

**BROAD-BASED BLACK ECONOMIC EMPOWERMENT CODES OF GOOD PRACTICE 2014:
SUBMISSION BY EU-SA BUSINESS LINKS**

NOVEMBER 2014

Part A. INTRODUCTION

EU-SA Business Links welcomes the opportunity to comment on the Broad-Based Black Economic Empowerment Codes of Good Practice.

EU-SA Business Links is a forum for EU businesses in South Africa on matters concerning the South African business landscape. Its aim is to strengthen the partnership between the EU business community and South African stakeholders by improving communication and advocacy.

EU companies and investors continue to be an important long-term and substantive contributor to South Africa's economic growth, development and transformation. As at June 2013, at least 2,000 EU companies had invested over €75.9 billion (R1,1062.6 billion) in South Africa, and created over 350,000 direct jobs (with the indirect impact on job creation being much higher). The creation of jobs has also been accompanied by the widespread provision of vocational and educational training, up-skilling opportunities, and management development. EU investors have played an important part in technology transfer, with many high tech, high skill companies located in South Africa. They also play a key role in export development, not just directly, but also by locating in South Africa to service operations throughout Africa. Additionally, EU investment contributes significantly to the achievement of broad-based Black Economic Empowerment (B-BBEE).

In this regard, the EU investor community sees itself in a mutually advantageous partnership with the South African government and the people of South Africa.

After talking to EU businesses in South Africa on issues concerning the B-BBEE Codes (the Codes), which were published for comment in October 2014, EU-SA Business Links wishes to make the below comments.

Part B. GENERAL COMMENTS

In general, EU-SA Business Links notes that the published codes seek to implement the changes introduced by the amendments to the law. EU-SA Business Links understands the imperative in South Africa to advance socio-economic transformation, and also views the effective and broad-based economic participation of South Africans as intrinsic to sustainability in South Africa. The New Growth Path has noted that black economic empowerment has failed to adequately deliver substantive economic transformation and has also encouraged abuses such as fronting. The new Act and Codes aim to rectify this, as well as clear up areas of interpretative confusion between the enabling legislation, the codes, the charters, and other areas of legislation.

We note that, from both a substantive and procedural perspective, the new codes have significant ramifications. Previously compliant enterprises have found themselves suddenly non-compliant. And the degree to which they find themselves non-compliant will, in many cases, require significant cost and planning in order to regain compliance. What continues to be an additional concern is that the manner in which B-BBEE has been applied reflects a weak link between compliance (and attendant costs), and increased sales.

It is with these overarching elements, as well as the core principles of the governing act, in mind that we make the specific comments in Part C, below. Part D concludes.

Part C. SPECIFIC COMMENTS

- **Qualifying Small Enterprise Statement**

EU enterprises in South Africa are heterogeneous in size and turnover. A number of them are small enterprises with turnovers of between R10 million and R50 million. These enterprises have expressed concern about the potential impact of the new B-BBEE requirements on their businesses. An enabling environment for SMEs is one of the means to creating jobs and transforming the economy, as envisaged in the National Development Plan (NDP). As a general point of departure, any initiative which in any significant manner, increases the cost of compliance for these enterprises could negatively affect their ability to create and sustain jobs.

Firstly, we note that the cost of compliance for QSEs has increased considerably. We also note that designated groups are now measured separately in the case of QSEs, while in the case of management control they are no longer so. In both these cases, the resultant is an automatic drop in QSE points.

On the issues of skills development, the increased emphasis on this element reflects the fact that skills are key to productivity growth and competitiveness. EU companies invest significantly

to workforce skills, with many already investing more than 3% of payroll on training. In fact, the extent of this training represents a sizeable investment on the part some of these companies in terms of financial capital, as well as the cost of foregone opportunities to invest in expansion. Given this, it is important that the investment in skills yields substantive returns for both these companies and the economy. We note the requirement for Sector Education and Training Authority (SETA) approval of workplace skills plans and annual training reports. We would like to, in that regard, reiterate the concerns of the EU business community relating to problems with the SETA system. If issues relating to SETA red-tape are not attended to urgently, business will in the end be penalised for SETA inefficiencies.

With respect to empowering suppliers, we would like to note that the process of verifying whether a supplier is an empowering supplier will likely involve additional administrative costs, but still result in downgrade even if a QSE has taken genuine efforts to comply, but fails for other reasons to find such supplier in their sector. As a point of observation, we would also like to add that the new requirements here could invariably prejudice black-owned and controlled companies and firms that do not comply with all the requirements as there will be no incentive (from a BBBEE rating perspective) for companies to prefer such suppliers over others.

Lastly, on a practical note, we note that no provision has been made for a transitional period to allow QSEs to implement the codes. We also note that the technical guidelines are yet to be published. We would suggest, under the circumstances, that a period of exemption from ownership (particularly for new QSEs) be granted, in order to allow them to work on their ownership structures.

- **Equity Equivalents for Multinationals**

Government is aware of the constraints to transferring equity faced by some multinationals, registered as external companies or subsidiaries. Those with a turnover of over R50 million face an automatic downgrade under the new codes. However, the experience with equity equivalents - which would be the alternative in this case - has been prohibitive costs and practicality barriers to complying. We highlight that concerns regarding bureaucratic hurdles in the approval of projects have previously been raised by business associations representing multinationals. As already noted, EU companies appreciate the need to achieve social and economic transformation in South Africa. And, it is our view that an effective system of equity equivalents has the potential to contribute considerably to the country's developmental objectives, as enunciated in the Industrial Policy Action Plan (IPAP) and the NGP and NDP. We make the following proposals regarding the published equity equivalent codes:

- We urge that, in practice, the launch of projects is not thwarted by approval delays.

- We propose continuous engagement between industry and the Department regarding practicality issues, to ensure that equity equivalents are; commercially viable, implementable, and contribute to transformation and economic development.
 - We also request details of the topping up principles, and request the publication of the technical assistance guide.
 - For planning purposes, we urge that the above guide be gazetted as a matter of urgency.
 - Companies also require more clarity on how long ownership can be claimed for under paragraph 9 of the statement.
 - Lastly, we note that paragraph 10.2.5 requires that, in addition to the programme manager, the chief executive officer should sign off on all reports. We would like to request that consideration be given to delegated authority in some cases.
- **General Implementation Issues**

Part of the success and sustainability of enhanced B-BBEE in South Africa relies on the business community operating within the spirit and tenor the B-BBEE legislation. We agree with the government's perspective that there is a need to close loopholes and abuses that have been used to acquire "compliance", while circumventing the substance of the Act. On the other hand, we caution against a punitive effect upon those companies that desire to comply, and that have been substantively complying. We emphasise, in that regard, the need for continuous engagement with the Department on the implementation components of the codes, both in the run up to the date of 01 May 2015, and also beyond that date. We also propose engagement between the B-BBEE Commission and industry to assess how practical implementation is proceeding, and whether there are unintended consequences attendant to this.

We are still concerned about inconsistencies between the new codes and other legislation and practice. The decision not to issue BEE Certificates for companies with enhanced recognition has been one of concern for some members of the EU business community; and has been raised with the Department in previous interactions. Firstly, procurement legislation requires proof of BEE recognition level by IRBA or SANAS accredited verifications. Secondly, we are not clear that the process of self-declaration through affidavits sufficiently safeguards against perjury or false declarations aimed at influencing bidding processes. We also note reports from some QSEs that public entities are declining affidavits which certify their total annual income and level of black ownership.

Also, companies that operate regional subsidiaries remain concerned that the Economically Active Persons (EAP) criteria does not provide for their geographical activities.

We also highlight continued concerns regarding the potential practical consequences of automatic downgrades; on investment, on transactions in process, and in some instances upon designated groups.

Lastly, we are also concerned about the practical and planning implications arising from the fact that technical guidelines with respect to both QSEs and Equity Equivalents are yet to be published.

Part D. CONCLUDING REMARKS

There is still a perceived disjuncture among some enterprises between the written and applied B-BBEE legislation. We emphasise the need for the B-BBEE codes to be practicable and to support the need to transform the economy, while also supporting and attracting investment that supports the country's long-term job-creation and economic imperatives. This entails that applied B-BBEE legislation be predictable, and that a balance is maintained between improved criteria for B-BBEE compliance, and the collective regulatory impact on existing and prospective investors.

We look forward to further engagement with the Department on these codes, in the run up to the implementation deadline, and during the ensuing implementation phases.