

EBRD's Settlements: How Settlement Agreements Fit within EBRD's Enforcement Regime

The Agreement Establishing the European Bank for Reconstruction and Development (“**EBRD**” or the “**Bank**”) expressly provides that EBRD must 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, obstructive practices, theft and misuse of EBRD's resources (“**Prohibited Practices**”) in relation to its projects and activities. EBRD's Enforcement Policy and Procedures (the “**EPPs**”) (available at: <http://www.ebrd.com/integrity-and-compliance.html>) set out the policy and procedures for processing allegations of Prohibited Practices made against (i) parties that have engaged in Prohibited Practices in projects financed from EBRD's ordinary capital resources, special funds resources or cooperation funds administered by EBRD and (ii) parties on whom a Third Party Finding has been imposed.²

EBRD's investigative and enforcement processes are not criminal proceedings, but rather internal administrative mechanisms established to ensure that the funds entrusted to EBRD are only used for their intended purposes.

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 (the “**Enforcement Actions**”):

- (i) rejection of a proposal for award of contract in respect of a procurement of goods, works or services;
- (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) conditional non-debarment;
- (v) debarment for a fixed or indefinite period of time;
- (vi) debarment with conditional release; and
- (vii) restitution of diverted funds or the amount representing the economic benefit that the party obtained as a result of having committed a Prohibited Practice.

Debarments, either for a fixed or indefinite period of time or with conditional release, that are greater than one year in length and meet the criteria set forth in paragraph 4 of the Agreement for Mutual Enforcement of Debarment Decisions are subject to cross-debarment by the other participating institutions (the MDBs).³

¹ See Agreement Establishing the European Bank for Reconstruction and Development, Article 13(xiii) (1990), available at: <http://www.ebrd.com/downloads/research/guides/basics.pdf>

² “Third Party Finding” means a final judgment of a judicial process in a Bank's member country or a finding by the enforcement (or similar) mechanism of another international organisation that is not an MDB (as defined in footnote 3 below) that an individual or entity has engaged in a Prohibited Practice or equivalent act of that member country or international organisation.

³ In addition to EBRD, the MDBs consist of the following: the African Development Bank Group, the Asian Development Bank, the Inter-American Development Bank Group and the World Bank Group. The Agreement for Mutual Enforcement of Debarment Decisions was signed on April 9, 2010 and can be found at: <http://www.ebrd.com/downloads/integrity/Debar.pdf>.

Summary of the Enforcement Process

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 (i) more likely than not, the suspected Prohibited Practice was committed or (ii) a Third Party Finding may warrant an Enforcement Action.

OCCO’s investigations generally involve the collection and analysis of project, tender, and contract documents and information, as well as interviews with involved persons 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 contained in the Bank-financed contracts and in tender documents for the Bank-financed activities. In recognition of OCCO’s limited powers, the EPPs admit all forms of evidence, although the decision-maker decides what weight to give 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 an OCCO investigation concludes that there is sufficient evidence to support a finding that either (i) more likely than not, the suspected Prohibited Practice was committed or (ii) a Third Party Finding may warrant an Enforcement Action, the Chief Compliance Officer (the “**CCO**”) prepares a Notice that details, among other things, the CCO’s evidence and findings (or a copy of the Third Party Finding), the Enforcement Action(s) proposed by the CCO and any exculpatory or mitigating evidence.⁴

If, either before OCCO concludes its investigation of the suspected Prohibited Practice, or after the end of its investigation, the CCO believes that the suspension of the party’s continued eligibility 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 seek a suspension of such party’s eligibility to (i) become a Bank Counterparty (as defined in Section 2.1.9 of the EPPs) and/or (ii) receive payment in respect of a Bank project, to the extent contractually permissible. If, based on the CCO’s request or on his/her own initiative, the first-tier decision-maker (the Enforcement Commissioner) issues a Suspension Decision, the party may then file an objection to such Suspension Decision, within 30 days from the date of the deemed receipt of the Suspension Decision, explaining why the suspension should be lifted.⁵

EBRD’s enforcement proceedings follow a two-stage decision-making process. In **the first stage**, the CCO submits the above-described Notice to the Enforcement Commissioner, who determines whether, in the Enforcement Commissioner’s view, the CCO has presented evidence sufficient to support a finding that (i) more likely than not, the party committed the alleged Prohibited Practice(s) or (ii) a Third Party Finding may warrant an Enforcement Action. If the Enforcement Commissioner

⁴ The exact content of the Notice is set forth in Sections 5.4 and 5.5 of the EPPs.

⁵ More information on suspensions can be found in Article X of the EPPs.

finds sufficient evidence, he/she will issue the Notice to the party (at this stage referred to as the “**Respondent**”).

If the Respondent does not contest the case within the deadline prescribed in the Notice (which is never less than 30 days), the Enforcement Commissioner will issue a decision against the Respondent imposing one or more Enforcement Actions.

If the Respondent contests the case 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 arguments and evidence addressing the arguments and evidence presented in the Respondent’s response.

Based on these submissions and any additional submissions requested or authorised by the Enforcement Commissioner, the Enforcement Commissioner will issue a decision setting forth: (i) a recitation of the relevant facts; (ii) his/her determination as to whether it is more likely than not that either (a) the Respondent engaged in the alleged Prohibited Practice(s) or, (b) following the 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 an appeal, the Enforcement Commissioner will impose the Enforcement Action set forth in his/her decision, which will be disclosed in accordance with Section 11.3 of the EPPs.

If either the Respondent or the CCO submits an appeal, the matter proceeds to **the second stage** before the Enforcement Committee and the eligibility of the Respondent to become a Bank Counterparty is automatically suspended until final outcome of the appeal proceedings. The Enforcement Committee is a five-member body comprised of senior experts (three external to the Bank and two senior Bank staff members) that is chaired by an external member. The 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 the complexity of the issues raised in the appeal so requires. The Respondent may contest the Enforcement Commissioner’s decision in written pleadings and may also request permission to make oral representations to the Enforcement Committee. In addition, the Enforcement Committee may also request oral representations of both parties on its own volition.

In response to the appellant’s notice of appeal, the appellee may submit an appeal response, following which the appellant may submit an appeal reply, in each case within the prescribed deadlines. Based on the materials described in Section 8.7(i) of the EPPs, the Enforcement Committee will issue a decision setting forth: (i) a recitation of the relevant facts; (ii) its determination as to whether it is more likely than not that either (a) the Respondent engaged in the alleged Prohibited Practice(s) or, (b) following the Third Party Finding, the Respondent would be an unacceptable Bank Counterparty; and (iii) any Enforcement Action to be imposed on the Respondent and any of its affiliates and the reasons therefor. The Enforcement

⁶ More information on the proceedings before the Enforcement Commissioner can be found in Articles V and VI of the EPPs.

Committee's decisions are non-appealable⁷ and will be subject to disclosure in accordance with Section 11.3 of the EPPs.

The Settlement Option

Settlements are intended to be an efficient way to resolve investigations without resorting to the full enforcement proceedings. Settlements can save EBRD and the party under investigation 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 party under investigation.

Every subject of an OCCO investigation under the EPPs may initiate the option of settlement. Settlement discussions may also be initiated by OCCO. A settlement proposal may be initiated at any stage during OCCO'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 to the parties.

When a party expresses an interest in pursuing a settlement, the CCO must first determine whether the case warrants resolution by settlement rather than pursuing the full enforcement proceeding. The criteria that the CCO will consider when determining whether to settle a particular case includes, without limitation, the following:

- whether the party has admitted culpability;
- whether settlement will result in resource savings to EBRD;
- whether the party has agreed to cooperate or is cooperating with OCCO's investigation; and
- whether the party 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 MDBs., 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 should contain, including:

- The identification of all parties that are subject to the settlement;
- An acknowledgement of the accuracy of the information contained in the settlement;
- The agreed Enforcement Action(s) to be imposed 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;

⁷ More information on appeals can be found in Article VIII of the EPPs.

- A statement as to whether or not the sanction is eligible for mutual enforcement by other MDBs;
- 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; and

If a party has obtained an economic benefit as a result of having engaged in a Prohibited Practice, the settlement agreement should provide for the restitution of that economic benefit to another party or to the Bank (with respect to the Bank's funds, Special Funds resources or other cooperation funds or trust funds administered by the Bank).

It is critical that all parties, both 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, fully informed of its terms. If a party engages legal counsel to represent them, the settlement should attach a certificate that confirms the party has read and understands the terms of the settlement and voluntarily consents to them

Once all parties have signed the settlement agreement, it must be submitted to the Enforcement Commissioner for his/her 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, any guidance issued by the Bank in respect thereof or any other Bank policy. Upon confirmation that the terms of the settlement agreement do not violate the EPPs, any guidance issued by the Bank in respect thereof or any other Bank policy, the Enforcement Commissioner will provide clearance on the settlement agreement and promptly inform the parties subject to the settlement agreement thereof. The EBRD Board of Directors will also be informed that the Bank has entered into a Settlement Agreement but does not receive a copy of the Agreement. At that time or an agreed upon point in time thereafter, the Enforcement Action is imposed.

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 a final and non-appealable.

Enforcement Action(s) imposed pursuant to a settlement agreement shall have the same effect as if the Enforcement Action(s) had been imposed by the Enforcement Commissioner in the course of enforcement proceedings, including the disclosure requirements set forth in Section 11.3 of the EPPs and the application of cross-debarment.