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INTO A THIRD DECADE OF LAW REFORMS

The EBRD Legal Transition Team was established as a distinct unit within the Bank's Office of the General Counsel in 1995.¹ Its 20th anniversary is a good time to reflect on the changes that have occurred in the way the EBRD undertakes legal reform, from the perspective of those in charge of running such activities. The Bank's Legal Transition Programme has grown and evolved over the last 20 years, both substantively and geographically. This has taken place in response to the changing circumstances in countries in which the EBRD invests, the ever more complex world economy and the Bank's expanded mandate. While the core reform methodology remains largely the same, there have been operational changes in both funding mechanisms and legal matters covered by the programme. There is also now an increased emphasis on measuring results, which will only become more important in a tight budgetary environment.





Over the past two decades, the Legal Transition Team (LTT) has carried out the Bank's Legal Transition Programme (LTP), an EBRD initiative which contributes to improving the investment climate in countries in which the Bank works by helping to create an investor-friendly, transparent and predictable legal environment. LTP activities focus on developing legal rules and establishing the legal institutions and culture on which a vibrant market-oriented economy depends. These past 20 years have seen extensive growth in country law expertise at the Bank and the development of more than 200 technical cooperation projects in over 30 countries, touching on many aspects of commercial law and institution-building. The LTP has also encouraged reflection on commercial law reform through numerous outreach events and by publishing 34 issues of *Law in transition*.²

An external evaluation conducted in 2012 concluded that the LTP had been successful overall, with some sectors and activities being deemed highly successful.³ This backs up the LTT's own perception that through its programme the Bank has had an impact on the investment climate and economic development of transition countries by improving their legal framework for businesses. However, the environment in which the LTP operates is constantly changing and past achievements are no guarantee of future success.

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COMMERCIAL LAW IN TRANSITION COUNTRIES – CHALLENGES OLD AND NEW

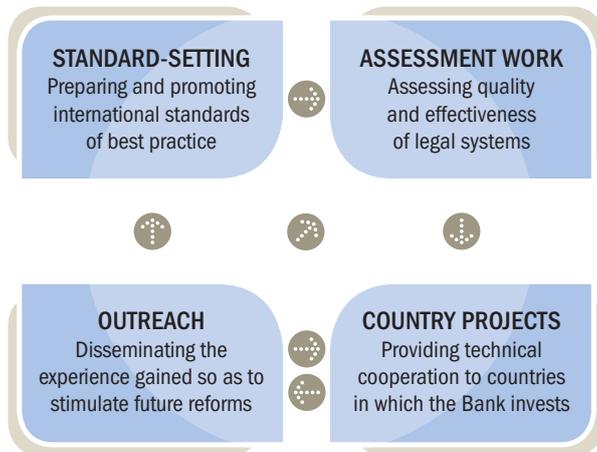
Considering the big picture of commercial law reform in the EBRD region, which is the background against which the LTP operates, it is evident that the environment has changed dramatically. In the 1990s the new market economies of central and eastern Europe were boldly seeking to establish legislation and institutions to support the growth of business activities. In these countries, the need for technical assistance was immense and so was the appetite to learn from “western” experience. Twenty years later, many transition countries have made significant progress towards fully functioning market economies with relatively well-developed laws. Yet the need for technical assistance across the region keeps growing. Why is that?

First, despite unquestionable progress in establishing legal frameworks for modern business activities, the development of sound institutions in these countries has been uneven. The EBRD’s legal assessments continue to show that, despite legislation of decent quality in many countries, there remains a substantial deficit in the implementation of commercial law. There are many contributing factors to this problem, which differ from country to country, including: a general lack of resources to train officials and judges (or even to remunerate them as appropriate); low levels of transparency, which masks improper dealings and creates inefficiencies; and weak institutional organisation and management, all of which translates into under-performing systems. International organisations and donors are often called upon to assist governments in addressing such concerns. There is a general agreement in development circles that building strong institutions is much more difficult than passing laws.

Second, the regional and global financial crises (the last one being in 2007-09) have shown that even modern legal frameworks have their limits and can fail. Policy-makers in transition countries are now considering the best way to continue reforms. Governments are seeking fresh approaches in their efforts to transition fully to the market economy, while taking stock of the lessons learned from the crises. This is a difficult balancing act, which can be facilitated by external assistance and comparative analysis of the kind conducted by the LTP.

Lastly, the international legal framework for businesses has continued to develop globally and transition countries often need to catch up with new approaches. A typical example is public procurement, where e-Procurement has transformed the operational landscape and is expected to be introduced everywhere in the near future. Many countries in which the EBRD invests lack the financial resources and technical expertise to introduce such reforms and must therefore turn to institutions like the EBRD for assistance. Further, commercial law is becoming ever more complex in response to developments in the markets and the use of technology in society. This is particularly the case with financial products, which pose significant policy challenges for governments.



CHART 1 THE EBRD VIRTUOUS CIRCLE OF LEGAL FORM

Source: EBRD

EVERGREEN VALUES

While much has changed in the LTP, its core features remain intact even 20 years after its inception. The fundamental approach to project management is the same – the Bank continues to retain full in-house intellectual ownership and control of the technical assistance it provides. The LTT remains structured as a group of experts on specific topics, who call on external consultancy services as needed, but who ultimately deliver the EBRD message and take responsibility for the contents of advisory services. This model is restrictive in terms of leverage opportunities (that is, the internal lawyers in charge cannot carry out more projects than they can personally manage at any given time). However, the approach has distinct advantages with regard to quality control and consistency. The Bank can be confident that the substance of its legal technical assistance is in line with its philosophy and policies, rather than being left to the judgement of external consultants.

Another feature that remains current is the adherence to the “EBRD virtuous circle of legal reform” (see Chart 1). From the beginning, the LTP has been engaged in a series of activities that are mutually reinforcing, such as: (i) contributing to the establishment of international standards and

best practices; (ii) conducting diagnostic activities; (iii) following up with advisory services in countries in which the Bank invests; and lastly (iv) disseminating lessons learned to external audiences. At the EBRD, all four activities are within the remit of the LTT, whereas other organisations have divided these functions.⁴ Each approach has its pros and cons. Even though the LTT operates with limited resources, the view at the EBRD is that combining these four activities in the same operational unit is beneficial and leads to cross-fertilisation. For example, lawyers having conducted a comparative assessment of insolvency laws in countries in which the EBRD invests are well placed to engage in policy dialogue with officials in those countries. They are able to indicate how that particular country fares compared with neighbouring countries, identify the current shortcomings in the system, determine which reforms have worked abroad, and so on. Similarly, experience in the preparation of standards for transition countries is of great help to LTP lawyers when designing a diagnostic tool for the same legal area.

In addition, the Bank took the view early on that some of its lawyers should work full-time on legal reform activities (as opposed to doing this part-time in addition to their investment-related duties). This approach remains in place today. It is seen as a good way for in-house lawyers to handle the potential conflict that could arise between the daily pressures of investment operations and the longer-term time frames and objectives that are typical of legal reform work. It also helps to create a strong pool of expertise in policy dialogue and law reform.

FROM SECURED TRANSACTIONS TO RESOURCE EFFICIENCY

Having started with a relatively narrow focus on secured transactions, which was identified as the most pressing need in developing credit markets in the region in the 1990s, the programme rapidly grew to include new focus areas. These additions were guided by the feedback of EBRD bankers working on investment operations and the desire to create a better business environment throughout the region. By the new millennium, the programme was already working on corporate governance, telecommunications regulation and concessions/public-private partnerships. Then came insolvency

CHART 2 LEGAL AREAS WHERE THE EBRD CURRENTLY FOCUSES ITS TECHNICAL COOPERATION



Source: EBRD

(2004), judicial capacity-building (2006), public procurement (2008), and energy law and regulation (2011). At the same time, expansion has occurred within some of the focus areas. For example, secured transactions have evolved from covering security over movable and immovable property to including credit-information reporting systems, and have further extended to cover the full access-to-finance range, including factoring and leasing. Telecommunications regulation has grown to encompass all infrastructure regulation. The energy focus has broadened into a resource efficiency approach. And judicial capacity now covers alternative dispute resolution and the work of bailiffs.

The future will most likely see more developments in the programme. Knowledge management and innovation are important thematic issues within the Bank. Subject to resource constraints, the LTP's remit may expand into topics such as intellectual property, venture capital and private equity.

FROM MOSCOW TO CASABLANCA

Changes have also occurred on the geographical side. Three years ago, the Bank implemented the most exciting change since it was established. Having worked for two decades on promoting transition to market economies in central and eastern Europe, it turned its attention to the countries of the “Arab spring”. This move was approved by the Bank’s shareholders, eager to support the political reforms that were developing in parts of the Arab world. Although the Bank was established to help countries transition from centrally planned economies to market economies, its skill-set and experience were seen as relevant for other economies with significant state control or those with a need to boost small enterprises. The LTT embraced this new direction with enthusiasm and its lawyers approached the new jurisdictions with interest but caution, mindful that new thinking might be necessary. This proved to be the case. Whereas in eastern Europe the EBRD is recognised as an authority on the market economy and is welcomed as an adviser by transition countries, the Bank is more of an unknown in the southern and eastern Mediterranean (SEMED) region.⁵ As such, more effort is required in these countries to establish credible policy dialogue and build rapport with officials in charge of reforms. A meeting in SEMED typically starts with an explanation of what the EBRD is, which is unnecessary in the “traditional” region where people are very much aware of the Bank’s existence and mission from the beginning. Additional care and attention is needed to convey LTP messages to policy-makers in Arab countries. It is also more important than ever to build coalitions with other aid providers, to undertake



more frequent visits to interact with stakeholders on the ground, and to become acquainted with local culture and traditions. Though it has taken some time to strike up policy dialogue in the new region, there is now a certain momentum. At the time of writing, the Bank had been able to initiate several legal technical cooperation projects in the SEMED region, such as legislation for secured transactions and derivatives in Morocco, a regulatory environment for small and medium-sized enterprises in Egypt and judicial capacity-building in Jordan.

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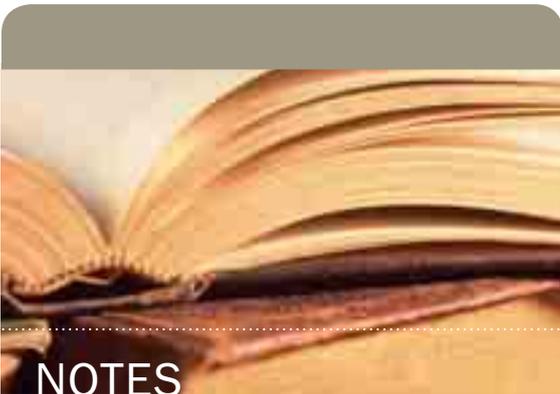
MONEY MAKES REFORM GO ROUND

The majority of LTP activities are funded by donors. Their monies are used to hire consultants where necessary, to organise events and trainings, and publish analytical materials. At present, this represents an annual spending of approximately €6-8 million, compared with approximately €1 million in the early 2000s. The Bank runs a donor programme, which collects contributions from its shareholders and makes them available for technical cooperation activities. The trend over the past 10 years has been to move away from tied bilateral donor funding⁶ and to increasingly use multi-donor funds comprising untied money. This is a result both of the growing awareness of donors that their money could be used more efficiently in collective schemes combining various resources, and of the Bank’s position that donors should “untie” their donations to facilitate the best use of funds. This has been a very positive development for the LTP and has created more flexibility in hiring consultants. Think, for example, of having to



source experts to promote public procurement law reforms in the Kyrgyz Republic and being forced to hire most of the experts from only one jurisdiction, to which funding is tied. This is a serious limitation which could cause problems. Typically, such a project would require local expertise in the recipient country and some international expertise in the public procurement sphere, preferably consultants with Russian language skills. The mismatch between tied funding and law reform requirements is obvious.

There has been abundant funding for technical cooperation in the last 10 years or so, such that the Bank has rarely had to walk away from a law reform project due to lack of funding. The Bank has almost always been able to match some donor funds with the proposed activities, or to obtain support from the EBRD Shareholder Special Fund, which can be used to fund legal reform projects, among other things. Back in the 1990s, the situation was very different and new projects would routinely face a nervous wait for donor funding. More recently, donor funding has once again become somewhat scarce and one cannot assume that the LTP will always be able to find support for the funding needs of its many projects.



NOTES

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Note that the EBRD did engage in law reform activities from as early as the year of its foundation (1991), but until 1995 these were carried out on an ad hoc basis by various members of the Office of the General Counsel.

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For more information on the EBRD's Legal Transition Programme, see www.ebrd.com/law (last accessed 12 December 2014).

3

See <http://www.ebrd.com/downloads/about/evaluation/121109legal.pdf> (last accessed 12 December 2014).

STRONGER INTEGRATION OF EBRD ACTIVITIES

Another important change in the LTP has been the greater integration of its activities into the Bank's strategic initiatives. Legal policy dialogue has moved a long way from the 1990s, when it was very much a niche activity developed by specialists; it is now much more a part of the Bank's mainstream activities. In the last decade, the LTP has been operating under three-year action plans prepared in consultation with all other units in the Bank. As a result, recent initiatives launched or prepared by the Bank (for example, the Small Business Initiative, Knowledge Economy Initiative and Sustainable Resource Initiative) include a significant policy dialogue component where the LTP is expected to contribute. This integration has helped boost the programme's activities. However, it also makes it necessary to manage internal and external expectations about what can be achieved with a relatively small team of lawyers.⁷

MANAGING FOR RESULTS

In the 1990s the understanding that "good laws make good economies" increasingly became accepted as one of the cornerstones of international development assistance. The EBRD itself made this point very early on⁸ and highlighted the positive correlation it had observed between legal reforms and economic transition. Later on, this doctrine was promoted by the World Bank's *Doing Business* reports⁹ and associated research, which all underlined the importance of efficient and properly implemented laws and regulations to support economic development. Encouraged by these findings, international financial institutions

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For example, at the World Bank standards-setting is done by the Legal Vice Presidency, whereas diagnostics and advisory services are provided by other departments.

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SEMED is the acronym used by the EBRD to refer to Arab countries where it works. This currently includes Egypt, Jordan, Morocco and Tunisia.

6

Tied funding refers to donor money to which specific conditions are attached, typically the mandatory use of some of the funding to hire consultants from the donor's country.

amplified their efforts to improve legal frameworks for businesses in developing and transition countries. However, uneven attention was paid to measuring the actual impact of such development assistance. At the EBRD in particular, some measuring was done, but on an ad hoc basis rather than on a comprehensive and systematic basis. More recently, governments, in particular those of donor countries, have been asking for more detailed results of their assistance. The *2005 Paris Declaration on Aid Effectiveness* establishes as one of its main principles the need to manage for results.¹⁰ This attempt to better capture the effect of development assistance has translated into specific measures at the EBRD. Since 2013 all new technical cooperation projects must include a “results matrix” detailing the expected outcome and outputs of EBRD assistance, and specific indicators that allow the Bank to measure success or lack thereof. This new approach will be monitored closely and is expected to give donors more detailed information on what has been achieved with their money.

These developments are welcome and should give more legitimacy to the work of international financial institutions. One might say there is a certain cost entailed, as staff may end up spending more time preparing sophisticated instruments to measure success, and therefore have less time to spend on actual assistance to transition countries. However, such systems promote proof of success in legal reform, which is important to improve the investment climate – the LTP’s ultimate objective. Obviously the right balance must be struck between these conflicting parameters. The Bank has also been experimenting with other tools to measure the

results of judicial training programmes, such as the use of randomised impact studies to monitor the effectiveness of training activities. Although the high cost of such studies has been questioned by some stakeholders and detailed analyses can only be conducted in a few selected cases, their value cannot be underestimated. They offer hard proof that legal reform projects have achieved legal and economic success.

THE FUTURE

The EBRD Legal Transition Programme is ready to enter its third decade with confidence. The challenges highlighted in this article call for continuous adaptation. However, there is no question that legal technical assistance will be a priority for the EBRD’s involvement in transition countries in the future. That said, the Bank may struggle between the desire to expand LTP activities, clearly expressed by all stakeholders, and the tight budgetary environment which points to limited resources in future years. Indeed, consistent funding levels must not be taken for granted. These can fluctuate due to donor budget limitations or to possible reductions in the portion of EBRD profits that can be allocated to technical cooperation. Efforts will need to continue to rationalise assistance, improve coordination with other institutions and make the best use of past experiences. In addition, particular attention must be paid to measuring and publicising results (or lack thereof) of technical cooperation projects. If these conditions are met, the LTP can be expected to contribute to the realisation of the UN’s Post-2015 Development Agenda in its regions, from central and eastern Europe to Central Asia and the southern and eastern Mediterranean.

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At present, the LTP has 13 permanent lawyer positions and a few ad hoc research assistants.

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EBRD (1995), “The contribution of law to fostering investment”, *Transition Report 1995: Business in transition*, Chapter 6, pp. 101-108.

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See <http://www.doingbusiness.org/> (last accessed 12 December 2014).

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See <http://www.oecd.org/dac/effectiveness/34428351.pdf> (last accessed 12 December 2014).

