

Note on EBRD's Enforcement Processes, including Settlement Agreements

EBRD's Enforcement Policy and Procedures

The Agreement Establishing the European Bank for Reconstruction and Development (“**EBRD**” or the “**Bank**”) expressly provides that EBRD shall take all necessary measures to ensure that the proceeds of its financing are used solely for the purposes for which such financing was granted.¹

To this end, EBRD sanctions corrupt, fraudulent, coercive, collusive and obstructive practices, theft, and misuse of Bank Resources or Bank Assets (“**Prohibited Practices**”) in relation to a Bank Project or Bank Assets.²

EBRD's Enforcement Policy and Procedures (the “**EPPs**”)³ sets out the policy and procedures applicable when (i) processing allegations of Prohibited Practices made in relation to a Bank Project or Bank Assets, (ii) the Bank considers taking action against an individual or entity against whom/which a Third Party Finding has been imposed, and (iii) implementing Enforcement Actions, Disclosure Actions, and Mutual Enforcement.

EBRD's investigative and enforcement processes are not criminal proceedings, but rather internal administrative procedures established as part of EBRD's zero tolerance approach to corruption and to ensure that EBRD resources and assets are used only for their intended purposes.

Terms defined in the EPPs have the same meaning when used in this Note. In the event of any inconsistency between this Note and the EPPs, the provisions of the EPPs shall prevail.

Summary of EBRD's Enforcement Processes

Investigation Phase

The enforcement process begins with an investigation by the Office of the Chief Compliance Officer (“**OCCO**”) to determine whether there is sufficient evidence to support a finding that, more likely than not, a suspected Prohibited Practice was committed or whether a Third Party Finding has sufficient relevance and seriousness for the Bank as to warrant an Enforcement Action.

OCCO's investigations generally involve the collection and analysis of project, tender, and contract documentation and information, as well as interviews with involved persons, including the Subject(s) of the investigation, and, in some cases, physical site inspections.

OCCO does not have law enforcement powers. Rather, OCCO relies on both the cooperation of individuals and entities that it approaches during an investigation and the audit and inspection rights provided for in Bank-financed contracts and in tender documents for Bank-financed activities. The EPPs admit all forms of evidence; the decision-maker, be it the Enforcement Commissioner or the Enforcement Committee, decides whether to admit and the weight to be given to each piece of evidence. Witness evidence may be provided but only through transcripts or written records of interview: no live witness testimony is permitted.

When investigating a suspected Prohibited Practice or a Third Party Finding, OCCO may issue a so-called “show-cause” letter to the Subject(s). This letter will set forth the basis of the Chief

¹ See Agreement Establishing the European Bank for Reconstruction and Development, Article 13(xiii), available at: <http://www.ebrd.com/downloads/research/guides/basics.pdf>.

² See respectively Sections II (46), (13) and (10) of the EPPs for the definitions.

³ The EPPs were most recently amended effective 4 October 2017 and are available at: <http://www.ebrd.com/integrity-and-compliance.html>.

Compliance Officer's (the "CCO's") allegations and request that the Subject(s), within a prescribed deadline, show cause as to why Enforcement Proceedings should not be instituted.

When an OCCO investigation concludes that there is sufficient evidence to support a finding that, more likely than not, the suspected Prohibited Practice was committed or that a Third Party Finding may warrant an Enforcement Action, the CCO prepares a Notice. This Notice details, among other things, (i) the CCO's evidence and findings (including exculpatory or mitigating evidence) in relation to the occurrence of a Prohibited Practice or include a copy of the Third Party Finding (where relevant) and (ii) the Enforcement Action(s) proposed by the CCO.⁴

Suspension

If, pending the completion of an investigation or any Enforcement Proceedings, the CCO believes that the suspension of a Subject's or a Respondent's continued eligibility to become a Bank Counterparty is necessary to protect the Bank's interests or reputation, to protect other Bank Counterparties' interests or to ensure the integrity of an ongoing Bank procurement process, the CCO may request a suspension of such party's eligibility to become a Bank Counterparty and/or to receive payment in respect of a Bank Project to the extent contractually permissible.

If, based on the CCO's request or on the Enforcement Commissioner's own initiative, the Enforcement Commissioner issues a Suspension Decision, the party affected may file an Objection to such Suspension Decision, within 30 days from the date of the receipt or deemed receipt of the Suspension Decision, explaining why the suspension should be lifted. The Enforcement Commissioner shall consider the Objection and arguments presented in response thereto and shall render a decision whether to terminate or uphold the Suspension Decision within thirty days of receipt of the Objection. In either event, there will be no appeal against such decision.⁵

Enforcement Proceedings - First Instance

The CCO submits a Notice of Prohibited Practice or a Notice of Third Party Finding to the Enforcement Commissioner, who determines whether, in the Enforcement Commissioner's view, the CCO has presented sufficient evidence to support a finding that more likely than not, the party concerned has committed the alleged Prohibited Practice(s) or that the Third Party Finding may warrant an Enforcement Action. If the Enforcement Commissioner finds sufficient evidence, the Enforcement Commissioner will issue a Notice of Prohibited Practice or a Notice of Third Party Finding to the party concerned (the "**Respondent**").

If the Respondent does not submit a Response within the deadline prescribed in the Notice (which is no less than 30 days), the Enforcement Commissioner will issue an Enforcement Commissioner's Decision against the Respondent, imposing one or more Enforcement Actions as specified in the Notice.

If the Respondent submits a Response within the prescribed deadline, the CCO may, within 20 days following receipt of the Respondent's Response, submit to the Enforcement Commissioner a Reply presenting the CCO's arguments and evidence addressing the arguments and evidence presented by the Respondent in the Response.

Based on these submissions and any additional submissions requested or authorised by the Enforcement Commissioner, the Enforcement Commissioner will issue an Enforcement Commissioner's Decision setting forth, among other things, (i) a recitation of the relevant facts; (ii) his determination as to whether (a) it is more likely than not that the Respondent engaged in the

⁴ The exact content of the Notice is set forth in Section III, Article 4.4 (Notice of Prohibited Practice) and in Section III, Article 4.5 (Notice of Third Party Finding) of the EPPs.

⁵ More information on suspensions can be found in Section III, Article 9 of the EPPs.

alleged Prohibited Practice(s) or, (b) following a Third Party Finding, the Respondent would be an unacceptable Bank Counterparty; (iii) any Enforcement Action to be imposed on the Respondent and any of its Affiliates and the reasons therefor and (iv) the manner in which the Respondent or the CCO may submit an Appeal of such decision.⁶

If, within the prescribed deadline, neither the Respondent nor the CCO presents a Notice of Appeal, the Enforcement Commissioner will impose the Enforcement Action set forth in the Enforcement Commissioner's Decision, which will be subject to disclosure in accordance with Section III, Article 10.3 of the EPPs.

Enforcement Proceedings – Appeal

If either the Respondent or the CCO submits a Notice of Appeal, the matter will proceed to the Enforcement Committee. The eligibility of the Respondent to become a Bank Counterparty is automatically suspended during the appellate phase, until the final outcome of the Enforcement Proceedings.

The Enforcement Committee is a five-member body comprised of senior experts. Three members are external to the Bank and are appointed by the Bank's Board of Directors upon the nomination of the President of the Bank. Two members are senior Bank staff and are appointed by the President of the Bank. The Enforcement Committee is chaired by an external member. A decision of the Enforcement Committee shall be made by either a panel composed of the Chairperson and two members, one of whom shall be an external member, or, exceptionally, by the full committee if, in the opinion of the Chairperson, the complexity of the issues raised in the Appeal so requires.

The Respondent may request permission to make oral representations to the Enforcement Committee. In addition, the Enforcement Committee may also request oral representations from Respondent(s) and/or from the CCO, of its own volition.

In response to the Appellant's Notice of Appeal, the Appellee (whether the CCO or the Respondent) may submit an Appeal Response, following which the Appellant may submit an Appeal Reply, in each case within the prescribed deadlines. Based on the Appeal Record (consisting of the materials described in Section III, Article 7.7(i) of the EPPs), the Enforcement Committee will issue a Final Decision.

In its Final Decision, the Enforcement Committee will set forth: (i) a recitation of the relevant facts; (ii) its determination as to whether (a) it is more likely than not that the Respondent engaged in the alleged Prohibited Practice(s) or, (b) following the Third Party Finding, the Respondent would be unacceptable as a Bank Counterparty; and (iii) any Enforcement Action to be imposed on the Respondent and the reasons therefor. The Enforcement Committee's decision is non-appealable⁷ and will be subject to disclosure in accordance with Section III, Article 10.3 of the EPPs.

Enforcement Action, Disclosure Action, and Mutual Enforcement

As the nature and severity of the Prohibited Practice(s) can vary from case to case, the EPPs permit the imposition of a variety of Enforcement Actions:⁸

- (i) rejection of a proposal for an award of contract in respect of a procurement of goods, works or services;

⁶ More information on the proceedings before the Enforcement Commissioner can be found in Section III, Articles 4 and 5 of the EPPs.

⁷ More information on appeals can be found in Section III, Article 7 of the EPPs.

⁸ See Section III, Article 10.2 of the EPPs.

- (ii) cancellation of a portion of Bank finance allocated to the relevant party but not yet disbursed in respect of a contract for the procurement of goods, works or services;
- (iii) letter of reprimand;
- (iv) debarment for a fixed or indefinite period of time;
- (v) conditional non-debarment;
- (vi) debarment with conditional release; and
- (vii) restitution of diverted funds or the amount representing the economic benefit obtained as a result of having committed a Prohibited Practice.

Debarments (for either a fixed term or an indefinite period of time) and debarments with conditional release are subject to disclosure on EBRD's internet site pursuant to Section III, Article 10.3 of the EPPs.

Debarments, either for a fixed or indefinite period of time or with conditional release, that are imposed for longer than one year and meet the criteria set forth in Section II(18) of the EPPs are also subject to notification to and possible cross-debarment by the other Mutual Enforcement Institutions.⁹

Treatment of Affiliates¹⁰

The treatment of Affiliates is informed by the MDB Harmonized Principles on Treatment of Corporate Groups adopted on September 10, 2012.

More particularly, Enforcement Actions and Disclosure Actions will apply to a Respondent and to its Subsidiaries established as at the date of the Prohibited Practice unless the Respondent demonstrates, to the satisfaction of the Enforcement Commissioner or the Enforcement Committee, as the case may be, that (i) the Subsidiary is free from responsibility for the Prohibited Practice in question, (ii) application to that entity would be disproportionate and (iii) the application is not necessary to prevent evasion of the Enforcement Action by the Respondent.

Further, the Enforcement Action and Disclosure Action will apply to the Parent of a Respondent only if the Parent has been impleaded in the Enforcement Proceedings and is proven to have been involved in the commission of the Prohibited Practice in question. Involvement may include wilful blindness and /or a failure to supervise.

The Settlement Option¹¹

Settlements are intended to be an efficient way to resolve investigations without resorting to the full Enforcement Proceedings. Settlements can save EBRD and the Subject considerable resources, while providing certainty of result. Settlements will generally lead to quicker and more efficient resolution of investigations, as well as provide EBRD with an opportunity to acquire invaluable information through the cooperation of the Subject.

Every Subject of an OCCO investigation under the EPPs may initiate the option of settlement. Settlement discussions may also be initiated by the CCO or a person appointed by and on behalf of the CCO. Further, a settlement proposal may be initiated at any stage during the CCO's investigation or the Enforcement Proceedings prior to the issuance of the Enforcement Commissioner's Decision. After that point, settlement is no longer available as an option.

When a party expresses an interest in pursuing a settlement, the CCO will first determine whether the case warrants resolution by settlement rather than pursuing Enforcement Proceedings. The criteria that

⁹ See Section III, Article 12.3 of the EPPs.

¹⁰ More information on the treatment of Affiliates can be found in Section III, Article 11 of the EPPs.

¹¹ More information on settlements can be found in Section III, Article 13 of the EPPs.

the CCO will consider when determining whether to settle a particular case include, without limitation, the following:

- whether the Respondent has admitted culpability;
- whether settlement will result in resource savings to the EBRD;
- whether the Respondent has agreed to cooperate or is cooperating with the CCO's investigation; and
- whether the Respondent has taken corrective measures or has shown that it will no longer be a significant reputational or integrity risk to EBRD.

In accordance with the General Principles and Guidelines for Sanctions agreed to by the Mutual Enforcement Institutions, an admission of culpability, cooperation with an investigation and satisfactory implementation of a compliance programme are each 'Mitigating Circumstances' that may reduce the severity of the Enforcement Action(s) to be imposed.

After a party informs OCCO that it is interested in considering a settlement, it is provided with a standardised Settlement Agreement. This document outlines the key terms that a Settlement Agreement will contain, including:

- the identification of all parties that are subject to the effect of settlement;
- an acknowledgement of the accuracy of the information contained in the Settlement Agreement;
- the agreed Enforcement Action(s) to be imposed, which will be consistent with the General Principles and Guidelines for Sanctions;
- a statement of the applicability of the terms of the Settlement Agreement to the relevant party(ies) and affiliates;
- a statement as to whether or not the sanction is eligible for Mutual Enforcement by the other Mutual Enforcement Institutions;
- a statement concerning the required cooperation of the relevant parties with OCCO during the term of the settlement;
- the implementation / enhancement of a compliance program by the relevant party(ies) acceptable to OCCO.

Furthermore, if a party has obtained an economic benefit as a result of having engaged in a Prohibited Practice, the settlement agreement will provide for the restitution of that economic benefit to another party or to the Bank (with respect to Bank Resources).

It is critical that all parties, large and small, represented or unrepresented, who enter into a Settlement Agreement, do so voluntarily. To this end, the Settlement Agreement must contain an acknowledgement by all parties that are subject to it, including the CCO, that the Respondent entered into the settlement freely and fully informed of its terms. If a party engages legal counsel to represent it, the settlement should attach a certificate that confirms the party has read and understood the terms of the settlement and voluntarily consents to those terms.

Once all parties have signed the Settlement Agreement, it must be submitted to the Enforcement Commissioner for review. The Enforcement Commissioner, in consultation with the Bank's General Counsel, will review the terms of the Settlement Agreement to ensure that they do not violate the EPPs, and any guidance issued by the Bank in respect thereof or any other Bank policy. Upon confirmation thereof, the Enforcement Commissioner will provide clearance on the Settlement Agreement and promptly inform the parties subject to the Settlement Agreement. Where the Settlement Agreement includes a debarment or a debarment with conditional release, the Enforcement Commissioner shall also inform the EBRD Board of Directors. At the time of clearance or at an agreed upon point in time thereafter, the Settlement Agreement becomes effective.

Unless the Settlement Agreement expressly provides otherwise, any questions regarding compliance by the parties with the terms and conditions of the Settlement Agreement, or any disagreement between the parties as to the interpretation or performance thereof, will be determined by the Enforcement Commissioner. Any such determinations will be final and non-appealable.

Enforcement Action(s) imposed pursuant to a Settlement Agreement shall have the same effect as if imposed pursuant to an Enforcement Commissioner's Decision, other than the right to Appeal, and shall be subject to the disclosure requirements set forth in Section III, Article 10.3 of the EPPs and may be subject to notification to and possible cross-debarment by the other Mutual Enforcement Institutions (if applicable).

Note to reader: This Note provides a high-level overview of EBRD's Enforcement Processes. The information contained in this Note is not exhaustive and non-binding and may be amended without any prior notice.