

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.

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Innovative risk-sharing instruments boost SME lending

Many 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.

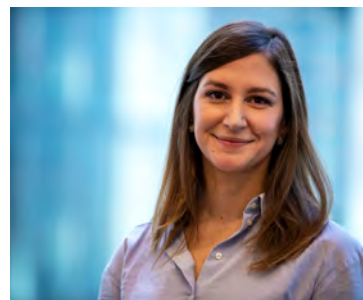
The PRS provides unfunded credit protection to a pool of loans originated by a PFI. The risk of loss is typically covered in part by a donor-funded first-loss risk cover (FLRC), while the residual risk is shared between the originator and the EBRD.

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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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. ■

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Our role in the EBRD-EU partnership

Since 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



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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.

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

In 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



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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. ■

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The road to resuming operations in Uzbekistan

It 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.



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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. ■