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Working Party No. 3 on Co-operation and Enforcement

Interim Measures in Antitrust Investigations – Note by South Africa

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This document reproduces a written contribution from South Africa submitted for Item 2 of the 135th OECD Working Party 3 meeting on 21 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm>

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1. Introduction

1. The South African competition legislative framework is structured in such a way that the South African Competition Commission (“CCSA”) is not expressly conferred with the power or entitlement to bring interim relief measures. This power has been conferred upon the South African Competition Tribunal (“Tribunal”), and complainants, within the context of a complaint which has been filed with the CCSA. The Competition Act, 98 of 1998, as amended (the “Competition Act” or “Act”) under section 58, empowers the Tribunal to grant interdictory relief, however, whether this power can be extended to interim interdictory relief, has yet to be tested in our jurisprudence.
2. In view of the structure of the South African competition system, the focus of this paper will be how the Tribunal has approached interim relief brought by complainants within the context of an ongoing investigation.
3. Interim relief, as a means of protecting a complainant’s rights during an investigation of a complaint or while the prosecution of a complaint is ongoing, has been part of the South African competition dispensation since its genesis in 1998.
4. The Competition Act originally catered for interim relief under erstwhile section 59, and since its amendment in 2009, houses such relief under section 49C of the Competition Act. Section 49C of the Competition Act, allows for a complainant to approach the Tribunal for interim relief, independently of the main proceedings in circumstances where the CCSA is investigating or prosecuting a complaint filed by the complainant, alternatively ancillary to the main proceedings if the matter is being prosecuted by the complainant.
5. The objective of this interim measure is to ensure the effectiveness of competition law enforcement and prevent serious or irreparable harm during the Commission’s investigation to ensure the effective enforcement and protection of the complainant’s rights. The Competition Act entrusts the Competition Tribunal (“Tribunal”), as the adjudicating body within the South African Competition authority structure, with the power to order interim relief in order to prevent serious or irreparable damage while the conclusion of the hearing into the alleged practice is pending. Interim relief in the South African context is regarded as extraordinary and will generally only be granted in exceptional circumstances. Notwithstanding this the Tribunal has in recent times shown a propensity for granting interim protection, where the facts justify such an order. This propensity, supported by the relatively lower legal threshold contained in section 49C, may be driven by the need to preserve the status ante, and the desire to mitigate the harm that may be occasioned by inaction. Abuse of dominance cases may take years before they reach finality, and in the intervening period, a complainant may have exited the market because of exclusionary conduct by a dominant firm before a final determination had been made by the Tribunal.

2. The Legal Standards and Key Principles which underpin Interim relief in the South African Context

6. The Competition Act's stated purpose is to promote and regulate an efficient and competitive economic environment throughout South Africa.¹ Consistent with principles underpinning a constitutional democracy, the Competition Act is to be read through a Constitutional prism, and with due regard to the purpose of the Competition Act. In this respect the Competition Act's overarching purpose is that of promoting and maintaining competition which is intended to have the effect of promoting several objectives such as the efficiency, adaptability and development of the economy; and providing consumers with competitive prices and product choices. Against this backdrop the Competition Act empowers a complainant to approach the Tribunal for an interim relief order under section 49C. The section in full states:

2.1. 49C Interim Relief -

At any time, whether or not a hearing has commenced into an alleged prohibited practice, the complainant may apply to the Competition Tribunal for an interim order in respect of the alleged practice.

The Competition Tribunal—

must give the respondent a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and

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

The evidence relating to the alleged prohibited practice;

the need to prevent serious or irreparable damage to the applicant; and

the balance of convenience.

In any proceedings in terms of this section, the standard of proof is the same as the standard of proof in a High Court on a common law application for an interim interdict.

*An interim order in terms of this section may not extend beyond the earlier of the—
conclusion of a hearing into the alleged prohibited practice; or
date that is six months after the date of issue of the interim order.*

If an interim order has been granted, and a hearing into that matter has not been concluded within six months after the date of that order, the Competition Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months.

Any party to an application may apply to the Competition Appeal Court to review a decision of the Competition Tribunal in terms of this section.

The applicant may appeal to the Competition Appeal Court against a refusal by the Competition Tribunal to grant an interim order in terms of this section.

¹ Glaxo Wellcome (Pty) Ltd v Terblanche and Others 03/CAC/OCT00 ("Glaxo Wellcome") at p 25.

The respondent may appeal to the Competition Appeal Court in terms of this section against any order of the Competition Tribunal that has a final or irreversible effect.

7. Section 49C, read with section 58² of the Competition Act, empowers the Tribunal to grant interim relief to an applicant in circumstances where the applicant has met the requirements listed above.

2.2. Procedural issues

8. Before moving onto a brief synopsis of the substantive principles of section 49C, it is important to briefly canvas the procedural aspects. Pertinently, only a complainant appears to have locus standi to institute an application for interim relief under section 49C of the Competition Act. Complainant is defined narrowly as “a person who has submitted a complaint in terms of section 49B(2)(b)”. Section 49B(2) of the Competition Act states:

(2) Any person may—

submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form; or

submit a complaint against an alleged prohibited practice to the Competition Commission, in the prescribed form.

9. Accordingly, there is no clarity on whether the Commission, is precluded from bringing an application for interim relief under section 49C of the Competition Act.

10. A complaint in terms of section 49B(2)(b) of the Competition Act appears to a jurisdictional pre-requisite and situates the interim relief application within the Commission’s investigation.

11. Section 49C places a time limitation on any interim relief granted. Section 49C(4) indicates that the interim relief may not extend beyond the earlier of: (a) the conclusion of a hearing into the alleged prohibited practice; or (b) six months after the date of issue of the interim order. Section 49C(5), allows for an extension of the six-month period if the hearing is not concluded within six months from the interim order. In this instance the Tribunal may, on good cause shown, extend the interim order for a further period not exceeding six months. Jurisprudence has shown that the good cause requirement is not simply there for the taking, and that “the showing of good cause is not a modest burden”.³ In deciding whether to exercise its discretion in favour of granting an extension of the interim order, the Tribunal will need to “consider whether on all the evidence before it, the further extension of the order is justified. That consideration should not exclude an open-minded approach as to whether the original grant of the interim order was warranted, not to undo what has been done, but rather to recognise that if an error was made it should not be perpetuated.”⁴ Accordingly, the Tribunal is obligated to necessarily reconsider its previous findings in the matter.

12. Other than the time limitation, Section 49C does not otherwise expressly restrict the type of interim order that the Tribunal may make. Most commonly an interim remedy

² Which specifies, in “addition to its other powers in terms of this Act” the orders the Tribunal is empowered to make.

³ *Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another* (182/CAC/Mar20) [2020] ZACAC 4 (15 July 2020) at para 45.

⁴ *Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another* (182/CAC/Mar20) [2020] ZACAC 4 (15 July 2020) at para 45.

takes the form of an interdict, however the Tribunal is not limited to such and may conceivably also suspend the operation of an agreement, or part of an agreement, pending a final determination. The Tribunal has also noted that that section 49C of the Competition Act does not preclude it from granting relief of a final nature on an interim application.⁵

2.3. Substantive principles

13. The wording of section 49C of the Competition Act, bestows upon the Tribunal a discretion as to whether or not to grant interim relief, in circumstances where it is “reasonable and just to do so”.⁶ The section sets out a number of substantive principles, to be considered by the Tribunal in exercising its discretion as to whether or not to grant interim relief. The three essential factors established in section 49C(2)(b) are (1) a *prima facie* right to the interim relief being sought, (2) serious or irreparable harm and (3) balance of convenience. These factors are however not each standalone jurisdictional facts which must be present but must rather be reckoned holistically with each of the other factors and balanced accordingly, under the overarching requirement of reasonableness and justice.⁷ The Tribunal in *Nedschroef Johannesburg (Pty) Ltd and Teamcor Ltd and Others*⁸ in assessing the question of reasonableness and justice has held:

[23] *The Tribunal has previously observed in National Wholesale Chemists (Pty) Ltd and Astral Pharmaceuticals (Pty) Ltd et al, (a case considered shortly after the Act was amended to provide for the present section 49), that:*

“...In terms of section 49C(2), the Tribunal no longer has to consider whether each of the requirements has been established in isolation, but rather looks at all the factors listed in section 49C(2) as a whole to see whether a case for interim relief has been established. This feature of section 49C(2) distinguishes it from the old section 59 where interim relief could only be granted where each of the listed requirements had been satisfied. Section 49C(2) follows the approach at common law as applied by Appellate Division in the case of Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton 1973 (3) 685 (A). The court held that in deciding whether to exercise its discretion to grant interim relief the court should not look at the prerequisites in isolation but should consider all of them in conjunction with each other. The court went on to state that these prerequisites ...are not individually decisive, but are interrelated, for example, the stronger the applicant’s prospects for success the less the need to rely on prejudice to himself. Conversely, the more the element of “some doubt” the greater the need for the other factors to favour him.”

[24] *Therefore, what the Tribunal found in NWC is that although the sections may appear similar, in terms of language used and the nature of the factors to be considered, there has been a decisive shift in the way it is to be applied. The*

⁵ *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd* 95/IR/Oct05 para 58–66.

⁶ The Tribunal retains the discretion not to grant interim relief even where all factors are present. See *Replication Technology (Pty) Ltd v Gallo Africa Ltd* 92/IR/Sep07 para 17.

⁷ Note that whilst section 49C(3) indicates that a High Court standard of proof is to be applied in application for an interim interdict, this, as has been found in *York Timbers Ltd v South African Forestry Company Ltd* 15/IR/Feb01 para 38, refers to the “standard of proof” as opposed to the common law requirements. The requirements at common law differ materially from those of Section 49C.

⁸ Case No: 95/IR/Oct05.

old section required proof of each of the various constituents; the new starts off by making the threshold requirement that the granting of the order is ‘reasonable and just’ and then requires that the Tribunal ‘has regard’ to the constituent factors, not as separate building blocks, but rather as a collective set of criteria that can be weighed and balanced through the lens of what is “reasonable and just”.

[25] *The implication of this shift, is that an application may meet the three factors, but there may be reasons why granting the application is not reasonable and just. Conversely, an applicant may not make out a strong case on all three of the factors, but the Tribunal may nevertheless consider that an order for interim relief is nevertheless reasonable and just following and Eriksen type approach.*”⁹

14. Clearly then the Tribunal can grant interim relief, even if one of the factors are lacking, in circumstances where reasonableness or justice strongly militates for the granting of the interim relief. Section 49C of the Competition Act, unlike its predecessor, has a less exacting standard of proof than the normal balance of probabilities which was required by the former section.¹⁰ The applicant need only establish a *prima facie* case.¹¹ The Tribunal has repeatedly indicated that it is not its function to arrive at a definitive finding of a contravention.¹² A successful applicant is only required to make out a *prima facie* case, not to establish its case on a balance of probabilities. In this way interim relief applications under section 49C are analogous, though not identical to interim interdict applications in the High Court, where applicants seek relief pending the determination of some other dispute.

15. The first factor to consider is whether the applicant has established a *prima facie* right.¹³ Whilst the text and context of section 49C of the Competition Act, indicate that each factor is not to be regarded as a pre-requisite, but rather factors to be weighed against each other in determining what is just and reasonable, the Tribunal has repeatedly indicated that it would be “extremely reluctant” to grant interim relief in the absence of convincing evidence of a prohibited practice, at least on a *prima facie* basis, regardless of the prospect of damage or the balance of convenience.¹⁴

16. The Tribunal approaches the enquiry into whether there has *prima facie* been a contravention, in the same way as the High Court deals with the *prima facie* right

⁹ Nedschroef para 23-25.

¹⁰ See *York Timbers Ltd v South African Forestry Company Ltd* 15/IR/Feb01 para 43.

¹¹ Akin to the standard of proof required in the High Court or South Africa.

¹² See *GovChat Proprietary Limited and Another v Facebook Inc and Others* (IR165Nov20) para 20.

¹³ Section 49C(2)(b)(i).

¹⁴ *York Timbers Ltd v South African Forestry Company Ltd* 15/IR/Feb01 para 101. Also: “[W]e would, as we have observed elsewhere, be extremely reluctant to uphold an application for interim relief in the absence of evidence confirming the restrictive practice alleged”. *Nuco Chrome (Pty) Ltd v Xstrata South Africa (Pty) Ltd* 31/IR/Apr04 6. “[W]e would be extremely reluctant to grant interim relief in the face of unconvincing evidence of a restrictive practice”: *National Association of Pharmaceutical Wholesalers v Glaxo Wellcome (Pty) Ltd* 68/IR/Jun00 para 28. See also *Msomi v British American Tobacco South Africa (Pty) Ltd* 49/IR/Jul02 par 13; *Replication Technology (Pty) Ltd v Gallo Africa Ltd* 92/IR/Sep07 para 29; and *Trudon (Pty) Ltd v Directory Solutions CC* 96/CAC/Apr10 para 39.

requirement in interim interdicts.¹⁵ The Tribunal has articulated its approach to interim relief under section 49C in the seminal case of *York Timbers Ltd v South African Forestry Company Ltd*¹⁶ where it was held at [64] – [66] that:

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

If the applicant has succeeded in doing so, we can then consider the “doubt” leg of the enquiry. Do the facts set out by the respondent in contradiction of the applicants case raise serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed.

As far as the remaining factors in section 49C(2) are concerned viz, irreparable damage and the balance of convenience, these are not looked at in isolation or separately but are taken in conjunction with one another when we determine our overall discretion.”

17. The Tribunal does not require the applicants to establish a contravention of the Competition 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.

18. The second factor to which the Tribunal must have regard is the need to prevent serious or irreparable damage to the applicant.¹⁷ The requirement stems from the rationale that interim relief is extraordinary, and the need for intervention at an interim relief stage is a function of the probability of serious or irreparable damage occurring, if no intervention is ordered by the Tribunal before it can make a final determination as to whether the alleged prohibited practice has taken place. In the assessment of the second factor, the applicant need not be required to prove actual harm, but rather a reasonable apprehension of likely, or probably harm.¹⁸

19. The Tribunal has formulated the following test in relation to the second factor, and in *National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome (Pty) Ltd and Others*¹⁹:

“In order to establish serious or irreparable damage the evidence must demonstrate that, on the face of it, absent a granting of interim relief, the ability of the applicants to remain as viable competitors within the market is “seriously” or “irreparably” threatened. In such circumstances, the material content of the applicants’ right to move to the final stage of adjudication is called into question

¹⁵ In this regard the High Court’s approach to the “prima facie right” criterion, see the oft-cited decision in *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others* 2001 (3) SA 344 (N) at 353H-I.

¹⁶ 15/IR/Feb01.

¹⁷ Section 49C(2)(b)(ii)

¹⁸ This is akin to the position in the High Court procedure that there is a reasonable apprehension of harm.

¹⁹ [2003] 2 CPLR 402 (CT).

because, even if relief was granted at that stage, it may nevertheless not assist the applicants in their attempt to remain viable competitors.”²⁰

20. The serious, or irreparable damage is reckoned with reference to the damage to the competitive position of the applicant should interim injunctive relief not be made.²¹ Phrased differently, the harm must be considered with reference to the effect on competition harm that arises from a prima facie contravention of the Competition Act, and not ordinary commercial harm.²²

21. Finally, the third factor to which the Tribunal must have regard is the balance of convenience.²³ This factor entails a balancing of interests. On the one hand the prejudice the applicant will suffer if the interim order is not granted against the prejudice the respondent will suffer if it is. The Competition Appeal Court, in *Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another*²⁴ held that:

“Finally, the balance of convenience in s49C is a direct borrowing from the common law. It weighs the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is granted. This requires an equitable reckoning as to who bears the greater burden of error. If the interim order is granted and no case is ultimately established to prove the alleged prohibited practice, what prejudice will have been suffered by the respondent, and how might that prejudice be mitigated? So too, if the interim order is refused and the prohibited practice is ultimately proven, what prejudice will the applicant suffer in the interim. Here too, the currency of prejudice is reckoned by recourse to the consequences for the competitive positioning of the parties in the market. A respondent that is required to desist from conduct that gives it a legitimate competitive advantage suffers prejudice. An applicant that is required to endure an unlawful competitive disadvantage also suffers prejudice. How to weigh prejudice in the balance is a difficult task. Hence the warranted caution with which the Tribunal and this court have approached the exercise of the power to grant an interim interdict.”²⁵

22. The weighting exercise is not limited to the litigating parties, but extends to the broader public interest,²⁶ this is accentuated by the differing role that the Tribunal plays viz-n-viz an ordinary court, where unlike a common law court, which grants relief to the

²⁰ *Ibid* para 147.

²¹ *Ibid* and See the Competition Appeal Courts assessment in *Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another* (182/CAC/Mar20) [2020] ZACAC 4 (15 July 2020) at para 21.

²² *Malefo v Street Pole Ads (SA) (Pty) Ltd* 35/IR/May05 para 38

²³ Section 49C(2)(b)(iii)

²⁴ *Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another* (182/CAC/Mar20) [2020] ZACAC 4 (15 July 2020)

²⁵ *Ibid* para 22.

²⁶ See in this regard the informative Supreme Court of Appeal judgement of *Cipla Medpro (Pty) Ltd v Aventis Pharma SA and Related Appeal* 2013 (4) SA 579 (SCA) where at para 46, read with para 52 they indicated that “the broader public interest, and not only the interests of the litigating parties, must be placed in the scales when weighing where the balance of convenience lies.”

private litigant, the Tribunal grants relief that is in the public, not private interest.²⁷ Additionally, the Competition Appeal Court has indicated that attention must also be given to the broader objective sought to be achieved by the Competition Act in the balancing exercise.²⁸ The Competition Appeal court in *National Association of Pharmaceutical Wholesalers v Glaxo Wellcome (Pty) Ltd*²⁹ has held:

*“For this reason the preservation of a status quo or the reversion to the status ante quo, albeit that such situations are uncompetitive is often the device which is found to be the fairest, least harmful and most practical solution on an interim basis. The perpetuation of an apparently outlawed practice on an interim basis is not only unobjectionable but will, in many cases be inevitable or, simply the least of all evils. When the matter is finally decided the Tribunal will be less constrained in ordering fundamental changes to uphold the central purposes of the Act. I say “less constrained” because the potential for conflicts between the various purposes in sec. 2 of the Act is quite apparent and a measure of balancing and choice will often be unavoidable even at the stage of final decision.”*³⁰

23. Even if all of the factors listed in section 49C(2)(b) of the Competition Act are satisfied, the wording of section 49C clearly indicates that the Tribunal is entrusted with a judicial discretion as to whether or not to grant interim relief if it is reasonable and just to do so, having regard to the above factors. The Tribunal accordingly retains a discretion not to grant interim relief even where all factors have been satisfied.³¹ The Competition Appeal Court has indicated that interim relief in terms of section 49C of the Competition Act is an exceptional remedy which should only be granted where it is just and reasonable to do so.³² The Tribunal has indicated that interim relief is an extraordinary and discretionary remedy that provides relief in the case of immediate or threatening harm,³³ and has cautioned against the potential for abuse that section 49C may pose in *Africa People Mover v PRASA*³⁴ where it remarked that:

“We must also guard against the Competition Tribunal being used for ulterior motives by parties . . . and carefully analyse and consider each matter in order to discern whether a competition issue, falling within the competence of the Tribunal, arises.”

²⁷ *National Association of Pharmaceutical Wholesalers v Glaxo Wellcome (Pty) Ltd* [2005] 1 CPLR 102 (CAC).

²⁸ *Ibid* para 14.

²⁹ *Ibid*.

³⁰ *Ibid* para 29.

³¹ In this regard the Competition Appeal Court in *National Association of Pharmaceutical Wholesalers v Glaxo Wellcome (Pty) Ltd* [2005] 1 CPLR 102 (CAC) held in considering the provisions of section 49C and in particular the meaning of the words “may grant” held “*The above requirements are ... not determinative and even where all these requirements are present a court has a discretion to refuse an interim interdict.*”

³² *National Association of Pharmaceutical Wholesalers v Glaxo Wellcome (Pty) Ltd* [2005] 1 CPLR 102 (CAC) para 8.

³³ *Schering (Pty) Ltd v New United Pharmaceutical Distributors (Pty) Ltd* 11/CAC/Aug01 para 8

³⁴ IRO28May19 at para 35

3. Discussion on the key themes emerging from Interim Relief Measures within the South African Context

24. Having set out the key principles above, it is interesting to note that the Tribunal has historically been reticent and adopted a cautious approach to granting interim relief in the past. The Tribunal, prior to 2020 had only granted two interim orders in a complaint proceeding in terms of the section 49C of the Competition Act, and one of those was overturned on appeal. This trend seems to be shifting post 2020, where three (out of four considered) interim orders have already been granted to date, in a period of roughly two years.

25. The rationale for the inclusion of an interim relief measure is to put a temporary hold, to preserve or restore the status quo, pending the finalisation of the Commission's investigation. The Tribunal has remarked in *South African Raisins (Pty) Ltd and Another/SAD Holdings and Another* that the rationale for interim relief is:

“Aggrieved parties . . . generally claim that they are incurring considerable economic harm in consequence of the alleged transgression of competition law. This harm, it is alleged, continues unabated during the inevitably lengthy investigations that are necessary to bring competition matters to full trial, thus frequently killing the patient before the cure can be administered. For this reason, the right to appear before the competition authorities and petition for an interim order that, if successful, temporarily interdicts the perpetrator from continuing the allegedly transgressive behaviour is generally accepted as an important remedy under competition law.”³⁵

26. The shifting trend or proliferation of interim relief applications may be attributable to the renewed emphasis on the relatively less exacting standard of proof in interim applications, being the reasonableness and justice standard, as well the rising emergence of dynamic, fast-moving markets (such as digital markets). Interim relief by the complainant becomes increasingly valuable in such dynamic markets and seeks to address the harm continuing “unabated during the inevitably lengthy investigations” ultimately mitigating the risk of “killing the patient before the cure can be administered”. In such markets potential contraventions and the investigations thereto require a delicate balancing act. Where on the one hand the need to conduct in depth investigation to determine if a contravention has taken place – carefully, to avoid being draconian or permissive; on the other, doing it swiftly to keep up with the pace of these dynamic markets. The more in depth the investigation, the longer it takes to act, and the greater the risk that eventual intervention will be in vain. The introduction of an interim measure to maintain the status quo therefore buys valuable time to properly investigate the potential violation and increases the chance of a successful intervention.

27. In addition to the above, the Tribunal's historically cautious approach can be attributed to the concern of imposing restrictive measures onto the business of a firm who has not been found in contravention of the Competition Act. The concern therefore is that the defendant's business is at risk of being unfairly and punitively constrained during the interim period. South Africa's historically powerful property rights meant that such concerns are likely to have heavily militated against the granting of any interim relief measures. This concern may be slowly diluting with the growing concern that an overly cautious approach will result in anti-competitive conduct continuing during an investigation and generate harm that cannot be compensated for, nor remedied.

³⁵ *Ibid para 1.*

Accordingly, if the conduct is found to be a contravention, allowing the behaviour to go unchecked pending the finding, may lead precisely to what the Tribunal in *South African Raisins (Pty) Ltd and Another/SAD Holdings and Another* described as having “...kill[ed] the patient before the cure can be administered...”.

28. The South African approach takes cognisance of this important balancing act, by empowering the Tribunal with a discretion as to whether the granting of the interim relief would be reasonable and just in the circumstances. Within this consideration, the Tribunal is to have regard to, inter alia, the balance of convenience in granting the relief. This, accordingly, requires the Tribunal to squarely consider and weigh these juxtaposed interests in arriving at a determination of reasonableness and justness. The Tribunal weighs up the harm to the applicant if the relief is not granted, and the conduct is ultimately proven to be a contravention, versus the harm to the defendant if the relief is granted, and the conduct is ultimately not proven to be a contravention.

29. Notwithstanding the benefits of interim relief, the Commission has previously noted its concern as to the effect that such findings may have on pending and ongoing investigation of such a complaint by the Commission. The Tribunal and other adjudicating bodies should exercise caution as to the nature of their findings in such interim fora, for example on definitive findings on market shares, or market delineation which may unnecessarily hamstrung, or restrict the Commission’s investigation.

4. Recent example of the Tribunal’s application of the interim relief measure – GovChat Proprietary Limited and Another v Facebook Inc and Others

30. Before concluding, it may be illustrative to utilise a recent example of how the Tribunal has utilised interim relief measure in the context of a platform market.

31. In March 2021, following an application seeking interim relief brought by GovChat (pty) Ltd (“GovChat”), the Tribunal interdicted and restrained Facebook Inc., WhatsApp Inc., and Facebook South Africa (Pty) Ltd. (“Facebook”) from off-boarding, or removing GovChat from the WhatsApp platform.

32. GovChat is a South African start-up company that has developed and integrated government communications systems to provide online real-time escalation and reporting services.

33. Facebook operates in the social media market through the Facebook App, and a photo and video sharing platform and social networking app called Instagram (Instagram App). In 2014 Facebook acquired and obtained sole control of WhatsApp, the firm that provides the WhatsApp Messenger messaging app (WhatsApp Messenger).

34. WhatsApp Messenger provides increasingly essential channels for users to communicate and for businesses and government to access customers and citizens respectively. WhatsApp Messenger provides these services using data over the internet which goes over-the-top of normal telecommunication services (OTT).

35. GovChat created a platform, which it describes as “a citizen-centric engagement platform” (“GovChat Platform”). The GovChat Platform provides South African citizens with a solution for engagement with the South African national government, government departments, and local government (collectively “government”). Government utilising the GovChat Platform can visually map the specific locations of reported incidences (e.g., potholes) and can also monitor these complaints in real time via the GovChat Platform. The GovChat platform is built utilising the WhatsApp platform as a medium to connect to users. This is made possible by the provision of access by Facebook to the WhatsApp API, this

access is conditional upon the acceptance of terms and conditions imposed by Facebook. GovChat's services rely on their continued access to the WhatsApp Business API, and the WhatsApp platform generally.

36. On 14 November 2020, following a threat of removal by Facebook, GovChat applied to the Tribunal for interim relief in terms of section 49C of the Competition Act, in which they sought interim relief in the form of an interdict preventing Facebook from removing or "off-boarding" them from WhatsApp's platform pending the outcome of their complaint against Facebook to the CCSA, or for a six-month period (whichever occurs first). The Tribunal granted the relief, and subsequently, on good cause shown extended same for a further period of 6 months. We will briefly set out the Tribunal's reason's for granting the interim relief, with due regard to the three factors highlighted above.

37. The Tribunal initially recognised the overarching imperative of reasonableness and justice where it held –

"Section 49C therefore confers a discretion on the Tribunal to grant interim relief having regard to what is reasonable and just in the circumstances. The three legs of the inquiry are however considered holistically..."

38. As regards the *prima facie* right, the Tribunal noted that –

"...it is not our function, in interim relief proceedings, to arrive at a definitive finding of a contravention. A successful applicant is only required to make out a prima facie case, not to establish its case on a balance of probabilities".

39. In the context of this case however, the Tribunal held that –

"...the applicants have established a prima facie case of prohibited conduct on the part of the respondents in that the respondent's selective application of its rules against the applicants amounts to an effective refusal to deal... The applicants have (thus) also made out a prima facie case of exclusionary conduct and anti-competitive effects ... The respondents on the other hand have not provided any evidence of pro-competitive gains to off-set the prima facie anti-competitive effects".

40. As regards serious or irreparable harm, the Tribunal recognised that GovChat currently assists the Department of Health with Covid-19 education, symptom tracking and testing. It also assists the Department of Social Development and the South African Social Security Agency with enabling citizens to apply for distress grants, and held that –

"Members of the public who rely on GovChat's platform for assistance pertaining to distress grants and Covid-related information will be deprived of access to these critical services during the Covid-19 pandemic if it was off-boarded from the WhatsApp platform, pending the outcome of the complaint lodged with the Commission..."

41. Further, the Tribunal notes that the refusal to supply by off-boarding would –

"...certainly result in an anti-competitive outcome...The refusal to supply by off-boarding will certainly result in an anti-competitive outcome. The applicants will no longer be able to participate in the government messaging services..."

42. Finally, the Tribunal held that the balance of convenience fell in favour of the granting of interim relief to the applicants who provide an invaluable service to both government departments and citizens alike. It was found that GovChat would suffer irreparable harm if off-boarded, which will ultimately also negatively impact the public interest in a very critical time of the Covid-19 pandemic. Whilst conversely, the Tribunal

could not “... *conceive of any real prejudice which the respondents will suffer during the period of our order, pending the outcome of the Commission’s investigation*”.

43. Accordingly, in conducting its balancing exercise, the Tribunal determined that the holistic assessment of the factors rendered it reasonable and just to implement interim measures, the effect of which was a preservation of the status quo, until the conclusion of a hearing into the applicants’ complaint lodged with the Commission or 6 (six) months of date hereof, whichever was the earlier.

5. Conclusion and observations

44. As is clear from the above, the power to grant interim relief is vested in the Tribunal, and it is the complainant who appears to possess the necessary *locus standi* to bring such an application in terms of section 49C. These applications are brought within the context of an ongoing Commission investigation and is carefully considered with due regard to the balancing of each of the parties’ legitimate interests and reckoning what would be ultimately to be regarded as reasonable and just.

45. It is therefore notable that the preservation period, or maximum period that interim relief can be granted, is of a limited duration. Experience has shown that investigations into effects-based contraventions render the sixth-month period insufficient. This is exacerbated by the fact that section 49C envisages that the prosecution of such investigations would also be within this six-month window. This therefore renders the interim protection largely insufficient and cannot be said to offer interim protection pending the finalisation of the litigation.

46. Additionally, as highlighted above, the Tribunal seems to be placing an increasing emphasis on the reasonableness and justice criterion, this renewed emphasis has resulted in a proliferation of interim relief applications brought by complainants under section 49C of the Competition Act. This approach is both welcome and necessary in balancing the competing interests of the applicant and respondent to such interim applications.