PARLIAMENTARY PUBLIC HEARINGS ON THE COMPETITION AMENDMENT BILL: 29 AUGUST 2018

BUSA

Background

- BUSA is a confederation of business organisations, including chambers of commerce and industry, professional associations, corporate associations, and unisectoral organisations. It represents a cross-section of business, large and small.
- BUSA's function is to ensure business plays a constructive role in economic growth, development and transformation.
- As the principal representative of business in South Africa, BUSA conveys the views of its members in various structures, including in the National Economic Development and Labour Council (NEDLAC).

Nedlac Process

- BUSA participated in the NEDLAC process on the Bill along with EDD and Organised Labour. Meetings were held on the following dates:
- 5 December 2017
- 29 January 2018
- 23 April 2018
- 4 June 2018
- 7 June 2018
- 16 July 2018
- Additional bilateral meetings between BUSA & EDD were held on 28 March, 23 April & 31 May 2018.

Summary of Nedlac Engagements

- Engagements at Nedlac were substantive and robust, with consideration by government of the various proposals put forward by social partners.
- During the course of the engagements at Nedlac, Business (represented by BUSA) compromised significantly on a number of counts with a view to maximising consensus.
- BUSA's position therefore reflects not only the overarching views of business as a whole, but also a sincere effort to accommodate the policy imperatives of government in workable legislation that strikes the required balance between an effective competition regime and investment promotion / ease of doing business.
- What follows does not deviate from BUSA's position at Nedlac, but seeks to unpack positions put forward to facilitate consideration by the Portfolio Committee.

Introduction

- BUSA recognises the importance of finding the right balance between addressing anti-competitive practices and behaviour; dealing with markets that are exclusionary; and stimulating competitive practices to enable investment and growth in the economy.
- BUSA largely endorses the objectives of the Amendment Bill, particularly the promotion of entry into market of small and medium businesses and firms owned by historically disadvantaged persons.
- BUSA is however concerned that the balance may be disproportionately weighted against ease of doing business.

Concentration

- A key concern for BUSA is the initial diagnosis of the problem.
- In the Background Note to the December 2017 version of the Bill (subsequently amended), concentration levels for various industries are provided.
- BUSA understands the motivation to address concentration to be unchanged since this initial version of the Bill.
- However, analysis by BUSA members shows very different results: Levels of concentration are often much less than often assumed.
- Also, major jurisdictions (EU) distinguish between market share and dominance. They also distinguish between dominance and economic harm.

Concentration (2)

- One problem is how to define market share.
- Market share could refer to a firm's participation in certain product lines in a market, or its share in a market (e.g. a particular bank's share in the mortgage bond market or its overall share of the banking sector – itself distinct from the financial services sector).
- This debate is not simply academic if it informs the use of some of the powers created in the envisaged legislation.
- Market inquiries for example, are time consuming and expensive exercises for businesses and should be informed by credible data and evidence of harm.

Withdrawal of the yellow card regime (1)

- The current version of the Bill does away with the “yellow card” regime currently in place through the amended Section 59, providing for an administrative penalty for a first-time offence in relation to all of 8(1).
- The yellow card regime provides for an area of less prescriptive regulation in cases where conduct is not automatically identified as anti-competitive.
- BUSA views it as necessary to maintain provision in the legislation for such borderline conduct to be scrutinised and strengthened, but for the treatment thereof to be differentiated from clearly anti-competitive behaviour.

Withdrawal of the yellow card regime (2)

- In BUSA's view, a viable middle ground would be to do away with yellow card protection once the Competition Tribunal or Competition Appeal Court has issued a final judgment that particular conduct is prohibited.
- This proposal would bind other firms in relation to the same or similar conduct going forward.
- BUSA has possible text to amend the current Section 59(1)(b) in this regard, which we are able to share with the Portfolio Committee.

Withdrawal of yellow card regime (3)

- BUSA appreciates the concerns of government that retaining the yellow card may open the door to vexatious or frivolous litigation.
- This could be mitigated in the legislation and discouraged through enabling the Competition Tribunal to award costs against parties guilty of vexatious or frivolous litigation.
- This has the benefit of retaining the advantages of the yellow card regime while addressing government's concerns therein.

Shifting of evidentiary burden (reverse onus provision)

- Provisions introduced to section 8 by the Amendment Bill seek to reduce the onus on the Commission in the cases that it wishes to pursue.
- EDD's motivation is that the current provisions of the Act, and the tests therein, read with questions of onus are too high a threshold for the Commission to discharge – especially insofar as they are required to show anti-competitive effect.
- The amendment Bill allows the Commission to refer a complaint without having conducted a substantive investigation. This could lead to spurious and unjustified litigation, which would likely disproportionately prejudice large entities.

Shifting of evidentiary burden (reverse onus provision) (2)

- To the extent that the reverse onus provisions are retained, the Amendment Bill should at least introduce an “effects based” test for dominance (such as those adopted by the European Commission during its modernisation agenda) so as to ensure that such reverse onus is only placed on firms that are truly dominant and do not simply have a large share in the domestic market.
- An alternative solution is to introduce provision for adverse costs orders (imposed by the Tribunal) for spurious and unjustified litigation. Failure to do this could deter investment.

Section 9: Price discrimination

- Section 9 of the Act, as it currently stands, prohibits price discrimination by a dominant firm if the price discrimination implicates equivalent transactions and is likely to result in a substantial lessening or prevention of competition. The discrimination may be justified on certain grounds, including allowances for differences in costs of supply, meeting price competition, and changing market conditions.

Section 9: Price discrimination (2)

- While BUSA supports the Minister's objective behind the proposed amendments to this section to address the potential effects of anti-competitive price discrimination on SMMEs and firms controlled by historically disadvantaged persons, we are concerned around the move away from the existing test of establishing a substantial lessening of competition.
- For this reason, BUSA would be supportive of provisions that specifically protect small businesses and firms owned by HDPs, whilst retaining the overall SLC test.

Market Inquiries

- BUSA understands the necessity to hold market inquiries to investigate and create the platform to address anti-competitive market structures, particularly where these have been the result of historical factors.
- Alongside this is the imperative to create a conducive market to grow the economy and power job creation.
- In this regard, BUSA has a number of concerns regarding market inquiry provisions in the draft Bill.

Market Inquiries: Concerns (1)

- The Commission may impose far reaching, binding remedies following a market inquiry (i.e. structural, pricing or other behavioural remedies) on a no-fault basis.
- The competition test has been watered down significantly from a “substantial lessening of competition” to an “adverse effects” test.
- This is a matter of significant concern since it allows the Commission to intervene in markets (in which it considers there to be a restriction, lessening or prevention of competition) to impose remedies that may change the structure and terms of supply and demand in a market in circumstances where there has been no breach of the Act.

Market Inquiries: Concerns (2)

- The proposals in the Bill envisage a limited role for the Tribunal in exercising oversight.
- The Tribunal constitutes an important safeguard, and has the capacity to regulate complex findings arising from market inquiries.
- As a result, the Tribunal should have a role in developing recommendations.

Market Inquiries: Proposals

- BUSA proposes that no binding remedy may be imposed absent a finding by the Commission and confirmed by the Tribunal, based on substantial lessening of competition. This should also be subject to appeal.
- Furthermore, the trigger for a market inquiry should be on the basis of credible information.
- A market inquiry should be in two stages: an initial fact-finding exercise through RFIs, followed by a "full-blown" market inquiry on the basis of anticompetitive features made visible in the fact-finding exercise.

National Security Provisions (Envisaged S. 18A)

- While BUSA did not argue against the concept when it was raised in the context of the NEDLAC engagements (given the fact that there are similar provisions which have been adopted in comparable jurisdictions), there are justifiable concerns around how this provision will be implemented in practice.
- It will be incumbent on the executive to use these new-found powers in a manner that strikes an effective balance between securing South Africa's national interest and encouraging investment.

National Security Provisions (Envisaged S. 18A) (2)

- Interventions in this regard should not be seen as being exercised arbitrarily or resulting in undue delays in merger proceedings.
- In BUSA's view, it is essential that these powers are used responsibly and that government provides maximum guidance to the market on government's approach to national security (policy transparency); how choices are made (executive transparency) and communicating interventions (information transparency).

Conclusion

- BUSA acknowledges the difficult task of finding the right balance between firmly addressing anti-competitive practices and behaviour; dealing with markets that are exclusionary; and stimulating competitive practices to grow investment and the size of the economy.
- The proposals set out above are aimed at finding such solutions, while signalling areas that we believe have gone too far and will stunt competitive forces rather than provide an environment and investment climate in which to activate them.
- We appreciate the opportunity to provide input to the Bill with the view to strengthening the legal framework in the interests of inclusive growth and a competitive economy.

THANK YOU