



Key changes in Broad-Based Black Economic Empowerment (B-BBEE) legislation since 2015 which impact EU businesses in South Africa

Introduction

The Broad-Based Black Economic Empowerment Amendment Act (Act No.46 of 2013) came into operation on 24 October 2014. Building on the earlier Broad-Based Black Economic Empowerment (B-BBEE) legislation, the act aims to advance economic transformation and enhance the economic participation of black people in the South African economy. The application of the Act is supported by the B-BBEE Codes of Good Practice, which serve as an implementation framework. Whilst not negating the many developments in B-BBEE policy over the years, this flash report focuses on the key legislative changes in B-BBEE since 2015, most notably as it is effected through amendments to the B-BBEE Codes of Good Practice and as it pertains to the impact on EU businesses in South Africa.

The rationale for this paper is founded in a study conducted under the EU Dialogue Facility, which revealed that the 2013 amendments to the B-BBEE Codes resulted in downgraded ratings for many companies, including EU companies. The study further noted that the Ownership component of the Codes remains a challenge for non-listed small EU companies, especially those in family ownership and that whilst the Equity Equivalent Programmes (EEP's) are seen as possible measures by which to respond to the Ownership criteria of the Codes, these programmes may not be economically viable for many companies, especially new investors and SME's.

Thus, with cognisance to the above backdrop, this flash report provides an aerial perspective of these B-BBEE legislative changes as they would need to be considered by foreign-owned businesses in South Africa. It must be noted that this flash report only seeks to explore the general application of the respective Codes' changes and in no way addresses the B-BBEE changes contained in Sector Charters nor the treatment of Ownership for Specialised Enterprises. For all such and similar detail the reader is referred to the Department of Trade and Industry's website.¹ In addition, it must be mentioned that this report holds a rather narrow focus and in no way aims to serve as an academic substitute on B-BBEE knowledge. Rather, the further readings may serve to inform a legislative foundation. Finally, this report prepares the ground to a survey on different experiences by several EU companies in complying with B-BBEE policies, which is aimed at carving a realistic scope for advocacy with regard to these policies striking the balance between attracting foreign investments and achieving true transformation of the South African economy.

¹ www.thedti.gov.za

1. Defining business size from a B-BBEE perspective

Before continuing to explore the B-BBEE changes, it is perhaps relevant to mention that B-BBEE is applicable to all businesses registered in South Africa. The way it is applied is primarily dictated by the size of the business's **total annual income**. The current (post 2013) descriptors and thresholds used in this report are:

- Exempted Micro Enterprises (EME's) - R10 million (or less) total annual income
- Qualifying Small Enterprises (QSE's) - a total annual income of between R10 million and R50 million
- Generic Enterprises (GE's) – R50 million and above.

Foreign-owned businesses in South Africa should also note that the above descriptors apply to them as well. The B-BBEE Codes do not distinguish on the basis of local or foreign ownership at this point of departure. Thus, foreign-owned businesses registered in South Africa will have the same definitions of size applied to them as locally owned businesses.

Also, as per the current B-BBEE Codes of Good Practice:

EMEs and QSEs that are 100% black-owned are deemed to have a Level 1 BBEE status and EMEs and QSEs that are 51% black-owned are deemed to have a Level 2 BBEE status.

The above-mentioned points should be kept in mind when considering the changes discussed in the upcoming sections of this report.

2. Changes in B-BBEE levels in 2015: the most visible of change in status

B-BBEE status is measured in points and reflected in levels. The generic Codes of Good Practice were first published on 9 February 2007. Significant changes were published on 11 October 2013² and came into effect from 1 May 2015. Whilst this report focuses on B-BBEE changes since 2015, it is relevant to consider the landscape changes which occurred in 2015, as for many businesses these changes signified major adjustment in both the 'psychology of their business' and the related business sustainability strategies. In simple terms, businesses sought to adjust their responses to B-BBEE, with the aim of striving towards either sustaining or improving their levels and thus their B-BBEE status. The following table compares the changes in the levels pre and from 1 May 2015 and reflects the related procurement recognition value:

BBBEE Level	'Old' Codes	The Codes (gazetted in 2013, effective 1 May 2015 – current)	Current B-BBEE recognition level
1	≥100	≥100 points	135%
2	≥85 but <100	≥95 but <100 points	125%
3	≥75 but <85	≥90 but < 95 points	110%
4	≥65 but <75	≥80 but < 90 points	100%
5	≥55 but <65	≥75 but < 80 points	80%
6	≥45 but <55	≥70 but < 75 points	60%
7	≥40 but <45	≥55 but < 70 points	50%
8	≥30 but <40	≥40 but < 55 points	10%
NON-COMPLIANT	<30	< 40 points	0%

² Gazette number 36928

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Considering the above table, it is evident that companies that had not strategically responded to the various elements of their respective B-BBEE scorecards would have experienced far-reaching effects as a result of the Code changes. For example, a company that scored 65 points would have received a Level 4 rating under the 'old' codes but a Level 7 rating under the current Codes. This would have a significant impact on whether or not the company would then be deemed a supplier of choice to its customers, given that its procurement recognition level would decrease from 100% to 50%. It is thus evident from the changes above, that many companies would indeed have experienced a downgrade in B-BBEE status. Unfortunately, the ability to turn this situation around is not a simple process of compliance, instead it requires businesses to address B-BBEE elements in a holistic manner, keeping cognisance of their core business imperatives whilst doing so.

3. Changes to the B-BBEE Elements in 2015: changing business models and strategies

The two most significant changes to the B-BBEE elements were as follows:

- Changes in terms of the number of elements, and
- The introduction of the concept of Priority Elements.

3.1 Changes in the number of B-BBEE elements

The B-BBEE changes in 2015 saw the number of B-BBEE elements being reduced from seven to five, with the weighting points adjusted, as illustrated in the Generic Scorecard table below:

7 Elements as per the 'old' codes	Weighting points	5 Elements as the B-BBEE Codes (1 May 2015)	Weighting points as at 1 May 2015
Ownership	20 (+ 3 bonus)	Ownership	25
Management Control	10 (+ 1 bonus)	Management Control	15 (+ 4 bonus)
Employment Equity	15 (+3 bonus)		
Skills Development	15	Skills Development	20 (+5 bonus)
Preferential Procurement	20	New enterprise and supplier development	40 (+ 4 bonus)
Enterprise Development	15		
Socio-economic development	5	Socio-economic development	5
	107		118

The above changes have had a significant impact on both QSE's and GE's. Possible change responses included restructuring of organograms and revisiting recruitment processes in order to bring about succession mechanisms, which would aid the merging of 'Management Control' and 'Employment Equity' compliances and considerations. In response to the merging of Preferential Procurement and Enterprise Development into the 'New enterprise and supplier development', businesses have had to revisit their responses to their Supply-Chain models, as they seek to find a balance between concepts such as out-sourcing, in-sourcing and the creation of new business units to cross-service other areas of the business, whilst at the same time ensuring that there is no conflict of interest or compromise of corporate governance practices.

The possible change responses captured above are but the proverbial 'tip-of-the-iceberg' of business strategies that would need to be adjusted in order to respond successfully to the ever-changing landscape of B-BBEE. When most businesses start out, they do so in response to a need in the market. Thereafter, an initial strategy is developed; followed by a structure of the organisation. To then restructure their organograms as a response mechanism to B-BBEE criteria, challenges the very foundations of business modelling and if not done in a constructive manner is bound to result in company structures which are no longer properly positioned to respond sustainably to the evolving business deliverables, least of all ensuring return-on-investment from both human and material resourcing perspectives.

3.2 The introduction of the Priority Elements

The Priority Elements are: Ownership, Skills Development and Enterprise and Supplier Development. The Codes require that the following minimum requirements apply:

- 40% of the "net value" targets for the ownership element
- 40% of the total weighting points for the skills development element
- 40% for each of the three categories within the enterprise and supplier development element, that is, preferential procurement, supplier development and enterprise development.

Further to the above, the Codes instruct that whilst a QSE is required to comply with Ownership as a compulsory element and either Skills Development or Enterprise and Supplier Development, a GE must comply with all three the Priority Elements. The further infliction being that if the measured enterprise fails to meet these requirements as set out above, its B-BBEE status will automatically be downgraded by one level.

As businesses in South Africa, however, generally continue to experience the pressured awareness of having to comply with B-BBEE in order to remain part of the active economy, the Department of Trade and Industry (the DTI) has regulated further initiatives to encourage companies to support and implement B-BBEE.

4. Equity Equivalent Programmes (EEP's) for multinationals

Equity Equivalent Programmes (EEP's) are public or private programmes/schemes designed to fulfil the requirements of B-BBEE ownership. The programmes are aimed at providing an alternative pathway for multinationals to contribute towards B-BBEE, other than the traditional sale of shares to black South Africans. The concept is not a new one, having seen some of its earliest respondents in 2010, as the following media extract from the DTI's site shows:

"The Department of Trade and Industry (the DTI) is pleased to announce the approval of two Equity Equivalent Investment Programmes by Liebherr – Africa (Pty) Ltd and Hansen Transmissions (Pty) Ltd. Following the signing of Equity Equivalent Agreements with both Multinationals, the Minister of Trade and Industry has approved the launch of the proposed Equity Equivalent Investment Programmes. This approval will entitle both Multinationals to twenty (20) points under the Ownership Element of Code 100 of the B-BBEE Codes of Good Practice."³

³ <https://www.thedti.gov.za/editmedia.jsp?id=1962>

As is evident from the above extract, application and successful implementation of the related EEP would have resulted in 20 points being achieved under the Ownership Element. Currently the calculation of the contribution of EEP's towards Ownership is as per the following extract from the current DTI guidelines for EEP's:

"The value of these EE contributions may be measured against 25% of the value of the Multinational's South African operations or may be measured against 4% of the Total Revenue from its South African operations annually over the period of continued measurement."⁴

The implementation of EEP's has certainly evolved over the past decade, and whilst the DTI continues to attempt to encourage businesses to engage on EEP's, their attempts at clarifying and managing, even regulating the processes around EEP's, have seemingly done more to scare investors away rather than encourage them. The current process of implementing an EEP is time consuming and labour intensive and could very well result in businesses losing focus on their core business.

For more detail on the DTI's guidelines to EEP's implementation see Further Reading.

5. Youth Employment Service (Y.E.S) Initiative: 28 August 2018

On 28 August 2018, the Youth Employment Service (Y.E.S) Initiative was gazetted to form part of the Code Series 000 of the B-BBEE Act no. 46 of 2013. The overview states:

"The Youth Employment Service (Y.E.S) Initiative is to provide for, and institute, Broad-Based Black Economic Empowerment (B-BBEE) Recognition for Y.E.S Measured Entities and qualification criteria applicable to, the B-BBEE Recognition for Job Creation."⁵

The following points briefly outline the criteria for an entity to qualify to register for the Y.E.S initiative:

- Meet the 40% sub-minimums for each priority element (as indicated in paragraph 3.2 above) or meet an average of 50% (if a GE) across the 3 priority elements or an average of 40% (if a QSE) in 2 of the 3 priority elements including ownership; and
- Improve its BEE score each year; and
- Score full points on the Skills Development Scorecard (if a generic); and
- Give 12-month full-time employment contracts to such number of Black youth (18 – 35 years) as determined in the Y.E.S policy.

The Y.E.S initiative aims to promote youth employment whilst at the same time rewarding the Y.E.S companies through improving their B-BBEE scores. To move up 1 BEE level, the Y.E.S company must meet the target and achieve 2.5% absorption rate. To move up 2 BEE levels, the Y.E.S company must meet double the target and achieve 5% absorption rate.

Whilst an enticing aid to B-BBEE, the Y.E.S initiative is not void of implementation challenges. As with the challenges expressed in terms of the revised scorecard, the Y.E.S programme implementation is likely to also require businesses to consider very carefully their ongoing

⁴ http://www.thedti.gov.za/economic_empowerment/equity.jsp

⁵ Government Gazette no. 41866 – see Further Reading

capacity to be able to absorb⁶. Companies should remain aware that the Y.E.S initiative is primarily meant to be an employment targeting initiative and should not be confused with direct skills enhancing initiatives. It is also worth noting that as with much of the B-BBEE legislation, it remains pertinent to interpret and apply the Y.E.S policy with due consideration for the rest of the B-BBEE legislative context.

6. B-BBEE amendments to the Codes in 2019: Gazette no 42496

On 1 December 2019, further Amendments to the B-BBEE Codes of Good Practice⁷ came into effect. The amendments, which replaces those of 2015, addresses, in this order, the following three components of the Codes:

- Code series 400: Enterprise and Supplier Development
- Code series 300: Skills Development
- Code series 000: General Principles.

It is relevant to note that these amendments also re-iterate the priority elements, namely: Ownership, Skills Development and Enterprise and Supplier Development, as it against this backdrop that companies (in particular QSE's and GE's) will need to implement the amended codes.

This section of this report will briefly explore the changes within each of these amended series.

6.1 Code series 400: Enterprise and Supplier Development

Amongst the technical changes mentioned in this series, perhaps one of the most notable points for attention is the introduction of the concept of an “Empowering Supplier”. The Codes define the empowering supplier in rather complex ways, including “good citizen”, complying with “all regulatory requirements” and in the case of a QSE, meeting at least three criteria of the four mentioned, pertaining to local procurement, job creation, transformation of raw material/beneficiation and skills transfer requirements. The significance of the ‘empowering supplier’ is particularly evident if one considers that Enterprise and Supplier Development weighs in at 40 points on the generic scorecard; placing companies under significant pressures to be able to achieve the status of being an ‘empowering supplier’ to other companies – a ‘status’ they can only achieve if they meet their own internal criteria on the element. The ‘bottom line’ to this point of discussion is that no preferential procurement points will be obtained if a supplier does not comply with these requirements. Also, if the company fails to meet the minimum 40% target for preferential procurement, its B-BBEE status will automatically be downgraded (as mentioned above, this is a priority element).

The amendments tend to assume that the ‘Empowering Suppliers’ exist in all sectors of the economy; however, the reality of the situation is that this is not the case. For example, in the manufacturing/assembly type businesses, wherein specialist components are imported as per the manufacturing criteria pertaining to product standards. Often the suppliers of such businesses are not within the juristic arena of South African B-BBEE legislation and therefore

⁶ ‘Absorption’ means “a measure of the entity’s ability to successfully secure a long-term contract of employment for the Employee, Learner, Intern or Apprentice” (Notice 303 of 2019: effective 1 December 2019)

⁷ Gazette number 42496

have no need to comply. As these suppliers are likely to constitute the primary components of these business's procurement values, the subsequent B-BBEE scores are prejudiced. Also, whilst Government seeks to encourage foreign investors to support local economic development through enterprise development, there remains the challenge of capacitating potential local suppliers, whose enabling factors are often dependent on the skills transfer from larger, foreign-owned companies within their respective sectors. Attempting to respond to enterprise development and skills development simultaneously, as the Codes tend to suggest, might well result in enterprise development beneficiaries who are precariously not ready to respond to market demands.

6.2 Code series 300: Skills Development

The Skills Development amendments bring with it possibly the most positive change in that recognition for skills development expenditure arising from informal and workplace learning programmes, previously limited to 15% of the total value of skills development expenditure, has been increased to 25%. Unfortunately, this positive development is countered by the change in target for skills development expenditure on learning programmes for Black People, which had been reduced from 6% to 3.5%, wherein the weighting has been reduced from 8 to 6 points. This does not bode well for companies who in recent years have invested significantly in embarking on Learning Programmes, only to now find that it is not recognized at the same values as when they commenced on these initiatives. Also, whilst the amendments introduce a target of 2.5% for 4 points on the recognition on bursaries for Black students at Higher Education Institutions, it is evident from workplace skills planning reports that company contributions to bursaries, whilst well-intended, are often not thoroughly thought through and generally do not render the desired impact towards the National Skills Development Strategy. Rather, these monies would be much better spent internally as part of in-house learning programmes for staff.

6.3 Code series 000: General principles

Key changes included in this section of the amendments include the following:

- Application of the flow-through principle⁸ in recognizing the Black Ownership of EME's and QSE's.
- Guidance is also provided on the measurement of unincorporated joint ventures, wherein their respective B-BBEE scores will be weighted according to their proportionate shares in the joint venture and then added together for a combined score out of 100.

The above changes are likely to be positively received as they serve to challenge fronting actions by ensuring the application of the flow-through principle. Also, through the correct apportioning of scores in joint ventures, the Codes will ensure more transparent relationships

⁸ "As a general principle, when measuring the rights of Ownership of any category of Black people in a Measured Entity, only rights held by natural persons are relevant. If the rights of Ownership of Black people pass through a juristic person, then the rights of Ownership of Black people in that juristic person are measurable. This principle applies across every tier of Ownership in a multi-tiered chain of Ownership until that chain ends with a Black person holding rights of Ownership." (Codes of Good Practice, Gazette No. 36928)

amongst suppliers, thus increasing the probability of more sound deliverables for which these joint venture partners can be held responsible.

7. Conclusion

As indicated at the outset of this paper, the above-mentioned changes are but an aerial view of the changes that B-BBEE has undergone since 2015. For many companies in South Africa, both local and foreign owned, responding to this ever-changing landscape of B-BBEE has become like treading water whilst trying to keep head-above-water. Whilst this brief overview of the selected elements above portray a picture of progressive transformation in terms of business opportunities for South African Black persons, it also renders a stark reality that the current B-BBEE codes are not bringing to fruition South Africa's need to enhance its position as a sustainable and conscious stakeholder in the global economy. Simply being reactionary in response to legislative changes - without bringing forward constructive solutions - is not likely to result in holistic transformation progress. Perhaps it is time for local and foreign business stakeholders to revisit their responses to B-BBEE through dialogues which will hopefully result in Empowerment methodologies which:

- Will recognize and thereby encourage contributions that businesses, especially foreign owned businesses, are and can continue to make in terms of Skills Enhancement to the South African workforce and entrepreneurs,
- Will effect a more actionable influence on the successful implementation of the Y.E.S initiative.
- Will enable legislators to appreciate and draw on the entrepreneurial and technical skills and insights which family-owned businesses are able to share with industry without compromising their ownership.
- Will ultimately contribute to enhance an investment-conducive climate in South Africa, particularly for SMEs.



FURTHER READING

Act No. 46 of 2013: Broad-Based Black Economic Empowerment Amendment Act, 2013

<http://www.thedti.gov.za/news2014/Act46of2013BEE.pdf>

Amended Codes of Good Practice: Notice 1019 of 2013, Gazette No. 36928

<http://www.gpwoonline.co.za/Search/Pages/Results.aspx?k=36928>

Equity Equivalent Programmes for Multinationals

http://www.thedti.gov.za/economic_empowerment/equity.jsp

Youth Employment Service (Y.E.S) Initiative

<https://www.thedti.gov.za/gazettes/41866.pdf>

Amended statement 000, 300, 400: Notice 303 of 2019, Gazette No. 42496

https://www.bbbeeecommission.co.za/wp-content/uploads/2019/06/42496_31-5_Amended-Statement-000-300-and-400.pdf