

Interdict Granted in Favour of GovChat, Preventing Removal from the Whatsapp Platform

By Gina Lodolo

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The South African Competition Tribunal (the “Tribunal”) has been called to consider a complaint of abuse of dominance against Whatsapp, arising out of its notice to terminate its contract with “GovChat” and off-board GovChat from the Whatsapp platform. GovChat is a chatbot service that allows the government to engage with citizens and provide government services such as health and education.

[GovChat](#) approached the Tribunal, alleging that due to the high market shares of Whatsapp in South Africa, competing platforms do not have sufficient scale (consumer numbers and reach) to provide alternatives on their own separate platform (such as WeChat in China). Smaller platforms are forced to make use of the Whatsapp network where Whatsapp’s terms of service do not allow for the expansion of the GovChat business model to become a competitor to Whatsapp. GovChat stated that its “entire existence will be materially prejudiced” if removed from the platform. It was alleged that the decision to off-board GovChat would put GovChat out of business and affect millions of citizens who benefit from the platform. CEO of GovChat, Eldrid Jordaan stated that “GovChat’s case is that Whatsapp/Facebook have abused their dominance because off-boarding GovChat has an exclusionary effect, preventing GovChat from operating in the relevant market.” Exclusionary acts are prohibited by Section 8(1)(c) of the Competition Act 89 of 1998 (“Act”) which states that a firm is prohibited from engaging in an exclusionary act if the “anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain”. In this matter, Whatsapp/Facebook would have to prove that the exclusionary act has a pro-



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competitive gain. The respondent has to discharge the allegation that refusing consumers access to an essential facility or a scarce service is an abuse of dominance according to sections 8(1)(b) and/or 8(1)(d)(ii) of the Act.

The alleged breach of the terms of service lies in the use of GovChat as a *de facto* communications platform for the government, when it is in fact not a government owned entity and WhatsApp stated of concern that *“GovChat seeks to intermeditate itself between government and citizens as a profit-making entity. It seems to aspire to become the official communication channel for the South African Government and effectively be the gateway through which citizens access government through Whatsapp”*, where GovChat monetises confidential information of citizens through the use of the Whatsapp platform. Accordingly, citizens share confidential information which is monetized by a private entity, of which practice Whatsapp believes to be prejudicial to its platform and its terms of use, and therefore in breach of its terms of service.

The competitive harm towards GovChat lies in the manner in which Whatsapp made use of its dominance through the unilateral off-board of GovChat. Whatsapp argues that its conduct cannot be anti-competitive as Whatsapp and GovChat do not provide the same facilities and are therefore not direct competitors. To this end, representing GovChat, Advocate Paul Farlam stated that *“Facebook founder and CEO Mark Zuckerberg intends to introduce a payment system, as such, locking GovChat out of Whatsapp would give Whatsapp an advantage as being locked out of the market for an indefinite period would stop GovChat from entering the market first, allowing Whatsapp to keep customers away from GovChat while Whatsapp enters that market”*. If this is the case, Facebook is hiding under the guise that the offboard is due to a breach in its terms of service, in order to remove the potential competition from GovChat in the same market.

On the 25th of March 2021, the Tribunal issued an interim interdict to restrain Whatsapp from removing GovChat from its platform, pending the outcome of the complaint that GovChat has lodged against Facebook with the Competition Commission. The interim interdict has been granted in favour of GovChat as it established a *prima facie* case demonstrating the alleged exclusionary conduct and anticompetitive effects that the off-board would have on GovChat. Facebook failed to rebut the *prima facie* case by providing pro-competitive gains that outweigh the alleged anti-competitive effects of the off-board. Due to the nature of the GovChat platform being in the public interest during the COVID-19 pandemic, the Tribunal held that *“the balance of convenience favours the granting of interim relief to the applicants who provide an invaluable service.”*

Importantly, the relief is only interim in nature. Accordingly, the Competition Commission has not yet made a finding that Facebook has indeed contravened the Competition Act 89 of 1998 through an abuse of dominance.

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