

**European Bank**  
for Reconstruction and Development

## LAW IN TRANSITION SPECIAL EDITION



**HOW LAWYERS  
DELIVER  
KNOWLEDGE,  
INNOVATION  
AND IMPACT**





## ● ABOUT THE EBRD

The EBRD is a multilateral bank that promotes the development of the private sector and entrepreneurial initiative in 38 economies across three continents. The Bank is owned by 69 countries as well as the EU and the EIB. EBRD investments are aimed at making the economies in its regions competitive, well-governed, green, inclusive, resilient and integrated.

## ● ABOUT THIS JOURNAL

Legal reform is a unique dimension of the EBRD's work. Legal reform activities focus on the development of the legal rules, institutions and culture on which a vibrant market-oriented economy depends. Published once a year by the Legal Transition Programme, the *Law in Transition* journal covers legal developments in the region and, by sharing lessons learned, aims to stimulate debate on legal reform in transition economies.

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## INTRODUCTION TO THIS SPECIAL EDITION OF *LAW IN TRANSITION*

A commitment to the rule of law is enshrined in the Agreement Establishing the EBRD and promoting good governance, fostering the development of sound legislation and facilitating access to justice have remained critical dimensions of its transition mandate ever since.

The Office of the General Counsel (OGC) plays a key role in this respect. We protect the Bank against legal and reputational risk by handling all of the legal and policy aspects of EBRD governance, administration and operations. We also engage in legal reform work, including through the Legal Transition Programme, which is dedicated to creating a better legal environment for business in the EBRD regions. As this special edition of the *Law in Transition* journal demonstrates, our legal reform work draws on the support the OGC provides to investments and on our contribution to shaping the institutional framework of the Bank.

Over nearly three decades we have become the centre of EBRD knowledge on legal and regulatory frameworks affecting the investment climate in the jurisdictions in which we operate. In addition, we are a centre of expertise on the legal and policy frameworks that play a critical role in the Bank's governance and in the development of its funding and investment modalities.

OGC lawyers are a diverse group, representing 37 different nationalities and speaking as many languages. Most have legal expertise gained in their home country and are qualified to practise the law of their local jurisdiction in addition to UK or US law.

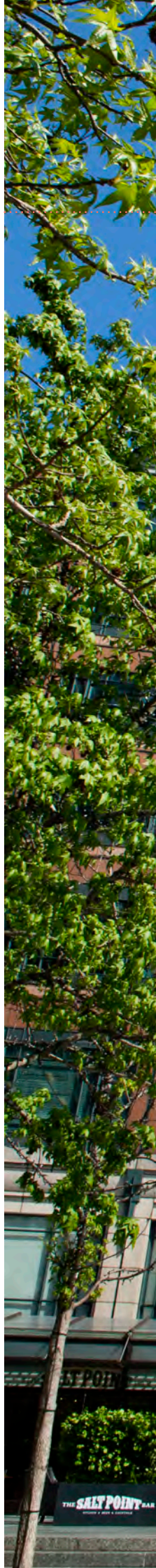
The OGC is known for its support to internal EBRD clients and recognised for helping other departments in the Bank to deliver their work plans. However, the way in which OGC lawyers contribute to the delivery of the EBRD transition mandate, by using their knowledge to deliver innovation and impact, is less visible to our internal and external clients.

This special edition of the *Law in Transition* journal is an opportunity to showcase the skill, innovation and dedication of lawyers across the OGC and to illustrate how we contribute to the delivery of transition and allow the Bank to fulfil its mission.

I hope that you will find the stories, written by OGC lawyers for this special edition of the *Law in Transition* journal, to be informative and enjoyable.



MARIE-ANNE BIRKEN  
GENERAL COUNSEL, EBRD









# DELIVERING KNOWLEDGE

The OGC is a centre of legal knowledge on all aspects of the EBRD's work. Our lawyers are experts on the legal and regulatory frameworks of the economies where we operate, as well as on international public law, IFI practices and, of course, the Bank's own internal law.

The articles in this section describe how the OGC develops, manages and deploys this knowledge in the service of the EBRD's transition mandate.



## DELIVERING KNOWLEDGE

# Managing a treasure trove of legal knowledge

**L**egal knowledge exists in vast quantities in the OGC. Until recently, however, it resided largely in the heads of our lawyers, past and present, and in a labyrinth of repositories that had grown organically over the previous 28 years. As a result, lawyers faced challenges in gaining easy access to the collective institutional knowledge that OGC lawyers had built up since the founding of the EBRD. As legal precedents form a critical part of the Bank's internal law, this situation risked undermining the effectiveness of the OGC.

As part of a wider effort to improve the collection, management and sharing of knowledge within the EBRD, in 2015, the General Counsel included the development of a knowledge management (KM) framework as one of the department's core objectives. The aim of the framework was to map existing sources of legal knowledge, to devise ways of making them more accessible to lawyers and colleagues across the Bank and to implement these solutions in a user-friendly and cost-effective manner.

A team was formed to coordinate work on the KM exercise. It consulted with colleagues on what knowledge to keep, create or throw away, what content to share with the wider Bank and what to make available to Bank lawyers only.

The team then developed new ways of visualising, presenting and accessing content that had previously only existed in distinct silos.

The parallel processes of consultation and development supported and complemented each other and were repeated again and again, each time drawing on the results of the previous stage. This allowed users to access information in a way that best suited their specific requirements, while avoiding the need to move any content, which might have led to a loss of data.

To make content more accessible, the team developed five new tools. The first is an interactive Mind Map, which allows users to find what they want in only three clicks, while preserving a secure-access matrix for different levels of confidential content. The second is a clickable list, which gives access to the same content



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While technology is a key enabler, the more important driver has turned out to be fostering the desire to manage knowledge more effectively



as the Mind Map, but suits users who prefer lists to diagrams.

The third tool is a series of documents to help organise content: Practical Legal Guides summarising the country-specific knowledge needed to support Bank operations, Legal Practice Notes containing formal guidance on certain key legal or policy issues and Topic Guides gathering relevant material on a range of issues that lawyers follow or cover.

The fourth tool identifies who does what in the OGC, so that anyone in the Bank can search for a lawyer by area of expertise, languages spoken, country and sector experience, participation in Bank committees and involvement in the drafting of individual templates and policies.

Lastly, the Submission Tool helps lawyers to capture potentially useful information from the mass of data that passes across their desks every day, store it in the right place within the KM system and alert interested colleagues to its existence.

We deployed existing software in radically new ways to create an integrated KM system. The use of already available software enabled an early roll-out and minimised the need for user training. We also organised the content in such a way as to

make it relatively easy to migrate onto another (yet-to-be-identified) system that the Bank will hopefully purchase in future.

While technology is a key enabler, the more important driver has turned out to be the desire to manage knowledge more effectively. This desire was fostered by including KM activity in every lawyer's annual objectives, as well as through an outreach programme, regular updates and awareness raising. To be successful, capturing and sharing knowledge must become part of OGC culture and a feature of every lawyer's DNA.

We have come a long way since we started our KM drive in 2015, but there is still more work to be done. The department is in the process of hiring a dedicated KM lawyer who will contribute directly to content and assist lawyers in developing better ways of managing knowledge. We are also exploring innovative ways of using technology to deliver our services, including document and process automation. ■



## DELIVERING KNOWLEDGE

# A passion for legal transition

Since the establishment of the Bank in 1991, it has been a core mission of the OGC to help create a better legal environment for business in the EBRD's regions.

Our focus on legal reform grew out of the first Annual Meeting of the EBRD – in Budapest, in April 1992 – where OGC lawyers led a discussion on creditors' rights and secured transactions in central and eastern Europe. At the meeting, three eminent lawyers from central Europe requested that the Bank propose a basis for the uniform regulation of secured transactions across the region. As a result, the EBRD Model Law on Secured Transactions was published in April 1994.

A year later, the OGC established the Legal Transition Programme (LTP), which is led by lawyers in the legal transition team, often in collaboration with colleagues in other departments. Lawyers in other teams, including those based in Resident Offices, also support our legal reform agenda.

Over the years, our legal reform agenda has grown. We first added corporate governance, public-private partnerships and regulation in the telecommunications sector. Next came work on insolvency law and, in 2009, public procurement and dispute resolution. We expanded our judicial capacity-building initiatives in the commercial law sector, having spotted a gap in the assistance programmes put in place by aid-providing organisations. Around the same time, the LTP started to focus on the regulation of the mining sector. In 2012, as the EBRD increased its focus on the green investments, we started to look into energy-efficiency matters.

As demand for legal reform in our regions changed, so did our focus areas. Expanding our work on secured transactions, we turned our attention to access to credit and topics such as pledges and mortgages, crop receipts, factoring and leasing. We have recently increased our support for legal frameworks that rely on new financial technologies, such as blockchain, crowdfunding and smart contracts. We are increasingly developing legal reform projects that support gender equality, for example, through better access to finance for women



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## The evolution of the OGC's legal reform activities reflects profound changes in the process of legal transition in the economies where we invest



entrepreneurs or promoting dispute resolution mechanisms, such as mediation, which women often prefer to court-based proceedings.

Overall, these various focus areas fit into one of two categories. The first concerns legal reforms that have a wide impact on the economy and involve establishing the regulatory and institutional framework for future investments. One can see this in our work on judicial capacity development, competition law training, insolvency and access to finance.

The second consists of legal reform work with a narrower remit, such as a single sector of the economy. Focus areas of this type include energy, mining or telecommunications regulation and capital-market development. Their sector-specific nature creates a more direct link between policy reform and individual EBRD investment projects, for example, by making Bank financing conditional on the implementation of certain reforms.

The evolution of the OGC's legal reform activities reflects profound changes in the process of legal transition in the economies where we invest.

From around 1990 to the middle of that decade, authorities sought to establish a legal framework that would support a nascent private sector.

Their task was enormous and encompassed laws on companies, competition, capital markets and insolvency, among other things.

From the mid-1990s to the early 2000s, regulators focused on conducting an inventory of existing laws in order to separate the effective from the ineffective. They also drafted rules to cover new business areas and increasingly considered the quality and workability of laws when preparing legislation. At the same time, technical assistance providers took local laws and the social and business environment into greater account and drew on the expertise of local advisers.

In the third and current stage, lawmakers are focusing on the further harmonisation of commercial laws, enforcement issues and legislating for increasingly sophisticated and technology-driven instruments.

While the demand for legal reform has changed considerably over the years, the Bank has remained faithful to its core belief that creating a predictable, stable and transparent legal environment for business contributes to the emergence of well-functioning market economies. The OGC will remain focused on this agenda for years to come. ■

## DELIVERING KNOWLEDGE

# A galaxy of legal stars shine in the OGC's Associates Programme

**T**he OGC has always recognised the importance of diversity and employs lawyers from more than half of our 69 member countries. All our lawyers have developed skills that are relevant to our work, either in international law firms, commercial businesses or other international organisations.

In 1994, the department created the OGC Associates Programme with the aim of engaging lawyers from the economies where the EBRD invests. The two-year Programme serves as an important tool for providing international experience to legal talent from the EBRD regions, thereby fostering legal transition in a very practical manner.

The success of the Programme over the last 25 years stems from three factors: first, it deepens OGC knowledge of legal frameworks in the economies where the EBRD invests.

Second, it affords Associates the opportunity to develop market-oriented professional skills, enhancing their career prospects once they have completed the Programme. Third, it benefits the Associates' home jurisdictions, whether they return to their countries as locally employed lawyers or join other international organisations, international law firms or businesses that promote investment in the EBRD regions. Some Associates have stayed with the EBRD as counsel and quite a few have re-joined the OGC, having gaining experience outside the Bank after completing the Programme. Nineteen of the lawyers currently working for the OGC were once Associates.

Maria Samoylova, who previously worked in private practice, is one of the scores of Associates to have passed through the Programme over the last quarter of a century. A Russian national, Maria was part of the Programme from 2014 to 2018. She believes that her experience as an Associate at the EBRD helped her to secure her current position at the Moscow office of leading global law firm Freshfields.

"I acquired knowledge of English law, as most EBRD deals are governed by English law, as well as of international deals covering different jurisdictions and of banking and project finance law, in



Inna Gretchka  
Chief Counsel, EBRD





Joining the legal banking team, with only Kazakh and Russian law experience, set me on a difficult but very exciting learning journey. Within a year I had learned so much that lawyers were entrusting me with their projects



addition to corporate and mergers and acquisitions law,” she says. “Joining the Associates Programme was a unique chance for someone with my background, as a Russian lawyer, to get to know more about law globally.”

Rony Yaacoub is a current member of the Programme. He worked for law firms in the United States of America and his home country of Lebanon before joining as an Associate in August 2018, supporting the Bank’s Treasury department.

“Since coming to the Bank I have acquired in-depth knowledge of capital markets law and it has made me much more interested in the economic thinking behind what we do. Now I’m planning to do a Master’s degree in economics,” he says. “New York and London are home to the main financial markets, so having worked in both places will mean I have a lot of knowledge to bring to an emerging economy like Lebanon when I eventually go back there.”

Sher Yunusov from Uzbekistan joined the Associates Programme at the same time as Rony. Sher, who previously worked for an oil company, says he appreciates the focus the EBRD places on renewable energy projects and the diversity of

our financing instruments.

“Here, you are not just providing legal advice, you also need to consider the business and policy-related aspects of projects, bearing in mind the Bank’s mandate to help the economies where we invest to transition towards open market economies,” he says.

Oxana Kompaniyets from Kazakhstan joined the Programme in 2003. After she completed the Programme she worked for a few years as a counsel in the Moscow resident office and she is now a Senior Counsel supporting Banking Operations.

“Joining the legal banking team, with only Kazakh and Russian law experience, set me on a difficult but very exciting learning journey,” Oxana says. “Within a year I had learned so much that lawyers were entrusting me with their projects!”

“Being an Associate gives you the chance to work on a wide variety of projects in more than 30 countries,” she adds. “This is a fantastic experience and, if I were a young lawyer, I wouldn’t hesitate to choose the OGC Associates Programme over joining a law firm.” ■

# DELIVERING INNOVATION AND IMPACT

The EBRD delivers impact through investments and policy dialogue in economies undergoing transition to a well-functioning market system.

Our activities are guided by six “transition qualities” that focus on making economies competitive, well-governed, green, inclusive, resilient and integrated. Donor funds play a vital role in ensuring the success of Bank operations.

The articles in this section detail how OGC lawyers contribute to the delivery of each of these qualities.





# COMPETITIVE

**A competitive market economy features a dynamic and diverse private sector. For the EBRD, providing support for small and medium-sized enterprises (SMEs) and other businesses is an important means of promoting competition, widening choice and improving goods and services.**

**DELIVERING INNOVATION AND IMPACT**

# Innovative risk-sharing instruments boost SME lending

**M**any economies in which the EBRD invests rely heavily on SMEs for growth and job creation. In turn, these companies depend on local banks for the financing they need in order to thrive.

At the same time, however, banks run the risk of incurring unmanageable losses if large numbers of borrowers were to default on their loans. Such losses could destabilise a country's financial system, as occurred in many jurisdictions during the global economic crisis.

To enable more financing to flow to SMEs the EBRD has created a Risk Sharing Framework (RSF) and Portfolio Risk Sharing (PRS). These innovative instruments allow local partner financial institutions (PFIs) to reduce the level of risk associated with their credit exposure and, thus, increase their lending.

Under the RSF the Bank shares up to 65 per cent of the risk taken by PFIs in their sub-loans. It does so either on a funded basis, whereby the EBRD finances part of the sub-loan, or an unfunded basis, whereby the EBRD provides a form of guarantee to cover part of the PFI's exposure to a sub-loan.

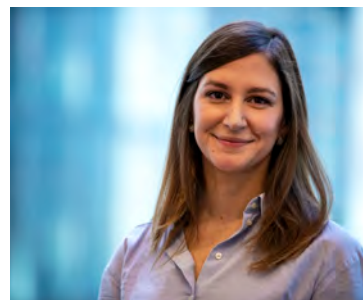
The PRS provides unfunded credit protection to a pool of loans originated by a PFI. The risk of loss is typically covered in part by a donor-funded first-loss risk cover (FLRC), while the residual risk is shared between the originator and the EBRD.

Both instruments allow PFIs to transfer the risk of a portion of any potential losses to the EBRD while remaining a lender of record as far as its borrowers are concerned. The RSF gives sub-borrowers greater access to long-term financing, in addition to providing them with business advice and technical assistance. Other benefits include improvements in PFIs' operational skills as a result of their close collaboration with the EBRD on assessing the creditworthiness of sub-borrowers.

OGC lawyers are responsible for drafting the suite of legal documentation relating to the RSF and PRS, including the Framework Agreements between the EBRD and PFIs, and each



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Senior Counsel, EBRD



Zeina Talhouni  
Counsel, EBRD



Another way in which OGC lawyers support the use of these risk-sharing instruments is by contributing to training sessions to our PFIs on the legal structure of the Framework



sub-loan agreement signed under the RSF. They also liaise with external counsel in the relevant economy and with the legal representatives of PFIs to ensure that sub-loans signed under the RSF are valid and enforceable in the jurisdiction in question.

We streamlined the legal documentation associated with these instruments to make them easier for PFIs and sub-borrowers to use, while ensuring a watertight set of agreements. In this way, we hope to shorten the negotiation timelines of transactions, resulting in significant cost-savings for all parties involved, as well as larger volumes of future lending.

For instance, under the RSF the Bank does not have a direct relationship with sub-borrowers, so does not have a direct claim on any security interests in their assets. Rather, PFIs hold the security on the Bank's behalf. One reason we have chosen to remain unsecured creditors under

the RSF is that it avoids complicating the legal documentation that Framework sub-loans would otherwise require. This simplicity makes the instruments more attractive to PFIs and sub-borrowers.

Another way in which OGC lawyers support the use of these risk-sharing instruments is by participating in training sessions for our PFIs on the legal structure of the Framework. Internal training is also available for EBRD banking team colleagues on the legal processes and latest updates of the RSF and PRSF, to help maintain a consistent approach to these transactions.

The EBRD is expanding the use of the RSF in the economies where it invests in response to high levels of demand from PFIs. Subject to the availability of donor-funded FLRC, the number of PRS projects is also expected to increase. ■



## DELIVERING INNOVATION AND IMPACT

# Our role in the EBRD-EU partnership

**S**ince the establishment of the EBRD the international donor community has been a vital source of support for the transition process by providing funds to help deepen the impact of the Bank's activities in the countries and sectors in which it operates.

The European Union (EU) is the Bank's largest donor: it has contributed more than a third of all donor funds received by the EBRD to date and in 2018 provided €280 million, or 48 per cent, of donor funding for Bank operations that year.

EU financing takes various forms, including funding for technical assistance and risk-sharing facilities, investment grants and performance fees. Access to finance for SMEs is a key focus area for EU-funded activities, along with infrastructure, energy efficiency and climate change. Other priorities include financial inclusion, building a resilient financial sector, legal and regulatory reform and nuclear safety.

OGC lawyers help to establish the complex legal arrangements that underpin the partnership between the EBRD and the EU and enable the Bank to access European funds. They ensure that these arrangements clearly define the use of EU funds and the Bank's responsibility for managing them. They also make certain that these donor co-financing activities are in keeping with the Bank's institutional and policy framework.

EU donor funds come with a comprehensive set of terms and conditions stemming from EU regulations. Often, these are not readily compatible with the status of the EBRD as an international organisation or with its operational policies. OGC lawyers analyse these terms and conditions, advise on their implications and, following negotiations with counterparts in Brussels, suggest solutions that are mutually acceptable to both sides.

A particularly important outcome of this work by OGC lawyers is the Framework Agreement with the EU, signed in June 2015. This document governs the use and administration of EU funds in EBRD operations and allows the two sides to settle on individual EU contributions for Bank activities far more quickly and easily



Hasan Atamirzaev  
Principal Counsel, EBRD



In each of the examples mentioned, the skill of OGC lawyers was instrumental in reconciling complex European requirements with the institutional specificities of the EBRD, thereby helping to further cement the strong partnership between the Bank and the EU



than before. OGC lawyers provided extensive support for the negotiation, drafting and conclusion of the Agreement.

Another significant accord with the EU that drew heavily on our expertise is the Horizon 2020 Framework Partnership Agreement. This enables the EBRD to access new financing under Horizon 2020, an EU funding programme for research and innovation worth €79 billion.

As a result of this agreement the Bank has received funds for a pilot project aimed at helping innovative SMEs and mid-cap companies in Bulgaria, Latvia and Romania. The project will seek to increase the competitiveness of these enterprises by providing financing, advisory services and training, and supporting their investments in innovation.

Also in Bulgaria citizens have benefited from an agreement between the EBRD and the EU to use European Structural and Investment Funds (ESIF) to develop the country's water sector. The ESIF support investments that promote job creation and foster a healthy environment. Under the agreement, the EBRD receives and manages ESIF resources to co-finance loans to regional water operators and provide guarantees to commercial banks that extend loans to these companies.

In each of the examples mentioned the skill of OGC lawyers was instrumental in reconciling complex European requirements with the institutional specificities of the EBRD, thereby helping to further cement the strong partnership between the Bank and the EU. ■

**DELIVERING INNOVATION AND IMPACT**

# The legal basis for EBRD work in the West Bank and Gaza

**I**n the West Bank and Gaza, the EBRD focuses on promoting private-sector competitiveness and innovation, in addition to increasing access to finance for micro-, small and medium-sized enterprises (MSMEs).

The process that led to the EBRD operating in the territory began in late 2014, when the Bank started to explore whether it could expand its activities to the West Bank and Gaza. There was widespread political support for the initiative among shareholders of the Bank, which has been investing in the southern and eastern Mediterranean region since 2012.

It soon became apparent, however, that existing financing windows would not allow for an extension of Bank operations to the territory. Ordinary operations and special operations are restricted to EBRD member countries that have been granted recipient country status. Bank membership is open to International Monetary Fund (IMF) member countries anywhere in the world. The West Bank and Gaza is not a member of the IMF, so not eligible to become an EBRD member.

Because of the support of the EBRD Board of Directors for Bank investments in the West Bank and Gaza, however, we considered other ways in which this could be facilitated.

In 1999 the Bank considered offering technical assistance to Kosovo. At the time, Kosovo was not recognised as a sovereign state, so was not eligible for EBRD membership. After extensive legal analysis by the OGC, it was determined that in “exceptional circumstances”, where the proposed activities are “broadly compatible with the purposes and functions of the Bank”, the EBRD can offer technical assistance to economies other than those in which it invests. The Board of Directors supported this two-pronged test, which has come to be known as the Kosovo Interpretation.

The OGC was of the view that the rationale of the Kosovo Interpretation could be applied in the case of the West Bank and Gaza, as the territory was experiencing exceptional economic challenges. Furthermore, the West Bank and Gaza is



Norbert Seiler  
Deputy General Counsel, EBRD





Trust funds are frequently used by other multilateral development banks, but had not been used before by the Bank



closely linked to the economies of its neighbours, Jordan and Egypt, in which the EBRD invests.

The EBRD, however, intended to offer not only technical assistance in the West Bank and Gaza, but also loans, equity investments and other forms of financial support. We, therefore, decided to rely on the trust fund structure as the platform for EBRD operations in the territory. Trust funds are frequently used by other multilateral development banks, but had not been used before by the Bank.

Under this structure, the EBRD becomes the legal owner of funds provided by donors, who retain a beneficial interest. Trust funds can support the entire range of Bank products, including loans and equity investments. We considered that the Kosovo Interpretation could also be applied to trust fund operations, enabling the Bank to make investments in the West Bank and Gaza.

OGC lawyers developed the approval and governance arrangements for the West Bank and Gaza Trust Fund and its operations, drafted the associated rules and regulations and consulted with the Bank's accountants and external auditors on the accounting treatment for the Trust Fund.

OGC lawyers then negotiated with the Israeli and Palestinian authorities over their involvement and support for future EBRD activities in the West Bank and Gaza and concluded bilateral agreements with both parties.

The Board of Directors and the Board of Governors approved the establishment of the Trust Fund and supported the legal arguments that the Kosovo Interpretation could be applied in this case. The Board of Governors also supported a net income allocation to the Trust Fund.

Consequently, the Bank signed its first operation in the West Bank and Gaza in early 2018 and has since invested €10 million in the economy through four projects. The EBRD is also engaged in policy dialogue, including an OGC-supported project aimed at helping the Palestinian Stock Exchange to develop a crowdfunding platform. This will involve assessing the existing legal and regulatory framework for such an instrument, giving advice to the bourse in this regard and extending advisory services and know-how to MSMEs interested in obtaining financing through the platform. ■

**DELIVERING INNOVATION AND IMPACT**

# The road to resuming operations in Uzbekistan

**I**t all started in late autumn 2016, when we heard that the new government of Uzbekistan had expressed interest in re-engaging with the EBRD after a decade-long pause in its relationship.

This was exciting news for me, both personally and professionally, as Uzbekistan is my home country and the jurisdiction for which I am focal point in the OGC. Given the relative inactivity of the EBRD in Uzbekistan up to that point, this responsibility had not been particularly challenging.

Shortly afterwards, we heard that Senator Sadiq Safayev, who the Uzbek authorities had appointed to lead discussions with the Bank, was due to make a visit to EBRD Headquarters. A few days before his arrival, an official from the Embassy of Uzbekistan had phoned to ask me if Uzbek members of staff at the EBRD would be willing to meet the senator. We all agreed to do so and at the meeting Mr Safayev spoke about his government's ambitious reform agenda and commitment to re-engaging with the Bank.

From December 2016, the Bank began to work on potential projects in Uzbekistan. OGC lawyers contributed to this work, which was spearheaded by then Managing Director for Russia and Central Asia Natasha Khanjenkova.

First came transactions with clients the Bank already knew. Following the lengthy hiatus in the EBRD's operations in the country, however, we had to scrutinise Uzbekistan's legislation and assess the legal risks of every aspect of a transaction, from transferring funds to Uzbekistan to the local enforcement regime for collateral. This required a lot of legal research from our side and I was very grateful that I had continued to subscribe to the updates that Uzbek law firms had been sending me since 2011.

I prepared an initial report on the general legal environment for EBRD transactions in Uzbekistan, paving the way for further analysis of the legal issues applicable to Bank products. All this research is recorded in a Legal Practice Note for Uzbekistan.



Rustam Turkmenov  
Senior Counsel, EBRD



By the autumn of 2017, less than a year since that first meeting with Senator Safayev, the EBRD had signed projects worth US\$ 120 million in Uzbekistan



In July 2017, I travelled to Uzbekistan as part of an EBRD delegation tasked with drawing up a country strategy for Bank investment and policy dialogue. Thanks to the efforts of our colleagues in the Tashkent Resident Office, the trip was packed with meetings with policymakers and private-sector entrepreneurs. The visit gave me the opportunity to conduct further legal research, determine how OGC expertise might be required and inform potential clients about the legal services the Bank could offer.

For example, I learned that the government was developing a law on public-private partnerships (PPPs). As the EBRD has outstanding expertise in that field, we offered our assistance to officials. This resulted in a technical assistance project that helped pave the way for the adoption of a new law on PPPs in 2019. The project also saw the OGC organise a workshop in Uzbekistan on international standards and best practices for PPP frameworks and provide

support to the government on developing the legal and policy framework for PPPs.

By the autumn of 2017, less than a year since that first meeting with Senator Safayev, the EBRD had signed projects worth US\$ 120 million in Uzbekistan. Following the completion of the country strategy for Uzbekistan in September 2018, the Uzbekistan government invited the EBRD to cooperate on a large number of investment and reform projects.

To date, the value of projects signed by the EBRD in Uzbekistan exceeds €700 million (on course to reach €1 billion in 2019). Projects range from the financing of a small bakery on the outskirts of Tashkent to an investment in modernising one of the largest power stations in Central Asia.

I am very proud of the important role I was able to play in the successful re-engagement of the Bank in Uzbekistan and in the delivery of transition in the country that I love and will always consider my home. ■







# WELL-GOVERNED

EBRD investments and policy dialogue seek to improve the quality of governance at the national, subnational and company level in the economies where we operate. The Bank engages in work aimed at legal and institutional reform and provides support for higher standards of corporate governance.



## DELIVERING INNOVATION AND IMPACT

# How to solve the corporate governance jigsaw puzzle

Since 2006, the OGC has been helping companies in which the EBRD invests to improve their corporate governance practices. Moreover, we work closely with regulatory authorities and lawmakers to improve corporate governance laws, regulations, codes and guidelines and to train various institutional stakeholders in their implementation.

For the EBRD, in particular, it is important that the companies receiving our financing are properly set up under applicable laws and that their treatment of shareholders, customers and other stakeholders is transparent and compliant with legislation.

As part of our due diligence process for each individual investment project, we conduct a corporate governance analysis. This looks at the company's commitment to good corporate governance, the structure and functioning of the board, internal control mechanisms, transparency and disclosure, and the rights of minority shareholders. If deficiencies are detected, we work with the company to address them and improve its practices, often by developing a corporate governance action plan.

Our approach is in line with the toolkit for assessing corporate governance in investee companies, as established by the development finance institutions that are signatories to the Corporate Governance Development Framework.<sup>1</sup> The EBRD is a founding signatory.

A crucial piece of the corporate governance jigsaw puzzle consists of effective laws, regulations and various types of soft law – including corporate governance codes to be applied on a so-called comply-or-explain basis. We work with policymakers to ensure that a country's company law allows for the effective enforcement of the legal rights of minority shareholders – including the EBRD, which only takes minority equity stakes.

Furthermore, we have worked extensively on legal and regulatory frameworks for state-owned enterprises (SOEs), whose ownership structure adds a distinctive layer of governance challenges atop the standard corporate governance issues faced



Jelena Madir  
Chief Counsel, EBRD

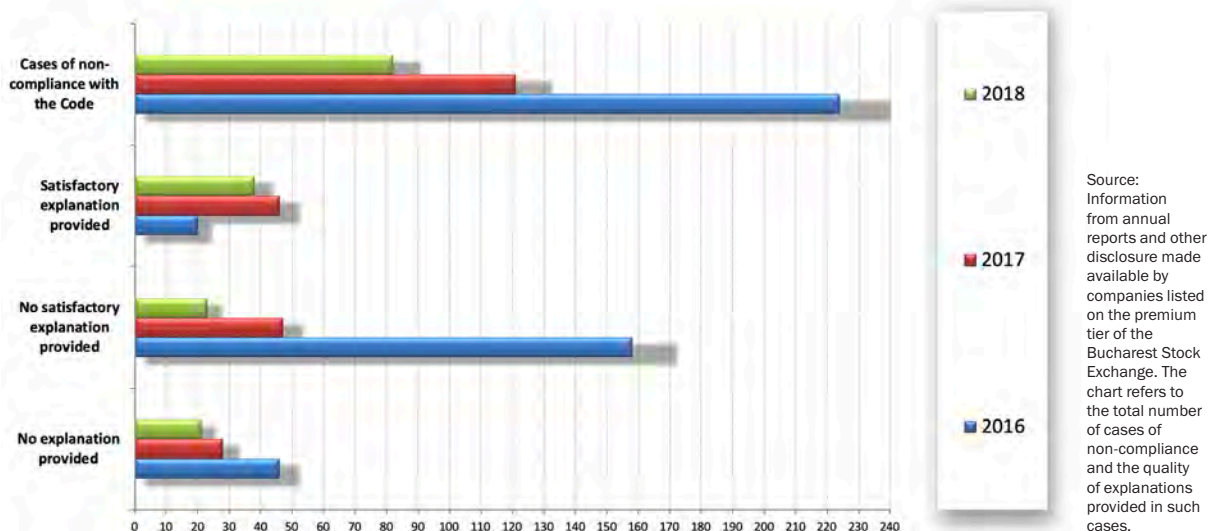


Gian Piero Cigna  
Chief Counsel (acting), EBRD



Pavle Djuric  
Principal Counsel, EBRD

## COMPLIANCE OF COMPANIES LISTED ON THE PREMIUM TIER OF THE BUCHAREST STOCK EXCHANGE WITH THE BVB CORPORATE GOVERNANCE CODE



by private companies. Our efforts typically focus on eliminating or reducing differences between the rules governing SOEs and those for other companies. We also help SOEs to develop corporate governance practices that are more aligned with those of their private counterparts.

In addition, we work with securities regulators and stock exchanges on the development and implementation of corporate governance codes to be applied to listed companies, as well as with national banking regulators on supervisory regimes focused on governance. Sound risk management is a key pillar of good governance for banks and, in Slovenia, we worked with the central bank on the development of the country's Guidelines on Risk Appetite Practices for Banks, now deemed an example to follow by other jurisdictions.

Admittedly, laws and regulations are a dead letter without courts to expound and define their true meaning and operation. Our work on good governance would, therefore, be incomplete without our extensive training of regulators, state officials and the judiciary. This is an area where many transition countries continue to have demonstrable needs.

An example of OGC work in the field of corporate governance is the assistance we provided to the Bucharest Stock Exchange (BVB) in developing a new corporate governance code, which came into force in January 2016. Compared with its

predecessor, the new code is much more precise in what it requires from listed companies.

To help companies disclose corporate governance information as accurately as possible and provide reliable information on any non-compliance with the new code, we delivered several training workshops to listed companies. We also assisted BVB in developing a Manual for Reporting Corporate Governance<sup>2</sup> and a Compendium of Corporate Governance Practices,<sup>3</sup> which were posted on the BVB website.

Following the completion of our project, BVB started to monitor the practices of companies listed on its main market. In October 2017, it published the third edition of its assessment of the quality and accuracy of information provided to the investor community by listed companies.<sup>4</sup>

Based on our review of annual reports published in 2016 to 2019, most companies listed on the premium tier of the exchange appear to have improved both their compliance with the code and the quality of their explanations since their 2016 disclosures (see the above chart). ■

<sup>1</sup> See: <http://cgdevelopmentframework.com>

<sup>2</sup> [http://www.bvb.ro/info/Rapoarte/Diverse/EN\\_EBRD\\_BVB\\_Compendium\\_18.09.2015\\_note%206.01.2017.pdf](http://www.bvb.ro/info/Rapoarte/Diverse/EN_EBRD_BVB_Compendium_18.09.2015_note%206.01.2017.pdf)

<sup>3</sup> [http://www.bvb.ro/info/Rapoarte/Diverse/EN\\_EBRD\\_Manual%20for%20reporting\\_CG\\_18.09.2015\\_note%206.01.2017.pdf](http://www.bvb.ro/info/Rapoarte/Diverse/EN_EBRD_Manual%20for%20reporting_CG_18.09.2015_note%206.01.2017.pdf)

<sup>4</sup> [http://www.bvb.ro/info/Whitebook3\\_EN.pdf](http://www.bvb.ro/info/Whitebook3_EN.pdf)



## DELIVERING INNOVATION AND IMPACT

# An insight into corporate recovery work at the EBRD

**W**hen the EBRD is mentioned in the press, corporate recovery work is probably not the issue grabbing the headlines. At the same time, the EBRD, like any other bank, has to deal with the reality that, for a variety of reasons, not all of its investments go according to plan.

At the Bank, mostly away from the public eye, specialist teams of bankers and OGC lawyers work closely together to manage distressed investments with a view to returning them to health or avoiding further erosion of value and maximising recovery. By promoting best practices in corporate recovery work, the EBRD helps to increase the resilience of the corporate sector and the wider economy in the countries where it operates.

The EBRD set up its specialist recovery teams in 1998 and this focused approach has proved to be successful over the last 21 years, particularly as and when crises have affected the economies where the Bank invests. Specialist OGC lawyers have played an important role in the Bank's corporate recovery work as they help to navigate the complex legal requirements related to restructuring, enforcement and dispute resolution in all of the jurisdictions where the EBRD operates.

The EBRD strives to respond quickly and effectively when projects become distressed. It has developed streamlined internal procedures with the aim of ensuring that the Bank's recovery teams can move swiftly in response to any deteriorating situation. Over the years, the EBRD has demonstrated its ability to successfully apply the different recovery tools at its disposal, including the exercise of its legal rights, managed by OGC corporate recovery lawyers.

For reasons of confidentiality, we can go into little detail of what the recovery teams do in a publication like this and we like to keep a few tricks up our sleeve. We hope, however, to provide some flavour of the commercial and creative edge of corporate recovery work at the Bank.



Matthew Cumberpatch  
Chief Counsel, EBRD



Artem Shyrkozhukhov  
Associate, EBRD



With hard work and perseverance, the EBRD  
has preserved the underlying assets of the  
business in a difficult environment



Much corporate recovery work focuses on restructuring. The EBRD has, where appropriate, long adhered to a constructive, cash flow-driven approach to restructuring, which seeks to mitigate distress and maintain a client as a going concern. This is the ideal, win-win scenario for the EBRD and for borrowers, sponsors, employees, co-lenders and other stakeholders who depend on the success of the project. It is, therefore, important that a client engage in an open and transparent conversation with the Bank as early as possible about any problems they face and be prepared to pursue a commercially viable restructuring plan.

There are also situations in which consensual restructuring is not feasible or possible, or where there is a lack of counterparty cooperation, whether this be passive or through the adoption of hostile strategies. If this happens, the EBRD is prepared to assert its legal rights, for example, by enforcing security, instituting arbitral or court proceedings, pursuing court-sanctioned restructuring arrangements (for example, a scheme of arrangement) or commencing insolvency proceedings. The Bank has

successfully taken such action on a number of occasions and will continue to do so where warranted in future.

A notable example is an enforcement related to a fleet of moveable assets. The case has tested the resolve of the EBRD to protect its legal rights and maximise recovery to the full. It is a multi-jurisdictional case in which the recovery teams have faced down severe and persistent opposition from counterparties. This has involved numerous court proceedings in various jurisdictions and prompted the Bank to create bespoke corporate structures to safeguard its collateral in a volatile situation.

With hard work and perseverance, the EBRD has preserved the underlying assets of the business in a difficult environment, defended its position as a secured lender, produced significant transition impact in a recovery scenario and developed and tested new products and tools to assist in the recovery of its money. ■









# GREEN

The EBRD is committed to environmentally sustainable economic development. It supports investment and policy-dialogue projects that promote energy and resource efficiency, the use of renewable power, adaptation to climate change and improvements to the environment.



## DELIVERING INNOVATION AND IMPACT

# How lawyers support the EBRD's sustainability mandate

**T**he Agreement Establishing the EBRD states that one of its functions is “to promote in the full range of its activities environmentally sound and sustainable development”. How the Bank fulfils this function has evolved since the EBRD was created in 1991 and continues to do so.

In 1996, the Bank approved its first Environmental Policy. It was six pages long and made no reference to social issues. Since then, the policy has been revised and, in almost 80 pages, the 2019 text covers all aspects of environmental and social law. Other milestones include the launch of the Sustainable Energy Initiative in 2006 and the Green Economy Transition approach in 2015. Over time, the number of green projects in which the Bank has invested has grown exponentially, as has the volume of donor funding dedicated to sustainable operations.

Sustainable development has also had profound effects on the law and triggered significant growth in the number and scope of policy instruments, contractual arrangements and institutions addressing sustainability concerns. So, how has the OGC contributed to the EBRD's function of promoting sustainable development in the economies where it invests?

OGC lawyers have advised colleagues within the Bank on every single investment, including green ones. They have facilitated collaboration between the Bank and other agencies, advised on the EBRD's relationship with its economies and donors and set up a number of fund structures for the pooling of donor resources. Much of this work has focused on sustainability issues.

For example, OGC lawyers helped to draft the innovative agreements regulating the Multilateral Carbon Credit Fund founded by the EBRD and the European Investment Bank. These agreements survived a number of vicissitudes, price fluctuations and challenges and the OGC always found a clause that could be used to regulate matters and settle differences between parties. The EBRD became an agency under the Global Environment Fund (GEF), the Climate Investment Funds (CIF)



Angela Delfino  
Senior Counsel, EBRD



Law and lawyers work with conceptual problems that are complex, interesting, important and transformational



and the Green Climate Fund (GCF) by entering into sophisticated financial-procedure agreements with them and with multilateral development banks. Our lawyers further assisted with the multiple contractual arrangements involved in the offsetting of carbon emissions that enabled the EBRD to declare its internal operations carbon neutral.

The Bank has encouraged the economies in which it invests to focus on environmental problems and has provided the financial resources and know-how, including legal expertise, to address them. The OGC has played a key role in supporting legal reforms to improve the environmental performance of those economies, including through our LTP. Examples of LTP work in this sphere include a project aimed at helping Georgia to develop a National Energy Efficiency Action Plan that will support the country's efforts to reduce its energy intensity while allowing for continued economic growth and compliance with its international commitments.

OGC lawyers also provide critical input to the Bank's policy framework, which, in addition to the Environmental and Social Policy, includes the Access to Information Policy and the Project Accountability Policy. Collectively, these policies outline the commitment of the Bank to these areas while promoting better awareness and understanding of EBRD policies and operations.

Our advice on these policies is based on our knowledge of public international law and EU law and on our deep understanding of the standards that influence the behaviour of states, businesses and other non-state actors (for example, professional organisations or indigenous peoples). This work is a concrete example of how the OGC lawyers support the Bank in the execution of its function to promote sustainable development. ■

## DELIVERING INNOVATION AND IMPACT

# Our contribution to the fight against climate change

**A**t the 2015 United Nations climate conference in Paris, nearly 200 countries agreed to undertake ambitious efforts to combat global warming and keep the average global temperature rise this century well below 2°C. Three years later, at Katowice in Poland, signatory countries met again to negotiate the rules of implementing the Paris Agreement.

The Katowice Rulebook sets out decisions and procedures for most of the provisions of the Paris Agreement, such as mitigation, adaptation, finance, transparency and periodic stocktakes of global and national activities. The package of decisions – while falling short of ensuring full implementation of the Paris Agreement – has implications for countries in key areas and will require legal, institutional, regulatory and policy adjustments at national level.

One area relates to the adoption of detailed requirements for communicating and tracking the progress of Nationally Determined Contributions (NDCs). These are the actions that signatory countries have pledged to take after 2020 to support the collective effort against climate change. The Katowice Rulebook gives a committee the power to respond to a country's non-compliance with legally binding obligations under the Paris Agreement.

Another area relates to the requirement, under the Paris Agreement, for countries to take measures that will help vulnerable communities adapt and strengthen their resilience to the impacts of climate change, such as rising sea levels or desertification. At Katowice, delegates agreed to track efforts to enhance national capacities in this regard and to make available dedicated funds for such efforts.

The adoption of a transparency framework is a third important area. This envisages procedures and guidelines that all countries must follow to ensure that they are reporting in a transparent manner on their greenhouse gas emissions, climate-change mitigation and adaptation actions. The guidelines allow limited



Vesselina Haralampieva  
Senior Counsel, EBRD



## OGC lawyers launched an initiative in 2018 to help companies from emerging countries adequately identify, assess and report on climate-related risks



flexibility for developing countries.

Fourth, the Katowice Rulebook introduces more clarity and predictability on climate finance, including regular publication of the funds that developed countries will provide to support the needs of developing economies, consistent with the Paris Agreement.

A fifth area relates to the global exercise aimed at taking stock of collective progress on combatting climate change. The Rulebook indicates that non-state actors, including the business community, can participate in this exercise.

Katowice delegates recognise the need to build the capacity of developing countries and emerging markets to implement all aspects of the Paris Agreement.

Accordingly, the EBRD provides support and guidance to countries in implementing policy, law and governance reforms aimed at building climate resilience and reducing carbon emissions. OGC lawyers play an important role in this agenda.

Working closely with national authorities, we have led and contributed to projects on developing new legal and regulatory instruments to help countries achieve their climate-change mitigation and adaptation targets. These projects also seek to

create a stable and transparent regulatory environment to attract climate finance. Measures include new energy-efficiency and renewable energy legislation and the enhancement of regulatory frameworks for developing sustainable energy infrastructure and PPPs.

An example of our work in this sphere is the 2017 pilot study of the NDCs of Jordan, Morocco and Tunisia and of their respective climate-related policy, legal and institutional instruments. The study informed national and international efforts aimed at assessing legal and regulatory gaps. It also helped to develop targeted technical assistance and legal advisory programmes.

In 2018 we launched an initiative to help companies from emerging countries adequately identify, assess and report on climate-related risks.<sup>1</sup> In this work, we looked at the key drivers, legal and regulatory trends, standards and emerging climate-related disclosure practices of both financial and non-financial companies.

In the journey towards reducing carbon emissions and building climate resilience, national governments and regulators have a central part to play in facilitating the identification, assessment and disclosure of climate-related financial risks and the adoption of adequate measures. This is another area where the OGC's knowledge and expertise can play a constructive role. ■

<sup>1</sup> See V. Haralampieva (2019), "Ramping Up Climate Action by Enhancing Companies' Governance Framework", journal, EBRD, London.



## DELIVERING INNOVATION AND IMPACT

# Unleashing the potential of blended finance

**B**lended finance has a key role to play in helping the international community meet the Sustainable Development Goals (SDGs) set by the United Nations for 2030. It involves using funds from various sources – including donors, philanthropic funds, development finance institutions and commercial investors – to boost private market growth and catalyse private investment in emerging markets. This investment is essential in order to plug the large gap in SDG-focused financing.

Blended finance is not a financial instrument in itself. It is an approach to structuring project financing that seeks to address the two main barriers to private investment in emerging markets: high levels of perceived and real risk and poor returns compared with other investments.

Blended finance can take the form of loans or equity, priced at or below market rates; risk-mitigation products; incentives (promises of payment that are conditional upon the beneficiary reaching a certain level of performance); and non-reimbursable grants and technical assistance (such as funding consultancy services for the beneficiary).

The EBRD is very active in the field of blended finance. For instance, it invests in numerous climate projects that combine the Bank's own resources with financing from donors, such as the CIF, the GEF and the GCF.

OGC lawyers support the use of blended finance in a variety of ways. They negotiate agreements with donors on the financing they provide to EBRD projects and draft the rules of the funds the Bank establishes to receive and administer donor resources.

For example, OGC lawyers were instrumental in negotiating a Master Accreditation Agreement between the Bank and the GCF. After this agreement was signed, the Bank established an EBRD-GCF Special Fund, for which we drafted the rules. We also negotiate Funded Activity Agreements with the GCF for each project the GCF wants to finance and ensure that the Bank's special status is properly reflected in all such agreements.



Nino Butkhuzi  
Principal Counsel, EBRD



OGC lawyers support the use of blended finance in a variety of ways. They negotiate agreements with donors on the financing they provide to EBRD projects and they draft the rules of the funds the Bank establishes in order to receive and administer donor resources.



OGC lawyers have further negotiated Financial Procedures Agreements with the CIF and GEF. These agreements enable the Bank to receive funding from these donors, to be used alongside the EBRD's own resources, for climate projects. Similarly to the GCF Special Fund, we drafted rules for the GEF and CIF Special Funds.

Another way in which OGC lawyers enable the use of blended finance is by ensuring that financing agreements between the EBRD and its clients correctly document the legal structure of projects benefiting from the approach. We also have to ensure that these financing agreements address the requirements of the blended-financing element of a given project.

For example, loans or equity investments require loan or share-purchase agreements that reflect the EBRD's terms alongside those of donors. In the case of a grant agreement between the EBRD and a beneficiary, this must satisfy any conditions and obligations arising from the relevant donor funds. This means that every financing agreement is carefully scrutinised by OGC lawyers to ensure that they reflect not only the requirements of the EBRD, but also all mandatory donor requirements. ■

## DELIVERING INNOVATION AND IMPACT

# Debt finance in the increasingly green world of real estate

**T**he financing of real-estate projects forms an integral part of the EBRD's investment portfolio and contributes significantly to the achievement of green transition metrics, thanks to a growing emphasis on investing in energy- and resource-efficient buildings. There are several key points that OGC lawyers consider when the Bank funds the construction and development of commercial, residential and hospitality real-estate assets with senior debt.

The first is cash flow-generating lease agreements. From a senior-lender perspective, the assessment of the financial viability of a commercial real-estate project is based primarily on the future cash flow-generating capacity of the asset.

To fully understand the risk of the investment, it is crucial to review in detail any relevant existing and draft lease and pre-lease agreements to determine the length of their terms, the parties' termination rights and any applicable penalties and sub-letting rights.

Amid rapidly changing trends in the use of space, such as the rise of co-working and sub-leasing, the stronger role of real-estate asset managers and the shortening of lease terms, we pay close attention to the allocation of risk in all project agreements.

The second is the management of rent proceeds. As EBRD debt will be serviced from rental income, the Bank needs to tightly control the use of such proceeds by the borrower. To this end, the parties usually agree on a project accounts structure, including, at a minimum, a reserve account with sufficient funds to cover the debt-servicing costs for a specified period, a rental account into which all net rental income is paid and a proceeds account for any cash sweep and prepayment proceeds. The payment waterfall and the right to dispose of the cash deposited on each account need to be included in the loan agreement.

Third, the value of the investment property is important for the financial covenants set by the EBRD. Apart from the debt-service cover ratio, there are two ratios specific to real-estate finance



Natalie Skacelova  
Principal Counsel, EBRD



The Bank is working with sponsors and developers on promoting and supporting advanced technologies to produce greener and more climate-resilient buildings, thereby achieving the green transition quality



with which the EBRD requires borrowers to comply.

The first is the loan-to-cost (LTC) ratio, which is applied during the construction phase and compares the amount of the outstanding loan to the total investment cost. The second is the loan-to-value (LTV) ratio, which is typically applied once construction has been completed and is the ratio of the amount of the loan outstanding to the market value of the property.

It is important that any financial covenants requiring compliance with these ratios apply for the whole term of an investment. Compliance with the LTC ratio should be a prerequisite to disbursement for projects in the construction phase, while meeting the LTV ratio should be a precondition to disbursement for projects that have been completed, are nearing completion or are in need of refinancing.

Lastly, construction and buildings contribute

significantly to CO<sub>2</sub> emissions and energy use. The Bank is working with sponsors and developers to promote and support advanced technologies to produce greener and more climate-resilient buildings thereby achieving the green quality of transition. Any negotiated technical specifications, reporting requirements or specific undertakings need to be carefully drafted in the loan agreement and their compliance effectively monitored by the lenders.

Real-estate markets in the Bank's regions are being affected by new technologies, increasing urbanisation, greater demand for sustainability and changing demographics. These trends will impact property-project risk assessment and structuring. The input of OGC lawyers will be required to document innovative structures in a way that continues to protect the interests of the EBRD and its mandate. ■









# INCLUSIVE

**Inclusive market economies provide opportunities to previously underserved social groups and are, therefore, more sustainable. The EBRD fosters the economic inclusion of women, young people and those living in less advanced regions.**

## DELIVERING INNOVATION AND IMPACT

# Improving the legal knowledge of women entrepreneurs in Jordan

**W**omen are a small but growing force in the Jordanian economy and helping more of them to run their own businesses is one of the most promising routes to greater economic empowerment.

Currently, however, Jordanian women entrepreneurs face a number of legal obstacles, as well as social and economic ones, that can limit their chances of success. These barriers are compounded by a lack of awareness about their legal rights and how to access justice and resolve disputes.

To improve women's access to justice, the Bank is helping to establish a training programme to inform women entrepreneurs in Jordan of the legal requirements involved in setting up and running a business. The scheme will also provide training on the support tools that women can use to access the finance and advisory services they need for their enterprises to flourish.

The inspiration for the training programme came from a seven-month study conducted by the Bank and the International Development Law Organization (IDLO) in Jordan in 2018. This aimed to identify the barriers women entrepreneurs encounter when seeking to access justice and resolve disputes affecting their business.

The study, which is expected to be published in the fourth quarter of 2019, found that women in business in Jordan had limited awareness in a number of areas. First, many of them did not know how to fulfil the legal requirements for registering a new business and were unfamiliar with the online platform available for the registration process.

Second, study participants lacked knowledge of the legal requirements for other stages of the business life-cycle, such as tax and social-insurance obligations, or how to meet those requirements.



Ammar Al-Saleh  
Senior Counsel, EBRD



The programme will also provide information about the financial tools available to women entrepreneurs. The EBRD-IDLO study found that many of them were unaware of the Microfund for Women, the largest microfinance institution in Jordan, as a source of finance



Third, they expressed confusion about the eligibility criteria for obtaining credit from financial institutions. For instance, in the southern and eastern Mediterranean region, women are less likely than men to have a bank account at a formal financial institution and lag men in terms of access to savings accounts and loans.

The training programme will give participating women entrepreneurs an overview of the regulatory framework for registering a business, managing taxes and social-insurance payments and using collateral to obtain credit. It will teach them how to meet the basic legal requirements of each stage of the enterprise life-cycle, from setting up a business to winding it down.

The programme will also provide information about the financial tools available to women

entrepreneurs. The EBRD-IDLO study found that many of them were unaware of the Microfund for Women, the largest microfinance institution in Jordan, as a source of finance. In addition, they did not know about the possibility of using trade-finance tools, such as factoring and invoice discounting, to further develop their business.

The initiative is just one of the ways in which the OGC lawyers help to improve the business environment for women entrepreneurs in the economies where the EBRD invests. This is in keeping with the efforts of the Bank to make those economies more inclusive and, hence, more sustainable. ■



653.25





# RESILIENT

EBRD operations build resilience by fostering the emergence of a stable banking system, promoting the development of local capital markets and supporting local currencies. These measures and others support growth, prevent excessive volatility and protect against shocks.

## DELIVERING INNOVATION AND IMPACT

# Maximising the impact of EBRD bond investments

**T**he EBRD is developing its practice of investing in bonds to expand the range of financing instruments it offers, deepen their impact and promote the growth of capital markets in the Bank's regions. Strong capital markets help to make economies more resilient by offering alternative sources of funding. They also generate attractive investment opportunities, contributing to the growth and competitiveness of companies in these economies.

OGC lawyers support these transactions and provide expertise that serves to maximise the impact of EBRD bond investments on both capital-market development and the wider economy.

The EBRD invests in four categories of bond. From most to least liquid, these are hard-currency bonds publicly listed on a stock exchange in a well-developed capital market; local-currency bonds listed on local stock exchanges; local-currency bonds (which may or may not be listed) in jurisdictions with less developed capital markets; and illiquid bonds, where the EBRD is often one of a few or, occasionally, the sole investor and where the driver is the specific use of proceeds. In each of these categories, the impact of the EBRD investment can be on the individual bond issuer or on the development of the market as a whole (hopefully, both).

In addition to simply financing the activities of an issuer, a bond investment by the Bank can have a ripple effect on capital-market development. By participating in a bond issuance, the EBRD gives confidence to other potential investors, which can increase demand and lead to more favourable conditions for the issuer.

In addition, the investment shows that the debt capital market in question meets the standards required by the Bank in terms of laws, regulations and internationally accepted practices, which in turn provides comfort to investors who may be considering other issuers in the market. This includes new regulations under consideration in many EBRD economies that are similar to the EU's updated Markets in Financial Instruments Directive (MiFID II).



Corentine Delobel  
Counsel, EBRD



Joshua Van der Ploeg  
Principal Counsel, EBRD



OGC lawyers work on every EBRD bond transaction, but make an especially valuable contribution to capital-market development in cases of less liquid issuance in emerging bond markets



Lastly, a bond investment can energise a local primary market or exchange when the EBRD requires an issue to be listed, either exclusively or in conjunction with another exchange.

OGC lawyers provide significant input to issuance in emerging bond markets that are less liquid. In such markets, we have substantial involvement in drafting and negotiating the terms and conditions of the issue and advising the issuer on the intricacies of international best practices. Through such transactions, the Bank makes significant contributions to the development of local capital markets.

In addition, the Bank increasingly invests in bonds that have a leverage effect. These are bonds where the issuer undertakes to reinvest a multiplier (up to 200 per cent) of the EBRD funds into projects of a particular kind. Typically, these are projects with a strong transition impact, such

as those that benefit the environment (as in the case of Green Economy Transition bonds) or facilitate lending to MSMEs.

For these bonds, the EBRD sets specific reinvestment criteria for the issuer through policy statements, taking into account the issuer's particular practices, often strengthening their existing portfolio. OGC lawyers advise on how these conditions are to be clearly reflected in the legal documentation.

For example, in the case of Bank Millennium, a large commercial bank in Poland, the issuer committed to reinvest 150 per cent of the amount invested by the EBRD in eligible green investments. This leverages the impact of EBRD financing and helps to deliver a stronger transition impact. ■



## DELIVERING INNOVATION AND IMPACT

# Building resilience through local capital-market development

**T**he EBRD is strongly committed to the development of domestic capital markets in the economies where it invests and, in many markets, the Bank has become the leader in this field among international financial institutions (IFIs). The OGC works closely with the Treasury department to deliver on this commitment.

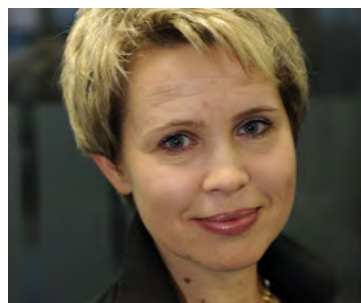
The importance of EBRD local-currency lending for reducing foreign-exchange risk in the countries where it operates is indisputable. However, it is by borrowing in local currency that the Bank fosters the development of local capital markets, thereby boosting the resilience of economies.

Bonds issued by an AAA-rated institution, such as the Bank, serve as an alternative pricing benchmark to government bond markets. For domestic investors, EBRD bonds serve as an additional investment asset of the highest credit quality, a class of asset of which there may be few in the local market.

These bonds also attract new investors wishing to gain exposure to local currency without being exposed to local credit risk. In addition, the Bank is able to introduce innovative techniques to local-currency financing activities that help foster the overall development of the market.<sup>1</sup>

The EBRD has issued local-currency bonds in a number of countries, including Armenia, Georgia, Hungary, Kazakhstan, Russia and Serbia, as well as Eurobonds in the currencies of many countries in the region. In many markets, the Bank was the first IFI to raise funds on the local market in local currency and the first to offer innovative products that had not been available previously.

Issuing an inaugural local-currency bond in one of the economies in which we invest is usually the culmination of months, years, or even decades of work by the Treasury and OGC lawyers on amending local legislation to create a regulatory framework suited to IFI bond issuance.



Elena Sulima  
Senior Counsel, EBRD



## Pursuing the task of changing local legislation requires not only the technical expertise for which OGC lawyers have long been praised



In addition to establishing favourable issuance rules, these changes seek to build a market infrastructure capable of mitigating legal, settlement, regulatory and other risks. Other goals of legislative reform in this area include creating a credible money-market index, a working settlement system, a properly functioning depository, an appropriate base of investors, clear rules for the admission of bonds to public trading and a multitude of other issues.

Pursuing the task of changing local legislation requires not only the technical expertise for which OGC lawyers have long been praised, but also calls for diplomatic skills to build relationships with local authorities (sometimes from scratch, when governments change), to persuade them to follow international best practices and to promote collaboration between various government bodies in order to achieve a functioning overall market.

The result is always rewarding. Once the regulatory framework is in place, the Bank starts by issuing a simple floating-rate note and moves on to more complex, innovative structures, such as index-linked, equity-linked or commodity-linked notes.

These complex structured bonds may seem relatively usual in developed capital markets, but they are significant milestone events for local markets, where the choice of financial instruments available to investors is not that broad and where the regulatory environment is constantly evolving. This is why a debut issue in a local market is usually a landmark issue with a considerable demonstration effect, attracting new long-term investors to the local market.

The Bank's involvement in local capital markets – on the regulatory side and by issuing bonds and entering into other financial transactions – is widely recognised as contributing significantly to their development. OGC lawyers are proud to be part of the process of helping the financial markets of the Bank's regions in their transition to becoming fully operational and more resilient. ■

<sup>1</sup> There are many colleagues I would like to thank for their valuable contribution to this work, but I would like to pay tribute, in particular, to the late Alexander Semernin.

## DELIVERING INNOVATION AND IMPACT

# Local-currency hedging benefits Kazakh clients

**S**ince the global financial crisis, the EBRD has significantly increased its levels of local-currency financing to help clients service their hard currency-denominated debt following a devaluation of their currency of revenue.

Providing financing in local currencies, however, presents clients with another risk: that of a mismatch between the debt currency and the currency in which project costs are denominated.

Many EBRD investments involve construction periods of up to 24 months, during which the Bank disburses its financing in stages in order to limit its exposure to any losses arising from a failed project. During this time, there is a risk that the undisbursed portion of local-currency financing may be devalued. If this occurs, a client may find it impossible to cover its hard currency-denominated costs, such as the acquisition of new technologies. The problem is compounded by the shortage of local-currency hedging products available in many local financial markets.

The EBRD has devised an innovative arrangement to overcome this difficulty. On several recent projects in Kazakhstan, the Bank agreed to disburse local-currency loans in hard currency by means of a pre-funding mechanism. This involved converting the major portion of the Kazakh tenge-denominated loans into hard currency and, subject to a range of conditions, disbursing them into an offshore escrow account belonging to the borrower, but controlled by the EBRD.

The conditions for the pre-funding included a guarantee from the project sponsor covering risks related to the hedging arrangement, an assignment by way of security in respect of the escrow account and the establishment of a trust arrangement in relation to the escrow account and the pre-funded disbursement.

As the funds were made available shortly after signing, before a standard set of preconditions was satisfied, it was essential for the EBRD to have sufficient security and other creditor support arrangements in place. Structuring the disbursement mechanism around both a trust and a security assignment creates an additional layer of lender protection. In particular, the trust



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OGC lawyers helped to find innovative solutions to the problems faced by clients in the economies where the Bank invests and demonstrated once again that the EBRD is a reliable partner in all circumstances.



arrangement ring-fences the offshore escrow account and pre-funded disbursement from the other assets of the borrower, mitigating the risk of these funds being claimed by creditors in the event of the client facing bankruptcy.

In the case of the aforementioned Kazakh projects, the borrower held in trust the offshore escrow account – all amounts credited to the offshore escrow account and the debt thereby represented – for the beneficiary offshore engineering, procurement and construction (EPC) contractor. If the borrower were to use the trust property for any other purpose, it would then be held in trust for the EBRD. Thus, the loan proceeds disbursed to the escrow account would essentially be deemed to belong to the EBRD if used for any other purpose than payments to the EPC contractor.

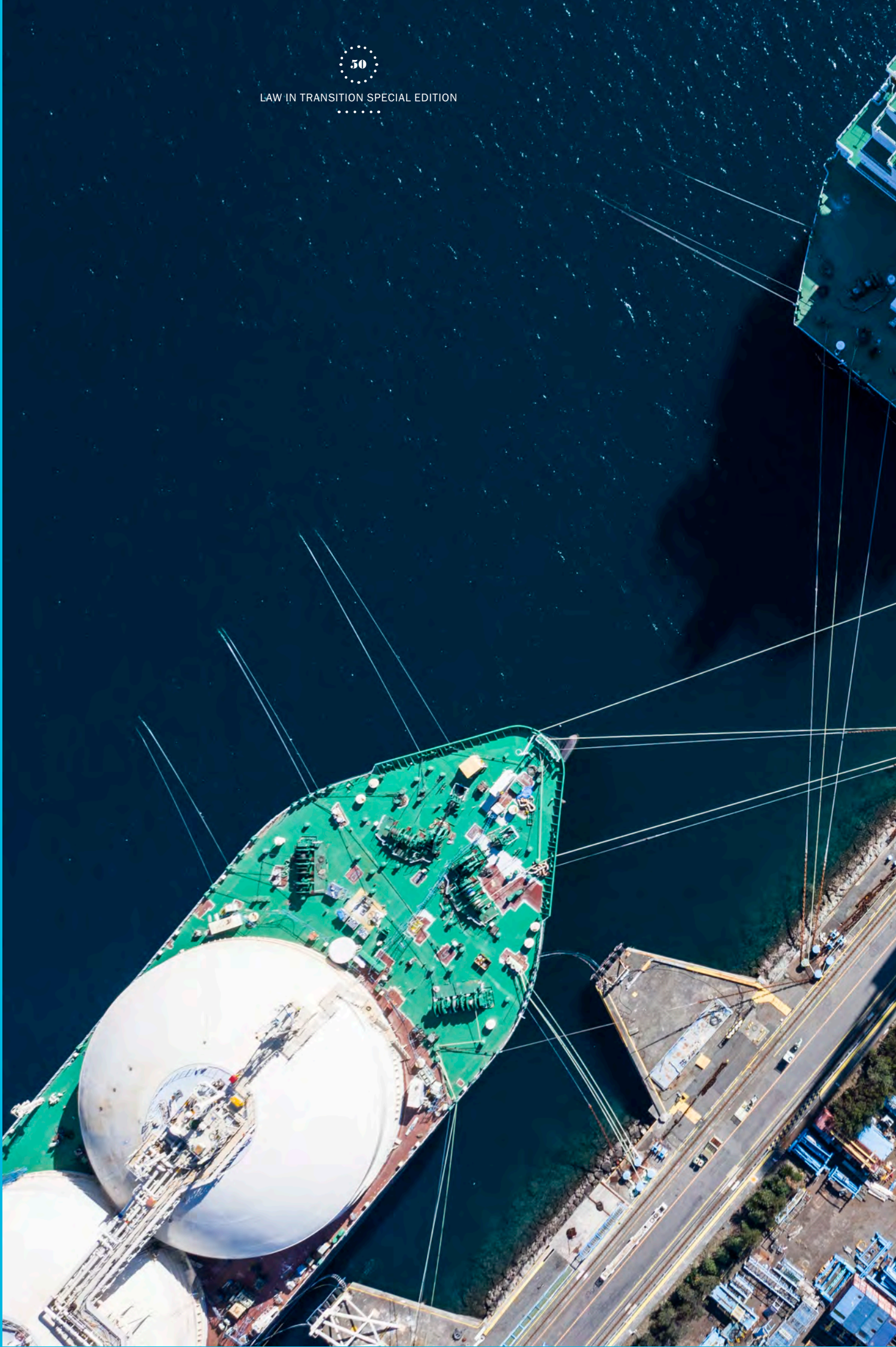
This solution addresses the foreign-exchange risks faced by clients, while also providing a certain level of comfort to lenders. It is, nevertheless, rather novel and not devoid of risks, given the differences between common- and civil-law security instruments and property-law concepts, the variation in bankruptcy regimes

from one jurisdiction to another and the potential difficulties with regard to the recognition and enforceability of court judgments.

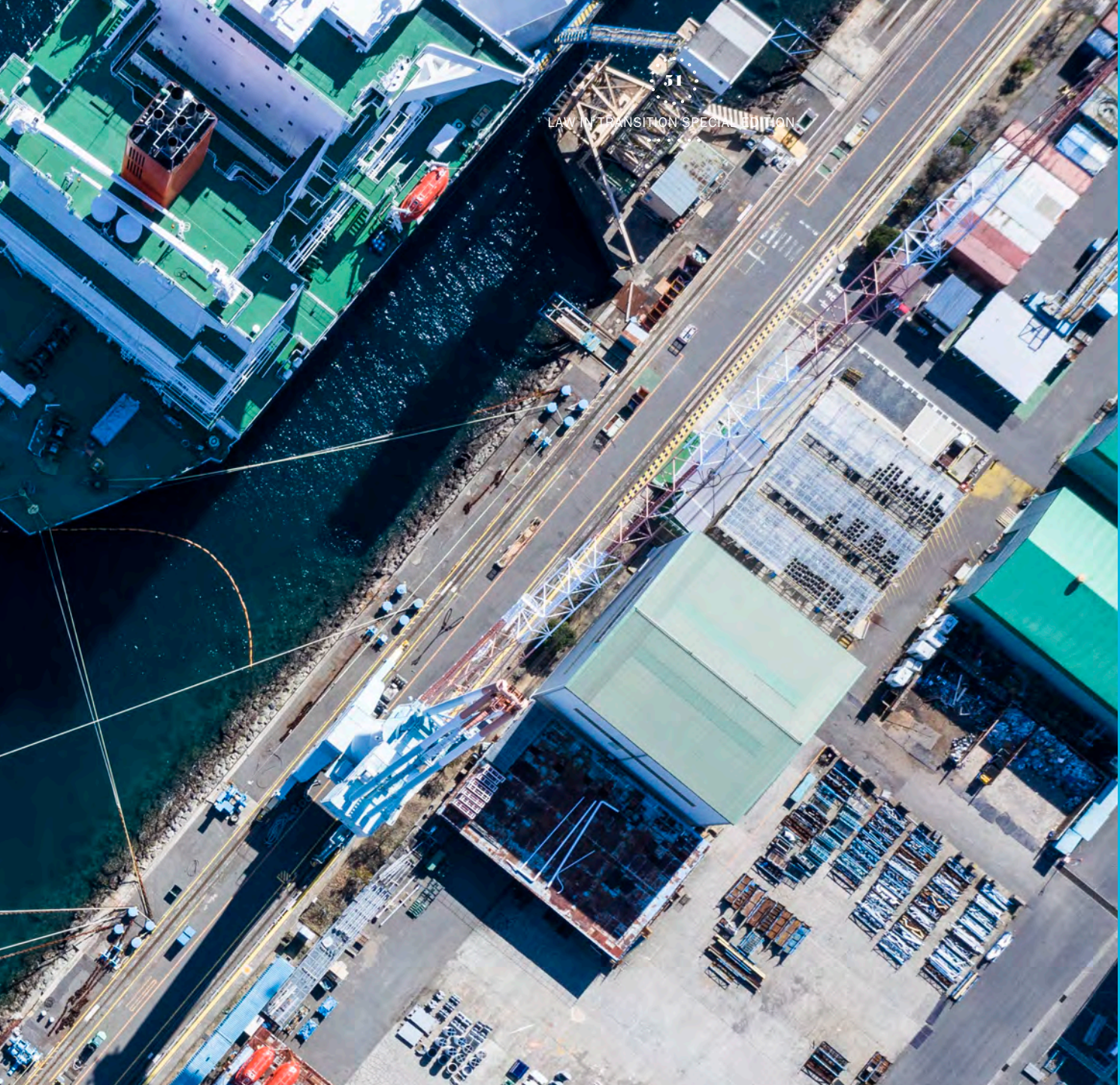
OGC lawyers were instrumental in devising this hedging arrangement. In response to a client's request for a hedging product, we facilitated discussions with colleagues from the EBRD's banking teams and the Treasury Department to determine what options were available. Overcoming various hurdles along the way, we managed to design a legal structure for the pre-funding mechanism and conducted a thorough assessment of its legal and commercial risks before reaching an agreement with the client.

Through this work, OGC lawyers helped to find innovative solutions to the problems faced by clients in the economies where we invest and demonstrated once again that the EBRD is a reliable partner in all circumstances. ■









# INTEGRATED

The EBRD promotes integration by supporting infrastructure, energy and information technology projects. Integration also involves greater harmonisation with international norms, the strengthening of institutions and the development of regulatory frameworks.



## DELIVERING INNOVATION AND IMPACT

# Improved PPP framework boosts infrastructure sector

**I**n times of global financial and economic instability many countries experience difficulties in solving large-scale infrastructure problems due to public funding constraints. This is the case for members of the Commonwealth of Independent States (CIS), whose infrastructure restrictions are well known.

International practice demonstrates that PPPs can help attract private investment, managerial experience and know-how to the infrastructure sector. A sound legal framework is a prerequisite.

The OGC, therefore, provided assistance to the CIS Inter-parliamentary Assembly (IPA) in drafting its Model Law On Public-Private Partnerships of 2014.

The main objectives of the Model Law were to harmonise PPP regulation across the region and to bring the national legislation of CIS countries into line with best international practices and the requirements of funding organisations to ensure the bankability of PPP projects.

Regulatory acts based on the Model Law stimulate private investment, including foreign investment, in PPP projects and many of these are in the infrastructure sector. The law provides comfort to investors by regulating in detail the allocation of risk between parties and the consequences of the termination of a PPP agreement, including compensation.

The non-mandatory nature of the provisions of the Model Law allows CIS countries to choose the most appropriate regulatory option for their jurisdiction, while skillful drafting eliminates the scope for controversy and ambiguity in interpreting the document. Importantly, the Model Law provides a conceptual basis for the implementation of cross-border PPP projects in the CIS.

Using the Model Law as a basis, governments have adopted or amended PPP legislation, or are in the process of doing so, in Belarus, Georgia, Kazakhstan, the Kyrgyz Republic,



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The main objectives of the Model Law were to achieve the harmonisation of PPP regulation across the region and to bring the national legislation of CIS countries into compliance



Russia and Ukraine. China has also used many of the concepts of the law for its PPP legislation.

For CIS countries to benefit fully from PPPs, however, regional authorities identified a need for PPP guidance and methodological materials to help public officials select, prepare for, implement and monitor PPP projects.

In response, the OGC collaborated with the CIS IPA to develop a set of practical tools and guidance documents for the preparation and implementation of PPP projects. These will help officials to evaluate the effectiveness of PPP projects, develop key performance indicators, improve the selection procedure for private partners, establish a risk-allocation matrix and draft heads of terms for a PPP agreement, among other things.

In the course of several rounds of consultation, national parliaments, authorities and non-governmental organisations in the CIS provided comments on the draft guidance tools; more than 400 comments and suggestions were received after the initial draft of nine modules was

presented. Working with our consultants, we considered all of these comments and only seven issues were submitted for consideration by the CIS IPA Standing Economic and Finance Commission when we presented them with the advanced text.

The set of all nine PPP Practical Tools was approved at the CIS IPA Plenary Assembly in St Petersburg on 29 November 2018 and the OGC published the approved set of guidance and methodology materials in March 2019.

Following numerous requests from a number of CIS countries for a continuation of the work, we are now working with the CIS IPA on developing the next set of guidance materials. ■



## DELIVERING INNOVATION AND IMPACT

# A new restructuring tool for Turkey

**C**ompanies facing temporary financial difficulties, but otherwise pursuing a viable business, should have the opportunity to restructure their debt rather than be forced into a value-destructive insolvency process. Restructuring can benefit an economy as a whole by saving jobs and maintaining skills.

Like many other countries, including those in the EU,<sup>1</sup> Turkey is developing its restructuring toolkit. At a time when high inflation and currency depreciation are putting significant stress on foreign currency-indebted and import-reliant Turkish companies, there is undoubtedly a need for well-designed restructuring in the country.

In August 2018 the Turkish Banking Regulatory and Supervisory Agency published a regulation on the restructuring of debt owed to the financial sector. The regulation tasked the Turkish Banking Association (TBA) with developing a set of detailed rules (the Framework Agreement) for all future restructurings.

Importantly, the regulation states that if a restructuring agreement is signed under the Framework Agreement by a majority of banks, representing two-thirds of the banks' receivables, the terms of the agreement can be imposed on a dissenting minority, which is then "crammed down".<sup>2</sup>

The restructuring regulation also contemplates a number of restructuring tools, including new financing, the reduction of principal and interest, and debt-for-equity swaps, not commonly seen in the Turkish restructuring market. Rather, the general tendency to date has been for banks to extend their loan maturities and hope for a recovery. There has also been concern among banks about the embezzlement provisions of the Turkish Banking Law and the potential liabilities of bankers who agree reductions in debt with borrowers.

In September 2018, the TBA published the Framework Agreement on Financial Restructuring, based on the restructuring regulation, to which all Turkish banks were invited to sign up.

The scheme is available to medium and large-sized companies with debts of more than TRY 100 million (around €16 million), which



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## The EBRD is now leading a broader initiative aimed at improving the financial resilience of the Turkish banking sector



face temporary difficulties with repayments or are likely to face such difficulties.

The process starts with a voluntary application by the debtor to one of its largest financiers. The debtor's disclosure obligations are onerous, including information on its assets, as well as on the assets of shareholders and guarantors and of their spouses and children.

The participating banks form a consortium and elect a lead bank that coordinates the process. The application triggers a standstill period of up to 150 days, during which the enforcement of participating banks' rights are frozen.

In addition to the option of "cramming down" any dissenting minority, it is possible for more than one bank holding at least 90 per cent of the banks' receivables to force the dissenting minority to advance additional funds. New loans will be repaid as a priority. Once a restructuring agreement is signed, participating banks cannot initiate enforcement proceedings against the debtor as long as the debtor continues to perform its obligations under the agreement.

The Framework Agreement is primarily applicable to financial institutions regulated in Turkey. Initially, the scheme did not provide for any coordination between participating and non-participating banks.

As a non-regulated international financial institution, the EBRD could not sign up to the

Framework Agreement. But because of its sizeable financial exposure to the country, as well as its expertise in law reform, the Bank was keen to engage with the Turkish authorities on how the restructuring of participating and non-participating banks could be coordinated under the Framework Agreement.

The OGC's transactional knowledge and policy-reform expertise was a key factor in convincing our Turkish partners to adjust the scheme to facilitate parallel restructuring conducted by participating and non-participating banks. The Framework Agreement now provides for the sharing of information between groups of creditors and other coordination rules.

To date, there have been relatively few applications by debtors under the Framework Agreement. However, in July 2019 the Turkish parliament adopted legislation that introduced tax incentives and exemption from embezzlement liability for debtors who applied to use the Framework. This may stimulate wider use of this restructuring tool.

With OGC support, the EBRD is now leading a broader initiative aimed at improving the financial resilience of the Turkish banking sector. It seeks to identify opportunities for opening up the secondary markets for non-performing loans (NPLs) and to provide Turkish banks and investors with stronger mechanisms for resolving their NPLs, including in relation to restructuring and insolvency. Further improvements to Turkey's restructuring toolkit are likely. ■

<sup>1</sup> Directive (EU) 2019/1023 on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending the Company Law Codification Directive (Directive (EU) 2017/1132) (CLCD).

<sup>2</sup> A cram-down is the imposition of a majority creditor-approved approved restructuring plan on a dissenting minority of creditors.

# GLOSSARY

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BVB	Bucharest Stock Exchange
CIF	Climate Investment Funds
CIS	Commonwealth of Independent States
EBRD	European Bank for Reconstruction and Development
EIB	European Investment Bank
EPC	Engineering, procurement and construction
ESIF	European Structural and Investment Funds
EU	European Union
FLRC	First-loss risk cover
GCF	Green Climate Fund
GEF	Global Environment Fund
IDLO	International Development Law Organization
IFI	International financial institution
IMF	International Monetary Fund
IPA	Inter-parliamentary Assembly
KM	Knowledge management
LTC	Loan-to-cost (ratio)
LTP	Legal Transition Programme
LTV	Loan-to-value (ratio)
MDB	Multilateral development bank
MSME	Micro-, small- and medium-sized enterprise
NDC	Nationally Determined Contribution
NPL	Non-performing loan
OGC	Office of the General Counsel
PFI	Partner financial institution
PPP	Public-private partnership
PRS	Portfolio Risk Sharing
RSF	Risk Sharing Framework
SDG	Sustainable Development Goal
SEMED	Southern and eastern Mediterranean (region)
SME	Small and medium-sized enterprise
SOE	State-owned enterprise
TBA	Turkish Banking Association

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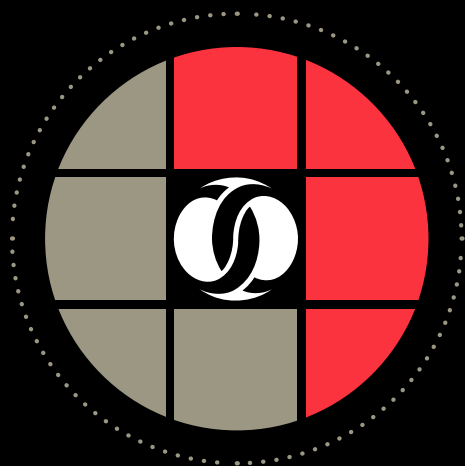
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