

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: IR191Mar23

In the interim relief application between:

LOTTOLAND SOUTH AFRICA (PTY) LTD

Applicant

And

GOOGLE IRELAND LIMITED

First Respondent

GOOGLE SOUTH AFRICA (PTY) LTD

Second Respondent

Panel	:	T Ngcukaitobi (Presiding Member)
	:	AW Wessels (Tribunal Member)
	:	T Vilakazi (Tribunal Member)
Heard on	:	19 July 2023
Last submission on	:	09 October 2023
Reasons issued on	:	12 November 2024

REASONS FOR DECISION AND ORDER

Introduction

- [1] This matter concerns an application for interim relief in terms of section 49C of the Competition Act 89 of 1998, as amended (“the Act”). The applicant, Lottoland South Africa (Pty) Ltd (“Lottoland”), contends that the first and second respondents, Google Ireland Limited and Google South Africa (Pty) Ltd (collectively “Google”) have engaged in conduct that amounts to prohibited practices in terms of sections 8(1)(d)(ii) and/or 8(1)(c) of the Act.
- [2] Lottoland alleges that in September 2020, without any legitimate justification, Google terminated Lottoland’s access to Google’s advertising services “Ads Services” (more accurately known as “Google Ads”), which Lottoland had used

since March 2020.¹ Lottoland further alleges that it has since been refused access to Google Ads despite it being economically feasible for Google to provide this service to it.² Lottoland argues that Google's conduct has not only caused it financial harm, but it has distorted competition in the market in which Lottoland competes to the detriment of consumers.

- [3] On 2 December 2022, Lottoland lodged a complaint against Google with the Competition Commission ("Commission").

- [4] Lottoland is a licensed bookmaker, which, *inter alia*, offers fixed-odds bets on the outcome of various lotteries around the world, including the South African national lottery, sporting events and other betting contingencies. Of relevance is that Lottoland is the holder of a bookmaker's licence first issued to it by the Western Cape Gambling and Racing Board (the "WCGRB") on 7 November 2017 in terms of the Western Cape Gambling and Racing Act (the "WC Act").³

- [5] Lottoland competes with other licensed bookmakers in South Africa such as Hollywood Bets, World Sports Betting, Betway, Betfred (which owns Lottostar), and Netbet (which trades as Sportingbet).⁴ According to Lottoland, all of these bookmakers offer competing fixed-odds bets on the outcome of lotteries and sports events, amongst others.⁵

- [6] The respondents form part of a broader group of companies ultimately controlled by Google LLC, a multinational technology company that, through various subsidiaries around the world, provides a wide range of internet-related services and products including online advertising technologies, search, cloud computing, software and hardware.⁶ The first respondent, Google Ireland Limited ("Google Ireland"), is licensed by Google LLC to operate as a service provider responsible for Google Ads in South Africa as well as the broader Europe, Middle East and Africa regions.

¹ Lottoland Founding Affidavit, at para 15.

² Ibid, at para 16.

³ Ibid, at paras 31, 86 and 87.

⁴ Ibid, at para 116.

⁵ Lottoland Founding Affidavit, at para 114, p844; Replying Affidavit at para 46 and following.

⁶ Google Heads of Argument, at para 2.1.

[7] Google Ads is an online advertising platform where advertisers can access tools to create advertisements (“ads”), bid to display ads, and track the performance of their ads, etc. Advertisers may choose to display their ads in multiple different places depending on their campaign goals, including on the Google Search⁷ page.⁸

[8] The relief which Lottoland seeks in terms of its Notice of Motion⁹ is:

“Pending the conclusion of a hearing into the alleged prohibited practices in terms of section 8(1)(c) and 8(1)(d)(ii) that are the subject of the applicant's complaint to the Competition Commission as detailed in the CC1 Form which is annexed to the applicant's founding affidavit as FA1, or six months from the date of the order, whichever occurs first:

- 1. The first and second respondents (collectively "Google") are directed to permit the applicant to access Google's Ads Services platform;*
 - 2. The applicant shall for the duration of such access adhere to Google's terms and conditions and shall be obliged to pay Google's fees for such access in accordance with such terms and conditions;*
- ...”*

[9] In terms of an amended Notice of Motion,¹⁰ Lottoland sought the following alternative relief to the relief in 1 above:

“Alternatively... for so long as Google permits any firm in South Africa to utilise Google's Ads Services to advertise fixed-odds betting on the outcome of lotteries, Google is directed to permit the applicant to access Google's Ads Services for the same purpose”.

[10] The Commission has filed a notice of intention to abide by the Tribunal's decision.

⁷ Google Search is a search engine operated by Google.

⁸ Google Ireland Answering Affidavit, at para 2.5.

⁹ Lottoland Notice of Motion, at paras 1-2, p1.

¹⁰ The amended notice of motion was attached to Lottoland's affidavit in answer to Google Ireland's application to file a supplementary answering affidavit as annexure “AA4” dated 18 July 2023.

Factual background

Procedural issues

[11] Prior to the hearing on 14 July 2023, Google Ireland applied for leave to file a supplementary answering affidavit to place evidence before the Tribunal about the steps it has taken, and is intending to take, to address its enforcement of its policies regulating the use of Google Ads, following the submissions by Lottoland which alleged that Google inconsistently applies its advertising policies to Lottoland when compared to other firms. Thereafter, on 18 July 2023, Lottoland filed an affidavit in opposition to Google Ireland's application to file a supplementary answering affidavit as well as an answer submitting *inter alia* that Google cannot continue to prohibit Lottoland from using Google Ads unless and until it has meted out the same treatment to all of Lottoland's competitors.¹¹

[12] At the hearing, Lottoland maintained its opposition to Google Ireland's supplementary answering affidavit being admitted. After hearing the parties, the Tribunal made a ruling to provisionally admit the further affidavit, subject to Google Ireland submitting a signed affidavit.¹² We do not see any material prejudice to Lottoland if Google Ireland's further affidavit is admitted. Google Ireland subsequently filed the signed and notarised supplementary answering affidavit on 27 July 2023.¹³ In the circumstances, we grant Google Ireland leave to file the supplementary answering affidavit.

[13] Following the hearing on 19 July 2023, the Tribunal requested written submissions from the parties regarding the provisions of section 57 of the National Lotteries Act, 1997 ("Lotteries Act") and whether or not the said provisions permit any exceptions from criminal sanctions, as submitted by Lottoland. The relevant sections of that legislation provide as follows:

¹¹ Lottoland's answer to the First Respondent's application to file a supplementary answering affidavit, at para 35.

¹² Hearing Transcript, p168.

¹³ The signature on the affidavit was dated 19 July 2023.

Section 57(1):

“Any person who –

(a) participates in; or

(b) conducts, facilitates, promotes or derives any benefit from the lottery, promotional competition or sports pool, shall, unless such lottery, promotional competition or sports pool is or has been authorised by or under this Act or any other law be guilty of an offence;” and

Section 57(2)(g):

“Any person will be guilty of an offence if he or she –

conducts, organises, promotes, devises or manages any scheme, plan, competition, which directly or indirectly provides for betting, wagering, gambling or any other game of risk on any outcome of any lottery unless authorised by or under this Act or any other law.”

- [14] In addition, Lottoland was requested to provide its annual financial statements for the period in which it submits it suffered a reduction in revenue, as stated in paragraph 45 of its Founding Affidavit. The parties filed their submissions on 28 July 2023.
- [15] On 10 August 2023, the Tribunal received a letter from Lottoland regarding the Commission publishing its final report in respect of its Online Intermediation Platforms Market Inquiry (“OIPMI”). Lottoland had referred to the Commission’s provisional report in its pleadings and arguments made at the hearing in respect of Google’s purported dominance in the search and search engine marketing (“SEM”) markets in South Africa. On 17 August 2023, Google submitted a letter to the Tribunal in response to Lottoland’s correspondence in respect of the Commission’s OIPMI.
- [16] On 25 August 2023, Lottoland submitted a further letter to the Tribunal explaining the basis upon which the Commission’s market inquiry findings are relevant to Lottoland’s application for interim relief, in response to its letter dated 10 August 2023 and Google’s letter dated 17 August 2023.

[17] On 19 September 2023, the Tribunal requested that Lottoland provide further written submissions regarding the relevance of the Commission’s final OIPMI report to the issues to be determined in its application for interim relief. Specifically, Lottoland was directed to provide submissions on the implications of the Commission’s findings on Google Ads and access to the Google Ads platform.

17.1. On 28 September 2023, Lottoland submitted its supplementary written submissions as requested by the Tribunal.

17.2. On 9 October 2023, Google provided its submissions relating to the Commission’s final OIPMI report.

[18] We have considered these submissions in our assessment.

Lack of urgency

[19] We note that Lottoland had taken some 26 months to file a complaint with the Commission following Google’s alleged termination of Google Ads to it and more than three months to launch an interim relief application. Google submitted that this was an indication of a lack of urgency.¹⁴

[20] Given the above, we conclude that Lottoland has not made out a case for urgency in this matter.

Lottoland’s case

[21] Lottoland prefaced its case by explaining that Google Ads enables advertisers to display advertisements to users who utilise Google search.¹⁵ One of the most compelling benefits to advertisers in doing so is the ability to target users based on certain keyword searches.¹⁶ For example, Lottoland’s rivals, who allegedly are permitted by Google to use its Ads Services, can place ‘bids’ to display their advertisements in the event of users of Google searching for “play lotto”, “play

¹⁴ Letter from Baker McKenzie addressed to the Tribunal dated 11 April 2024.

¹⁵ Lottoland Heads of Argument, at para 34.

¹⁶ Ibid.

lottery”, or “bet lotto”.¹⁷ Their advertisements will then appear in prominent positions on the first page of Google’s search results.¹⁸ If a user clicks on an advertisement they are directed to a ‘landing page’ where the advertiser is able to facilitate their registration as a customer.¹⁹

- [22] Lottoland argues that Google has refused to continue supplying Google Ads to Lottoland in circumstances where there are no alternative suppliers from which Lottoland can obtain such services, where it is economically feasible for Google to continue doing so, and where Google supplies the very same services to no less than seventeen of Lottoland's direct competitors.
- [23] Furthermore, Lottoland contends that Google's conduct impedes and / or prevents Lottoland from participating in and / or expanding within the market that it operates in, without any countervailing technological, efficiency or other pro-competitive gains to justify Google’s conduct. It submits that Google's conduct amounts to prohibited practices in terms of section 8(1)(d)(ii) and / or section 8(1)(c) of the Act.
- [24] Lottoland also submits that Google is overwhelmingly dominant both as a search engine and in the market for SEM services in South Africa.
- [25] In Lottoland’s view, as a result of Google's conduct, it has suffered (and continues to suffer) significant harm. Lottoland contends that while it may in theory be able to recover some of its losses by way of a future follow-on damages claim against Google, the ongoing harm to Lottoland’s ability to use Google Ads (as its rivals do) to expand its (new) customer base is irreparable. Furthermore, Google’s conduct irreparably (or at very least seriously) harms competition: by selectively enforcing its internal “rules”, Google is distorting competition as between Lottoland and its rivals. This *prima facie* causes harm to competition and consumers.
- [26] Lottoland further argues that the balance of convenience overwhelmingly favours the granting of the interim relief sought and that Google’s claim that doing so places

¹⁷ Lottoland Replying Affidavit, at para 46.

¹⁸ Lottoland Founding Affidavit at para 107; Google Ireland Answering Affidavit at para 2.5.

¹⁹ Google Ireland Answering Affidavit at para 3.4.

Google at risk of “potential criminal liability” is misconceived. Lottoland argues that Google’s claim that supplying Lottoland with access to Google Ads carries with it the potential for criminal liability (and other unspecified “risk”) is entirely undermined by the fact – not disputed by Google – that it permits Lottoland’s rivals to advertise precisely the same services which Google now claims contravene the Lotteries Act.²⁰ Lottoland also contends that some of Lottoland’s rivals are even permitted by Google to use the words “Lottoland” and “Lottoland South Africa” in their Google advertisements, thereby targeting users who search for Lottoland on Google.²¹

[27] In addition, Lottoland argues that the reasons given by Google for terminating Lottoland’s access to Google Ads have changed over time:²²

- 27.1. Initially, Google stated that Lottoland was prohibited from using Google Ads because it promoted “*international lotteries on [its] site ... which is not permitted per our South Africa country-specific gambling policy*”.²³
- 27.2. Thereafter, for the first time in its answering affidavit, Google claimed that it refused Lottoland access to its Ads Services because Lottoland’s business (namely accepting fixed-odds bets on the outcome of local lotteries) purportedly contravenes the Lotteries Act.²⁴
- 27.3. Google subsequently stated that Lottoland’s access had been revoked because Lottoland was allegedly “*accepting/taking bets on foreign lotteries, which is in violation of Sections 57(1) and 57(2) of the Lotteries Act*”.²⁵ Google advised Lottoland to “*remove the international lotteries in order to be able to advertise the ithuba ones*”.²⁶

²⁰ Lottoland Founding Affidavit, at para 67; read with Annexure O to the Complaint Memorandum at Record pp338-386 (see, in particular, the evidence of Lottoland’s rivals using Ads Services from p352 and following). See also Lottoland Replying Affidavit, at para 43 and following read with Annexure RA1 at Record pp901-952.

²¹ See Mr Michael Taberner’s report at Record p519.

²² Lottoland Heads of Argument, at para 8.

²³ Google’s email to Lottoland of 16 September 2020 at Record p269.

²⁴ First Respondent Answering Affidavit, at para 3.7.

²⁵ Google’s email to Lottoland of 24 September 2020 referred to in Lottoland’s attorney’s letter at Record p282.

²⁶ Google’s email to Lottoland of 6 October 2020 at Record p956.

Google's submissions

- [28] In March 2020, Google certified Lottoland to promote online gambling activities on Google Ads.
- [29] Google submits that following the certification and after Lottoland had commenced running ad campaigns on Google Ads, it detected that its ads did not comply with its relevant advertising policies.²⁷ It argues that during its periodic compliance audits of ads running on Google Ads in the months following Lottoland's certification,²⁸ Google detected that Lottoland's business, insofar as it promotes lottery betting in South Africa, contravenes Google's advertising policies as well as the Lotteries Act.²⁹
- [30] For this reason, in September 2020, Google revoked certification of Lottoland's website landing page.³⁰
- [31] Google contends that Lottoland's offering of fixed-odds bets on the outcome of the national lottery in South Africa contravenes sections 57(1) and 57(2)(g) of the Lotteries Act. Google also argues that Lottoland's business allows users to place fixed-odds bets on the outcome of various lotteries, including the South African national lottery. This practice allegedly contravenes the Lotteries Act³¹ as Lottoland does not hold a valid licence to conduct, promote, facilitate, participate in, or derive any benefit from a lottery. There is a single lottery licence holder in South Africa authorised to operate a lottery in terms of the Lotteries Act, namely Ithuba Holdings RF Proprietary Limited ("Ithuba").
- [32] Google submits that in terms of its online advertising policies, which are designed to protect users, restrictions are placed on the promotion of certain gambling activities. Of particular relevance, the promotion of lotteries is limited to state-licensed entities. This restriction is in place to ensure compliance with the

²⁷ First Respondent Answering Affidavit, at para 6.9.

²⁸ Google submits that it uses a combination of automated and human evaluation methods to ensure that ads comply with the advertising policies.

²⁹ First Respondent Answering Affidavit, at para 6.11.

³⁰ Ibid, at para 6.12.

³¹ Ibid, at paras 6.2 and 6.4.

provisions of the Lotteries Act which seek to ensure that, amongst other things, no schemes may be conducted for the placing of bets on the outcome of unauthorised lotteries. This prohibits games of risk on the outcome of any lottery. As such, it argues, this policy is underpinned by the purpose and provisions of the Lotteries Act.

- [33] Google contends that Lottoland has failed to demonstrate *prima facie* that Google has engaged in exclusionary conduct that is proscribed by sections 8(1)(d)(ii) and/or 8(1)(c) of the Act. Google has not engaged in a “refusal to deal” or any conduct that excludes Lottoland from effectively participating and/or expanding in the market. On the other hand, it is Lottoland’s business activities that are proscribed by the relevant law governing lotteries and for this reason, Google has restricted Lottoland’s use of Google Ads.

Legal framework

- [34] The adjudication of interim relief applications is circumscribed in section 49C of the Act which vests the Tribunal with discretionary power to grant interim orders. Section 49C(2)(b) states that the Tribunal:

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

- (i) The evidence relating to the alleged prohibited practice;*
- (ii) the need to prevent serious or irreparable damage to the applicant; and*
- (iii) the balance of convenience.”*

- [35] Section 49C(3) of the Act deals with the required standard of proof and states that:
- “In any proceedings in terms of this section, the standard of proof required is the same as the standard of proof in a High Court on a common law application for an interim interdict.”*

- [36] It is not our function, in interim relief proceedings, to arrive at a definitive finding of a contravention. A successful applicant is only required to make out a *prima facie* case, not to establish its case on a balance of probabilities. In *eMedia* the CAC in

relation to section 49C(2) held *“This really means that the Tribunal must make a summary assessment before granting the interim relief. This assessment is only at a prima facie level.”*³² In *Sekunjalo*, the CAC further confirms that the requirement of evidence relating to the alleged prohibited practice means *prima facie* evidence.³³ In this way interim relief applications under section 49C are analogous to interim interdict applications in the High Court, where applicants seek relief pending the determination of some other dispute.

[37] The Tribunal has held that the abovementioned three steps must be understood holistically with each factor balanced against the other: ³⁴

*“Section 49C confers a discretion on the Tribunal to grant an interim relief having regard to what is reasonable and just in the circumstances. The three legs of the inquiry are however considered holistically. Thus, a weak case on say irreparable harm may be counterweighed by a very strong case on the prohibited conduct. And vice versa, a weak case on prohibited conduct may be counterweighed by a strong case on irreparable harm.”*³⁵

[38] In *Nedschroef*,³⁶ the Tribunal held as follows:

“... 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....”

“... The 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

³² *eMedia Investments (Pty) Ltd SA v Multichoice (Pty) Ltd and Another*, Case No. 201/CAC/Jun22 (“eMedia”), at para 93.

³³ *Mercantile Bank, A Division of Capitec Bank Ltd and others v Surve` and others* [2023] 3 CPLR 33 (CAC), at para 25.

³⁴ *Natal Wholesale Chemists (Pty) Ltd v Astra Pharmaceuticals (Pty) Ltd and Others*, Case No. 98/IR/Dec00, at para 34; *York Timbers Limited v South African Forestry Company Limited* (Case No. 15/IR/Feb01) (“York Timbers”), at para 13; *Anchor Zedo Outdoor CC v Passenger Rail Agency of South Africa* (Case No. 017616), at para 16; and *GovChat (Pty) Ltd and Hashtag Letstalk (Pty) Ltd v Facebook, Inc and Others* (Case No. IR165Nov20), at para 160.

³⁵ *GovChat (Pty) Ltd and Hashtag Letstalk (Pty) Ltd v Facebook, Inc and Others* (Case No. IR165Nov20) (“GovChat”), at para 160.

³⁶ *Nedschroef Johannesburg (Pty) Ltd and Teamcor Ltd and Others*, Case No. 95/IR/Oct05 (“Nedschroef”).

'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 an Eriksen type approach"³⁷ (emphasis added).

- [39] The approach to interim relief applications has evolved through the judgments of the CAC in *Business Connexion*³⁸ and *eMedia*. Contrary to common law courts which grant relief to essentially protect private interests, the Tribunal grants relief that is in the public interest in its mandate to promote competition. In *Business Connexion* the CAC held: *"The need for intervention is a function of the probability of serious or irreparable damage occurring, if no intervention is ordered by the Tribunal before it can make a final determination as to whether the alleged prohibited practice has taken place. It is the damage to the competitive position of the applicant that the prohibited practice may cause that marks out this enquiry. Other forms of damage to the applicant are not relevant because the Act's purpose is to maintain and promote competition in the market"*.³⁹ Furthermore, we take guidance from the CAC in *eMedia* where it held that where non-speculative and objective evidence strongly points to a *prima facie* right and it is clear that if there is a *prima facie* right (contravention) established with reference to clear and non-speculative evidence, even where the establishment of that right is open to some doubt, but there is a well-grounded apprehension of harm – the Tribunal must find that it favours the granting of the interim relief application.⁴⁰

³⁷ *Nedschroef*, at paras 23-25.

³⁸ *Business Connexion (Pty) Ltd. v Vexall (Pty) Ltd and Another*, Case No. 182/CAC/Mar20 (*"Business Connexion"*).

³⁹ *Ibid*, at para 21.

⁴⁰ *eMedia*, at para 80.

[40] The CAC in *eMedia*⁴¹ also emphasised that “*there will inevitably be disputes of fact but that does not prevent the Tribunal from taking a robust approach nor is it necessary to await the outcome of an investigation in due course. The finality of an investigation is perhaps best utilised when considering final relief. In this case expert reports were filed; facts were placed before the Tribunal which could not seriously be disputed and at this interim stage, this should have facilitated the determination of interim relief. The application of an objective standard to the facts should facilitate an obviously fair decision.*” (Our emphasis)

[41] We deal with each of the factors listed in section 49C(2)(b) of the Act in greater detail below, with the lens that these three factors should be weighed and balanced to determine what is reasonable and just.⁴²

Relevant markets

[42] Lottoland submits that the relevant product markets are (i) the market for gambling, betting and bookmakers;⁴³ and (ii) the markets for (a) online search; and (b) SEM services.⁴⁴

[43] In broad terms, according to Lottoland, its business replicates the well-established practice of licenced bookmakers offering fixed-odds bets on the outcome of lotteries.⁴⁵ In addition, Lottoland competes with other licensed bookmakers in South Africa that offer competing fixed-odds bets on the outcome of lotteries.⁴⁶

[44] In respect of the markets for online search and SEM, Lottoland submits that Google’s primary business and product offering is as a search engine.⁴⁷ SEM refers to the practice of improving how customers find your product or service on a search engine (such as Google or Bing) through paid advertising.⁴⁸ In addition,

⁴¹ *eMedia*, at para 81.

⁴² Competition Law of South Africa, Phillip Sutherland, Lexis Nexis, November 2021, at para 11.6.2, pp11-44.

⁴³ Lottoland Founding Affidavit, p29.

⁴⁴ *Ibid*, p31.

⁴⁵ *Ibid*, at para 108.

⁴⁶ Lottoland Founding Affidavit, at para 114; Replying Affidavit, at para 46, p844.

⁴⁷ Lottoland Founding Affidavit, at para 119.

⁴⁸ Annexure FA1 of Lottoland Founding Affidavit, at para 134.

Lottoland believes that the online journey for persons wishing to play and partake in online gambling is the same for online shoppers and thus that search, and in particular, Google Search, is the starting point for most of its would-be customers, where such customers would, by virtue of Google's strategy and the search engine results page ("SERP") arrangements, be confronted first by gambling operators who make use of Google Ads.⁴⁹

[45] Google is of the view that Lottoland has made a bold statement that "*Google has a market share of more than 90% of the SEM market, measured by search volume*" without explaining why the "SEM market" is relevant for purposes of this matter other than an apparent allegation that Google's "Search Network campaigns", which Lottoland made use of, are "a species" of SEM.⁵⁰ Google also contends that aside from the vagueness of such statements by Lottoland, an analogy between the alleged markets for search and SEM is misplaced.⁵¹

[46] Google further submits that Lottoland's own marketing activities demonstrate that the relevant product market is not limited to online advertising but encompasses the broader advertising ecosystem in which Google is not dominant and competes vigorously. This includes offline advertising such as print media, outdoor advertising, television advertising and radio advertising, which ultimately have the same objective as online advertising - i.e., reaching as many potential customers as possible. Therefore, Google is of the view that the broad advertising ecosystem is the appropriate relevant product market.

[47] In addition, Google submits that Lottoland attempts to rely on Google's alleged market share in the "market for search engines" as an indication of a "similar" market share in the market for SEM. It contends that the internet is just one of several media channels (including offline and online) that can be chosen by advertisers to promote their products and services. From a demand-side perspective, advertisers would, therefore, take all media into account when planning their advertising campaigns. Substitutability among media channels can

⁴⁹ Annexure FA1 of Lottoland Founding Affidavit, at para 140.

⁵⁰ Google Heads of Argument, at para 4.14.

⁵¹ Ibid, at para 4.16.

be demonstrated through the growth experienced by online advertising in recent years, partially at the expense of offline advertising. Similarly, from a supply-side perspective, a broader market definition that includes all forms of advertising would be justified by the fact that traditional media publishers as well as major newspapers and magazines generally offer both online and offline advertising space.

[48] Google further alleges that the online advertising space is dynamic and crowded. That is, even if the relevant market is limited to online advertising only, which it argues is not appropriate in the context of this matter, there are thousands of companies, large and small, working together and in competition with each other to provide digital advertising, each with different specialties and technologies.

[49] Google therefore contends that Lottoland has failed to properly define the relevant market within which it alleges that Google is dominant or set out credible evidence for Google's alleged dominance in such a market. Google further provided that it is not appropriate to draw a correlation between Google's alleged market share in search and its market share in SEM (or any other market).⁵² Accordingly, that Lottoland has failed to adequately establish the relevant market in which Google's market position should be assessed for purposes of this matter or that Google is dominant or exercises market power in such a market.⁵³ As such, Lottoland's interim relief application should be dismissed on this basis alone.⁵⁴

Our assessment

[50] As previously held by the Tribunal, in order to assess dominance, there must be a *prima facie* delineation of the relevant market in which the abuse of dominance is alleged.⁵⁵

⁵² First Respondent Answering Affidavit, at para 7.4.7.

⁵³ Google Heads of Argument, at para 4.26.

⁵⁴ Ibid, at para 4.27.

⁵⁵ See, for example, *Mlonzi and Another v Eskom Holdings Soc Limited and Another* (IR1360CT22), at paras 22 and 35; *Apollo Studios (Pty) Ltd and Another v Audatex SA (Pty) Ltd and Another* (IR198Mar23), at para 65; *Govchat Proprietary Limited and Another v Facebook Inc and others* (IR165Nov20), at para 77.

- [51] As stated above, SEM relates to improving how customers find your product or service on a search engine (such as Google or Bing) through paid advertising.⁵⁶
- [52] Market delineation concerning services provided in online markets often is a complex issue and we take guidance from what has been found in other jurisdictions. The European Commission (“EC”), in the *Google/DoubleClick* merger, found that online advertising constitutes a relevant market. It notes “... *search and non-search advertising might exert some degree of constraint on each other, especially when considering the advertisers’ perspective. From a publisher’s standpoint, the distinction between the two categories seems to be clearer.*”⁵⁷
- [53] In the subsequent *Microsoft/Yahoo! Search Business* merger, the EC left open the question whether internet search, i.e., the provision of search results to internet users, constitutes a separate relevant market.⁵⁸ However, in line with its earlier merger decision in *Google/DoubleClick*, the EC confirmed that online advertising constitutes a separate relevant market.⁵⁹ Regarding online advertising it notes “*only one respondent to the market investigation submitted that online advertising and offline advertising belong to the same product market. The Commission therefore considers that online advertising is a distinct market from offline advertising*”.⁶⁰ It further finds that “*Whether segments of that market constitute relevant markets in their own right can be left open ...*”.⁶¹
- [54] In *Google Search (AdSense)*, the EC found that “*general search services and online search advertising constitute two different but interlinked sides of a general search engine platform*”.⁶² It described online search advertising as involving the matching by search advertising platforms of user queries with relevant search ads. On the demand side of this market are internet users and advertisers. On the

⁵⁶ Annexure FA1 of Lottoland Founding Affidavit, at para 134.

⁵⁷ Case No. COMP/M.4731 - *Google/DoubleClick*, 11 March 2008, at para 56.

⁵⁸ Case No. COMP/M.5727 - *Microsoft/Yahoo! Search Business*, 18 February 2010, at paras 86 and 87.

⁵⁹ *Ibid*, at para 87.

⁶⁰ Case No. COMP/M.5727 - *Microsoft/Yahoo! Search Business*, 18 February 2010, at para 61.

⁶¹ *Ibid*, at para 87.

⁶² EC Case AT.40411 (20 March 2019) - *Google Search (AdSense)*, at para 121. Accessible here: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40411/40411_1619_11.pdf.

supply side are the operators of search advertising platforms.⁶³ It further stated that an online search advertising platform requires at least three elements: (i) a general search service to match user queries with general search results; (ii) the technology to match user queries with relevant search ads; and (iii) an advertiser base that is large enough to compete effectively against other search advertising platforms.⁶⁴ It concluded that the market for online search advertising constitutes a distinct product market. Offline and online advertising belong to different product markets. The same is true for online search advertising and online non-search advertising and for online search advertising and paid specialised search results.⁶⁵ It again confirmed that offline and online advertising are not substitutable.⁶⁶

[55] It further found that the success of online search advertising “*depends also on the reach and performance of the underlying general search service*”.⁶⁷ It explained that the higher the number of users of a general search service, the greater the likelihood that a given online search ad is matched to an interested user and eventually converted into a click. Internal Google documents and a statement by Google confirmed this.⁶⁸ This suggests that functionally there are separate but inter-related markets for search, and SEM or search advertising.

[56] On appeal to the General Court (“EU General Court”),⁶⁹ the EU General Court upheld the majority of the EC’s findings on market definition for the market for online search advertising and the market for online search advertising intermediation by stating “*It follows from the foregoing considerations that Google’s line of argument does not manage to call into question the accuracy, reliability and consistency of the items of evidence on which the Commission relied in its overall assessment of the substitutability of online search ads and online non-search ads, or to demonstrate that that institution failed to take into account evidence relevant to that end. Accordingly, Google does not demonstrate that the Commission*

⁶³ *Google Search (AdSense)*, at para 121.

⁶⁴ *Ibid*, at para 122.

⁶⁵ *Ibid*, at para 123.

⁶⁶ *Ibid*, at para 125.

⁶⁷ *Ibid*, at para 251.

⁶⁸ *Ibid*, at para 251.

⁶⁹ Judgment of the General Court of 18 September 2024 – Google and Alphabet v Commission (“*Google AdSense for Search*”), (Case T-334/19).

*erroneously considered that the two types of ad at issue were not substitutable.*⁷⁰

In addition, the EU General Court affirmed the EC's finding that the market for online search advertising constitutes a distinct product market.⁷¹

- [57] In the monopoly trial involving Google in the U.S., Google was alleged to have abused its monopoly power to control the search engine business. In this matter, it was observed that *"Google monetizes this search monopoly in the markets for search advertising and general search text advertising, both of which Google has also monopolized for many years"*⁷², reiterating, as found by the EC, that the markets for general online search and for search advertising are distinct but directly related. It explains that Google uses consumer search queries and consumer information to sell advertising. It notes *"In the United States, advertisers pay about \$40 billion annually to place ads on Google's search engine results page (SERP). It is these search advertising monopoly revenues that Google "shares" with distributors in return for commitments to favor Google's search engine. These enormous payments create a strong disincentive for distributors to switch. The payments also raise barriers to entry for rivals—particularly for small, innovative search companies that cannot afford to pay a multi-billion-dollar entry fee. Through these exclusionary payoffs, and the other anticompetitive conduct ..., Google has created continuous and self-reinforcing monopolies in multiple markets."*⁷³

- [58] The Amended Complaint brought against Google identifies that general search services in the U.S. constitutes a relevant antitrust market⁷⁴ (also distinct from offline advertising); and that a separate relevant market exists for search advertising.⁷⁵ The latter comprises all types of ads generated in response to online search queries, including general search text ads (offered by general search

⁷⁰ *Google AdSense for Search*, at para 305.

⁷¹ *Ibid*, at paras 222 and 367.

⁷² *United States of America v. Google LLC* (1:20-cv-03010), at para 7. Accessible here: <https://www.justice.gov/atr/case-document/file/1428271/dl>.

⁷³ *United States of America v. Google LLC* (1:20-cv-03010), at para 7. Accessible here: <https://www.justice.gov/atr/case-document/file/1428271/dl>.

⁷⁴ General search services allow consumers to find responsive information on the internet by entering keyword queries in a general search engine such as Google, Bing, or DuckDuckGo.

⁷⁵ *United States of America v. Google LLC* (1:20-cv-03010), at paras 88 and 97. Subsequently confirmed in *United States of America et al., Plaintiffs, v. Google LLC, Defendant*, Case No. 20-cv-3010 (APM) / *State of Colorado et al., Plaintiffs, v. Google LLC, Defendant* Case No. 20-cv-3715 (APM).

engines such as Google and Bing).⁷⁶ Furthermore, general search text advertising, comprising ads sold by general search engines, typically placed just above or below the organic search results on the SERP as ‘sponsored’ ads, constitute a separate relevant market “*wholly contained within the broader search advertising market*”.⁷⁷ However, it notes clearly that other forms of online ads on social media or display ads do not enable the same *targeting* of consumers in response to a specific search query and are generally aimed at consumers who are further from the point of purchase. As Google’s Chief Economist explained: “*One way to think about the difference between search and display/brand advertising is to say that ‘search ads help satisfy demand’ while ‘brand advertising helps to create demand’*” and “*[d]isplay and search advertising are complementary tools, not competing ones.*”⁷⁸

[59] We are guided by the case law referred to above, which indicates that online search advertising or SEM (such as Google’s Ads Services) constitutes a distinct relevant market, which is separate albeit inter-related with the market for general online search. There are no facts in this case to suggest that this distinction is not applicable in South Africa, and we assess the matter in relation to separate but inter-related *prima facie* relevant markets for online search and SEM.

[60] Regarding a broader advertising market, we are not persuaded by Google’s argument that the relevant product market encompasses the broader advertising ecosystem and is not limited to online advertising. In *Google/DoubleClick*,⁷⁹ the EC explained that:

“...*This broad market definition cannot be accepted, primarily because the market investigation revealed that offline and online advertising are perceived as separate markets by the majority of respondents. Furthermore, online advertising is used for specific purposes. As opposed to offline advertising, online advertising is considered to be capable of reaching a more targeted audience in a more effective way. Advertisers can precisely target their*

⁷⁶ United States of America v. Google LLC (1:20-cv-03010), at para 97.

⁷⁷ Ibid, at para 101.

⁷⁸ Ibid, at para 99.

⁷⁹ *Google/DoubleClick*, at para 45.

audience by combining information regarding geographical location, time of day, areas of interest, previous purchasing record of the user and search preferences. This option is not available in the case of offline advertising... In addition to this specific targeting, respondents to the market investigation noted that online advertising has a unique reporting system that enables the advertiser to check exactly how many users have viewed the ad or clicked on it, moreover allowing a rapid "retargeting" of the ad. Hence the measurement of the effectiveness of online ads can also be more precise compared with the traditional measurement systems used in offline advertising."

- [61] Lottoland explained that although it utilises other forms of paid advertising (both online and offline), SEM is critical to engage with and acquire new customers who utilise Google in the first instance to search for fixed-odds betting offerings. To demonstrate the value of Google Ads to its business, Lottoland provided evidence of significant growth in its customer base and acquisition of new registrations during the period when it utilised Google Ads, which we discuss further below.
- [62] Furthermore, the case law provides that offline advertising is generally different in its effect and targeting from search advertising and online advertising. Ads Services, as Lottoland has argued, is effective as an SEM or 'pay-per-click' service. It allows advertisers to reach customers that follow a distinct and likely common customer journey that is not the same as for offline advertising or display advertising (where there is no customer query by means of a search engine), as the Commission has found in its OIPMI. There *prima facie* appears to be no significant substitute services available in the market.⁸⁰
- [63] Given the above, we consider the allegations brought by Lottoland in respect of the *prima facie* relevant market for SEM services, and the inter-related market for online search.

⁸⁰ Lottoland Heads of Argument, at paras 32.7 and 37.2.

Analysis of the alleged case for interim relief

[64] Lottoland's theory of harm in this case in essence is that, because of Google's dominance in the SEM market, its refusal to supply Lottoland access to Google Ads while supplying access to Lottoland's rivals distorts competition in the market that Lottoland operates in and that this conduct harms it and deprives consumers of choice. Google, as indicated above, disputes this.

[65] We turn to consider the relevant legal framework for the alleged prohibited practices and whether Lottoland has *prima facie* satisfied the elements of section 8(1)(d)(ii) and/or 8(1)(c) of the Act.

[66] The provisions of section 8 of the Act are limited to conduct by a dominant firm, and we assess Google's alleged dominance in the *prima facie* relevant markets.

Section 8(1)(d)(ii)

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

[68] Prior to the 2018 amendments,⁸¹ section 8(1)(d)(ii) only prohibited a dominant firm from refusing to supply scarce *goods to competitors*. The amendments have extended the ambit of the prohibition to include the supply of scarce goods or services to a competitor or a customer.⁸² As the Tribunal has held in *GovChat*,⁸³ the amendments to the Act have resolved any uncertainty about the approach taken by the Tribunal in *SAA* as the prohibition now also includes a refusal to supply a "customer" of the dominant firm.

⁸¹ Competition Amendment Act No. 18 of 2018 (published under Government Notice No 644 in Government Gazette No 42231 on 14 February 2019).

⁸² This portion of section 8 came into effect from 12 July 2019.

⁸³ *GovChat (Pty) Ltd and Hashtag Letstalk (Pty) Ltd v Facebook, Inc and Others* (IR165Nov20) ("GovChat"), at para 104.

- [69] The requirement of a substantial anti-competitive effect is met either (i) if there is “evidence of actual harm to consumer welfare” or (ii) “if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals”.⁸⁴ Since a refusal to supply is a rule of reason prohibition, the anti-competitive effects can be established by harm to consumer welfare evidenced by facts and inferences from proven facts. The anti-competitive effects of foreclosure must also be substantial.⁸⁵
- [70] Under section 8(1)(d), once the elements of section 8(1)(d) are satisfied the competitive harm is presumed and the onus shifts to the respondent to demonstrate that the effects are outweighed by pro-competitive gains. If the respondent does not, then the conduct will be found to be an abuse. In SAA the CAC explains this as follows “We find that as a matter of law if the Commission proves that SAA’s conduct “requires or induces a customer not to deal with a supplier” then it has proved an exclusionary act. It is not necessary for the Commission to go on to prove that the conduct “impedes or prevents a firm from entering into, or expanding within, a market”. This is consistent with our finding in *Patensie* where we held that section 8(d) does not require the showing of an exclusionary effect: “However, as already noted, in terms of Section 8(d) the complainant does not have to establish that the act complained of has an exclusionary effect, that is, that it prevents a firm from expanding in the market - if it is established that one of the acts specified in the various sub-clauses of Section 8(d) has been perpetrated and that the perpetrator is dominant, then the exclusionary nature of the act is presumed”⁸⁶
- [71] However, under section 8(1)(c), which we deal with next, an applicant or complainant must show the elements of the exclusionary conduct as well as the effects.⁸⁷

⁸⁴ *Competition Commission and South African Airways (Pty) Ltd* (18/CR/Mar01) [2005] ZACT 50 (28 July 2005) (“SAA”).

⁸⁵ *GovChat* at para 142.

⁸⁶ SAA at para 105.

⁸⁷ SAA at paras 134 and 135.

Section 8(1)(c)

- [72] 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.⁸⁸
- [73] Section 8(1)(c) provides that it is prohibited for a dominant firm to engage in an exclusionary act – other than a type of “named” exclusionary act listed in section 8(1)(d) – if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain. An exclusionary act is defined as “*an act that impedes or prevents a firm from entering into, participating in or expanding within a market*”.⁸⁹
- [74] An applicant/complainant in a section 8(1)(c) case bears the onus of demonstrating the anti-competitive effect of the conduct which can be demonstrated through evidence of harm to consumer welfare or the foreclosure in the market, and which can be based on reasonable inferences from proven facts.⁹⁰ In terms of section 8(1)(c) we then consider whether the anti-competitive effect outweighs any efficiency justification for the conduct. If it does, we can find that there has been an abuse of dominance. Here the onus is on the applicant/complainant.⁹¹

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

Dominance

- [75] As indicated above, both sections 8(1)(c) and 8(1)(d)(ii) of the Act require a showing of dominance.

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

“A firm is dominant in a market if –

⁸⁸ *Competition Commission v Media 24 (Pty) Ltd* 2019 (5) SA 598 (CC) (“*Media 24*”), at paras 12 and 63.

⁸⁹ Section 1(1) of the Act.

⁹⁰ SAA, at para 132; *Computicket (Pty) Ltd v Competition Commission of South Africa* (170/CAC/Feb19), at paras 18-19; *Media 24*, at para 76.

⁹¹ SAA, at para 134.

- (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”.*

[77] The term “*market power*” is defined in section 1 of the Act as “*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*”.

[78] Lottoland argues that Google is a *de facto* monopolist in the general search market, and that it is also a dominant firm in the SEM market.⁹² It submits that Google has a market share of more than 90% in the SEM market, measured by search volume.⁹³ In addition, Lottoland submits that Google’s dominance as a provider of SEM services is well-established as:⁹⁴

78.1. The Commission has stated that Google is “*the monopoly provider of intent-based marketing and customer acquisition in SA, as with many other markets*”;⁹⁵

78.2. The United Kingdom’s Competition and Markets Authority (“CMA”) has stated that advertisers are “*heavily reliant on Google as a key source of user traffic and do not have alternatives*”⁹⁶, and that Google has significant and enduring market power in general search;⁹⁷ and

78.3. The Autorité de la Concurrence recently found that Google has a share of the online search advertising market in France exceeding 90% and concluded that there are a number of “*extraordinary*” characteristics of Google Ads which mean that the inconsistent or discriminatory treatment of

⁹² Lottoland Heads of Argument, at para 55.1.

⁹³ Founding Affidavit, at para 14.

⁹⁴ Lottoland Heads of Argument, at para 6.

⁹⁵ Complaint Memorandum, at para 146, Record p95.

⁹⁶ CMA’s Online Platforms and Digital Advertising Market Study, 1 July 2020 (‘the UK CMA report’), at para 3.141, p111, accessible at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>.

⁹⁷ UK CMA report, at para 3.146, p112.

advertisers by Google can “*potentially harm competition in the downstream markets in which the advertisers operate*”.⁹⁸

[79] Google argues that it does not show ads on the vast majority of search queries. In fact, on average over the past four years, 80% of searches on Google have not had any ads at the top of search results. Further, only a small fraction of searches, namely less than 5%, currently have four top text ads. Accordingly, it is not appropriate to make a correlation between Google’s alleged market share in search and its market share in SEM (or any other market), and that Lottoland has failed to adequately establish that Google is dominant or exercises market power in such a market.

[80] Furthermore, Google submits that by Lottoland's admission, during the period in which it used Google Ads, namely between March and September 2020, it spent significantly less on Google Ads than on other advertising channels. Notably, during the period, Lottoland only spent █% of its advertising budget on Google Ads. The remaining █% was spent on Facebook advertising, direct customer engagement (including SMS), online paid articles and “*other advertising channels*”.⁹⁹ Therefore, Google submits that it is not dominant in the broad advertising ecosystem.

Our assessment

[81] The CAC in *eMedia*¹⁰⁰ noted that context matters. In this matter one needs to consider the inter-relationship between Google’s activities as a provider of online search and SEM services, as discussed below.

⁹⁸ Complaint Memorandum (quoting from the French Competition Authority’s finding in Decision 19-D-26 of 19 December 2019), Record pp103-104, accessible at: <https://www.autoritedelaconurrence.fr/en/decision/regarding-practices-implemented-sector-online-search-advertising-sector> and which finding was confirmed by the Paris Court of Appeal in Décision n° 15-D-13 du 9 Septembre 2015, accessible at <https://www.autoritedelaconurrence.fr/sites/default/files/commitments//15d13.pdf>.

⁹⁹ Lottoland Founding Affidavit, at para 34.

¹⁰⁰ *eMedia*, at para 102.

- [82] We note that an assessment of a firm's dominance is almost always done with reference to the market within which it functions.¹⁰¹ The CMA has published a report following its Online Platforms and Digital Advertising Market Study in which it states that *"Google has significant market power in search advertising. It accounts for over 90% of search advertising revenues and faces limited competitive constraints from other forms of advertising"*.¹⁰²
- [83] In addition, the Autorité de la Concurrence has found that Google is overwhelmingly dominant in the *"online search advertising market"*, and that *"the vast number of searches conducted using Google's search engine increases the search engine's attractiveness to internet users, but also makes the Google Ads services more attractive to advertisers, who need to ensure their ads reach a very large audience"*.¹⁰³
- [84] In South Africa, the Commission has found in its final OIPMI report that *"Most online search, travel and shopping journeys for goods and services start on general search, the entry point for most consumers to the Internet. General search leads are considered particularly valuable to platforms because they are intent-based. Google Search is a de facto monopoly, accounting for over 90% of all general search across desktop, tablet and mobile devices. Given its importance for customer acquisition, visibility on the Google search is critical and impacts on discoverability and website traffic"*.¹⁰⁴ (our emphasis) The Commission further says the following:

"Given the importance of Google Search for customer acquisition, visibility on the SERP is a critical component for intermediation platforms as it has an impact on discoverability and website traffic. On Google Search itself, ranking matters as

¹⁰¹ See the definition of market power in section 1(1) of the Act and the decision of the CAC in *Babelegi Workwear and Industrial Supplies CC v The Competition Commission of South Africa* (186/CAC/JUN20) [2020] ZACAC 7 (18 November 2020).

¹⁰² UK CMA report, accessible at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>, at para 5.371, pp211 and 307.

¹⁰³ The summary of the French Competition Authority's Decision 19-D-26 of December 19, 2019, accessible here: <https://www.autoritedelaconcurrence.fr/en/decision/regarding-practices-implemented-sector-online-search-advertising-sector>, at para 163, Record pp 101-102.

¹⁰⁴ Competition Commission of South Africa Online Intermediation Platforms Online Market Inquiry, final report and decision dated July 2023, p5.

*consumers show a predisposition to click on the first results assuming they are most relevant to the query.”*¹⁰⁵

- [85] Google contends that one cannot simply directly impute a firm's market share in one market (in this case its market share in relation to general search) to represent its market share in another market (i.e., the SEM market). However, as indicated above, these markets clearly are inter-related, which establishes a basis for an inference to be made, and we are compelled by the significance of Google's market share in search.
- [86] Google has been shown to be dominant and/or have market power in search and search advertising by authorities in various other jurisdictions. Taberner claims that Google is the most used search engine in South Africa with over 90% market share. The report goes on to state that globally Google has a market share in the 'SEM/PPC' (pay per click) market of 28%, a figure which is claimed to be at least 40% in South Africa¹⁰⁶. We have not seen compelling evidence to the contrary or to show that this is somehow not the case in South Africa, although Google argued that this statement is misplaced.¹⁰⁷
- [87] Since the markets for general search and SEM are inter-related, and to the extent that SEM activity derives inextricably from the search engine capability of providers such as Google, it is likely, in our view, that on a *prima facie* basis such a lead search engine would *prima facie* have market power in the related SEM market.
- [88] Furthermore, a large number of bookmakers use Google Ads and/or SEM as an important channel to market to new customers (Lottoland's marketing expert claims that 15 of the 20 largest bookmakers measured by annual traffic use Google Ads¹⁰⁸). This fact is not contested.¹⁰⁹ Even in instances where these operators also make use of other channels for marketing, as with Lottoland, it is likely that there is a degree of complementarity between channels.

¹⁰⁵ Competition Commission of South Africa Online Intermediation Platforms Online Market Inquiry, final report and decision dated July 2023, at para 36.

¹⁰⁶ Lottoland Founding Affidavit, Annexure Q, p519.

¹⁰⁷ Google Answering Affidavit, at para 7.4.7, p26.

¹⁰⁸ Lottoland Founding Affidavit, at para 128, p34.

¹⁰⁹ Google Ireland Answering Affidavit, at para 7.4.38, p34.

- [89] Our *prima facie* view is that Google Ads is likely to be dominant (by virtue *inter alia* of Google's market power in the inter-related market for search) in instances where consumers search online to identify a specific bookmaker or gambling offering. That is, for a specific customer journey, as identified in the Commission's OIPMI, wherein the customer uses search as their entry point, Google is the predominant search alternative in South Africa. This is more significant when taking into account the evidence presented in the Taberner (marketing specialist) report for Lottoland¹¹⁰, that bookmakers reviewed in South Africa generally do not have physical premises and customers interact with them primarily through the internet.
- [90] Google does not seem to dispute that one of the primary means by which customers look up a service provider or gambling offering is through its search platforms, with visibility of specific providers enhanced by SERP and placement on Google Ads. It simply argues that there are other channels available as well without further evidence or elaboration.¹¹¹
- [91] As indicated above, Google contends that other marketing channels such as offline advertising (including print media, outdoor advertising and television) comprise the broader (undefined) 'advertising ecosystem' that should form part of the relevant product market, such that it is not dominant. We have already concluded that we are not persuaded by Google's argument that the relevant product market encompasses the broader advertising ecosystem. In addition we note that while a consumer may have sight of a Lottoland billboard or poster, or an advert on television or radio, logically it is likely in our view that the customer, once he/she is aware of the brand and offering, may go on to search for Lottoland's website or a specific gambling product online (and indeed, mostly using Google Search) given a large number of bookmakers are primarily based online.
- [92] The trends identified by Google in its submissions regarding the growth of online advertising partly at the expense of offline advertising in recent years seem to

¹¹⁰ Lottoland Founding Affidavit, Annexure Q, "Search Engine Marketing, Google and Online Gambling Research Report", Record p519.

¹¹¹ Google Ireland Answering Affidavit, pp28-29.

reflect a general trend in consumer and marketing behaviour over time as consumers access markets through digital means (as is evident in newspaper or airline ticket buying markets).

[93] We accordingly find that Google on a *prima facie* basis is a dominant firm in the search and SEM markets in South Africa.

Section 8(1)(d)(ii): Is there a refusal to supply a customer?

[94] It is common cause that Lottoland is a customer of Google.

[95] Lottoland submits that Google is refusing Lottoland access to Google Ads while simultaneously providing access to this service to Lottoland's rivals, and that Google has not only proffered inconsistent reasons for its enforcement of its "*internal policies*" as against Lottoland, but it has also enforced these policies selectively in the market in which Lottoland operates.

[96] Lottoland also disputes Google's alleged justification for its refusal to supply Lottoland with access to its Google Ads on the basis that Lottoland allegedly contravenes the provisions of the Lotteries Act.

[97] Google has argued that it has not terminated Lottoland's access to Google Ads but that it has only refused use of the website <https://www.lottoland.co.za/> as a landing page for advertisements, as the website contains content that contravenes both Google's internal policies and the Lotteries Act.¹¹² Furthermore, according to Google, Lottoland's website continues to appear in organic search results and Lottoland is free to apply Search Engine Optimisation ("SEO") strategies to improve its ranking on the SERP. From Google's perspective, SEO is not dependent on the use of Google Ads and claims it has repeatedly provided: (i) reasons to Lottoland explaining the basis upon which its website (the intended landing page) does not comply with Google's policies; and (ii) instructions on the steps that Lottoland can take to rectify the non-compliance, thereby enabling

¹¹² Google Heads of Argument, at para 4.33.

further use of Google Ads. That is, Lottoland still has access to Google Ads and could advertise in a manner compliant with Google's policies and South African laws regarding lottery advertising.¹¹³

[98] In this regard, Lottoland contends that Google contradicts itself when it submits that Google has merely suspended and/or restricted a landing page that violates Google's policies and the Lotteries Act, as Google has stated that in order to use Google Ads Lottoland must comply with Google's advertising policies and applicable laws and that ad campaigns that violate these policies and applicable laws will not be permitted to run.¹¹⁴

[99] In general, we note that the concept of a refusal to supply includes not only situations in which there is an actual refusal to supply but also situations in which there is a 'constructive' refusal to supply (for example, situations in which the dominant firm makes a supply offer on unreasonable terms).¹¹⁵

[100] The category of conduct in which "*a firm refuses to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible*" encompasses several distinct fact patterns, and of which there are variations.¹¹⁶ The standard fact pattern involves a category of refusals to supply which in economics are called "vertical refusals to supply" and include situations in which the dominant firm: (1) refuses to supply inputs to firms who are in competition with its own downstream business, i.e., (downstream) competitors; or (2) refuses to supply downstream firms with whom it does not compete, i.e., customers.¹¹⁷ We have above emphasised the amendments to section 8(1)(d) of the Act that now includes reference to a customer.

[101] Lottoland's argument is that of a vertical refusal to supply a customer downstream with an upstream input.

¹¹³ Google Ireland Answering Affidavit, at para 3.4

¹¹⁴ Google Heads of Argument, at para 4.36.

¹¹⁵ *Competition Commission v Telkom SA Ltd* (Case No. 11/CR/Feb04, dated 7 August 2012) [2012] 2 CPLR 334 (CT); and *eMedia Investments (Pty) Ltd v Multichoice (Pty) Ltd and The Competition Commission* (IR194Mar22) ("*eMedia* Tribunal"), at para 91.

¹¹⁶ *eMedia* (Tribunal), at para 104.

¹¹⁷ *Ibid*, at para 105.

[102] We note that Google previously made Google Ads available to Lottoland until September 2020 and Lottoland has repeatedly attempted to have this access reinstated.

[103] Google's claim that supplying Lottoland with access to Google Ads carries with it the potential for criminal liability and other commercial risks is undermined by the fact that it permitted a number of Lottoland's competitors to advertise the same or similar services which Google claims contravene the Lotteries Act. This was not disputed by Google as it admitted that it is in the process of terminating the relevant advertisers' use of Google Ads through landing pages that contravene Google's policies.¹¹⁸ It is not clear to us why some providers are refused access and others are not, other than Google's admission that there is "*slippage*" arising from a mechanised classification system that is meant to detect problematic websites.¹¹⁹

[104] In this regard, although we do not go into the details of the Hartley affidavit filed on behalf of Google Ireland, it suffices to note its conclusion, and statements made in the hearing. Google stated that it was in the process of terminating the relevant advertisers' use of Google Ads where some of their websites contained landing pages that contravened Google's policies (identified following an eventual internal investigation based partly on the list of competitor websites that Lottoland had put forward).

[105] Regarding Google's defence, we note that there is pending litigation before the Western Cape High Court regarding the lawfulness of Lottoland's lottery betting business, in light of the *Lottostar* decision of the Mpumalanga High Court.¹²⁰ For our purposes, there is doubt regarding the interpretation and legality of Lottoland's own offering (rather than Lottostar's), also evidenced by the series of correspondence referred to above between the parties in which Google's position has changed over time. This is at the heart of Google's grounds for restricting Lottoland's access to Google Ads. It is also significant that the *Lottostar* judgment

¹¹⁸ Google Ireland Supplementary Answering Affidavit, at para 2.5.

¹¹⁹ *Ibid*, at para 2.4.

¹²⁰ Lottoland Founding Affidavit, Annexure FA2; Memorandum, at para 73.

on which Google relies was handed down in August 2021, approximately a year after Google first restricted Lottoland's access to its Google Ads service. That is, its initial decision to deny access was taken prior to the judgment on which it relies in support of its decision and so it relies on its internal policies and interpretation of the relevant laws and then appears to apply this interpretation asymmetrically in the market.

Scarce goods or services

[106] Lottoland and Google have differing views on whether Google Ads is a scarce service.

[107] Lottoland argues that Google Ads is plainly a scarce service in the sense contemplated in section 8(1)(d)(ii) of the Act as there is no feasible substitute for Google Ads to advertise via Google's search platform and that the UK CMA has said so.¹²¹ Thus, Lottoland argues that Google Ads "*cannot be easily duplicated without significant capital investment and therefore can be considered as 'scarce' or hard to come by*" as the Tribunal found in *GovChat*.¹²²

[108] As noted above, Google argued that there are numerous alternatives to Google Ads, including both online and offline advertising channels, all of which are viable alternatives and exercise a significant competitive constraint on Google Ads.¹²³ In particular, Google submitted that:

108.1. Lottoland uses numerous viable alternative advertising mediums in the relevant period, and it only spent █% of its advertising budget on Google Ads;¹²⁴

108.2. Lottoland provided that Google Ads accounted for around █% of its new customer registrations during the relevant period and that the customers who were directed to Lottoland by Google Ads contributed around █% of

¹²¹ UK CMA report, at para 5.23, p217.

¹²² Lottoland Heads of Argument, at para 55.2. Also see *GovChat*, at para 108.

¹²³ Google Heads of Argument, at para 4.53.

¹²⁴ Lottoland Founding Affidavit, at para 34.

its First Time Deposit Gross Gambling Revenue during the period (Google emphasised that it has not been established that new customer registrations, in and of themselves, are the appropriate proxy for effective participation in a market);¹²⁵ and

108.3. These metrics demonstrate that Google Ads was not the most significant contributor to Lottoland's alleged new customer registrations or spend by these new customers but is, most importantly to sustain a "scarce goods/services" case, one of many providers of advertising services.

[109] As indicated in *eMedia*,¹²⁶ the question of whether a good or service can be considered scarce requires us to consider whether i) it is impossible or prohibitively expensive to duplicate the service, (and therefore the cost of duplicating the alleged service constitutes a barrier to entry) or ii) there are effective substitutes for the service. In other words, there must be actual or potential real viable alternatives to the dominant firm's service that customers in the downstream market (in this case Lottoland) can rely on or it must be easy to duplicate the service in question without significant capital investment.

[110] Whether Google Ads should be viewed in the lens of a 'scarce service' as contemplated in section 8(1)(d)(ii) of the Act is context specific. In *GovChat*, the Tribunal found that where goods or services "*cannot be easily duplicated without significant capital investment*" they can be considered as 'scarce' or hard to come by.¹²⁷ SEM services in our view cannot be easily duplicated without significant capital investment.

[111] In *Audatex* the Tribunal noted that scarcity relates to an insufficient availability in the market of the relevant services that are being provided by the dominant firm.¹²⁸

¹²⁵ Lottoland Founding Affidavit, at paras 36 and 37, Record p12.

¹²⁶ *eMedia* (Tribunal), at para 129.

¹²⁷ *GovChat*, at para 113.

¹²⁸ *Apollo Studios (Pty) Ltd and Another v Audatex SA (Pty) Ltd and Another* (IR198Mar23), at para 81.

[112] The context to be noted around Google Ads is *inter alia* informed by the finding of the Commission in its final OIPMI report that “*Given its importance for customer acquisition, visibility on the Google search is critical and impacts on discoverability and website traffic*”¹²⁹ and the statement by the UK CMA that Google’s “*rivals face significant barriers to attracting advertisers, in addition to the barriers on the consumer side. Google’s market power has allowed it to charge higher prices to advertisers than its competitors. On a like-for-like basis, Google’s prices are on average [30-40]% higher on desktop and [30-40]% higher on mobile than those of Bing*”.¹³⁰

[113] In *Google AdSense for Search*, the EU General Court notes that Google in its appeal did not dispute the EC’s finding in respect of characteristics of the market that reinforce market power in online search advertising.¹³¹ Specifically, it was not disputed that “*there were numerous barriers to entry and expansion in the market for online search advertising intermediation in the EEA. In that regard, it stated, inter alia, that significant investments were required in order to establish, maintain and refine a ‘search advertising platform’ and that the online search advertising intermediation market was characterised by network effects. It noted that the success of an intermediary depended on the number of advertisers and publishers that it could attract as well as the size of its portfolio of online search ads. Thus, the greater the number of advertisers that used an online search advertising intermediation service, the more ads related to those searches the intermediary could choose from and thus increase the relevance of the ads that it served in response to a user’s query.*”¹³²

[114] In this context, we are persuaded by Lottoland’s argument that even though it utilises other forms of paid advertising (both online and offline), it has shown from its own experience in 2020 that SEM is critical to engage with to acquire new customers who utilise Google in the first instance to search for fixed-odds betting

¹²⁹ Competition Commission of South Africa Online Intermediation Platforms Online Market Inquiry, Final Report and Decision dated July 2023, p5.

¹³⁰ UK CMA report, p211, accessible here: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>.

¹³¹ Judgment of the General Court of 18 September 2024 – Google and Alphabet v Commission (Case T-334/19), at para 405.

¹³² *Ibid*, at para 403.

offerings. In particular, in the six-month period in which Lottoland utilised Google's Ads, Lottoland has submitted that it grew its customer base by an average of [REDACTED] new customers per month. This dropped-off significantly to [REDACTED] new registrations per month when Google terminated Lottoland's ability to place ads terminating on its landing page using Google Ads.¹³³ Therefore, Lottoland using other online platforms, such as Facebook, appears to speak to a degree of multi-channel marketing and complementarity rather than outright substitutability particularly given rapid advances in digital technology and advertising as noted above. In any event, the widespread use of Google Ads and search by bookmakers in South Africa suggests that Google Ads offers a unique value to these advertisers when customers *search* for a specific service or offering and that, along with other channels, it is an important additive channel for marketing for the firms to reach consumers that follow a particular online journey.

[115] The findings of the CMA¹³⁴ and Commission¹³⁵ show customer preference for Google search; that there is no feasible substitute for Google Ads or visibility when advertising via Google's search platform for customer acquisition as Google's rivals likely face significant barriers to attracting advertisers; Google Ads is a service which cannot be easily replicated by Google's competitors; and that customer objective considerations render their choice to use Google Ads likely given the predominance of Google Search.

[116] Given the above, we conclude that Google Ads can *prima facie* be considered as a scarce service.

Economic feasibility

[117] Lottoland argues that it is clear that the supply to Lottoland of access to Google Ads is economically feasible for Google as Lottoland seeks nothing more than equitable access with its rivals, which currently utilise Google Ads. Google's claim

¹³³ Lottoland Replying Affidavit, para 101 and Lottoland Heads of Argument, at paras 32.7 and 37.2.

¹³⁴ UK CMA report, accessible at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>, at para 5.371, pp211 and 307.

¹³⁵ Competition Commission of South Africa Online Intermediation Platforms Online Market Inquiry, final report and decision dated July 2023, at para 36.

that this presents certain potential risks is belied by the fact that it continued to supply access to Lottoland's rivals, and moreover does so despite being advised many months ago that these competitors were being allowed to do precisely what Google has refused to permit Lottoland to do.¹³⁶

[118] Google submits that it is not economically feasible to require it to display non-compliant and unlawful advertising and submits that contrary to Lottoland's claims, Google does not provide access to Google Ads to Lottoland's competitors that engage in similar activities relating to lottery betting. Google's advertising policies apply to all users of Google Ads, including Lottoland's competitors. Google makes every effort to remove ads that contravene its advertising policies once such ads are brought to its attention, either through automated detection processes or reporting mechanisms available to all users (including Lottoland).¹³⁷

[119] On the evidence before us, Google has acknowledged in its supplementary answering affidavit and conceded at the hearing,¹³⁸ that it still provides access to Google Ads to some of Lottoland's competitors due to an inconsistent enforcement of its internal policies and the mechanisms that Google has put in place. Therefore, the continuation of supply of Google Ads to Lottoland would *prima facie* not be impractical or unfeasible for the reasons noted above.¹³⁹ Lottoland seeks nothing more than equitable access with its rivals.

[120] Furthermore, Google has previously supplied Google Ads services to Lottoland and there is no evidence to suggest that it was not economically feasible for it to do so at the time.

[121] We conclude that it is *prima facie* economically feasible for Google to supply the services in question to Lottoland.

¹³⁶ Lottoland Heads of Argument, at para 55.3.

¹³⁷ Google Ireland Answering Affidavit, at para 3.11.

¹³⁸ Hearing Transcript, pp 111-112.

¹³⁹ Google Ireland Supplementary Answering Affidavit, at paras 2.4 and 2.5.

Pro-competitive gains

[122] Under section 8(1)(d), once the elements of section 8(1)(d) are satisfied the competitive harm is presumed and the onus shifts to the respondent to demonstrate that the effects are outweighed by pro-competitive gains. However, as indicated above, under section 8(1)(c) an applicant or complainant must show the elements of the exclusionary conduct as well as the effects.¹⁴⁰

[123] Lottoland contends that Google's conduct has the direct result of distorting competition in the market. Its refusal to allow Lottoland to use Google Ads while allowing its rivals to do so also leads to a reduction of consumer choice: consumers are less likely to be aware of Lottoland's competing offerings, which includes a wide variety of offers and choices of over 30 different draws to partake in, daily, weekly, and monthly draws, all at competitive prices relative to its rivals.¹⁴¹ Google argues that there is no evidence that consumers or end-users lack choice.

[124] Google further argues that Lottoland's application rests on the meritless proposition that it is entitled to make more money than it would otherwise. However, in our view Lottoland's contention that its expansion or growth has been curtailed by Google's action is relevant since we are required to consider the ability of firms to grow and expand within a market.¹⁴² In this regard, we considered that Lottoland has shown using its own data, as discussed above, that it has forgone substantial revenues and the acquisition of customers as a result of Google's conduct. The question is then whether there is an adequate justification for Google's actions.

[125] As the authorities show, even dominant firms are entitled to refuse to deal. However, if the dominant firm lacks a proper explanation for its conduct supported by facts, this might shift the probabilities in favour of the applicant.¹⁴³

¹⁴⁰ SAA, at paras 134 and 135.

¹⁴¹ Lottoland Heads of Argument, at para 43.6.

¹⁴² Section 1 of the Act.

¹⁴³ eMedia CAC, at para 56.

[126] *Prima facie*, Google exercises its market power in a manner which discriminates between downstream customers who rely on equitable treatment to compete effectively. Google's rules were not applied uniformly in this case. This, in turn, *prima facie* causes harm to Lottoland's ability to compete with its rivals for new users and led to significant commercial harm from the loss of revenue evidenced by Lottoland.¹⁴⁴

[127] That there is slippage in Google's application of its policies is not the fault of Lottoland, particularly as the issue was raised with Google some months before. What matters for our purpose is that the conduct complained of affects competition downstream and *prima facie* affects the ability of Lottoland to grow and expand in the market where it faces its rivals.

[128] Regarding Google's justification, we received post-hearing submissions from the parties on whether the provisions of section 57 of the Lotteries Act permit any exception from criminal sanctions. Google relied on the fact that in 2021, Ithuba successfully challenged the lawfulness of the business of Lottostar, a competitor to Lottoland, which had been providing substantially similar lottery betting games to the ones provided by Lottoland.¹⁴⁵

[129] Google argued that it faces potential criminal liability and unacceptable commercial risk in terms of the Lotteries Act if it were to approve ads promoting Lottoland's landing pages and further argued that alternative remedies are open to Lottoland if it were to ultimately succeed in its complaint before the Commission following a referral for determination to the Tribunal, such as a follow-on damages claim. Google is of the view that it has no alternative currently to mitigate the risk of contravening the law if the Tribunal were to grant interim relief and force Google to permit Lottoland's ads that promote lottery betting.

[130] In addition, Google is of the view that the WCGRB, which is the regulator which provided Lottoland with its current licence, is not legislatively competent to grant

¹⁴⁴ Lottoland Heads of Argument, at paras 43.3 and 58.

¹⁴⁵ The case was a full bench High Court appeal following the Supreme Court Appeal granting Ithuba leave to appeal to the full bench; *Ithuba Holdings (Pty) Ltd v Lottostar (Pty) Ltd and Others* (A46/2020) [2021] ZAMPMBHC 39 (30 August 2021) ("*Lottostar case / decision*").

licences pertaining to lotteries, including the placing of fixed-odds bets on the outcome of lotteries. Gambling activities relating to lotteries are exclusively regulated by the Lotteries Act. There is no concurrency of jurisdiction insofar as lotteries are concerned and, accordingly, “any other law” does not include provincial laws, including the WC Act, addressing other activities excluding lottery-related activities.¹⁴⁶ It argues that this position is expressly enunciated in the Constitution of the Republic of South Africa, 1996.

[131] Furthermore, Google also submitted that Lottoland is the subject of litigation before the Western Cape High Court in a case brought by Ithuba due to the unlawfulness of the business activities of Lottoland. However, the proceedings have been pending since the close of pleadings in February 2020.

[132] On the other hand, Lottoland submitted that it does not claim that its bookmaking activities are authorised under the Lotteries Act. However, in Lottoland’s view – supported by the WCGRB – the fixed-odds betting that is offered on its website is permitted by its bookmaker licence, granted under section 55 of the WC Act, and thus, too, by the WCGRB.¹⁴⁷

[133] Lottoland further provides that the appropriate authority to determine the lawfulness of its conduct in the gambling sphere is the regulator which has issued Lottoland with its bookmaker’s licence – i.e., the WCGRB. Specifically, the regulator is required annually to consider whether to renew the licence, and also approves all Lottoland’s advertising and advertisements.

[134] Lottoland submits that it does not engage in the conduct envisaged by section 57(1) of the Lotteries Act, as it does not “participate” in a lottery as envisaged by section 57(1)(a); nor “conduct” a lottery, “facilitate” a lottery or “promote” a lottery as contemplated in section 57(1)(b); or even “benefit” from the lottery as also contemplated in section 57(1)(b).

¹⁴⁶ Google Supplementary Submissions relating to the Lotteries Act and the Applicant’s business dated 28 July 2023, at para 6.3.

¹⁴⁷ As pointed out in Lottoland’s Heads of Argument, Lottoland is the holder of a bookmaker’s licence first issued to it by the WCGRB on 7 November 2017, and renewed by the WCGRB every year since then. See e.g., Lottoland Founding Affidavit, at para 31; at paras 86 and 87, p27.

[135] We note that the direct regulator of Lottoland's business, one which reviews its advertising content and services annually ostensibly with the expertise and knowledge of the relevant provincial and national regulations to do so, continues to issue Lottoland with a license to operate.

[136] On the evidence before us there are substantive disputes in relation to the legality or not of Lottoland's business as it relates to fixed-odds betting on the outcome of lotteries. In our view, it is not appropriate for us to attempt to determine these disputed issues.

[137] Furthermore, this is not a case in which we can find that there is a clear breach by Lottoland of any law relating to lotteries.

[138] For the purposes of assessing an application for interim relief we consider that: (i) Google has not presented clear evidence that Lottoland is in breach of the Lotteries Act and the matter stands to be decided by other Courts; (ii) it is prudent in our view, given the above, to err on the side of enabling a downstream firm to continue to compete with its rivals; (iii) several other operators downstream have also historically provided the same or similar services (for a number of years) presumably under the understanding that their activities are legal (it would be a serious legal and commercial risk to these businesses too to deliberately choose to offer illegal services to customers); (iv) we are compelled that Google's primary justification (effectively claimed as a pro-competitive gain) has at the very least been applied unevenly in the market; and (v) Lottoland is operating with a valid bookmaker's licence issued in terms of section 55 of the WC Act by the WCGRB.

[139] While there is no competition-related rationale for Google's actions in this matter, it is our view that Google's conduct *prima facie* distorts competition in the downstream market without any *prima facie* pro-competitive or efficiency justification by Google.

Conclusion on prohibited conduct

[140] Taking all the above evidence into consideration, we conclude that the termination or restriction of access in this matter *prima facie* constitutes a refusal to deal in the context of section 8(1)(d)(ii), given that the refusal *prima facie* undermines Lottoland's participation and expansion within the market in which it operates. The conduct *prima facie* distorts competition by impeding the ability of a downstream firm to expand within the market relative to its rivals in the absence of any technological, efficiency or pro-competitive gain. Lottoland has provided evidence on the impact on its business, which we interpret further below in circumstances where; i) there is no clear evidence that there is a contravention of the Lotteries Act; ii) there is evidence of unfairness or inconsistency in the application of Google's policies vis-à-vis Lottoland and its rivals; and iii) where access was previously provided (from March 2020) and subsequently revoked (in September 2020).

Section 8(1)(c)

[141] As indicated above, section 8(1)(c) provides that it is prohibited for a dominant firm to engage in an exclusionary act – if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain.

[142] Our assessment above, while done in the context of section 8(1)(d)(i) is also relevant for purposes of section 8(1)(c). For the reasons already set out in relation to the section 8(1)(d)(i) case, we find that *prima facie* Google has also contravened section 8(1)(c) of the Act in that its conduct has a *prima facie* anti-competitive effect in that it distorts competition by impeding Lottoland's ability to expand within the market relative to its rivals which conduct is not outweighed by technological, efficiency or other pro-competitive gain.

Irreparable harm to Lottoland

[143] Lottoland has quantified the effects on it of the alleged conduct. It argued that as a direct result of Google's refusal to allow it to utilise Google Ads its new customer

registration dropped by between [REDACTED]% and [REDACTED]%.¹⁴⁸ Furthermore, based on the seven months in which Google supplied its Google Ads to Lottoland, Lottoland estimates that it has, as a result of Google's refusal to supply, suffered a reduction in revenue in the amount of R [REDACTED] which losses are ongoing.

[144] Lottoland submitted that in the period March 2020 to September 2020, it spent R [REDACTED] (approximately [REDACTED]% of its advertising budget) on Google Ads; the remaining [REDACTED]% was spent on other advertising channels. According to Lottoland, Google Ads accounted for [REDACTED] new registrations (that is new customers who registered as players on www.lottoland.co.za), representing [REDACTED]% of Lottoland's new registrations over that period.¹⁴⁹ This shows that the share of Lottoland's budget spent on Google Ads as a single service provider and the results yielded from that are significant.

[145] Google contests this evidence, claiming that it is speculative and refutable. It argues that Lottoland's extrapolation of "lost" revenue¹⁵⁰ in reality comprises desired additional revenue from customers that Lottoland claims would be directed to it if it made use of Google Ads.

[146] In addition, we requested submissions from Lottoland on its annual financial statements for the period in which it submits that it suffered a reduction in revenue in the amount of R [REDACTED], in order to assess whether Lottoland's purported lost additional revenue is serious or irreparable harm for purposes of interim relief.

[147] Lottoland submitted that:

147.1. In calculating the loss suffered as a result of Google's refusal to supply access to its Ads Services, it extrapolated the percentage of new registrants obtained via Google Ads during the seven months in 2020 when Lottoland had access to those services, to determine the number of customers lost as a result of Google's refusal to supply, and applied its average lifetime value

¹⁴⁸ Lottoland Founding Affidavit, at para 43.1; Lottoland Heads of Argument, at para 43.1.

¹⁴⁹ Lottoland Founding Affidavit, at para 36.

¹⁵⁰ Ibid, at para 19.

of a customer (“LTV”) across the period since the date of Google’s refusal to determine a quantifiable loss suffered as a result thereof.

147.2. Its calculation of the loss of profit estimated at R [REDACTED] is determined as follows:

147.2.1. During the period in which Lottoland had access to Google Ads, [REDACTED] % of all new registrants came from pay-per-click (“PPC”) Google Ads. This amounted to [REDACTED] new PPC customers during the period 2 March 2020 to 11 September 2020.

147.2.2. When Lottoland’s access to Google Ads was removed, the applicant experienced an immediate drop in monthly registrations, from [REDACTED] registrations in August 2020 down to [REDACTED] registrations in September 2020.

147.2.3. Extrapolating that same ratio to the period following Google’s termination of Lottoland’s access to the date on which the present application was issued, Lottoland calculated that [REDACTED] potential new customers were lost as a result of Google’s refusal.

147.2.4. Applying Lottoland’s LTV (which it quantifies at € [REDACTED] or R [REDACTED] per customer, based on its experience and the data available to it) to [REDACTED] potential registrants, Lottoland quantifies its loss due to Google’s refusal to supply Google Ads at R [REDACTED].

[148] In assessing irreparable harm we take guidance from the CAC in *eMedia* where it stated: “In applying the three principles in s 49C(2) cognisance must be taken of whether clear, non-speculative and uncontroversial facts have been presented by an applicant from which it could be reasonably and logically inferred, on a balance of probabilities, that the alleged irreparable harm would occur ...”¹⁵¹ and “There is usually no time to delve too deeply in serious or irreparable harm but at the very least it must be assessed in the context of whether there is a *prima facie* right at the interim level. As long as there is clear and non-speculative evidence about

¹⁵¹ *eMedia* (CAC), at para 80.

*possible anti-competitive effects, then serious consideration must be given to the grant of the relief.”*¹⁵²

[149] After considering all the evidence, we do not regard Google’s contentions as adequate to refute the claims made by Lottoland for us to consider the prospects for firms to participate and expand within markets.¹⁵³ Part of how firms grow in the market in which Lottoland competes is through the use of effective advertising channels such as Google Ads. Indeed, several players in the downstream market make use of Google Ads to reach customers. Furthermore, the evidence provided by Lottoland of revenues lost appears to us to be based on sound projections using available data and is not seriously contested in terms of how the estimates have been derived or the significance of the quantum of (opportunity) losses incurred.

[150] We are of the view that Google’s conduct in this case *prima facie* resulted in significant commercial harm to Lottoland as well as affecting its ability to compete with its rivals for new users. Its access to new customers has evidently declined, whereas a significant number of customers have been shown (using data from March 2020 to September 2020) to be attracted by Lottoland’s services which are brought to their attention or made accessible through search and Google Ads, even in the presence of other marketing channels.

[151] The ongoing harm arising from Lottoland’s inability to use Ads Services to direct consumers to its landing page (as its rivals do) to expand its new customer base does not depend solely upon a consideration of the interests of the immediate parties and should include consideration of the broader objectives of the Act. i.e., any potential (ultimate) effects on consumer choice.¹⁵⁴ The preamble to the Act highlights the importance of access by consumers to goods and services: “*provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire*”, and the purpose of this Act is to promote and maintain competition in the Republic in order to *inter alia* provide

¹⁵² *eMedia* (CAC), at para 93.

¹⁵³ Lottoland Heads of Argument, at para 37.4, p 23.

¹⁵⁴ *National Association of Pharmaceutical Wholesalers and others v Glaxo Wellcome (Proprietary) Limited and others*, Case No. 68/IR/Jun00, p14. See also *Business Connexion* (182/CAC/Mar20), at paras 17 and 31.

consumers with competitive prices and product choice. Google's conduct *prima facie* affects (limits) consumer choice for end-consumers in that Lottoland advertising through Google Ads is removed.

The balance of convenience

[152] In considering the balance of convenience in interim relief proceedings, the Tribunal has to consider which of the two parties will suffer the greater harm from the granting or refusal of the interim relief, pending a decision on the merits. If there is clear and non-speculative evidence regarding the general extent of the harm that one party would suffer if the relief requested is not granted, then the interim relief ought to be granted.¹⁵⁵

[153] We reiterate the guidance in *eMedia*, where the CAC emphasised that in interim relief cases “*whilst there will inevitably be disputes of fact*”, these should not prevent the Tribunal from taking a “robust approach” on the evidence before it, and that “*if there is a prima facie right, even one open to some doubt and a well-grounded apprehension of irreparable harm if the relief is not granted and ultimately granted at final relief stage, then the balance of convenience favours the grant of the relief*”.¹⁵⁶

[154] We have concluded above that Lottoland has made out a *prima facie* case of restrictive practices, as well of irreparable harm to it. Any prejudice which the respondents may suffer during the period of our interim order, pending the determination of the matter, must be considered against the *prima facie* effect on competition in the market by Google impeding Lottoland's ability to expand within the market relative to its rivals, direct harm to Lottoland's business and depriving end-consumers of choice.

[155] Therefore, we conclude that the balance of convenience favours the granting of the interim relief.

¹⁵⁵ *eMedia* (CAC), at para 80.

¹⁵⁶ *eMedia* (CAC), at paras 83 and 95.

Conclusion

[156] For all the above reasons, we conclude that Lottoland has satisfied the requirements of section 49C of the Act and made out a case for the interim relief.

[157] We make the following order:

ORDER

- [1] The first respondent's supplementary answering affidavit is admitted.
- [2] For a period of six months from the date of this order, or the conclusion of a hearing into the prohibited practices alleged by the applicant, whichever is the earlier:
- 2.1. The first and second respondents (collectively "Google") are directed to for so long as Google permits any firm in South Africa to utilise Google's Ads Services to advertise fixed-odds betting on the outcome of lotteries, to permit the applicant to access Google's Ads Services platform for the same purpose; and
- 2.2. The applicant shall, for the duration of access to Google's Ads Services, adhere to Google's terms and conditions and shall be obliged to pay Google's fees for such access in accordance with such terms and conditions.
- [3] There is no order as to costs.

Signed by: Thando
Signed at: 2024-11-12 10:21:44 +02:00
Reason: Witnessing Thando


Prof. Thando Vilakazi

12 November 2024
Date

Mr Andreas Wessels concurring.

Tribunal Case Managers:

For Lottoland:

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Adv Paul Farlam SC, Luke Kelly and Silindile
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For Google:

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