

PUBLIC

**DOCUMENT OF THE EUROPEAN BANK
FOR RECONSTRUCTION AND DEVELOPMENT**

OFFSHORE JURISDICTIONS IN EBRD PROJECTS

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Preamble:

As an international financial institution with a mandate to promote transition towards a functioning market economy in its countries of operations, EBRD supports international efforts to discourage tax evasion and other harmful tax practices. In its own operations, the EBRD supports the principle of taxation of economic activity in accordance with the tax laws and international tax treaties of its countries of operations. In this context it is important that local tax authorities have access to the relevant information to monitor compliance with these laws and treaties. This may become more difficult when third countries are chosen as locations for establishment of entities involved in EBRD operations. Therefore when offshore jurisdictions are used, the EBRD makes use of internationally agreed processes and best practices designed to prevent misuse and to promote transparency and information exchange on tax matters.

As mandated by Article 13(i) of the Agreement Establishing the Bank, the EBRD applies “sound banking principles to all its operations”. One such principle is to “know your customer”, which requires that the Bank conduct appropriate due diligence on project sponsors and the projects themselves. In each case, the corporate governance structure, beneficial ownership, financial transparency and strength, compliance and integrity, including in relation to tax matters, are reviewed according to best practices. Naturally, similar assessments are also made in projects involving vehicles established offshore, with a view, among others, to obtaining a reasonable level of assurance that the offshore structure is not set up or used for the purpose of tax evasion, money laundering and terrorism financing.

With its project finance and private sector focus, the Bank has had to deal with offshore vehicles since its inception. This is because the use of such vehicles is not uncommon practice for private sector investors in international project finance and when engaged in cross-border investment. Where offshore jurisdictions are used, the Bank’s long standing practice has also been to satisfy itself that the reasons for using such structures are sound from a business viewpoint. Sound business reasons may include the need to establish a common investment vehicle in a stable and/or investor-friendly jurisdiction. Equally, while the Bank does not want to encourage the use of offshore jurisdictions, the choice of the jurisdiction may be influenced by the desire to avoid double taxation, as legally permitted by a network of bilateral treaties and national tax laws.

Where offshore jurisdictions are used, the Bank’s practice has been to assess whether or not there is a risk that the jurisdictions are associated with improper financial activities. This policy document respects and builds on these objectives and underscores the role of the Bank in supporting international efforts to combat such activities, in particular by making use of the peer group assessments of the Global Forum on Transparency and Exchange of Information for Tax Purposes (“Global Forum”) as well as the work of the Financial Action Task Force (“FATF”) in countering money laundering and terrorism financing risks.

1. Introduction

- (a) Ordinarily the Bank lends to, invests in, or guarantees obligations of, an entity established in the country of operations where the project so financed is located. In some cases, however, the borrower, investee or guaranteed entity will be established in an offshore jurisdiction, i.e., a country or territory different from the country of operations where the project is located.
- (b) In addition, a borrower, investee or guaranteed entity, wherever located, may be controlled by an entity established in an offshore jurisdiction. "Control" for this purpose means the power of an entity to govern the financial and operational policies of the entity of which it is a shareholder.

2. Principles

Whenever Bank financing involves, in either of the ways described in Section 1, an entity established in an offshore jurisdiction:

- (a) The Bank shall satisfy itself that there are sound business reasons for the use of the offshore jurisdiction in the context of the project being financed.

Whether there are sound business reasons in a given project will depend on the surrounding circumstances. Such reasons might include (i) the desire to use a jurisdiction to attract capital from multiple sources while avoiding double taxation of investments, (ii) the existence of stable legal systems which facilitate contract enforcement and registration of security, (iii) the existence of clear laws regarding issues such as governance, liability and taxation, and (iv) recognition of internationally accepted investment agreements, including shareholder agreements and put options, corporate forms that ensure limited liability of shareholders, and instruments such as preferred shares.

- (b) The Bank shall not provide financing where the offshore jurisdiction has not substantially implemented the internationally agreed tax standard endorsed by the UN Committee of Experts on International Cooperation in Tax Matters in 2008.

Whether an offshore jurisdiction has or has not substantially implemented the internationally agreed tax standard is to be determined by reference to the last Progress Report on the Jurisdictions Surveyed by the Global Forum in Implementing the Internationally Agreed Tax Standard. If however an offshore jurisdiction is not covered by the Report, the question of whether that jurisdiction has or has not substantially implemented the internationally agreed tax standard shall be resolved after consultation with the secretariat of the Global Forum.

- (c) The Bank shall not provide financing where the offshore jurisdiction is not effectively implementing the internationally agreed tax standard.

Whether an offshore jurisdiction is or is not effectively implementing its commitment to the internationally agreed tax standard is to be determined by reference to the work of the peer review process of the Global Forum. More particularly,

- (i) an offshore jurisdiction for which no phase 1 review has been undertaken or completed but which has substantially implemented the internationally agreed tax standard shall be deemed to be effectively implementing its commitment to the internationally agreed tax standard.
- (ii) an offshore jurisdiction for which a phase 1 review has been completed but where the Global Forum has determined that a phase 2 review will not take place until additional steps have been taken by the jurisdiction and found sufficient and satisfactory by the

Global Forum, shall be deemed not to be effectively implementing its commitment to the internationally agreed tax standard.

- (iii) an offshore jurisdiction for which a phase 2 review has been completed and which is assessed by the Global Forum as “compliant” or “largely compliant” shall be deemed to be effectively implementing its commitment to the internationally agreed tax standard
- (iv) an offshore jurisdiction for which a phase 2 review has been completed and which is assessed by the Global Forum as “partially compliant” or “non-compliant” shall be deemed not to be effectively implementing its commitment to the internationally agreed tax.

In the case of an offshore jurisdiction assessed by the Global Forum as “partially compliant”, the jurisdiction may nonetheless be deemed to be effectively implementing its commitment to the internationally agreed tax standard if (a) the report setting out the assessment identifies specific steps that need to be taken by the jurisdiction to improve its rating, and (b) the Global Forum has confirmed that the jurisdiction is actively taking the steps identified and that they are in an advanced stage of implementation.

If the work of the peer review process of the Global Forum does not extend to an offshore jurisdiction, the question of whether that jurisdiction is effectively implementing its commitment to the internationally agreed tax standard shall be resolved after consultation with the secretariat of the Global Forum.

- (d) The Bank shall not provide financing where the offshore jurisdiction is not cooperating in the international efforts to combat money laundering and terrorism financing.

Whether an offshore jurisdiction is or is not cooperating in the international efforts to combat money laundering and terrorism financing is to be determined by reference to the work of the FATF. Specifically, a jurisdiction is deemed to be not cooperating if it is a jurisdiction in respect of which the FATF has formally called for specified counter-measures by its members and others or in respect of which the FATF remains concerned about the money laundering or terrorism financing risks emanating from that jurisdiction.

3. Exemption where controlling entity is established in home jurisdiction

The beneficiaries of the Bank’s loans, equity investments and guarantees are sometimes entities established in the country of operations where the project is located and controlled by an entity established outside of that country. Such is the case, for instance, when a foreign strategic investor has acquired or – concurrently with the Bank’s operation – is acquiring a majority interest in the local entity.

The policy is not concerned with situations where the controlling entity is established in its home jurisdiction, e.g., a US food producing company controlled by US residents or an Italian bank whose shares are listed in Milan. If however the controlling entity chooses to invest through a holding company established in another jurisdiction, e.g., a French cement manufacturer investing through a Guernsey company, then the situation must be reviewed under this policy. Likewise, where the controlling entity is itself controlled by entities and individuals established in a different jurisdiction, e.g., a Cyprus holding company controlled by a Swiss resident, the situation must be reviewed under this policy. In addition, as the Bank should never be involved in projects where the controlling entity is established in an offshore jurisdiction which is not cooperating in the international efforts to combat money laundering and terrorism financing, the exemption for controlling entities established in their home jurisdiction should apply only in respect of tax transparency.

Accordingly Section 2(b) and (c) shall not apply to an offshore jurisdiction in which a controlling entity is established where the controlling entity is itself established:

- (i) in the same jurisdiction as the entities or individuals who ultimately control it, or

- (ii) in the offshore jurisdiction where the shares of the controlling entity has its primary listing.

4. Exemption in case of relocation of affected entity

Notwithstanding Section 2, the Bank may provide financing where, as a condition of providing such financing, it secures a contractual undertaking (the breach of which would entitle the Bank to exercise legal remedies) to change the place of incorporation of the entity within a reasonable time of signing the principal financing documents, which documents would set out a specific timetable within which the change is to take place. In such a case, the choice of jurisdiction should be consistent with the principles set out in Section 2.

5. Information of Board of Directors

- (a) Where Section 2 or 4 applies, the Board Report shall contain an annex (in the form of Annex 2)
 - (i) setting out the sound business reasons for the use of the offshore jurisdiction, including identifying any relevant double taxation treaties,
 - (ii) demonstrating, in the manner prescribed by the policy, that the offshore jurisdiction has substantially implemented the internationally agreed tax standard and is effectively implementing it, or, there is a contractual undertaking to change the place of incorporation of the entity within a specified time of signing the principal financing documents, and
 - (iii) demonstrating, in the manner prescribed by the policy, that the offshore jurisdiction is not one that is not cooperating in the international efforts to combat money laundering and terrorism financing, *or*, there is a contractual undertaking
- (b) Where Section 3 applies, the Board Report shall provide any information necessary to substantiate such a conclusion.
- (c) Where, in accordance with Section 4, the Bank has required, as a condition of providing financing, a contractual undertaking to change the place of incorporation of the entity within a specified time from the signing the principal financing documents, the annex to the Board Report shall also provide information about such contractual undertaking and the reasons for requiring it, specifying the jurisdiction where the new or transferred entity will be located.
- (d) Where the loan, equity investment or guarantee is an operation approved under authority delegated by the Board of Directors, information that would otherwise have been contained in the Board Report shall be disclosed to the Board of Directors in accordance with established reporting procedures.

5. Effectiveness, scope and review

The Policy becomes effective as of date of approval by the Board of Directors and applies to all banking operations, including those approved under authority delegated by the Board of Directors. The policy will be reviewed periodically, with the first such review to take place within three years.

**Offshore Jurisdictions in EBRD Projects
Specimen forms of Board Report annex
Offshore Jurisdiction Annex**

[Form A - For use where borrower, investee or guaranteed entity is in an offshore jurisdiction – Please note that Form A may need to be used together with Form B where both the borrower/investee company/guaranteed entity and its controller are established in offshore jurisdictions.]

Jurisdiction of proposed [borrower]/[investee company]/[guaranteed entity]

This annex has been prepared in accordance with the policy on Offshore Jurisdictions in EBRD Projects because, in the proposed operation, the entity [to which the Bank would make a loan]/[in which the Bank would make an equity investment]/[whose obligations would be guaranteed by the Bank], is established in [name of jurisdiction], while the project is located in [country of operations].

Reasons for the use of the offshore jurisdiction

[Set out sound business reasons for using the jurisdiction, including identifying any relevant double taxation treaties.]

Whether the offshore jurisdiction has substantially implemented the internationally agreed tax standard

The jurisdiction has substantially implemented the internationally agreed tax standard endorsed by the UN Committee of Experts on International Cooperation in Tax Matters in 2008. This has been confirmed by the Global Forum on Transparency and Exchange of Information for Tax Purposes (“Global Forum”) in its last Progress Report on the Jurisdictions Surveyed by the Global Forum in Implementing the Internationally Agreed Tax Standard, which is dated *[insert date]*.

The extent to which the offshore jurisdiction is effectively implementing its commitment to the internationally agreed tax standard

[The offshore jurisdiction is one for which no phase 1 review has been undertaken or completed but which has substantially implemented its commitment to the internationally agreed tax standard. Accordingly, consistent with Section 2(c)(i) of the policy on Offshore Jurisdictions in EBRD Projects, the offshore jurisdiction is deemed to be effectively implementing its commitment to the internationally agreed tax standard.]

[OR]

where no phase 2 review is planned. Accordingly, consistent with Section 2(c)(ii) of the Policy on the Use of offshore jurisdictions in EBRD Projects, the offshore jurisdiction is deemed not to be effectively implementing its commitment to the internationally agreed tax standard.

Therefore, the [borrower]/[investee company]/[guaranteed entity] will relocate to another jurisdiction, namely [jurisdiction]. *[Provide further explanations about the nature and timing of the undertaking and how this will be supported contractually, in particular whether such relocation will require the approval of third parties, including those who control the entity.]*

[OR]

[The offshore jurisdiction is one for which a phase 2 review has been completed and which is assessed by the Global Forum as *[insert “compliant” or “largely compliant”]*. Accordingly, consistent with Section 2(c)(iii) of the policy on Offshore Jurisdictions in EBRD Projects, the

offshore jurisdiction is deemed to be effectively implementing its commitment to the internationally agreed tax standard.]

[OR]

[The offshore jurisdiction is one for which a phase 2 review has been completed and which has been assessed by the Global Forum as “partially compliant”.

[Either] However, the Global Forum has identified, in its report dated [insert date], the following specific steps that need to be taken by the jurisdiction to improve its rating, namely

[list steps]

In addition, the Global Forum has confirmed, in its report dated [insert date], that the jurisdiction is actively taking the steps identified and that they are in an advanced stage of implementation. Accordingly, consistent with Section 2(c)(iv) of the policy on Offshore Jurisdictions in EBRD Projects, the offshore jurisdiction is deemed to be effectively implementing its commitment to the internationally agreed tax standard.]

[Or]

Therefore, the [borrower]/[investee company]/[guaranteed entity] will relocate to another jurisdiction, namely [jurisdiction]. *[Provide further explanations about the nature and timing of the undertaking and how this will be supported contractually, in particular whether such relocation will require the approval of third parties, including those who control the entity.]*

Whether the offshore jurisdiction is not cooperating in the international efforts to combat money laundering and terrorism financing

[The most recent report of the Financial Action Task Force (“FATF”) dated [date] does not identify the offshore jurisdiction as one in respect of which the FATF has called for counter-measures by its members and others or in respect of which the FATF remains concerned about the money laundering or terrorism financing risks emanating from that jurisdiction. Accordingly, consistent with Section 2(d) of the policy on Offshore Jurisdictions in EBRD Projects, the offshore jurisdiction is deemed not to be not cooperating in the international efforts to combat money laundering and terrorism financing.]

[OR]

[The most recent report of the Financial Action Task Force (“FATF”) dated [date] identifies the offshore jurisdiction as one in respect of which the FATF has called for counter-measures by its members and others or in respect of which the FATF remains concerned about the money laundering or terrorism financing risks emanating from that jurisdiction. Accordingly, consistent with Section 2(d) of the policy on Offshore Jurisdictions in EBRD Projects, the offshore jurisdiction is deemed to be not cooperating in the international efforts to combat money laundering and terrorism financing.

Therefore, the [borrower]/[investee company]/[guaranteed entity] will relocate to another jurisdiction, namely [jurisdiction]. *[Provide further explanations about the nature and timing of the undertaking and how this will be supported contractually, in particular whether such relocation will require the approval of third parties, including those who control the entity.]*

[Form B - For use where entity that controls borrower, investee or guaranteed entity is in an offshore jurisdiction – Please note that Form B may need to be used together with Form A where both the borrower/investee company/guaranteed entity and its controller are established in offshore jurisdictions.]

Jurisdiction of entity which controls the proposed [borrower]/[investee company]/[guaranteed party]

This annex has been prepared in accordance with the Note on “Use of offshore jurisdictions in EBRD projects” because, in the proposed operation, the entity which controls the entity [to which the Bank would make a loan]/[in which the Bank would make an equity investment]/[whose obligations would be guaranteed by the Bank], is established in [name of offshore jurisdiction], while the project is located in [name of country of operations].

Reasons for the use of the offshore jurisdiction

[Set out sound business reasons for using the jurisdiction, including identifying any relevant double taxation treaties.]

Whether the offshore jurisdiction has substantially implemented the internationally agreed tax standard

The jurisdiction has substantially implemented the internationally agreed tax standard endorsed by the UN Committee of Experts on International Cooperation in Tax Matters in 2008. This has been confirmed by the Global Forum on Transparency and Exchange of Information for Tax Purposes (“Global Forum”) in its last Progress Report on the Jurisdictions Surveyed by the Global Forum in Implementing the Internationally Agreed Tax Standard, which is dated *[insert date]*.

The extent to which the offshore jurisdiction is effectively implementing its commitment to the internationally agreed tax standard

[The offshore jurisdiction is one for which no phase 1 review has been undertaken or completed but which has substantially implemented its commitment to the internationally agreed tax standard. Accordingly, consistent with Section 2(c)(i) of the policy on Offshore Jurisdictions in EBRD Projects, the offshore jurisdiction is deemed to be effectively implementing its commitment to the internationally agreed tax standard.]

[OR]

[The offshore jurisdiction is one for which a phase 1 review has been completed and where no phase 2 review is planned. Accordingly, consistent with Section 2(b)(ii) of the policy on Offshore Jurisdictions in EBRD Projects, the offshore jurisdiction is deemed not to be effectively implementing its commitment to the internationally agreed tax standard.

Therefore, the entity which controls the proposed [borrower]/[investee company]/[guaranteed entity] will relocate to another jurisdiction, namely [jurisdiction]. *[Provide further explanations about the nature and timing of the undertaking and how this will be supported contractually, in particular whether such relocation will require the approval of third parties, including those who control the entity.]*

[OR]

[The offshore jurisdiction is one for which a phase 2 review has been completed and which is assessed by the Global Forum as *[insert {"compliant"} or {"largely compliant"}]*. Accordingly, consistent with Section 2(c)(iii) of the policy on Offshore Jurisdictions in EBRD Projects, the

offshore jurisdiction is deemed to be effectively implementing its commitment to the internationally agreed tax standard.]

[OR]

[The offshore jurisdiction is one for which a phase 2 review has been completed and which has been assessed by the Global Forum as “partially compliant”.

[Either] However, the Global Forum has identified, in its report dated [insert date], the following specific steps that need to be taken by the jurisdiction to improve its rating, namely

[list steps]

In addition, the Global Forum has confirmed, in its report dated [insert date], that the jurisdiction is actively taking the steps identified and that they are in an advanced stage of implementation. Accordingly, consistent with Section 2(c)(iv) of the policy on Offshore Jurisdictions in EBRD Projects, the offshore jurisdiction is deemed to be effectively implementing its commitment to the internationally agreed tax standard.]

[Or]

Therefore, the entity which controls the proposed [borrower]/[investee company]/[guaranteed entity] will relocate to another jurisdiction, namely [jurisdiction]. *[Provide further explanations about the nature and timing of the undertaking and how this will be supported contractually, in particular whether such relocation will require the approval of third parties, including those who control the entity.]*

Whether the offshore jurisdiction is not cooperating in the international efforts to combat money laundering and terrorism financing

[The most recent report of the Financial Action Task Force (“FATF”) dated [date] does not identify the offshore jurisdiction as one in respect of which the FATF has called for counter-measures by its members and others or in respect of which the FATF remains concerned about the money laundering or terrorism financing risks emanating from that jurisdiction. Accordingly, consistent with Section 2(d) of the policy on Offshore Jurisdictions in EBRD Projects, the offshore jurisdiction is deemed not to be not cooperating in the international efforts to combat money laundering and terrorism financing.]

[OR]

[The most recent report of the Financial Action Task Force (“FATF”) dated [date] identifies the offshore jurisdiction as one in respect of which the FATF has called for counter-measures by its members and others or in respect of which the FATF remains concerned about the money laundering or terrorism financing risks emanating from that jurisdiction. Accordingly, consistent with Section 2(d) of the policy on Offshore Jurisdictions in EBRD Projects, the offshore jurisdiction is deemed to be not cooperating in the international efforts to combat money laundering and terrorism financing.

Therefore, the [borrower]/[investee company]/[guaranteed entity] will relocate to another jurisdiction, namely [jurisdiction]. *[Provide further explanations about the nature and timing of the undertaking and how this will be supported contractually, in particular whether such relocation will require the approval of third parties, including those who control the entity.]*