

Institute for Public Policy Research

Comment on the National Equitable Economic Empowerment (NEEEF) Bill



May 2016

Executive Summary

In early 2016, the Namibian government, through the Office of the Prime Minister (OPM), published the draft National Equitable Economic Empowerment (NEEEF) Bill alongside a policy framework.

While the aims of broad-based empowerment and socio-economic upliftment of the poor and marginalised in Namibian society are, of course, laudable and welcome, the proposed NEEEF policy and legislation does have some significant flaws that could undermine these aims.

This comment, produced in response to the Office of the Prime Minister's call for feedback on the draft bill, points to some of the more noticeable flaws in the proposed law. In view of the problems with the current proposed law it is important that the changes envisaged are not rushed through since they could seriously damage business development and job creation.

The key concerns identified by the IPPR are:

- The absence of data/evidence in making the case for the NEEEF;
- The lack of clarity concerning definitions and understanding of previously/racially disadvantaged;
- Restrictions on business ownership vis-a-vis the provisions of the Namibian Constitution;
- Flawed consultation and problematic communications around NEEEF;
- The apparent lack of transparency in proposed NEEEF regulatory and decision-making processes.

Concerning the absence of a well-grounded, evidence-based argument for the NEEEF, it is recommended that:

- The consultative process around the NEEEF be restarted and preceded by an extensive information- and data-gathering process, which would include the following:

- A comprehensive census of the business and economic landscape and environment is undertaken as a matter of urgency;
- Comprehensive wage and skills surveys be conducted across economic sectors;
- Business and corporate tax data, public procurement data and company registration data be consolidated in order to generate meaningful data sets for decision-making purposes.

Concerning the definition of the NEEEF’s beneficiaries, it is recommended that:

- The issue of “previously disadvantaged” and “currently disadvantaged” be clarified and that an acceptable, workable definition and description be applied to potential NEEEF beneficiaries;
- The interchangeable and potentially confusing use of the terms “previously disadvantaged” and “racially disadvantaged” in the draft law should be clarified.

Concerning the envisioned restrictions on business ownership, it is recommended that:

- The constitutionality of such provisions be comprehensively assessed;
- The restrictive, and apparently punitive, nature of such provisions, be revisited, especially in the case of new businesses and start-ups, as well as foreign companies, as current provisions would discourage both domestic and foreign investment and undermine business growth;
- That potential impact of the proposed law on foreign-owned and multinational corporations should be clarified with a view to encouraging and incentivising investment and job creation.
- The logic and practicality of imposing NEEEF on SMEs, family businesses and sole traders should be re-examined

Concerning non-transparent NEEEF decision-making and regulatory structures, it is recommended that:

- At the highest decision-making levels within the NEEEF regulatory structure a broader range of interest groups (including business/private sector and civil society representation) should be actively involved;
- That NEEEF bill should be redrafted to ensure the Economic Empowerment Advisory Council report to Parliament and not only to the President.
- Appropriate transparency measures be built into the decision-making and regulatory regime to provide adequate avenues for direct public scrutiny and oversight in the interest of engendering sound decision-making and fair regulatory practices;
- The principle of access to information should be provided for in the law.

Concerning the flawed consultation and problematic communications around NEEEF, it is recommended that:

- Government adopt more participatory and inclusive practices when it comes to the crafting of particularly far-reaching laws and policy interventions;
- A more professional approach to communication around sensitive issues be adopted and implemented so as to avoid harm to the image and attractiveness of the country and to dispel perceptions of policy uncertainty.

Furthermore, it is recommended that:

- In the interest of dispelling prevailing confusion, relevant authorities and the legal drafters clarify how many pillars the NEEEF should have, as the proposed law and policy do not align in this regard.
- NEEEF be reworked to become a voluntary scheme that is appropriately incentivised to encourage widespread participation and compliance.

In conclusion, the NEEEF bill as it stands should not be enacted and implemented. The concepts underpinning NEEEF should rather be the subject of a rigorous consultative process, preceded by a concerted effort to gather the data and research needed to credibly inform the introduction of an empowerment policy framework and associated law.

Brief Overview

Over the past decade economic transformation has come to occupy an increasingly pronounced position in the Namibian developmental discourse. This occasionally erratic trajectory has resulted in the emergence of the New Equitable Economic Empowerment Framework (NEEEF) and its associated bill.

The arguments for the application of racial and other criteria to rebalance Namibian society are usually advanced in the context of Namibia's experience of apartheid colonialism. The legacy of this has been high unemployment, pervasive poverty and stubborn historical inequality.

Government has been proposing the formalisation of economic empowerment (BEE) measures and mechanisms for a decade now – since the appearance of the Transformation of Economic and Social Empowerment Framework (TESEF) in 2006.

Despite the absence of a formalised BEE framework, empowerment unofficial initiatives have taken place in some parts of the private sector. There has been little assessment of how effective such attempts at transformation have been.

Also over recent years, the Namibian government has sought to achieve substantial 'Namibianisation' of the national economy, which formally kicked off in mid-2013 with the introduction of Namibianisation criteria in public procurement, followed by the codifying of these criteria with the promulgation of the Public Procurement Act of 2015.

Emphasis is drawn to the emergence of a growing constellation of policy and legislative instruments, with the NEEEF now positioned at the centre, to guide the state's economic transformation efforts.

In light of this, also worth emphasising is that the Harambee Prosperity Plan (HPP), introduced at the start of April 2016, which positioned economic transformation as a core driver of economic advancement - and indicating that formal transformation mechanisms have become an urgent political priority.

Cognisant of the fact that Namibia needs to find an inclusive economic growth path and that the NEEEF springs from a laudable impulse to right historical wrongs in the pursuance of social justice, this submission seeks to constructively contribute to the consultative process.

The salient concerns that this submission are:

- The absence of data/evidence in making the case for the NEEEF;
- Who benefits? – Unclear definitions and understanding of previously/racially disadvantaged;
- Who gives? – Ownership and the Namibian Constitution; and
- Who decides? – Non-transparent decision-making structures.
- Flawed consultation and problematic communication around NEEEF.

The absence of data/evidence in making the case for the NEEEF

In this discussion it should be borne in mind that Namibia's efforts and experiences with BEE mirror those of South Africa, where the government formalised BEE in 2003 with the promulgation of the Broad-Based Black Economic Empowerment Act followed by the Codes of Good Practice in 2007.

In both Namibia and South Africa BEE has been posited as a response to unemployment, poverty and inequality. However, evidence from South Africa suggests that after almost a decade and a half of the BEE experiment, the scheme has largely failed to deliver. Although much research remains to be done, it has been argued that the BEE dispensation has negatively impacted both the country's economic growth rate and foreign direct investment (FDI) over the last decade. In short there is always a danger that BEE will become synonymous with corruption, influence peddling and the economic elevation of a politically-connected elite. The end result of such a worst-case scenario is that NEEEF in Namibia would largely take the form of a money transfer to a small, already well-off elite and not benefit the broad mass of people who are impoverished, jobless and marginalised. This would particularly be the case if, in addition to primarily benefiting a small elite, NEEEF has the effect of deterring investment and therefore undermining job creation. Enabling the creation of meaningful job opportunities in the private sector is probably the single greatest empowerment initiative the government could take.

In response, in what is touted as an upgraded phase two, the ANC government has revised the Codes of Good Practice since 2011, with the initial implementation phase coming to an end on 30 April 2016. As from 1 May 2016, the revised Codes of Good Practice will be in full force. However, in the testing phase leading up to end April 2016, it had already become clear that the new Codes were seemingly hurting small and medium enterprises and that many larger businesses have simply opted out of the compliance regime, citing onerous and unproductive regulation.

That said, two factors bear highlighting at this juncture: First, submitting to BEE regulation in South Africa is ***voluntary***, and; second, the discussion around BEE in South Africa is ***much better informed and data-rich***.

The reality in Namibia is there is an absence of relevant data and information that could inform any law-making process on BEE. This is a significant consideration, as it has been argued that NEEEF would substantially assist in increasing economic growth, decreasing unemployment and poverty, and result in an equitable (re)-distribution of wealth. None of these claims appear to be evidenced based.

It is thus recommended that:

- A comprehensive census of the business and economic landscape and environment is undertaken as a matter of urgency;
- Comprehensive wage and skills surveys be conducted across economic sectors;
- Business and corporate tax data, public procurement data and company registration data be consolidated in order to generate meaningful data sets for decision-making purposes.

This sort of information would not only significantly inform the law and policy drafting process, but would also create the basis for implementation and performance monitoring and evaluation. With the current perception that the NEEEF will only achieve the carving up of an already small pie, having an evidence-based departure point would allow for assessment of the credibility of such notions.

This is important to bear in mind given that the Namibian economy is nowhere near as large, deep and sophisticated as that of South Africa. Thus, the imposition of NEEEF on the Namibian economic landscape could have considerably greater negative impacts than formalised BEE appears to have had so far on the South African economy.

Who benefits? – The definition and understanding of previously/racially disadvantaged

NEEEF aims to uplift the “previously disadvantaged” and the “racially disadvantaged”. This raises the important question: who would qualify for empowerment under NEEEF? It has been argued that the term “previously disadvantaged” should not be used 26 years after independence and that it would

be much more appropriate to introduce measures aimed at empowering the currently disadvantaged. Potential contradictions like this should be included in a further consultation process aimed at ensuring empowerment measures benefit currently marginalised and disempowered people rather than those who are already well off.

For discussion purposes, the legal drafters of the NEEEF Bill, using Article 23 of the Namibian Constitution as their guide, define the “previously disadvantaged” as:

- Racially disadvantaged persons and groups;
- Women;
- Persons with any disability as defined by the National Disability Council Act, 2004.

A complementary definition of “previously disadvantaged” or “BBEE Beneficiaries”, as defined in the recently concluded Retail Charter, is:

“Natural persons who are:
· Black Africans, Basters or Coloureds; and
· Namibian Citizens by birth or naturalisation before 21 March 1990.”

A situation in which the currently advantaged exploit opportunities that should go to the currently disadvantaged will only serve to undermine the NEEEF dispensation in the future.

Thus, it is recommended that:

- The issue of “previously disadvantaged” and currently disadvantaged be clarified and that an acceptably workable definition and description be applied to the NEEEF beneficiaries;
- Similarly, the interchangeable use of the terms “previously disadvantaged” and “racially disadvantaged” be clarified.

Who gives? – Ownership and the Namibian Constitution

The ownership pillar of NEEEF is mandatory and by far the most contentious one. It is abundantly clear that the NEEEF seeks to effectively expropriate sizable chunks of white-owned businesses, both existing and still to exist, in the interest of BEE and the furtherance of social justice. However, it is still unclear to what extent NEEEF will impact foreign-owned businesses or multinational corporations, which usually have complex global ownership structures which are often decided by trading on stock exchanges.

That said, the pertinent provisions of the NEEEF state in this regard:

“(1) Any private sector enterprise that is established after the commencement of this Act may commence business only when such enterprise has secured 25 percent

ownership by a racially disadvantaged person or persons or such higher percentage as may be determined by Minister by notice in the *Gazette*.”

“(2) Despite any other legislation to the contrary, no private sector enterprise that is owned and controlled by a previously disadvantaged person in accordance with the provisions of this Act, may allot, issue, or register the transfer of any portion of its ownership in such enterprise to a person that is not previously disadvantaged or to a domestic or foreign enterprise owned by a person that is not previously disadvantaged.”

Furthermore, the law also aims to restrict ownership options for NEEEF’s beneficiaries, stating that:

(3) A person who has received ownership in a private sector enterprise in accordance with the provisions of this Act may only allot, issue, or register the transfer of any of his or her ownership in such enterprise to a person that is previously disadvantaged.”

On the face of it, all these provisions appear to violate constitutional provisions related to property ownership and freedom of association.

The relevant constitutional articles to consider in this regard are Article 16 (Property) and Article 21 (Fundamental Freedoms).

Article 16 reads:

“(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by way of legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.”

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.”

As for freedom of association, the constitution reads in Article 21 (1):

“All persons shall have the right to:

(4) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;”

While the Namibian Constitution does not specifically mention BEE, in Article 23 (Apartheid and Affirmative Action) it does provide for measures to empower those who were previously discriminated against. Article 23 states:

“(2) Nothing contained in Article (10) hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force and the prison service.”

Article 23 goes on:

“(3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.”

The constitutionality of NEEEF's provisions therefore need to be carefully considered and should be the subject of further consultation and legal research.

It is against this backdrop that it is recommended that:

- The constitutionality of such provisions be comprehensively assessed;
- The restrictive, almost punitive, nature of such provisions be revisited, especially in the case of new businesses and start-ups, as well as foreign companies, as current provisions appear to undermine investment;
- The potential impact of NEEEF on foreign-owned and multinational corporations should be comprehensively and coherently clarified.
- The logic and practicality of imposing NEEEF on SMEs, family businesses and sole traders should be re-examined.

Who decides? – Undemocratic decision-making structures?

The regulatory infrastructure that NEEEF proposes to establish lacks a participatory character and concentrates decision-making at the Executive level.

NEEEF will establish an Economic Empowerment Advisory Council, which will be the highest decision-making body, and which will consist of eleven (11) members, of which seven (7) will be Cabinet ministers appointed by the President and one will be the head of the Economic Empowerment Commission (also to be established by NEEEF). That leaves just three members to be drawn from the private sector, labour, civil society and the general public. These three members will also be appointed by the President.

While NEEEF endeavours to profoundly alter the economic landscape of Namibia,

those who would be most affected would seem to be under-represented at the high table. The Economic Empowerment Advisory Council will report only to the President. These sorts of measures do not speak of a climate that is inclusive and participatory.

In this regard, it is recommended that:

- At the highest decision-making levels within the NEEEF regulatory structure a broader range of interest groups be actively involved;
- That greater business/private sector and civil society representation be legislatively accommodated at the highest decision-making levels;
- The NEEEF be redrafted to ensure the Economic Empowerment Advisory Council report to parliament and not the President.

Flawed consultation and problematic communication

It would seem that very little consultation on NEEEF in its present form has taken place prior to the drafting of a bill presented in February 2016. As a result, the bill appears to have come as a surprise to businesses and prospective investors, many of whom appear to be seriously concerned about the content of the bill. This is mainly because of the differences between the bill and the previously issued draft policy frameworks - which see a voluntary regime replaced by a mandatory and punitive one.

The shock associated with the presentation of a poorly-drafted NEEEF bill in February is already having a chilling effect on prospective investors who are now left waiting for an outcome to the NEEEF process before they make investment decisions.

There are two concerns here: the absence of a coherent, evidence-based rationale for NEEEF and a cart-before-the-horse consultative and law-drafting processes.

This type of policy uncertainty has the potential of chasing away much-needed investment and appears to demonstrate a historic mistrust of business. Such mistrust will not enable Namibia to meet its development targets.

It would thus be reasonable to suggest that such a state of affairs could be damaging for a small open economy looking to amplify its investment attractiveness.

Against this backdrop, it is recommended that:

- Government adopt a more democratically-minded attitude that is reflected in more participatory and inclusive practices when it comes to the crafting of especially far-reaching law and policy interventions;
- A more professional approach to communication around sensitive issues be

adopted and implemented so as to minimise or avoid harm to the image and attractiveness of the country and to dispel perceptions of rampant policy instability and confusion.

A lack of transparency in regulatory and decision-making processes

NEEEF is not sufficiently transparent in terms of the decision-making it proposes. NEEEF does not provide for direct public scrutiny or oversight while at the same time cloaks high-level decision-making under a shroud of confidentiality. This goes directly against one of the foremost objectives of the Harambee Prosperity Plan (HPP), which seeks to establish “a more transparent Namibia” by 2020.

Thus it is recommended that:

- Appropriate transparency measures be built into the decision-making and regulatory regime to provide adequate avenues for direct public scrutiny and oversight of the NEEEF scheme in the interest of engendering sound decision-making and fair regulatory practices;
- Access to information should be appropriately provided for in NEEEF-related legislation.

Conclusion

The NEEEF bill as it stands should not be enacted and implemented. The concepts underpinning NEEEF should rather be the subject of a rigorous consultative process, preceded by concerted effort to gather the data and research needed to credibly inform the introduction of an empowerment framework on the Namibian business and economic landscape.

Bearing in mind Namibia's painful past of apartheid colonialism, it is a given that transformation and empowerment are necessary. However, NEEEF in its current form would not achieve social justice and equitable wealth (re)-distribution and could in fact undermine equitable wealth creation and job creation. The risks of rushing headlong into the passing and implementation of the current draft bill are too great and would imperil Namibia's hopes of development as envisaged in successive national development plans, the Harambee Prosperity Plan and Vision 2030.

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