] ZACT 8 (3 February 2009) at para 155.

The facts

89. We submit that the applicants have at very least established *prima facie* that the requirements of section 8(1)(d)(ii) are met in this case.

90. Dealing with the requirements in turn:

    90.1. For the reasons already given, Facebook / WhatsApp are dominant firms in the relevant markets.

    90.2. Facebook / WhatsApp also refuse to supply the applicants any longer with access to the WhatsApp Business API: they have repeatedly made this clear.

    90.3. The applicants would moreover, at the very least, qualify as the customers of Facebook / WhatsApp. Indeed, that is common ground. (We reiterate that there is no requirement that WhatsApp and GovChat / #LetsTalk be competitors in light of the 2018 amendment to s 8(1)(d)(ii).)

    90.4. The refusal involves denial of access to a "*scarce*" service (the WhatsApp Business API), which, as explained above, cannot realistically be duplicated, and is thus not merely scarce but effectively irreplaceable. It also cannot be disputed that "*services*" as envisaged in the amended section 8(1)(d)(ii) are implicated in this instance.

    90.5. As noted above, there can also be no question of it not being *"economically feasible"* for Facebook / WhatsApp to continue to provide

the applicants with access to the Business API and the respondents have put up no facts to suggest otherwise.

90.6. Finally, the refusal will result in an anticompetitive result: the applicants will no longer be able to participate in the market and consumers will be deprived of access to their services. The respondents (who bear the onus in this regard) have not put up any facts to sustain a countervailing pro-competitive efficiency defence.

(iv) <u>Section 8(1)(c)</u>

91. The prohibition in section 8(1)(c) is directed against anti-competitive behaviour generally and is considered the "catch-all" provision to protect against abuses of dominance.[218] The section provides that:

> *"It is prohibited for a dominant firm to—*
>
> *. . .*
>
> *(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain."*

92. An "*exclusionary act*" is defined by the Act as *"an act that impedes or prevents a firm from entering into, or expanding within, a market"*.[219]

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[218] See, for example, *Competition Commission v Media 24 (Pty) Ltd* 2019 (5) SA 598 (CC) at paras 12 and 63.

[219] Section 1.

93. Unlike cases brought in terms of section 8(1)(d), a complainant in a section 8(1)(c) case bears the onus of demonstrating that the anticompetitive effect of the conduct (which can be demonstrated through evidence of harm to consumer welfare or the foreclosure of the market, and which can be based on reasonable inferences from proven facts).[220]

94. We submit that, if for any reason the Tribunal were to find that the applicants have failed to make out a *prima facie* case in terms of sections 8(1)(b) or 8(1)(d)(ii), it ought to find that there is at least a *prima facie* case made out for a contravention of section 8(1)(c) of the Act.

95. The respondents' threatened offboarding of the GovChat platform, pursued through the selective and capricious enforcement of a variety of terms, conditions and policies, plainly impedes and prevents the applicants from expanding within the secondary market contended for (and not disputed), being the market for government messaging services. As we have already noted, there are no facts whatsoever which point to any countervailing technological or pro-competitive efficiency gains which would eventuate from the conduct in question. To the contrary: the respondents' conduct serves to stifle innovation in a nascent market.

[220] *South African Airways (Pty) Ltd supra* fn. 209 para 132, approved in *Computicket (Pty) Ltd v Competition Commission of South Africa supra* fn.216 paras 18-19 and *Competition Commission of South Africa v Media 24 (Pty) Limited supra* fn.216 para 76.

(v) <u>Overview of the respondents' grounds of opposition</u>

96. The respondents' defences to the various alleged contraventions overlap to a considerable degree. For example, the respondents deny in each instance that WhatsApp is a dominant firm in a relevant market;[221] they assert in response to the section 8(1)(b) and section 8(1)(d)(ii) complaints that there are purportedly many alternative messaging platforms available to GovChat;[222] and they deny in response to the section 8(1)(c) and section 8(1)(d)(ii) complaints that any anti-competitive effects would result from their proposed (and threatened) conduct;[223] It has already been explained why each of those defences is unsustainable, and they therefore need not be addressed again.

97. The respondents also contend in response to each of the three charges of abuse of dominance that they have a "*legitimate rationale*" for insisting on "offboarding" the applicants (alleged violations of the WhatsApp terms) and that they have acted in an "*equitable and non-discriminatory*" manner.[224]

98. The submission that the respondents have acted equitably and not discriminated against the applicants has been exposed above, under the heading "*Facebook's double standards*".[225] As pointed out there, the respondents have not been even-handed, but have instead either targeted GovChat on seeing the popularity and value of its offering, or (at best for them)

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[221] Record: AA, p 547, para 140; p 550, para 156; p 551, para 164.

[222] Record: AA, pp 547-548, para 142; p 551, para 165.

[223] Record: AA, p 550, para 160; p 551, para 166.

[224] Record: AA, p 549, para 152; p 550, para 161; p 551, para 167.

[225] Paragraphs 64 and 65 above.

applied the allegedly applicable rules in an arbitrary and discriminatory way. As was pointed out by the applicants in reply, the respondents' reasons for "offboarding" GovChat have also changed over time.[226] So, too, have the allegations regarding the WhatsApp terms that GovChat has purportedly breached or failed to comply with. The irresistible inference is that Facebook and WhatsApp were intent on blocking GovChat's continued participation on the WhatsApp Business API by whatever means – and that, whatever GovChat did or attempted to do, a new obstacle would be placed in its path.

99. The applicants deny that they are in breach of what they have described (fairly, we submit) as the "*convoluted, complex and chameleonic*" WhatsApp terms.[227] It is effectively impossible for a user of the WhatsApp platform to know what WhatsApp terms are applicable at any time, and WhatsApp can in any event modify the terms at any stage to prohibit a particular practice or use that it has hitherto allowed, and even encouraged. The applicants have expressly denied being in contravention of the one term on which Facebook and WhatsApp have repeatedly placed reliance.[228] To the extent that WhatsApp has, in its answering papers, relied on supposed breaches of its terms that it has not previously alleged, and which may have only recently been introduced, the nature of the breaches has moreover not been explained.[229]

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[226] Record: RA, pp 697-700, paras 40-44.

[227] Record: RA, p 693, para 31; p 695, para 35.

[228] Record: SFA, pp 260-261, paras 44-46.

[229] Record: RA, pp 693-694, para 33; pp 739-740, para 135.

100. In addition and in any event, it does not assist the respondents to claim that they are relying on terms that have purportedly not been complied with. For, one of the complaints of the applicants is that the WhatsApp terms of business may themselves be anti-competitive, more particularly when considered in conjunction with Facebook's intention to protect its core social networking business;[230] and that is something which the applicants have requested the Commission to investigate. It would appear that Facebook and WhatsApp have amended terms, or introduced new restrictions, in order to prevent GovChat from continuing to provide the services that it has introduced, and to remove GovChat as a potential competitor. The rationales behind the new prohibitions are also entirely opaque, as are any benefits and advantages of the rules, which, to the contrary, appear both impractical and deeply prejudicial to the South African government and its citizens.[231]

101. As the applicants have noted, the respondents' imposition of rules to exclude GovChat from its platform is ominously consistent with what has happened elsewhere in the world, when Facebook has been minded to crush competition that existed on its own platform.

101.1. For example, the following is stated in the California class action against Facebook: "*Facebook identified and categorized potential market threats, then extinguished those threats by cutting them off from key application program interfaces ('APIs') in Facebook's Platform–*

[230] Record: RA, pp 694-695.

[231] Record: SFA, pp 260-266, paras 44-59.

functionality that provided social applications with user data that fuelled their growth".[232]

101.2. Similarly, the States' anti-trust complaint against Facebook contains the following allegations at paragraphs 14 and 202:

> "*As part of its strategy to thwart competitive threats, Facebook pursued an open first–closed later approach in which it first opened its platform to developers so that Facebook's user base would grow and users would engage more deeply on Facebook by using third party services … Later, however, when some of those third party services appeared to present competitive threats to Facebook's monopoly, Facebook changed its practices and policies to close the application programming interfaces ("APIs") on which those services relied, and it took additional actions to degrade and suppress the quality of their interconnections with Facebook*."[233]
>
> "*Facebook began to selectively enforce its policies to cut off API access to companies Facebook worried might one day threaten its monopoly. Facebook itself described its Platform as a "critical piece of infrastructure" for new apps being developed: this is particularly true for social apps which rely heavily on network effects. Facebook knew that an abrupt termination of established access to Facebook APIs could be devastating to an app – especially one still relatively new in the market*."[234]

[232] Record: SFA, p 283, para 93.5; p 321, "SFA8", para 11.

[233] Record: RA, p 728, para 111.1; p 841, para 14.

[234] Record: RA, p 729, para 111.4; pp 886-887, para 202.

101.3. The FTC's recent complaint against Facebook also documents how Facebook has used access to key APIs to control and punish third parties: for example, by imposing anticompetitive conditions, and enforcing those conditions by terminating access to valuable APIs, thereby hindering and preventing apps from evolving into competitors.[235]

102. Far from immunising Facebook and WhatsApp from competition scrutiny, their reliance on unilaterally-imposed conditions to terminate GovChat's access to the WhatsApp Business API warrants careful scrutiny by the Commission and reinforces the applicants' allegations of *prima facie* contraventions of section 8.

F CONCLUSION

103. In the circumstances, we submit that the applicants have made out a case in terms of section 49C of the Act for relief in the following terms:

103.1. that the respondents are interdicted and restrained from "off-boarding" the applicants from the WhatsApp platform pending the conclusion into the alleged prohibited practices that are the subject of the applicants' complaint to the Competition Commission;[236] and

[235] See e.g. Record: p 787, paras 23-26.

[236] A copy of the unissued complaint was attached to the applicants' founding affidavit marked "FA1" (Record: pp 60 *et seq*.). A copy of the final complaint (lodged on 20 November 2020) has been provided to the respondents and will similarly be provided to the Tribunal, together with proof of filing with the Commission.

103.2. that the respondents are ordered to pay the costs of the application, with such costs to include the costs of two counsel where two counsel were employed.

PAUL FARLAM SC
LUKE KELLY

Applicants' counsel

Chambers, Cape Town
6 January 2021

G LIST OF AUTHORITIES

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