

COMMENTARY ON THE REVISED BROAD-BASED BLACK ECONOMIC EMPOWERMENT CODES OF GOOD PRACTICE AS PUBLISHED IN THE GOVERNMENT GAZETTE NO: 35754 (Hereafter “the Codes”)

The commentary is drafted as general comments, but may also be sector specific where applicable to Higher Education Institutions.

Commentary is given on the following aspects:

1. The amendment of par 3 of Code 000, Statement 000 – Application of the Codes

The effect of the proposed discounting of a Measured Entity’s scorecard may have the result that a company that is already busy implementing B-BBEE initiatives, to drop significantly in its status level, if it does not meet any one of the thresholds.

It may not be possible for a company to achieve the required minimums on one of the priority elements due to the nature or structure of its business.

The penalty imposed by these proposed amendments is very severe and may have the effect of discouraging companies to try and better their B-BBEE levels. We propose instead that it would be a better approach to also incentivise companies to continue improving their status and not only to penalise. To reach the next level should be achievable by a company and not be seen as an obstacle to the process.

As an alternative to this approach, it is recommended that the minimum thresholds be lowered, with incremental and phased increases over three to five years to allow for realistic timeframes within which specialised enterprises can implement measures to become compliant.

It is further recommended that the “discounting” of one level be effected, although only in the second year of measurement (as opposed to the proposed 12-month transition period). It is also suggested that the amendments to the B-BBEE recognition table be phased in over a 3 year period, to allow companies to revise their strategies in order to remain compliant.

Due to the unique nature and composition of Higher Education Institutions, the impact of the revised codes could be extensive and it might be necessary to establish sector specific codes.

2. Amendment of paragraph 2 of Code Series 100, Statement 100- Ownership

The proposed amended table appears to try to ensure that voting rights be afforded to black shareholders that will allow them to block special resolutions should they wish to do so. In terms of the old Companies Act No. 61 of 1973, requiring at least 75 % of votes for the passing of a special resolution, this would have been the case.

In terms of the new Companies Act No. 71 of 2008, the rule of 75% may not necessarily apply as the new Act allows companies to lower this percentage,

provided that there must always be at least 10% difference between the percentages required for adopting ordinary resolutions and the percentage required for special resolutions.

If the memorandum of incorporation of a company only requires more than 60% of shareholders votes for adopting a special resolution, the black shareholders holding 25+1% of the voting rights may not be able to block the passing of a special resolution.

The company will however still be able to claim maximum points for voting rights.

It is suggested that the Codes rather make provision for actual control, taking into account the memorandum of incorporation, rather than the currently proposed basis.

Although this section of the Code may not be directly applicable to Higher Education Institutions, it may also require a sector specific code.

3. The amendment of paragraph 3 of Code Series 100, Statement 100- Key Measurement Principles.

In this regard we refer you to our comments in paragraph 1.

4. Code Series 200: Measurement of the Management Control Element of Broad Based Black Economic Empowerment

The reference in paragraph 2.2 to different “race sub groups” is a cause for concern. There is currently no legislation in South Africa that determines how a person is to be classified in terms of “race sub groups”.

This could lead to disputes on the calculation of the compliance level. How and by whom is it decided whether a person is African or Coloured?

It also does not address the issue of a person of “mixed race”. How will a person born from an African father and Indian mother be defined?

The aforementioned is especially problematic due to the fact that companies may be criminally prosecuted for any misrepresentation in terms of the Employment Equity Act and will also be affected under the Codes.

The parameter (Economically Active Population) against which the different proportions will be measured varies across the different provinces. The calculation in its current format is confusing, especially with respect to the averaging out of the different groupings. In addition, no mention is made of people with disabilities. As indicated above, the proposed amendments also need to be clear on whether the Economically Active Population parameter to be applied, would be national or provincial.

The application to Higher Education Institutions of the regional demographic principles is also questioned, as their composition is drawn from across the country and not necessarily in line with the area in which it is situated. A balance must also be struck between equity and representation on the one hand and success, economic development and social responsibility on the other hand. The contributions made to the knowledge economy and national development should not be discounted.

5. Substitution of paragraph 2 of Code Series 300, Statement 300 - Skills Development Scorecard

The comments contained in paragraph 4 above relating to the demographic representation of “race sub groups” are also applicable on the above mentioned proposed amendment.

Doubling the Skills Development Expenditure from 3% to 6% will have an extremely detrimental effect all measured entities not only Higher Education Institutions. Under the current Codes Higher Education Institutions (whose core business is education and training) fail or struggle to achieve the required compliance levels.

The proposed increase will have the effect that currently complying entities becoming non-compliant, resulting in its B-BBEE level being discounted by two levels.

It is suggested that companies rather be incentivised for achieving or exceeding targets, rather than penalising them as proposed.

The role Higher Education Institutions play in the development and transformation of society must be acknowledged and the narrowing of the definitions for skills development might jeopardise this role.

It is suggested that the definition of "priority skills" be defined and aligned with other labour legislation.

6. Substitution of Annexe 400A of Code Series 300, Statement 300

The Skills Development categories as stipulated in this Annexe may create confusion as there is a discrepancy in the definitions for category C and category D. Both these categories have the word “Learnership” in its title, but the description thereof in the two categories differs.

It is suggested that the descriptions be aligned, or that reference to Learnerships in category D be deleted.

The measurement of the successful completion of Learnerships and the practical implementation thereof are not adequately addressed in the draft Codes.

The Skills Development matrix now only gives recognition for targeted training and internal training is discarded. The purpose of BBEE is to empower Black South Africans and recognition should be given to other types of training as well.

It is suggested a broader application to skills development be implemented especially bearing in mind the penalty associated with not reaching the minimum threshold requirements.

It is recommended that current programmes captured in the Learning Programme Matrix remain since it provides a comprehensive list of options that measured entities can receive recognition for. The current matrix can be expanded to include bursaries, internships, apprenticeships and learnerships.

In addition, it is recommended that the gender adjustment be retained to ensure that the skills development of females is prioritised.

7. Substitution of paragraph 2 of Code Series 400, Statement 400 - Preferential Procurement Scorecard

The reference to NPAT in the criteria table will not find application in the HESA environment and will be addressed at a later stage from a sector point of view.

It is recommended that further options be investigated other than NPAT, for example, 0.375% of turnover, as used in the Chartered Accounting sector scorecard, to ensure that the measure is relevant to all measured entities.

The measurements of Enterprise and Supplier Development should be defined more carefully. One of the discrepancies in the Codes is that the Scorecard refers to the "Annual value" of contributions made. The prescribed formula (Annexe 400(B)) uses the words "average annual value" which seems to indicate that measurement is of an accumulative nature. It can be suggested that both the cumulative measurement as well as annual measurement be allowed.

The draft Codes make provision that recognition will only be given to Value Adding Suppliers. It is our view that the definition of a Value Adding Supplier is too narrow and should be expanded. A company may not be labour intensive, but still contribute significantly to B-BBEE and should not be discarded because it does not conform to the definition.

It might be that due to the specific industry in which a company operates, such as the retail industry, it may not be possible for such a company to become Value Adding.

It is then possible that larger companies will then exclude non Value Adding Suppliers from their procurement spend calculation and will therefore not ask them for a certificate, causing such companies to abandon their B-BBEE drive.

It needs to be highlighted that only about 30% of suppliers will conform to the proposed definition and the impact on the infrastructural development not only of the country, but also of the Higher Education Institutions, must be considered especially in light of current labour legislation.

It is rather suggested the definition of Value Adding Supplier be changed and that a broader approach be considered in other words that a more literal approach of adding value to the supply chain and B-BBEE objectives be included.

It is also recommended that both value adding as well as non-value adding be included, and possibly provide a proportionate distribution of points between them that will be taken into account during the verification process, so as not to completely nullify the contribution of non-value adding suppliers to the preferential procurement process.

We acknowledge the importance of the B-BBEE legislation and support initiatives to guide the implementation and alignment hereof with the national development agenda, but do not believe that the draft Codes as it currently stand, will support it.

As stated above the Codes appears to be strongly penalty driven and would like to see a more balanced approach that takes into consideration aspects such as economic development, skills development and corporate social responsibility.

It is suggested that a risk and impact analysis focussing on the economic effect of the Codes be done by means of an independent investigation before finalisation of the Codes.

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