

**POLICY**

# **Domiciliation of EBRD Clients**

17 January 2019

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## Domiciliation of EBRD Clients

### Section I: Purpose

This document sets out those conditions under which the Bank may finance a project and that relate to the domiciliation of the Bank's clients.

This document supersedes the Policy on Domiciliation of EBRD Clients (BDS13-269 (Final)).

The purpose of this Document is to strengthen the Bank's approach to domiciliation in response to developments in international tax policy, including the adoption of international standards on automatic exchange of information for tax purposes and base erosion and profit shifting.

### Section II: Definitions

Terms used in this Policy have the following meanings:

|                           |   |
|---------------------------|---|
| <b>AEOI</b>               | automatic exchange of information   |
| <b>AML/CFT</b>            | anti-money laundering/combating the financing of terrorism  |
| <b>BEPS</b>               | base erosion and profit shifting  |
| <b>to Control</b>         | to possess, directly or indirectly, the power to direct or cause the direction of the management and policies of another person   |
| <b>Controlling Entity</b> | any legal entity that Controls the Counterparty, provided that: <ul style="list-style-type: none"> <li>(i) if the project is implemented by an affiliate of the Counterparty, any legal entity that Controls such affiliate shall also be a Controlling Entity;</li> <li>(ii) if a Controlling Entity indirectly owns an interest in the Counterparty (or the affiliate thereof that is implementing the project) through another legal entity, such other legal entity shall also be a Controlling Entity, even if such other entity only owns a minority interest in the Counterparty (or the affiliate thereof that is implementing the project); and</li> <li>(iii) in the case of an investment in a collective investment undertaking, any separate management entity of such undertaking shall be deemed a Controlling Entity</li> </ul> |
| <b>Counterparty</b>       | the direct borrower, investee or guaranteed entity  |
| <b>EOIR</b>               | exchange of information on request  |

|                            |  |
|----------------------------|--|
| <b>FATF</b>                | Financial Action Task Force  |
| <b>Global Forum</b>        | Global Forum on Transparency and Exchange of Information for Tax Purposes  |
| <b>G20</b>                 | Group of Twenty  |
| <b>Inclusive Framework</b> | Inclusive Framework on BEPS  |
| <b>OECD</b>                | Organisation for Economic Co-operation and Development   |
| <b>Project Entity</b>      | the entity implementing the project financed by the Bank in the country of operations where the project is located |
| <b>Tax Transparency</b>    | EOIR and AEOI  |
| <b>Third Jurisdiction</b>  | any jurisdiction other than the country of operations where the project is located                                 |

### Section III: Scope

#### 1. Acceptability of Jurisdictions - Money Laundering and Terrorism Financing

- 1.1. The Bank shall not provide financing where the project considered by the Bank involves a Counterparty or a Controlling Entity established in a jurisdiction, other than a country of operations, subject to a FATF call on its members and other jurisdictions to apply counter-measures.
- 1.2. If a country of operations is subject to a FATF call on its members and other jurisdictions to apply counter-measures, the Board of Directors shall, within a reasonable period of time after such call has been made public, and based on a report from Management, review the situation arising out of the FATF call. The Board of Directors shall determine what appropriate actions (including actions identified by the FATF as examples of counter-measures that could be undertaken) adapted to the circumstances of the country of operations and consistent with the Agreement Establishing the Bank should be taken by the Bank in respect of that country of operations.
- 1.3. The Bank may provide financing where the project considered by the Bank involves a Project Entity, a Counterparty or a Controlling Entity established in a jurisdiction (whether a country of operations or another jurisdiction) subject to a FATF call on its members and other jurisdictions to apply enhanced due diligence measures, but only if the project has been referred to the Bank's Office of the Chief Compliance Officer and has undergone enhanced due diligence, in order to satisfy the Board of Directors that the entity established in that jurisdiction is not being used as a vehicle for money-laundering or terrorism financing.

- 1.4. The Bank may provide financing where the project considered by the Bank involves a Project Entity, a Counterparty or a Controlling Entity established in a jurisdiction (whether a country of operations or another jurisdiction) subject to the FATF's on-going global AML/CFT compliance process, but only if the project has been referred to the Bank's Office of the Chief Compliance Officer and has undergone usual or enhanced due diligence, as may be deemed appropriate by Management.

## **2. Acceptability of Jurisdictions - International Tax**

- 2.1. Whenever a project considered by the Bank involves a Counterparty or a Controlling Entity established in a Third Jurisdiction other than a country of operations, the Bank shall not provide financing where the Third Jurisdiction is not implementing internationally agreed standards on Tax Transparency (being EOIR and AEOI) or BEPS.
- 2.2. Whenever a project considered by the Bank involves a Counterparty or a Controlling Entity established in a Third Jurisdiction that is itself a country of operations, the Bank may provide financing where the Third Jurisdiction is not implementing internationally agreed standards on Tax Transparency or BEPS, but only if the project has been referred to the Bank's Office of the Chief Compliance Officer and has undergone enhanced due diligence, in order to satisfy the Board of Directors that the use of that jurisdiction is not related to that jurisdiction's failure to meet internationally agreed standards on Tax Transparency or BEPS.
- 2.3. Whether a Third Jurisdiction is implementing internationally agreed standards on Tax Transparency shall be determined by reference to the work of the Global Forum, the OECD and the G20.
- 2.4. More particularly:
  - 2.4.1. a Third Jurisdiction that has been assigned an overall rating of "compliant", "largely compliant" or "provisionally largely compliant" by the Global Forum shall be deemed to be implementing internationally agreed standards on Tax Transparency, unless that Third Jurisdiction has been identified as "non-cooperative" by the OECD or the G20;
  - 2.4.2. a Third Jurisdiction that has been assigned an overall rating of "partially compliant", "provisionally partially compliant" or "non-compliant" shall be deemed not to be implementing internationally agreed standards on Tax Transparency;
  - 2.4.3. a Third Jurisdiction that has been identified as "non-cooperative" by the OECD or the G20 shall be deemed not to be implementing internationally agreed standards on Tax Transparency; and
  - 2.4.4. if a Third Jurisdiction has not been assigned an overall rating by the Global Forum, the question of whether that Third Jurisdiction is implementing internationally agreed standards on Tax Transparency shall be reviewed by Management after consultation with the secretariat of the Global Forum, in order to satisfy the Board of Directors that the Third Jurisdiction is implementing internationally agreed

standards on Tax Transparency or is not a jurisdiction of relevance for Tax Transparency purposes.

2.5. Whether a Third Jurisdiction is implementing internationally agreed standards on BEPS shall be determined by reference to the work of the Inclusive Framework and publicly available country assessments made by other relevant intergovernmental organisations.

2.6. More particularly:

2.6.1. a Third Jurisdiction that is a member of the Inclusive Framework, or is publicly committed to become a member thereof or to implement BEPS minimum standards, shall be deemed to be implementing internationally agreed standards on BEPS;

2.6.2. a Third Jurisdiction that, based on publicly available country assessments made by other relevant intergovernmental organisations, does not apply BEPS minimum standards and has not committed to address that issue, shall be deemed not to be implementing internationally agreed standards on BEPS; and

2.6.3. in any other circumstances, or in the event of a conflict between Sections III.2.6.1 and III.2.6.2, the question of whether a Third Jurisdiction is implementing internationally agreed standards on BEPS shall be reviewed by Management after consultation with the secretariat of the OECD, in order to satisfy the Board of Directors that the Third Jurisdiction is implementing internationally agreed standards on BEPS or is not a jurisdiction of relevance for BEPS purposes.

2.7. For any Third Jurisdiction, other than a country of operations, to which Section III.2.4.2 applies:

2.7.1. The operation of that Section shall be suspended for a period of fourteen months starting from the publication of the overall rating of the Global Forum, provided that the Third Jurisdiction has made, no later than three months after such publication, a commitment to correct the deficiencies identified in the report of the Global Forum. Such commitment shall be evidenced by an express undertaking to the Bank or a public expression of intent to implement concrete plans for legislative or administrative action to address any such deficiencies within a reasonable timeframe. Such commitment shall be communicated to the Board of Directors. If the Third Jurisdiction has not made such commitment within three months from the publication of the overall rating of the Global Forum, such suspension period shall come to an end.

2.7.2. If, within the suspension period referred to in Section III.2.7.1, the Third Jurisdiction has filed a request for a supplementary review and the Global Forum's peer review group has determined that such a review is warranted, the suspension period shall be extended until the date when the draft supplementary report approved by the Global Forum's peer review group is submitted to the Global Forum's members and observers. If, within the suspension period referred to in Section III.2.7.1, the Third Jurisdiction has not filed a request for a supplementary review with the Global Forum or the Global Forum's peer review group has not

determined that such a review is warranted, such suspension period shall come to an end.

- 2.7.3. If a draft supplementary report has been approved by the Global Forum's peer review group and submitted to the Global Forum's members and observers, and if such report concludes that the Third Jurisdiction should be assigned a revised overall rating of "largely compliant" or "compliant", the suspension period referred to in Section III.2.7.2 shall be extended until the publication of the overall rating as adopted by the Global Forum. If such report concludes that the Third Jurisdiction should not be assigned a revised overall rating of "largely compliant" or "compliant", such suspension period shall come to an end.
- 2.7.4. No further suspension period shall be granted under this Section III.2.7 with respect to any Third Jurisdiction that has not been assigned a revised overall rating of "largely compliant" or "compliant" by the Global Forum at the end of any suspension period.
- 2.7.5. Whenever a project considered by the Bank involves a Counterparty or a Controlling Entity established in a Third Jurisdiction in respect of which a suspension period applies in accordance with this Section III.2.7, the Bank shall satisfy itself that the use of the Third Jurisdiction is not related to the deficiencies identified by the Global Forum.

### **3. Project-by-Project Due Diligence - Sound Business Reasons**

- 3.1. Whenever a project considered by the Bank involves a Counterparty or a Controlling Entity established in a Third Jurisdiction (whether a country of operations or another jurisdiction), the Bank shall satisfy itself that there are sound business reasons for the use of such Third Jurisdiction.
- 3.2. Such reasons may include, without limitation, (i) the desire to attract capital from multiple sources, (ii) the need to consolidate assets across multiple jurisdictions, (iii) access to an investment protection treaty, (iv) the existence of a stable legal system which facilitates contract enforcement and registration of security, (v) the existence of clear laws regarding issues such as governance, liability and taxation or (vi) 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.
- 3.3. The use of a Third Jurisdiction may involve tax planning using lawful practices and double taxation treaties, provided that (i) there are sound business reasons for the use of that Third Jurisdiction, (ii) such tax planning does not involve the elimination or near elimination of taxation deriving from arrangements or methods inconsistent with the declarations, recommendations or international standards agreed by the OECD or the G20 regarding aggressive tax planning or BEPS and (iii) other relevant standards, such as standards relating to harmful tax practices and the use of no (or nominal only) tax jurisdictions, are duly considered.

- 3.4. Except in the case of repeat or follow-on projects with the same client where a questionnaire has already been used (and remains up-to-date) and the Control structure has remained substantially unchanged, the Bank shall assess the reasons for the use of a Third Jurisdiction and the tax implications thereof on the basis of (i) detailed replies from the client, including supporting documents, supplied in response to a questionnaire designed by Management and (ii) guidance notes prepared by Management.
- 3.5. The questionnaire and guidance notes referred to in Section III.3.4 shall be designed to facilitate the assessment of compliance with Section III.3.3.

#### **4. Relocation**

- 4.1. Notwithstanding Sections III.1 and III.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 relocate the Counterparty or the Controlling Entity to another jurisdiction before first disbursement. The choice of such other jurisdiction shall comply with Sections III.1 and III.2.

#### **5. Home Jurisdiction**

- 5.1. Sections III.2 and III.3 shall not apply in respect of the Third Jurisdiction where a Counterparty or a Controlling Entity is established, if such Third Jurisdiction is the jurisdiction where (i) the individuals who ultimately Control such Counterparty or Controlling Entity are established or (ii) the capital stock of such Counterparty or Controlling Entity, or the capital stock of the entity that ultimately Controls it, has its primary listing.
- 5.2. Notwithstanding Section III.5.1, Sections III.2 and III.3 shall apply if the Bank's integrity due diligence has indicated that the use of the Third Jurisdiction concerned is suspicious.

#### **6. Board Information**

- 6.1. Where Section III.1.3 or III.1.4 applies, the Board Report shall:
- (a) confirm that the project was referred to the Bank's Office of the Chief Compliance Officer;
  - (b) confirm that the project underwent enhanced due diligence (where Section III.1.3 applies) or underwent usual or enhanced due diligence, as was deemed appropriate by Management (where Section III.1.4 applies); and
  - (c) set out the outcome of applicable due diligence.
- 6.2. Whenever a project considered by the Bank involves a Counterparty or a Controlling Entity established in a Third Jurisdiction (whether a country of operations or another jurisdiction), and irrespective of whether a new questionnaire is required by Section III.3.4, the Board Report shall contain a domiciliation annex:



- (a) confirming that the Third Jurisdiction is acceptable under Sections III.1 and III.2, or that the Bank will require a contractual undertaking to relocate the Counterparty or the Controlling Entity before first disbursement;
- (b) confirming, where Section III.2.2 applies, that the conditions set forth in such Section are met and that the use of the Third Jurisdiction is not related to that jurisdiction's failure to meet internationally agreed standards on Tax Transparency or BEPS;
- (c) setting out, where Section III.2.4.4 or III.2.6.3 applies, the outcome of the review conducted by Management;
- (d) confirming, where Section III.2.7 applies, that the conditions set forth in such Section are met and that the use of the Third Jurisdiction is not related to the deficiencies identified by the Global Forum and disclosing any relevant information made available by the secretariat of the Global Forum to the Bank which may have a bearing on the matter;
- (e) setting out, unless Section III.5.1 applies, the sound business reasons for the use of the Third Jurisdiction and the tax implications of using the Third Jurisdiction (including an assessment of compliance with Section III.3.3);
- (f) providing, where Section III.4 applies, information about the contractual undertaking to relocate the Counterparty or the Controlling Entity and the reasons for requiring it, specifying the jurisdiction where the new or transferred entity will be located;
- (g) providing, where Section III.5 applies, any information necessary to substantiate the application of such Section; and
- (h) setting out any material tax-related findings of the Bank's integrity due diligence (unless already contained in the integrity section of the Board Report).

6.3. Where an operation is 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.

## **7. Intermediated Financing**

7.1. Whenever the Bank considers a project with a financial intermediary, the Bank shall, as far as feasible, endeavour to promote compliance with the underlying principles of this Policy in the conduct of such financial intermediary's business.

## **Section IV: Waivers, Exceptions and Disclosure**

### **Waivers**

The Board of Directors may grant a deviation from a requirement of this Policy that is not explicitly permitted by the terms of this Policy.

## **Exceptions**

Not applicable.

## **Disclosure**

This Policy shall be disclosed on the Bank's website immediately upon approval.

## **Section V: Transitional Provisions**

Not applicable.

## **Section VI: Effective Date**

This Policy shall become effective on 1 July 2019.

## **Section VII: Decision Making Framework**

The President is accountable for this Policy.

The Chief Compliance Officer is responsible for this Policy.

## **Section VIII: Review and Reporting**

### **Review**

This Policy shall be reviewed as and when appropriate, in particular when significant developments have taken place at the international level regarding tax evasion, money laundering or terrorism financing.

### **Reporting**

Management shall report in writing to the Board of Directors, at least semi-annually, on international developments in international tax policy and on the implementation of this Policy.

## **Section IX: Related Documents**

Treasury and Liquidity Authority Policy (BDS17-138 (Final))