







# 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)



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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



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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.



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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



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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. ■