ENFORCEMENT COMMITTEE APPEAL DECISION NO. 1
APPEAL CASE ECS 001-2023

IN THE MATTER OF AN APPEAL TO THE ENFORCEMENT COMMITTEE OF THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Between:

APPELLANT 1
APPELLANT 2

Appellants

v

THE CHIEF COMPLIANCE OFFICER OF THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Appellee

FINAL DECISION

The Hon. Yves Fortier KC (Chairperson)

Don Scott De Amicis

Enrico Canzio

19 June 2024

Decision of the EBRD Enforcement Committee imposing a sanction of debarment on Appellant 1, together with certain Subsidiaries, in Appeal Case no ECS 001-2023, for a four and a half (4.5) year period ending on 30 December 2027. This Enforcement Action is imposed for Fraudulent Practices.

I. INTRODUCTION

1. This Final Decision of the Enforcement Committee of the European Bank for Reconstruction and Development ("**EBRD**" or the "**Bank**") relates to appeal case ECS 001-2023 (the "**Appeal**"), brought by the Appellants against an Enforcement Commissioner's Decision dated 30 June 2023 (case EC 073-2022) under Section III, Article 4.8(ii) and Article 5.6(i) of the Enforcement Policy and Procedures of the EBRD in effect on and from 4 October 2017 (the "**EPPs**"), following an investigation by the EBRD's Chief Compliance Officer ("**CCO**") under the EPPs into an alleged undisclosed conflict of interest between a Bank consultant and a Bank staff member.
2. A panel consisting of the Hon. Yves Fortier KC (Chairperson), Mr Don De Amicis, and Mr Enrico Canzio (the "**Panel**") was appointed by the Chairperson of the Enforcement Committee to hear and determine this Appeal on behalf of the Enforcement Committee in accordance with Section III, Article 6.3(ii)(1) of the EPPs.
3. The Panel issues this Final Decision under Section III, Article 7.7 (vi) and Article 7.8(i) of the EPPs, following due consideration of the Appeal Record as defined in Section III, Article 7.7(i) of the EPPs.[1]
4. The Appeal Record includes oral submissions made at an in-person hearing on 19 March 2024 (the "**Hearing**") which was attended by the Appellants (represented by Appellant 1) and by the CCO (present and also represented by external counsel).
5. For the avoidance of doubt, any new evidence or arguments submitted at the Hearing which was not contained in the Appeal Record were deemed authorised by the Panel during the Hearing or in this Final Decision in accordance with Section III, Article 7.6(vii) of the EPPs.

II. PROCEDURAL HISTORY

Proceedings before the Enforcement Commissioner

6. On 3 November 2022, the Enforcement Commissioner, after having received a draft notice of prohibited practice from the CCO, issued a Notice of Prohibited Practice to the Appellants (the "**Notice**") with exhibits, in accordance with Section III, Article 4.1 and Article 4.4 of the EPPs:
   a. The Notice gave the Appellants formal notice of the commencement of Enforcement Proceedings against them under the EPPs.

[1] Words and phrases defined in the EPPs shall have the same meaning when used in this Final Decision, unless they are otherwise defined in this Final Decision.

b. Part II of the Notice stated the allegations of a Prohibited Practice, namely a Fraudulent Practice, as defined in Section II(46)(d) of the EPPs, and included a summary of the facts relevant to the alleged Fraudulent Practice. It was alleged that during the period of 2019-2021, the Appellants, when submitting proposals for consultancy services and when providing those consultancy services in several EBRD-financed projects, failed to inform the Bank about a conflict of interest.

c. The Notice also stated the Enforcement Action proposed by the CCO: "*Debarment for a period of six (6) years, during which period [Appellant 1] together with his Controlled Affiliates*[2] *and [Appellant 2] together with its Subsidiaries, in each case established as at the date of the Prohibited Practice will be ineligible to become a Bank Counterparty in any new Bank Project.*"

7. On 22 December 2022, the Appellants filed a Response together with exhibits.

8. On 20 January 2023, the CCO filed a Reply.

9. On 21 April 2023, the Appellants filed a Supplemental Response together with exhibits.

10. On 15 May 2023, the CCO filed a Supplemental Reply.

11. The Enforcement Commissioner authorised a Supplemental Response and a Supplemental Reply under Section III, Article 5.3(i) of the EPPs.

12. On 30 June 2023, the Enforcement Commissioner's decision (the "**Decision**") was issued pursuant to Section III, Article 4.8(ii) and Article 5.6(i) of the EPPs.

13. The Enforcement Commissioner, in his Decision, determined pursuant to Section III, Article 5.5 and Article 10.2 of the EPPs that:

a. The Appellants' failure to disclose the existence of a personal relationship between Appellant 1 and a Bank staff member constituted a Prohibited Practice (namely a Fraudulent Practice) in relation to a Bank Project:

i. being an omission that knowingly or recklessly misled the Bank as to the absence of affiliation and/or conflict of interest; or

ii. being a positive misrepresentation that knowingly or recklessly misled the Bank as to the absence of affiliation and/or conflict of interest,

which was committed in order to obtain a financial benefit for the Appellants, the financial benefit being that the Appellants be engaged as consultants by the Bank. The latest date of a Fraudulent Practice was 27 November 2020.

b. Debarment for a period of six years should be imposed as an Enforcement Action, during which period Appellant 1 and his Controlled Affiliates and Appellant 2 and its Subsidiaries, in each case established as at the date of the Prohibited Practice, will be

[2] In the Notice, "Controlled Affiliates" was defined as any entity that Appellant 1 directly or indirectly controls.

ineligible to become a Bank Counterparty in any new Bank Project. As in the Notice, "*Controlled Affiliates*" was defined as "*any entity that [Appellant 1] directly or indirectly controls*".

14. Following the Decision, in accordance with Section III, Article 5.8(i) and (iii) of the EPPs, the eligibility of the Appellants and any of their Affiliates subject to the Enforcement Commissioner's Decision to become a Bank Counterparty was automatically suspended until the date of the final outcome of the present Enforcement Proceedings.

Appeal proceedings before the Enforcement Committee

15. On 1 September 2023, the Appellants filed a Notice of Appeal by email to the Enforcement Committee and provided Appellant 1's email address as their contact details. The Notice of Appeal included an indication that the Appellants wished to make oral representations to the Enforcement Committee, pursuant to Section III, Article 7.6(i) of the EPPs. On 6 September 2023, the Notice of Appeal was sent by email by the Enforcement Committee to the Enforcement Commissioner and the CCO with instructions for submission of an Appeal Response.
16. On 13 September 2023, the Enforcement Commissioner sent the Record to the Enforcement Committee.
17. On 22 September 2023, the CCO (now the Appellee) filed an Appeal Response by email. On 26 September 2023, the Appeal Response was sent by email by the Enforcement Committee to the Appellants with instructions for submission of an Appeal Reply.
18. On 16 October 2023, the Appellants filed an Appeal Reply by email. On 19 October 2023, the Appeal Reply was sent by email to the CCO.
19. On 7 November 2023, the Panel sent a letter to the Parties by email, inter alia:
    a. Enclosing the then current Appeal Record in an Annex;
    b. Noting that no additional evidence (whether in the form of documents or written witness statements) was submitted with the Notice of Appeal or the Appeal Response, and directing the Parties, if they wished to submit additional evidence during the course of the Appeal to seek authorisation in writing from the Panel pursuant to Section III, Article 7.5 of the EPPs.
20. On 8 January 2024, the Panel sent a Hearing Notice to the Parties by email. The Hearing Notice convened an in-person hearing of the Appeal on 19 March 2024, at the EBRD's headquarters in London, and requested submissions from the Parties as to the relevance of some proposed additional evidence, by way of clarification under Section III Article 7.7(iii) of the EPPs.

21. On 6 February 2024, the Panel sent a letter to the parties with a list of authorities for the hearing bundle and inviting their comments.
22. On 13-15 February 2024, each Party filed submissions on the proposed additional evidence. The submissions were admitted in the Appeal Record by the Panel.
23. On 22 February 2024, the Panel requested the CCO to take "*reasonable and proportionate steps*" with respect to some additional evidence to be included in the Appeal Record.
24. On 22 February 2024, the Appellants submitted comments on the proposed authorities. The Panel admitted the comments in the Appeal Record.
25. On 5 March 2024, the CCO filed six new exhibits in response to the Panel's decision of 22 February 2024, together with a submission. The submission and the exhibits were admitted in the Appeal Record by the Panel.
26. On 8 March 2024, the Appellants filed a responsive submission to the CCO's submission of 5 March 2024, together with two new exhibits. The submission and exhibits were accepted and admitted to the Appeal Record by a decision of the Panel.
27. On 19 March 2024, the Hearing took place at EBRD's headquarters in London.

III. FACTUAL BACKGROUND

Appellants

28. Appellant 1 is a person, who, from 2019 to 2021, provided consultancy services as an infrastructure and transport engineer in the areas of roads and highways infrastructure, transport sector digitalisation and transport planning and economics.[3]
29. Appellant 2 was a limited liability company organised in the United States of America in order to provide consultancy services with Appellant 1. Appellant 1 was at all material times the sole director, sole member and representative of Appellant 2. At the Hearing, Appellant 1 informed the Panel that, following its dissolution, Appellant 2 has now been fully wound down.[4]

Consultancy services in Bank Projects

30. Appellant 1 negotiated consultancy services in six Bank Projects in 2019 and 2020 (the "**Projects**") and was engaged by the Bank to act as consultant (either directly in his own

[3] Hearing Bundle B/EC19.

[4] Since all written and oral submissions of Appellants during the Hearing were said to be made on behalf of both Appellants, in this Final Decision the Panel will refer to submissions being made by both Appellants.

name, or indirectly as expert in a contract between the Bank and Appellant 2) in five of these Projects:

a. Project One: Appellant 1 was engaged as a consultant to undertake an assessment of the suitability of drone technology in road rehabilitation project in Tajikistan under Consultancy Contract No. C42613/11281/69184 dated 24 July 2019.

b. Project Two: Appellant 2 was engaged as a consultant to review and develop digitalisation techniques for environmental and social aspects of infrastructure projects in international financing institutions, under Consultancy Contract No. C43540/12136/74884 dated 14 November 2019. Appellant 1 was designated as a team leader and subject matter expert.

c. Project Three: Appellant 2 was engaged as a consultant to undertake a market analysis on scoping the electric mobility market in Egypt, Kazakhstan, Morocco and Serbia; under Consultancy Contract No. C45235/499/7115 dated 17 July 2020. Appellant 1 was designated as a team leader and subject matter expert.

d. Project Four: Appellant 2 was engaged as a consultant with respect to an assignment relating to the preparation of a feasibility study on the potential use of drone technology with building information modelling, in support of a proposed financing by the Bank of a ring-road in Pristina, Kosovo, under Consultancy Contract No. C45544/12158/74954 dated 8 September 2020. Appellant 1 was designated as a subject matter expert.

e. Project Five: Appellant 2 was engaged as a consultant with respect to an assignment relating to the proposed construction of the Ploiesti-Brasov highway, in Romania, under Call-Off 2020.001150 dated 27 November 2020 to Framework Agreement No. FC1081 dated 31 July 2020. Appellant 1 was designated as a project manager.

f. Project Six: Appellant 2 submitted a technical proposal to assist the Georgian competition authority with the development and implementation of an online price monitor platform for pharmaceutical products in Georgia. Appellant 1 was designated as a subject matter expert. Appellant 2 indicated its intention to sign a template consultancy contract, but Project Six was cancelled before the contract was signed.

31. The contractual arrangements in Projects One, Two, Three, Four and Five are referred to as the "**Consultancy Contracts**". They were signed as follows:- (i) by Appellant 1 (Project One); (ii) by Appellant 1 as Director for and on behalf of Appellant 2 (Projects Two, Three and Four); and (iii) by Appellant 1 as Director of Appellant 2 and described as its "*duly authorised representative*" (Project Five).

32. The five Consultancy Contracts each contained the following, or a substantially similar[5], covenant:

> "*The Consultant shall ensure that no circumstances arise during the Term of Engagement in which the Consultant's activities under the Contract conflict or might conflict with the personal interest of the Consultant or Expert(s) or with any services which the Consultant or the Expert(s) may render to third parties.*"

33. All Consultancy Contracts as well as the draft consultancy contract for Project Six also provided for, inter alia, the application of the EPPs.

34. Additionally, for Projects Four, Five and Six, Appellant 2 submitted a pre-contracting Declaration and Contact Sheet (Form 1-TP.1), dated respectively 20 August 2020, 9 November 2020 and 27 November 2020 (collectively the "**Consultant Declarations**"). The Consultant Declarations were signed by Appellant 1 on behalf of Appellant 2 and as its Director.

35. The Consultant Declarations for Projects Four, Five and Six contained the following, or a substantially similar[6], representation:

> "*The Consultant… and the proposed experts have no affiliation to any person or entity likely, on the basis of the information currently available, to benefit from the provision of services. We also confirm that if the Consultant is awarded the contract for the Assignment, no conflict of interest for any party would be created.*"

36. The total fees paid by the Bank under the Consultancy Contracts amounted to approximately EUR 367,000.

Personal relationship with Bank staff member

37. The Appeal Record discloses that, prior to Appellant 1's engagement on the Projects, a close personal relationship existed between him and a Bank staff member ("**Ms A**").

    a. According to an employment offer letter dated 20 October 2017, Ms A's employment at EBRD started on 8 January 2018.

    b. The EBRD job application data for Ms A dated 27 October 2017 shows that Appellant 1 was described by Ms A as her "*Family Member/Dependents - Spouse*".

    c. On 26 February 2018, Ms A requested EBRD's human resources department to remove Appellant 1 "*as the listed domestic partner in my ESS profile and all his*

[5] The terms of Project One Consultancy Contract are slightly different as Appellant 1 was the Consultant himself, so there is no reference to the "Expert" in the covenant.

[6] The terms of the Project Five declaration are slightly different: Appellant 1 makes the declaration "*on behalf of Appellant 2*" that "*I have no affiliation… if I am awarded…*"

mentions. This is not applicable and I have not processed this when starting my position at EBRD."

d. Although not otherwise disclosed to EBRD at the relevant times, evidence has now been provided that Appellant 1 and Ms A were, at various times: co-tenants of a rental property from 28 February 2018; engaged in May or June 2019; married on 27 August 2020; co-owners of a property from 1 October 2020; and had a child together, born on 25 January 2021.

e. At the Hearing, Appellant 1 told the Panel that his relationship with Ms A was of a "*fluctuating nature*" starting in early 2017 and resuming at various points in 2018 and 2019. Appellant 1 stated that the details in the EBRD systems of his relationship with Ms A was done "*independently of my knowledge or involvement.*"[7]

Professional involvement of Ms A with the Appellants at EBRD

38. On 10 January 2018, two days after the commencement of Ms A's employment at EBRD, Appellant 1 emailed Ms A, stating:

"*It will be my pleasure to continue discussions on how best coordinate our needs for the Balkans and find happy synergies!*
Congratulations on your position, fancy email andI hope cool office!
Cant wait to hear more and that you share your life with me" (sic).

39. The Parties disagree on the significance of this email. At the Hearing, Appellant 1 explained that he was working for the World Bank as the team leader for the Western Balkans at the time, and sent the email purely with the intention to rekindle his relationship with Ms A, rather than (as alleged by the CCO) as part of a professionally motivated strategy of coordination with Ms A.[8]

40. On 18 February 2019, Appellant 1 sent his CV to Ms A. The next day, Ms A forwarded the CV to two separate Bank staff members, recommending him for two open positions as Associate Director, Sustainable Infrastructure Advisory and Principal, Public and Private Partnerships.[9]

41. In early July 2019, Appellant 1 was introduced by a third party to another Bank staff member, Mr B, who was Associate Director, Sector Specialist, Urban Transport, SIG at EBRD. Mr B joined Ms A into email correspondence with Appellant 1, in which both Ms A and Appellant 1 communicated with each other as if they had not met for a while, and

[7] Hearing Transcript pages 6, 106-108.
[8] Hearing Transcript page 113-114.
[9] Hearing Bundle B/EC31 and EC32.

only knew each other on a professional basis. Ms A and Mr B attended an introductory meeting with the Appellant 1, following which he sent his CV to Ms A and Mr B.[10]

42. Ms A was subsequently involved, whether alone or with other Bank staff members, in the introduction, selection and/or the supervision of the Appellants under the Consultancy Contracts for Projects One to Five and the potential consultancy contract for Project Six.[11] For all six Projects, Ms A sent the "*invitation for proposal*" to Appellant 1. In Projects One and Three, Ms A was identified in the Consultancy Contracts as the Operation Leader.[12] In the terms of reference for each of Project One, Project Two, Project Three, Project Four and Project Five, Ms A was, and in the case of Project Six, Ms A was to have been, identified as a person at the Bank to whom the Appellants reported and provided work-product (together with some additional Bank staff members).[13]

43. In their Response dated 22 December 2022, the Appellants wrote that they "*have been selected by and then reported to several EBRD staff and Operations Leaders (OL) and NOT the EBRD staff subject to the conflict of interest.*" At the Hearing, Appellant 1 reiterated that "*the EBRD bank staff did not select me and did not oversee my work.*"[14] When Appellant 1 was specifically asked, "*do you agree that Ms [A]… somehow shared an involvement either as an operational leader or as part of the team responsible for the selection for all the six cases*", he responded that "*the word that comes is involvement, which is correct*", although he denied that for Project Five Ms A was involved in the selection process. However, Ms A's emails and calendar entries suggest that Ms A organised and was listed to attend Appellant 1's panel interview for the Project Five framework in April 2020; sent the terms of reference to candidates for the call-off for Project Five and informed Appellant 1 by email of his selection for Project Five.[15]

Non-disclosure of the personal relationship between Appellant 1 and Ms A

44. Appellant 1 took steps to conceal the existence of his personal relationship with Ms A in correspondence with Ms A and other bank staff members, by affecting a formal tone and making comments that were not consistent with a personal relationship. For example in March 2020, when Appellant 1 and Ms A were married and co-owned a property, Ms A wrote to Appellant 1, with another Bank staff member in copy: "*I hope that you are doing*

[10] Hearing Bundle B/EC33 and C/EC79.
[11] Hearing Bundle A/1/pages 14-30.
[12] Hearing Bundle B/EC2/page 2 and EC6/page 10. For Project Six, Ms A would have been the contact at the Bank.
[13] Hearing Bundle B/EC1/page 4, EC3/page 6, EC6/pages 3 and 10, EC7/page 5, EC9/page 3, EC12/page 6
[14] Hearing Transcript page 11.
[15] Hearing Bundle C/EC80- EC85, Hearing Transcript pages 58-59.

well and safe in these critical COVID times" and Appellant 1 responded: "*All good here, although stuck in London and not able to get back to the US for now. I hope that all is good for both of you as well – I am guessing that EBRD also implements working from home policy…*".

45. In March 2020, Ms A was specifically asked by another Bank staff member about her connection with Appellant 1, and she said that she knew him "*from the world bank and we worked on railway in Vietnam. Since then he is a trusted contact in my expert pool of consultants- that's about it.*" The Appellants deny knowledge of this correspondence.

46. When Appellant 1's child was born in January 2021, Ms A provided to the Bank a birth certificate changing the child's surname and replacing the father's name and details (the "**False Birth Certificate**"). The Appellants deny contemporaneous knowledge of, or involvement with, the False Birth Certificate.

Investigation by CCO

47. In January 2021, the CCO received a report mentioning the relationship between Appellant 1 and Ms A, and commenced an investigation. Prior to the investigation, the Appellants had never disclosed to the Bank in connection with the Consultancy Contracts the existence of the personal relationship between Appellant 1 and Ms A.

48. The EBRD found that Ms A committed misconduct and she was terminated from the EBRD on 6 July 2021.[16]

Subsequent conduct

49. After the commencement of the investigation, the Appellants did not submit any bids for Bank projects. However, the Appellants were unable to confirm whether they had actively turned down any opportunities to participate in proposed Bank projects.[17] In fact, the Appellants continued to work on a separate Bank project for which Appellant 2 had already been contracted by a call-off on 19 July 2021; the final invoice for this project was issued by Appellant 2 to the Bank on 29 May 2022.[18]

50. On or around 3 June 2022, Appellant 2 was dissolved.[19]

51. On 21 December 2022, Appellant 1 requested the deletion of Appellant 2's account on the EBRD Client E-Procurement Platform ("**ECEPP**").[20] Appellant 2 had never submitted any bids through ECEPP, because the platform is used for client-led procurements,

[16] Hearing Bundle A/1/para 20.
[17] Hearing Transcript pages 37-38.
[18] Hearing Bundle D/OC3.
[19] Hearing Bundle D/R1.
[20] Hearing Bundle D/OC1.

whereas Projects One to Six were Bank-led procurements. However, the Appellants state that they had used ECEPP for market research.[21]

52. In January 2023, Appellant 1 became employed by company C. There is a dispute as to whether Appellant 1's new role in company C involves providing services in the same industry and market as EBRD.[22] The CCO states that company C is a major group operating in the same industry and markets as EBRD which has submitted multiple bids for Bank Projects. Moreover, the CCO notes that, during the investigation process, in his Supplemental Response dated 21 April 2023, Appellant 1 stated that he was planning to pivot and was looking for a job at a named logistics company, without mentioning his new role in company C. Appellant 1 replied that company C has about 10,000 employees and may indeed have divisions that are active in the same industry and markets as EBRD and that submit bids for Bank Projects; however, Appellant 1 says his role is in different industries and regions (namely in the UK and Ireland) where EBRD is not involved.

Settlement negotiations

53. During settlement negotiations between the CCO and Appellants, which both sides acknowledge to have been made on a "without prejudice" basis,[23] the Appellants submitted a number of subcontractor invoices to the CCO in support of calculations of their net profit from the Projects. However, the CCO produced in the Appeal a number of confirmations from the named subcontractors either denying that they had worked for the Appellants, or stating that the alleged invoices had been altered to increase the payment amounts.[24] At the Hearing, Appellant 1 admitted that he altered those invoices (the "**False Invoices**"), noting that this was done in "*panic*" and "*under duress*".[25]

IV. APPLICABLE STANDARDS OF REVIEW

Issues to be determined

54. Section III, Article 1.1 of the EPPs states: "*This Policy applies: (i) to the commission or occurrence, or suspected commission or occurrence, of one or more Prohibited Practices in relation to Bank Assets or a Bank Project*…".

[21] Hearing Transcript pages 36-37.
[22] Hearing Transcript pages 91-93 and 116-117.
[23] Hearing Transcript pages 83, 109 and 128.
[24] Hearing Bundle C/EC100.
[25] Hearing Transcript pages 109-113.

55. At the Hearing, CCO's counsel confirmed that the CCO no longer seeks any Enforcement Action to be imposed on Appellant 2, having received confirmation that Appellant 2 had been fully wound down.

56. Therefore, in accordance with Section III, Articles 7.7(vi) and 7.8(i) of the EPPs, the Panel will (1) determine whether or not the Appeal Record supports the conclusion that it is more likely than not that Appellant 1 engaged in the alleged Prohibited Practice and (2) decide the Enforcement Action, if any, to be imposed on Appellant 1 and any of his Affiliates.

Burden of proof

57. The Appellants contend that the burden of proof rests on the CCO on all matters to be decided by the Panel.

58. The CCO, on the other hand, refers to the practice of the World Bank Group Sanctions Board,[26] and contends that:

> "*Under the EPPs, OCCO bears the initial burden of proof to present evidence sufficient to establish that it is more likely than not that the Appellants engaged in a Prohibited Practice. Upon such showing, the burden of proof shifts to the Appellants to demonstrate that it is more likely than not that their conduct did not amount to a Prohibited Practice*."

59. The Panel notes that there are no express provisions in the EPPs with respect to the burden of proof to be applied. Having considered the matter and the submissions of the Parties, the Panel has formed the view that for the purposes of the Appeal, the burden of proof will rest on the CCO to prove that it is more likely than not that Appellant 1 engaged in the alleged Prohibited Practice. With respect to any Enforcement Action however, the burden of proof as regards the existence of aggravating or mitigating factors will be borne by the party seeking to rely on that factor.

Evidence

60. As set out in Section III, Article 7.7(i) of the EPPs, the Panel's review is restricted to the Appeal Record. Pursuant to Section III, Article 7.7(ii) of the EPPs, formal rules of evidence do not apply and the Panel has discretion to determine the admissibility, relevance, materiality, weight and sufficiency of the evidence offered. The Enforcement Committee may also take judicial notice of well-known, indisputable facts and such facts need not be established in the Appeal Record.

[26] Hearing Bundle A/8/page 3 footnote 4.

V. APPLICABLE PRINCIPLES AND THE PRINCIPAL ARGUMENTS OF THE PARTIES – PROHIBITED PRACTICE

Applicable principles

61. Pursuant to Section III, Article 7.7(vi)(2) of the EPPs, the relevant test with respect to a Prohibited Practice is whether or not the Appeal Record supports the conclusion that it is more likely than not that Appellant 1 engaged in the alleged Prohibited Practice.

62. As set out in Section II (29) of the EPPs, "*more likely than not*" means that, upon consideration of all of the relevant evidence and materials, the evidence and materials support the findings on a balance of probabilities.

63. As noted earlier, the alleged Prohibited Practice in this Appeal is, specifically, a "Fraudulent Practice", which is defined in Section II (46) of the EPPs as "*any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation*".

64. Section II (46) of the EPPs also provides that the test for recklessness in this context is satisfied if Appellant 1 was indifferent as to: (i) the outcome or consequence of an act or omission; or (ii) whether information supplied or a representation made is true or false. Mere inaccuracy of information supplied or an act, omission or misuse committed through simple negligence, is not enough.

Appellants' principal arguments[27]

65. In their Response of 22 December 2022, the Appellants acknowledged that they "*had an existing personal relationship with the EBRD staff at the time of the signing of these contracts*". They stated that:

> "*The Respondents admit and accept the responsibility in the sanctionable conduct The Respondents fully admit and regret that a breach has occurred as they have failed to inform the Bank about a potential conflict of interest ahead of the signing of the contracts. The Respondents deeply regret not to have kept in mind that the conclusion of whether a case is a potentially perceived conflict of interest, or an actual conflict of interest, comes through disclosure. The Respondents agree that their subjective assessment as to the impact of a conflict of interest should not have*

[27] Principally set out at Hearing Bundle A/2/page 2; A/7/pages 1-5 and A/9/pages3-6.

determined whether such a conflict must have been disclosed or not…." (emphasis in the original)

66. However, in their Notice of Appeal of 1 September 2023, the Appellants requested that the Enforcement Commissioner's Decision be overruled on the ground, amongst others, that there was no conflict of interest. The Appellants argued that under EBRD policies, a personal relationship does not automatically trigger a conflict of interest unless the relationship exerts undue influence over the procurement process. The Appellants argued that the procurement process was properly conducted, that they were the most suitable candidate for these projects, and that there was insufficient evidence as to the existence of any such undue influence.

67. At the Hearing, the Appellants admitted that "*the failure to inform EBRD of the conflict of interest with the EBRD staff was a reckless omission*."[28] With respect to their obtention of a financial or other benefit, under the Fraudulent Practice definition, the Appellants initially argued that the conflict of interest was not a means to an end and did not materialise in any advantage, as it did not influence procurement decisions or project outcomes.[29] However, the Appellants acknowledged when questioned by the Panel that "*if the nature of the advantage is the introduction itself, yes, there is an opening the door*," although they maintained that the opening of the door did not distort the procurement process and market.[30]

68. The Appellants also confirmed at the Hearing that they accept that some form of Enforcement Action by way of debarment would be appropriate.[31] It can therefore be inferred that the Appellants continue to recognize that a Prohibited Practice occurred in relation to Bank Projects.

CCO's principal arguments[32]

69. The CCO argued in both the Notice[33] and at the Hearing that the Appellants' failure to disclose a material conflict of interest amounted to a Fraudulent Practice as defined in Section II (46) of the EPPs, namely:

a. an act or omission, including a misrepresentation;
b. that knowingly or recklessly misleads, or attempts to mislead, a party;
c. to obtain a financial or other benefit or to avoid an obligation.

[28] Hearing Transcript page 12.
[29] Hearing Transcript pages 12-24.
[30] Hearing Transcript page 35.
[31] Hearing Transcript pages 47-48.
[32] Principally set out at Hearing Bundle A/1/Part II/pages 2-40; A/3/page 3 and A/8/pages 1-5.
[33] Hearing Bundle A/1/pages 33-40.

70. In particular, to substantiate these three elements, the CCO argued:
    a. The breaches of the contractual terms in the Consultancy Contracts and Consultant Declarations constitute a relevant "act". In addition, at the Hearing, the CCO's counsel argued that the Appellants' failure to disclose the conflict of interest could constitute a sufficient "omission" if the other limbs of Section II(46) test were met, regardless of whether there was any underlying obligation to disclose the conflict.[34]
    b. As regards knowingly or recklessly misleading or attempting to mislead, Appellant 1 and Ms A sent choreographed messages back and forth pretending that they only knew each other as distant former colleagues, and Ms A expressly covered up the relationship. This was no unintentional oversight - the actions of Appellant 1 and Ms A to deceive the Bank evidence an intention to mislead.[35]
    c. As regards the intent to obtain a benefit or avoid an obligation, the financial benefit was obvious as the Appellants were to be paid approximately EUR 367,000 in consultancy fees for the six Projects.[36]

Enforcement Commissioner's position[37]

71. In his Decision, the Enforcement Commissioner referred to the Appellants' admission of a Prohibited Practice and determined that the actions of the Appellants (whether directly or indirectly in Appellant 1's role as the guiding mind of Respondent 2) amounted to a Prohibited Practice in relation to a Bank Project.

72. The Enforcement Commissioner concluded that there had been a Fraudulent Practice, namely a relevant omission that knowingly or recklessly misled the Bank as to the absence of affiliation and/or conflict of interest in Projects One, Two, Three, Four and Five, and a positive misrepresentation that knowingly or recklessly misled the Bank as to the absence of affiliation and/or conflict of interest in Projects Four, Five and Six.

73. The Enforcement Commissioner determined that the latest date of a Fraudulent Practice was 27 November 2020, being the Consultant Declaration for Project Six.

[34] Hearing Transcript pages 54-55, 63-65.
[35] Hearing Transcript pages 60-62.
[36] Hearing Transcript page 62.
[37] Principally set out at Hearing Bundle A/6/pp4-6 and 9.

VI. APPLICABLE PRINCIPLES AND THE PRINCIPAL ARGUMENTS OF THE PARTIES – ENFORCEMENT ACTION

Applicable principles

74. In the event that the Panel determines that it is more likely than not that Appellant 1 engaged in the alleged Prohibited Practice, the Panel must then decide what Enforcement Action, if any, should be ordered.

75. Section III, Article 10.1 of the EPPs provides as follows:

> "*Purpose*
>
> *Enforcement Actions and Disclosure Actions are intended, and shall primarily seek, to assist a Respondent and its Affiliates to address deficiencies in control or compliance functions that may have contributed to the occurrence of a Prohibited Practice and/or to reduce the Bank's operational and reputational risks in the carrying out of Bank Projects with a Respondent and/or any of its Affiliates*."

76. Under Section III, Article 10.2 of the EPPs, any Enforcement Action ordered by the Panel shall include one or more of the following:

a. Rejection of a proposal for an award of contract to an Appellant in respect of a procurement of goods, works or services.
b. Cancellation of a portion of Bank finance allocated to an Appellant but not yet disbursed in respect of a contract for the procurement of goods, works or services.
c. Reprimand: a formal letter of censure for an Appellant's actions, which notifies an Appellant that any subsequent violation may result in a higher penalty.
d. Debarment: an Appellant and certain of its Affiliates are declared ineligible, either indefinitely or for a stated period of time, to become a Bank Counterparty in any new Bank Project.
e. Conditional Non-Debarment: an Appellant and certain of its Affiliates are required to comply, within stated time periods, with certain remedial, preventative or other measures as a condition to avoid debarment. In the event the Appellant or certain of its Affiliates (if any) fail(s) to demonstrate its/their compliance with the prescribed conditions within the prescribed time periods, a debarment will automatically become effective for the period provided in the relevant decision.
f. Debarment with Conditional Release: an Appellant and certain of its Affiliates are declared ineligible for a stated period of time subject to conditional reinstatement pursuant to which the period of debarment is reduced or terminated if the Appellant

and its Affiliates (if any) demonstrate(s) compliance with specified conditions set forth in the relevant decision.

g. Restitution: an Appellant is ordered to make restitution to another party or the Bank (with respect to the Bank Resources) in an amount representing the diverted funds or the economic benefit that the Appellant obtained as a result of having committed a Prohibited Practice.

77. Pursuant to Section III, Article 7.7(iv) of the EPPs, the Enforcement Committee's decision to impose an Enforcement Action shall take account of the factors listed in Section III, Article 5.5 of the EPPs, namely:

a. The egregiousness and severity of the conduct of each Appellant;
b. The degree of involvement of each Appellant in the Prohibited Practice (including whether the conduct involved was active or passive);
c. The magnitude of any losses caused by the Appellants and/or damage caused by the Appellants to the EBRD;
d. The past conduct of the Appellants involving a Prohibited Practice;
e. The Appellants' attempt to become a Bank Counterparty despite the imposition of a suspension under the EPPs;
f. Any mitigating circumstances, including the extent to which the Appellants cooperated in the investigation and whether such cooperation was of substantial benefit to the EBRD;
g. If applicable, the period of suspension already imposed on the Appellants;
h. The implementation of programmes by the Appellants to prevent and/or detect fraud and corruption and/or introduction of other relevant remedial measure sin the interim period; and
i. Any other factor that the Enforcement Committee deems relevant.

78. The Panel also notes the General Principles and Guidelines for Sanctions dated 17 September 2006 (the "**General Principles**"), entered into between the EBRD, African Development Bank Group, Asian Development Bank, European Investment Bank Group, Inter-American Development Bank Group and World Bank Group. The General Principles provide that the "*base sanction is three-year debarments (with or without conditional release), which may be decreased or increased taking into account any mitigating and/or aggravating circumstances*" and set out tables of aggravating or mitigating circumstances as follows:

Increase in Base Sanction	Aggravating Circumstances
1-5 years	Severity • Repeated Pattern of sanctionable conduct • Sophisticated means • Central role in the sanctionable conduct • Management's role in the sanctionable conduct • Involvement of public official or IFI staff
	Harmed Caused • Harm to Public Welfare • Harm to the Project
1-3 years	Interference with Investigation, or obstruction of the investigative process • Intimidation/payment of a witness • Refusal to accept notice/failure to respond
Up to 10 years	• Past History of sanction by any Institution • Violation of a Sanction or Temporary Suspension

Decrease	Mitigating Circumstance
1-2 years or alternatively up to 25%	Minor Role in the sanctionable conduct
1-3 years or alternatively up to 33%	Voluntary Corrective Action Taken • Cessation of sanctionable conduct independent to and in advance of investigation • Internal action against responsible party • Institution of corrective measures to prevent the sanctionable conduct • Restitution or financial remedy
1-3 years or alternatively up to 50%	Cooperation with Investigation • Assistance and/or ongoing cooperation • Internal Investigation • Admission/acceptance of guilt/responsibility • Voluntary restraint

79. Although not binding on EBRD or the Panel, it is noted that the World Bank Group Sanctioning Guidelines ("**WBG Sanctioning Guidelines**") provide more detail on what the World Bank Group treats as aggravating and mitigating circumstances. In particular, the WBG Sanctioning Guidelines include in the scope of the "Interference with Investigation" aggravating factor, "[d]*eliberately… falsifying, altering, or concealing evidence material to the investigation or making false statements to investigators in order to materially impede a Bank investigation… or acts intended to materially impede the exercise of the Bank's contractual rights of audit or access to information*."

80. Pursuant to Section III, Article 11.1 of the EPPs, an Enforcement Action shall apply to an Appellant and its Subsidiaries[38] established as at the date of the Prohibited Practice giving

[38] Under Section II (55) of the EPPs, "Subsidiaries" is defined as "[a]*ny entity controlled, directly or indirectly, by a Respondent or by a Subject*" (here, an Appellant). This is, in essence, the same as the phrase "Controlled Affiliates" in the Enforcement Commissioner's Decision.

rise to the relevant Enforcement Action, regardless of whether the Subsidiaries are identified, unless the Appellant demonstrates to the satisfaction of the Enforcement Committee, that (1) such Subsidiaries are free from responsibility for the Prohibited Practice; or (2) the application of the Enforcement Actions and Disclosure Actions to such Subsidiaries would be disproportionate; and (3) the application of the Enforcement Actions and Disclosure Actions would not be reasonably necessary to prevent evasion.

81. The 2012 MDB Harmonized Principles on the Treatment of Corporate Groups provides that "[s]*anctions will generally be applied to all entities controlled by the Respondent*" with potential exceptions where "*the Respondent demonstrates inter alia to the satisfaction of the Institution that such entities are free from responsibility for the prohibited practice, and application to the entities would be disproportionate, and application is not reasonably necessary to prevent evasion*."

Appellants' principal arguments[39]

82. In their Response dated 22 December 2022 and in their subsequent written submissions and in oral submissions at the Hearing, the Appellants put forward 20 points either in mitigation or in response to alleged aggravation. The Appellants' arguments can be summarised as follows:

a. Aggravating factors:

   i. There was no repeated pattern of conduct. Rather, the Prohibited Practice was a single isolated scheme uninterrupted over a short period of time.

   ii. A finding of sophisticated means was not justified. There was no complexity in the case and, there was no diversity of techniques being applied as Appellants had used a professional email and polite tone; they could not be held responsible for Ms A's other actions.[40] Moreover, Appellant 2 was not a shell company but a consultancy firm structure that was very common within the industry.[41]

   iii. No involvement of Bank staff; although, at the Hearing, as noted above Appellant 1 conceded that there was some involvement of Bank staff.

   iv. No harm caused to Bank Projects as the Appellants were competitively selected and provided a high quality of work; Appellant 1 provided examples

[39] Principally set out at Hearing Bundle A/2/pages 2-18; A/4/pages 2-5; A/7/pages 5-6; A/9/pages 6-14; A/10/pages 2-4 and A/13/pages 1-6; A/15.
[40] Hearing Transcript page 16-17.
[41] Hearing Transcript page 117.

of positive feedback and emphasised his honesty and professionalism. This was also referred to as a mitigating factor.[42]

b. Mitigating factors:

i. Voluntary restraint: particularly noting Appellant 1's intention to "*seek other professional activities in a different industry/market*"; the winding down of Appellant 2; and the voluntary removal of Appellant 2 from ECEPP and lack of bids for further Bank Projects after the start of the CCO's investigation.[43] Appellant 1 argued that the Appellants were capable of, and had demonstrated, remedial actions.[44]

ii. The Appellants had cooperated with the CCO's investigation.

iii. Passage of time should be taken into account.

iv. The Enforcement Action imposed on Appellant 1 should be lower than for Appellant 2, since Appellant 1 had only perpetrated a Fraudulent Practice with respect to one contract.

83. The Appellants also argued that the Enforcement Action imposed by the Enforcement Commissioner was disproportionate and asked the Panel to impose a sanction that would be proportionate, fair and reflecting of the actual circumstances surrounding the alleged conflict of interest.[45] Appellant 1 stated at the Hearing that a debarment period of two to four years would be more appropriate.[46]

84. The Appellants also sought the exclusion of certain affiliates which had not been established at the date of the alleged Prohibited Practice.[47]

CCO's principal arguments[48]

85. The CCO characterised the Appellants' actions as "*a repeated systemic and calculated attempt to deceive the Bank*" which was egregious, compromised the integrity of the Bank's procurement processes and deprived the Bank of its opportunity and requirement to assess and mitigate the conflict of interest.[49] The CCO argued that "*the decision of the Enforcement Committee must set an important and strong precedent to deter similar misconduct in the future.*" However, upon further questioning by the Panel at the

[42] Hearing Transcript pages 18-35.
[43] Hearing Transcript pages 36-39.
[44] Hearing Transcript pages 118-120.
[45] Hearing Transcript pages 40-42, 120-122.
[46] Hearing Transcript pages 47-48.
[47] This exclusion is not in dispute.
[48] Principally set out at Hearing Bundle A1/1/Part II/pages 40-46; A/3/pages 3-8; A/5/pages 2-6; A/8/pages 5-9; A/11/pages 1-3 and A/14/pages 1-4.
[49] Hearing Transcript page 50-52.

Hearing, the CCO said that she was not sure that the Panel should base its decision on being an example or sending a message.[50]

86. The CCO also stated at the Hearing that the purpose clause at Section III, Article 10.1 of the EPPs should guide the Panel's determination of the sanction. As the first part regarding addressing deficiencies could not apply, and the second part mentions the Bank's reputational risks, the CCO argued that Article 10.1 militated towards a more severe sanction.[51]

87. While the CCO advocated for a six-year debarment period throughout the first-tier process, at the Hearing she changed her position and submitted that the appropriate Enforcement Action should be "*at least*" six years.

88. The CCO's arguments on aggravating and mitigating factors can be summarised as follows:

    a. Aggravating factors:

        i. A repeated pattern of conduct, being six separate contracts over more than a two-year period;

        ii. The Appellants used sophisticated means, namely:

            1. A high degree of forethought and planning, as expressed in the 10 January 2018 email from Appellant 1 to Ms A;
            2. Coordination between Appellant 1 and Ms A, half of the Projects being in the Balkans; and
            3. Diverse tactics to conceal the conflict of interest through false statements during an approximately two-year period; including a level of concealment of Ms A by first listing and then removing Appellant 1 from the EBRD systems; the creation of Appellant 2 as "*an additional layer of concealment*"; and the False Birth Certificate. In respect of attributing liability for the False Birth Certificate to Appellant 1, the CCO referred to the False Invoices, and argued that "*since there is evidence of forgery by [Appellant 1] in that case [(the False Invoices)], it is not implausible that [Appellant 1] had a hand in the forgery of that other document [(the False Birth Certificate)]*."[52]

        iii. Involvement of Bank staff, namely Ms A;

[50] Hearing Transcript pages 52-54.
[51] Hearing Transcript pages 96-102.
[52] Hearing Transcript pages 81-86.

iv. Harm to the Bank caused by undermining the integrity of the Bank's procurement process; and

v. The CCO also submitted at the Hearing that Appellant 1's voluntary decision to use the False Invoices "*should cast a long shadow as to the character of Appellant 1 and therefore as to the amount of the sanction that is warranted here*" as it showed no genuine remorse and intention to reform and was additional evidence of dishonesty and intent to deceive.

b. Mitigating factors:

i. Neither the Appellants' quality of work, nor an absence of damage, were easily quantifiable on the facts, and in any event neither would constitute a mitigating factor.

ii. There was no evidence of voluntary restraint in the sense of the Appellants turning down substantive opportunities to bid for Bank Projects. The CCO considered the ECEPP removal to be a red herring given that it had never been used for bids. The CCO also challenged Appellant 1's claim to have pivoted to a different industry and market, given the activities of Company C, and noting also Appellant 1's creation of a new company in order to re-enter the market in the future.[53]

iii. At the Hearing, the CCO confirmed that Appellant 1 had been debarred since the Enforcement Commissioner's Decision on 30 June 2023 and that period of time should be taken into account.[54]

iv. In answer to the Appellants' position as to Appellant 1's minor role compared to Appellant 2, the CCO argued that Appellant 1 was the guiding mind of Appellant 2 and should be sanctioned with respect to Prohibited Practice on all the Projects.[55]

v. The CCO did not consider the relatively low value of the contracts to be a mitigating factor.[56]

89. The CCO argued that each of the aggravating factors should be taken into account separately and increase the sanction separately. However, the CCO accepted that there was some flexibility as to how the guidelines could be interpreted in the categorisation of aggravating and mitigating factors.[57]

[53] Hearing Transcript pages 89-93.
[54] Hearing Transcript pages 93-94.
[55] Hearing Transcript page 88.
[56] Hearing Transcript page 68.
[57] Hearing Transcript pages 102-103.

90. The CCO also confirmed at the Hearing that the Enforcement Action should only apply to Subsidiaries of Appellant 1 established as at the date of the Prohibited Practice, and not Subsidiaries established after that date.[58]

Enforcement Commissioner's position[59]

91. In his Decision, the Enforcement Commissioner determined that the following Enforcement Action should be imposed:

> "*debarment for a period of six (6) years, during which period [Appellant 1] together with his Controlled Affiliates and [Appellant 2] together with its Subsidiaries, in each case established as at the date of the Prohibited Practice, will be ineligible to become a Bank Counterparty in any new Bank Project*."

92. The Enforcement Commissioner's Decision included as reasons for the Enforcement Action, the following factors:

a. Debarment for a period of three years as a base sanction.
b. The following aggravating factors:
    i. Repeated pattern of conduct – one year increase applied.
    ii. Involvement of Bank staff – one year increase applied.
    iii. Harm caused to public welfare – one year increase applied.
    iv. Sophisticated means – determination of sophisticated means, but no increase applied.
c. No mitigating factors.

VII. PANEL'S ANALYSIS

93. The Panel will first decide whether it is more likely than not that the alleged Prohibited Practice has occurred. If so, it will decide upon the appropriate Enforcement Action.

94. During the Hearing, Appellant 1 informed the Panel that Appellant 2 has been dissolved and wound down. The CCO confirmed that she no longer seeks any Enforcement Action to be imposed on Appellant 2. As a result, the analysis in this Final Decision will be limited to Appellant 1.

[58] Hearing Transcript pages 94-96.
[59] Principally set out at Hearing Bundle A/6/pages 9-22.

A. Evidence of Prohibited Practice

95. The CCO alleges that by bidding for, and performing, the Consultancy Contracts without disclosing to the Bank an existing personal relationship between him and an employee of the Bank, Appellant 1 has committed a Fraudulent Practice.

96. For the sake of convenience and as noted earlier, "Fraudulent Practice" is defined in Section II(46) of the EPPs as:

> *"Any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation".*

97. The Panel will determine whether the evidence adduced by the CCO supports the conclusion that it is more likely than not that Appellant 1 engaged in a Fraudulent Practice.

98. As set out in Section II(29) of the EPPs, "*more likely than not*" means that, upon consideration of all the relevant evidence and materials, the evidence and materials support the findings on a balance of probabilities.

99. As set out above,[60] the Panel considers that the CCO bears the burden to prove that it is more likely than not that Appellant 1 engaged in the alleged Prohibited Practice. In the view of the Panel this is not a complicated case. The central question which the Panel needs to answer is the following: Did Appellant 1, when submitting proposals for consultancy services and when providing such consultancy services under the Consultancy Contracts in several Bank financed projects, knowingly or recklessly fail to inform the Bank about a conflict of interest, namely a personal relationship between himself and a Bank staff member, in order to obtain a financial benefit?

a. Act or omission, including a misrepresentation

100. Appellant 1, on his behalf in one case and on behalf of Appellant 2 in four cases, agreed to the following covenant (or equivalent) in five (5) Consultancy Contracts signed between July 2019 and November 2020:

> *"The Consultant shall ensure that no circumstances arise during the Term of Engagement in which the Consultant's activities under the Contract conflict or might conflict with the personal interest of the Consultant or Expert(s) or with any services which the Consultant or the Expert(s) may render to third parties."*

101. Appellant 1 also made the following Consultant Declaration on behalf of Appellant 2 in respect of 3 (three) of the projects during the same period:

[60] Supra at paras. 57-59.

"The Consultant… and the proposed experts have no affiliation to any person or entity likely, on the basis of the information currently available, to benefit from the provision of services. We also confirm that if the Consultant is awarded the contract for the Assignment, no conflict of interest for any party would be created."

102. As indicated above,[61] the evidence is conclusive that, at the time Appellant 1 agreed to the covenants in the Consultancy Contracts and made the Consultant Declarations, a close personal relationship existed between him and a Bank staff member (Ms A).

103. Ms A's employment at the Bank commenced on 8 January 2018 and terminated on 6 July 2021.

104. In fact, as set out in detail earlier,[62] Appellant 1 and Ms A were co-tenants of a rental property in London from 28 February 2018 and were married in August 2020. Ms A gave birth to a child in January 2021 whose father is Appellant 1. The evidence is also conclusive that, while she was employed at EBRD, Ms A was involved in the introduction, selection and/or supervision of the Appellants under the Consultancy Contracts.[63]

105. The Panel notes in particular the following:[64]

a. On 18 February 2019, Appellant 1 sent his CV to Ms A. The next day, Ms A forwarded the CV to two Bank staff members recommending him for two open positions and,

b. In the terms of reference for each project, Ms A was identified as one of the persons at the Bank to whom the Appellants reported and/or provided work-product.[65]

106. Given the existing personal relationship between Appellant 1 and Ms. A and given that Ms. A was likely to benefit as Operation Leader in Projects One and Three and Team Member in Projects Two, Four, Five and Six from the services provided by Appellant 1, the Consultant Declaration was false and constituted a misrepresentation.

107. Furthermore, the Panel finds that the failure to inform the Bank about the close relationship between Appellant 1 and Ms. A was an omission to disclose a conflict of interest. By signing the covenant in the Consultancy Contracts to ensure no conflict of interest would arise and by breaching the covenant, the Appellant has disregarded the express requirement of the Bank to avoid any conflict of interest. Such conflicts of interests include situations where the consultant has a close relationship with a Bank staff member, who will benefit from his services. Indeed, in such a situation the personal

[61] Supra at para. 37.
[62] Supra at para. 37(d).
[63] Supra at paras. 42 et seq.
[64] Supra at paras. 40-43.
[65] For Project Six, Ms A was to have been identified as one of the contact persons at the Bank.

interests of a consultant and of a close staff member may not be aligned with the interests of the Bank.

108. Having reviewed the successive iterations of Appellant 1's argument in this case and as set out in paragraphs 65-68, it appears to the Panel as if Appellant 1 also shares the Panel's conclusion.

109. In his Response to the initial Notice on 22 December 2022, Appellant 1 acknowledged that [he] "*had an existing personal relationship with the EBRD staff at the time of signing of those contracts*" and "*admitt[ed] and accept[ed] the responsibility in the sanctionable conduct*".

110. The Appellants added:

> "*The Respondents admit and accept the responsibility in the sanctionable conduct. The Respondents fully admit and regret that a breach has occurred as they have failed to inform the Bank about a potential conflict of interest ahead of the signing of the contracts. The Respondents deeply regret not to have kept in mind that the conclusion of whether a case is a potentially perceived conflict of interest, or an actual conflict of interest, comes through disclosure. The Respondents agree that their subjective assessment as to the impact of a conflict of interest should not have determined whether such a conflict must have been disclosed or not….*" (emphasis in the original).

111. Less than one year later, the Appellants, in their Notice of Appeal of 1 September 2023, changed their position and asserted that there was no conflict of interest as "*under EBRD policy, a personal relationship does not automatically trigger a conflict of interest unless the relationship exerts undue influence over the procurement process*".

112. Appellant 1 considered that, in respect of all the Consultancy Contracts, the procurement process was properly conducted, that there was no evidence of any undue influence and that the Appellants were the most suitable candidates for the Projects.

113. In the light of the evidence reviewed earlier, the Panel does not find the Appellants' argument persuasive. Basic principles of procurement include transparency, integrity and openness, and when a relationship between a service provider (Appellant 1) and Bank staff (Ms A) results in the service provider gaining an advantage, such principles are contravened.

114. Indeed, at the Hearing, Appellant 1 reverted to his initial position. He admitted that his failure to inform the Bank of the conflict of interest with Ms A "*was a reckless omission*"[66] which he regretted.[67]

[66] Hearing Transcript at page 12.
[67] Hearing Transcript at page 48.

115. The Panel concludes that Appellant 1 omitted to inform the Bank of a conflict of interest, and made a misrepresentation in his Consultant Declaration.

b. That knowingly or recklessly misled, or attempted to mislead, a party

116. The Panel finds very convincing the submissions of the CCO that Appellant 1 and Ms A, in concertation with one another, took steps to conceal their relationship from the Bank and to ensure that Bank employees did not learn of the existence of this relationship.

117. As indicated above, the Appeal Record contains numerous communications between Appellant 1 and Ms A, with Bank employees in copy; as well as communications between Ms A and some of her Bank colleagues which, the Panel concludes, were meant to conceal the existence of their personal relationship and deceive the Bank.[68]

118. The CCO, in support of her contention that Ms A and Appellant took actions to hide their relationship, also refers to Ms A's request on 26 February 2018 to the EBRD human resources department to remove Appellant 1 "*as the listed domestic partner in my ESJ profile and all his mentions*". Ms A ends that communication with the following words: "*This is not applicable and I have not processed this when starting my position at EBRD*". The CCO also refers to Ms A's submission of the False Birth Certificate.

119. Appellant 1 denied "*any knowledge or involvement*" of Ms A's actions with respect to her personal details in the EBRD system and the False Birth Certificate.

120. Having reviewed and analysed the evidence, the Panel concludes that there is insufficient evidence to conclude that it is more likely than not that Appellant 1 conspired with Ms A in her actions seeking to deceive the Bank and that he was aware of this request by Ms A to the Bank's human resources department or of the False Birth Certificate.

121. The Panel notes that the Appeal Record discloses that, after an investigation by the CCO, Ms A was found to have committed misconduct and was terminated from the Bank on 6 July 2021.

122. Given the persuasive evidence referred to above, the Panel concludes that it is more likely than not that the Appellant 1 knowingly or recklessly misled the Bank.

c. To obtain a financial or other benefit or to avoid an obligation

123. The total fees paid by the Bank under the Consultancy Contracts amounted to approximately EUR 367,000. The misrepresentations and misleading omissions enabled Appellant 1 to secure the Consultancy Contracts and to obtain a remuneration under such

[68] Supra at paras. 44-46.

contracts. The quality or value of the Appellant's services are not relevant for the determination of the existence of a financial benefit.

124. Accordingly, the Panel concludes that it is more likely than not that the misrepresentations and omissions were made by Appellant 1 in order to obtain a financial benefit.

d. Conclusion on Prohibited Practice

125. Considering the totality of the evidence and arguments presented by the CCO, the Panel finds that the CCO has met her burden of proof.

126. It is more likely than not that Appellant 1 has committed a Fraudulent Practice as defined in Section II (46) of the EPPs, namely an omission and misrepresentation that knowingly or recklessly misled the Bank in order to obtain a financial benefit.

127. The Panel also finds that the latest date of Fraudulent Practice was 27 November 2020, being the Consultant Declaration for Project Six.

B. Enforcement Action

128. The Panel will now consider and determine what Enforcement Action should be imposed on Appellant 1.

129. As noted earlier, pursuant to Section III, Article 7.7(iv) of the EPPs, the Panel's decision to impose an Enforcement Action shall take account of the factors listed in Section III, Article 5.5 of the EPPs.[69]

130. The Panel also notes the General Principles which provide that the "*base sanction is three-year debarments (with or without conditional release), which may be decreased or increased taking into account any mitigating and/or aggravating circumstances.*"[70]

131. The Panel recalls that, in his Decision, the Enforcement Commissioner determined that a debarment of six years should be imposed[71] while the CCO[72], at the Hearing, submitted that the appropriate Enforcement Action should be a debarment of "*at least*" six years.[73]

132. As for the Appellants, the Panel also recalls that, in their Response as well as in their subsequent written and oral submissions, they set out numerous arguments either in favour of mitigation or in response to alleged aggravating circumstances.[74]

[69] Supra at para. 77.
[70] Supra at para. 78.
[71] Supra at paras. 91-92.
[72] See CCO's arguments supra at paras. 85-90.
[73] Hearing Transcript at page 132.
[74] Supra at para. 82-83.

133. Essentially, the Appellants during the Hearing, argued that the Enforcement Action imposed by the Enforcement Commissioner was disproportionate and asked the Panel to impose a sanction that would be proportionate, fair and reflecting the actual circumstances surrounding the alleged conflict of interest.[75]

134. As mentioned earlier, during the Hearing, in answer to a question by a member of the Panel, Appellant 1 acknowledged that a proportionate sanction would not be zero (0) but "*a debarment period of two to four years*".[76]

135. In order to determine the appropriate Enforcement Action, the Panel will consider the totality of the evidence and all potential aggravating and mitigating factors. The choice of an Enforcement Action should be tailored to the specific facts and circumstances present in this case. It should be proportionate to the sanctionable conduct.

136. In accordance with the General Principles referred to above, and considering the persuasive evidence adduced by the CCO of Appellant 1's egregious conduct as well as his active role in seeking to deceive the Bank, the Panel determines that debarment for a period of three years should be imposed as a base sanction.

137. The Panel must now determine whether there are any aggravating factors which should lead it to increase the debarment period and also whether there are any mitigating factors which impact the length of such debarment.

138. Firstly, the Panel determines that the involvement of a Bank staff (Ms A) in the sanctionable conduct is an applicable aggravating factor.

139. Secondly, the Panel also determines as an applicable aggravating factor Appellant 1's repeated pattern of conduct in respect of six separate contracts, conducted in different countries during more than two years.

140. With respect to the alleged use of sophisticated means by Appellant 1 in order to conceal his relationship with Ms A from the Bank, although the matter is not entirely free from doubt, the Panel is not comfortably satisfied that the conduct of Appellant 1 involved sophisticated means as an aggravating factor which should lead to an increase in the base sanction.

141. As for the harm to public welfare alleged by the CCO to be an aggravating factor, the Panel is not persuaded that the standard has been met having regard to the fact that there were no delays in the award of the contracts and that such contracts were all well and timely executed.

142. As for any mitigating circumstances, the Panel has considered Appellant 1's arguments that the winding down of Appellant 2 and the lack of bids for other Bank Projects after

[75] Hearing Transcript pages 40-42, 120-122.
[76] Hearing Transcript pages 47-48.

the commencement of the CCO's investigation should be considered mitigating circumstances. In the Panel's view, such actions were not of sufficient weight and gravity to warrant a reduction in the sanction.

143. Appellant 1 also argues that his cooperation with the investigation was a mitigating factor. The Panel disagrees. Appellant 1 did not provide any substantive input into the investigation. Furthermore, the Appeal Record discloses that settlement discussions were terminated in circumstances which caused the CCO to doubt that Appellant 1 was engaged in those discussions in good faith.

144. Having regard to the applicable aggravating factors mentioned above, the Panel has decided to increase the base sanction of three (3) years debarment by one and a half (1.5) years.

145. Therefore, the Panel determines that the following Enforcement Action should be imposed on Appellant 1:

> "*debarment for a period of four and a half (4.5) years, during which period Appellant 1 will be ineligible to become a Bank Counterparty in any new Bank Project*."

146. Having regard to the fact that Appellant 1 has been suspended from becoming a Bank Counterparty since 30 June 2023, the period of debarment will end on 30 December 2027.

147. Before issuing its Final Decision, the Panel, for the sake of good order, needs to address the following: to what extent should the Panel take the False Invoices into account for its Final Decision.

148. The False Invoices were submitted during the settlement discussions[77] between the CCO and the Appellants prior to the issuance of the Notice.

149. Both Parties acknowledge that the settlement discussions took place on a "*without prejudice*"[78] basis. As the parties did not adequately brief the Panel on the scope and application of the "*without prejudice*" principle on this particular point, and the Panel does not consider that the CCO's arguments relating to the False Invoices, if successful, would materially alter its decision, the Panel does not make any determination as to the admissibility of evidence relating to the False Invoices and does not include the False Invoices in its analysis.

[77] Supra at para. 53.
[78] Hearing Transcript, pages 83, 109 and 120.

VIII. DECISION

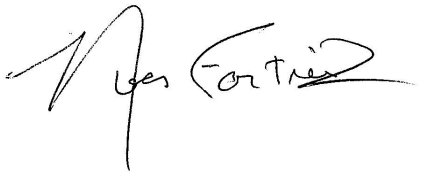
150. Considering the Appeal Record and all the factors discussed above, the Panel determines that:

a. a period of debarment of four and a half (4.5) years should be imposed on Appellant 1, during which period Appellant 1 will be ineligible to become a Bank Counterparty in any new Bank Project;

b. taking into account the period of suspension already served, the period of debarment will end on 30 December 2027.

151. According to Section III, Article 11.1(i) of the EPPs, the above-mentioned Enforcement Action will apply to any Subsidiary of Appellant 1 established as at the date of the Prohibited Practice (27 November 2020), if any.

152. The Bank will also provide notice of the corresponding declaration of ineligibility to the other multilateral development banks that are party to the Agreement for Mutual Enforcement of Debarment Decisions (the "**Cross-Debarment Agreement**") so that they may determine whether to enforce the declaration of ineligibility with respect to their own operations in accordance with the Cross-Debarment Agreement and their own policies and procedures.



The Hon. Yves Fortier, KC (Enforcement Committee Chairperson)

On behalf of the
Enforcement Committee Panel

The Hon. Yves Fortier, KC
Don Scott De Amicis
Enrico Canzio