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THE EFFECTIVENESS OF FINANCIAL INSTITUTIONS, PLEDGE AND BANKRUPTCY LAWS IN THE EBRD'S COUNTRIES OF OPERATIONS

The framework for a well-functioning market economy goes well beyond the areas covered by the transition indicators. Such an economy requires an effective government capable of providing for the security of contracts and property rights, for competition and a stable environment for investment (which includes macroeconomic stability) - (see, for example, Stern N.H. [1,2] and Stiglitz J.E. [3]).

Macroeconomic stabilisation of market-oriented transition in CIS has also revealed the enduring weaknesses of the financial sector. With less exchange rate volatility, sharply reduced yields on government securities and decreasing interest rate spreads- all induced by stabilisation- the era of easy profitability that fuelled the phenomenal growth of financial institutions has largely come to an end. But in most of the transition economies, the new banks are not yet prepared to provide the basic array of intermediation services to secure their own future and to promote medium- and long-term investment in their economies.

That is why the problem of effective functioning of financial institutions is becoming actual, particularly for the transition in CIS, the Baltics and eastern Europe.

The purpose of this article is the analysis of the effectiveness of financial institutions in the EBRD's countries of operations with point of view an government capable of providing for the security of financial agreements and corresponding reforming pledge and bankruptcy laws.

In an effort to analyse and compare the progress in market- oriented transition in eastern Europe, the Baltics and the CIS, the EBRD has presented annually since 1994 an appraisal, across a number of dimensions, of the state of the transition. This appraisal provides a snapshot of the cumulative progress in the movement from a centrally planned economy to a market economy [4]. Progress is measured against the standards of advanced industrial economies, recognising that there is no perfectly functioning market economy

Table 1

Progress in transition in eastern Europe, the Baltics and the CIS[1]

	Markets and trade			Financial institutions	
	Price liberalisation	Trade & foreign exchange system	Competition policy	Banking reform & interest rate liberalisation	Securities markets & non-bank financial institutions
Ukraine	3	3	2	2	2
Belarus	3	1	2	1	2
Bulgaria	3	4	2	3 -	2
Estonia	3	4	3 -	3 +	3
Hungary	3 +	4 +	3	4	3 +
Kazakhstan	3	4	2	2 +	2
Latvia	3	4	3 -	3	2 +
Russian Federation	3	4	2 +	2 +	3

[1] The classification system is simplified and builds on the judgement of the EBRD's Office of the Chief Economist. Pluses and minuses have been added to the 1-4 scale to indicate countries on the borderline between two categories. The classification 4 which was used in previous years has been replaced with 4+, though the meaning of the score remains the same.

and that the institutional diversity among market economies does not present a unique end-point for the transition.

The cateqories covered by the transition indicators in Table 1 continue to focus on two of the most basic elements of transition: markets and trade and financial institutions.

The numerical indicators are intended to represent the cumulative progress in the movement from a centrally planned economy to a market economy in each dimension, rather than the rate of change in the course of the year.

The classification system is described in detail:

price liberalisation- 3- substantial progress on price liberalisation: state procurement at non-market prices largely phased out;

trade and foreign exchange system – 1 – widespread import and/or export controls or very limited legitimate access to foreign exchange; 3 – removal of almost all quantitative and administrative import and export restrictions; almost full current account convertibility; 4 – removal of all quantitative and administrative import and export restrictions (apart from agriculture) and all significant export tariffs; insignificant direct involvement in exports and imports by ministries and state-owned trading companies; no major non-uniformity of customs duties for non-agricultural goods and services; full current account convertibility; 4+) – standards and performance norms of advanced industrial economies: removal of most tariff barriers; membership in WTO;

competition policy- 2 - competition policy legislation and institutions set up; some reduction of entry restrictions or enforcement action on dominant firms; 3 - some enforce-

ment actions to reduce abuse of market power and to promote a competitive environment, including break-ups of dominant conglomerates; substantial reduction of entry restrictions;

banking reform and interest rate liberalisation – 1 – little progress beyond establishment of a two-tier system; 2 – significant liberalisation of interest rates and credit allocation; limited use of directed credit or interest rate ceilings; 3 - substantial progress in establishment of bank solvency and of a framework for prudential supervision and regulation; full interest rate liberalisation with little preferential access to cheap refinancing; significant lending to private enterprises and significant presence of private banks; 4 - significant movement of banking laws and regulations towards BIS standards; well-functioning banking competition and effective prudential supervision; significant term lending to private enterprises; substantial financial deepening;

securities markets and non-bank financial institutions – 2 – formation of securities exchanges, market-makers and brokers; some trading in government paper and/or securities; rudimentary legal and regulatory framework for the issuance and trading of securities; 3 - substantial issuance of securities by private enterprises; establishment of independent share registries, secure clearance and settlement procedures, and some protection of minority shareholders; emergence of non-bank financial institutions (e.g. investment funds, private insurance and pension funds, leasing companies) and associated regulatory framework.

On markets and trade, the transition indicators are intended to gauge how well these markets are functioning. In this regard, they indicate the openness of markets, the extent of competitive practices, and the degree to which prices reflect costs. On financial institutions, the indicators attempt to capture the extent to which the financial system provides financial discipline, effective intermediation between savers and investors, and an efficient payments system. This requires an analysis of the ownership structure of financial institutions, the range of instruments and services they provide, the level of competition among them, their role in corporate governance and enterprise restructuring, and the effectiveness of the regulatory environment in which they operate.

This article examined a number of key issues relating to the ability of party to pledge movable property as security for credit. In particular, the survey examined whether countries had reformed existing civil codes and/or adopted new laws to provide for the non-possessory pledge of movable property [4]. The survey also examined whether countries had provided for a cost-efficient mechanism for the registration and enforcement of security interests or pledges in movable property.

While the survey confirmed that in most of the countries of operations of the EBRD it was possible to obtain a non-possessory pledge in another party's movable property, the survey indicated that only a few of the jurisdictions had established a functioning central registry for the registration of non-possessory pledges. The absence of such registries undermines the effectiveness of the non-possessory pledge. Such effectiveness may be achieved only through a system whereby the existence of charges over movable property and the priority of competing charges over the same property may be established without undue expense or delay.

Other impediments that are still present it a number of jurisdictions examined are high notary or registration fees relating to the legal notarisation or registration of a pledge or security interest. Notarisation is often the most common method whereby a security interest becomes legally enforceable and binding upon third parties. Another impediment is the absence of "self-help" remedies which permit the beneficiary of a charge to sell charged property in whichever way it considers most appropriate without the need to first obtain a court order.

In May 1997, Hungary introduced a centralised and computerised system for the

registration of non-possessory pledges over movable assets, which provides for a reasonably efficient means of registering non-possessory charges and of conducting a search for the existence of charges on specific property. This major change follows Hungary's 1996 amendment to its Civil Code to provide greater flexibility in the area of secured transactions. Poland adopted a new pledge law that came into force in January 1998. Polish regulations implementing a registration system for pledges are being prepared but have not yet been promulgated. Bulgaria, Estonia, Kyrgyzstan, Lithuania and Moldova have also introduced new pledge laws. These countries have not yet established efficient centralised systems for the registration of non-possessory pledges.

A middle category of countries has enacted changes to their pledge laws, but has yet to move to a more streamlined system of creation, registration and enforcement of pledges over movable property. Russia, for the example, created a pledge law in 1992. This law permits creditors to obtain a non-possessory charge over a wide range of movable assets, both tangible and intangible, and permits parties to agree in the charging document that the charge may be enforced without the need to obtain a court decision. The law also provides that charges must be recorded by the debtor in a charges registry maintained by the debtor and required to be made available for inspection by interested parties. The law, however, does not provide for a uniform or centralised system of registration that would give public notice of the existence of pledges. In addition, burdensome notarisation fees (in Russia's case, 1,5 per cent of the value of the collateral) renders use of the charging instrument prohibitively expensive.

A last category of countries still lacks pledge laws that enable non-possessory security interests to be created over a wide range of movable property.

The bankruptcy section of the survey included questions on reorganisation proceedings (whereby creditors and a debtor can reach a settlement rather than liquidate the company), liquidation and the role of the liquidator /trustee/ manager. The survey also examined the efficacy of bankruptcy legislation with a focus on the time, frequency and manner of liquidation proceedings. Many countries have enacted new bankruptcy legislation or amended laws that were adopted in the early 1990's. Armenia, Azerbaijan, Croatia, the Czech Republic, Estonia, Latvia, Lithuania and Moldova, for example, are countries that have adopted new bankruptcy laws.

Almost all of the countries have laws which provide that a debtor is insolvent when it cannot meet its debts as they fall due. Similarly, most countries provide for some form of reorganisation proceedings whereby a majority (either simple or, in some cases, qualified) of creditors may approve a plan of reorganisation binding on all creditors. The rules for distribution of liquidation proceeds, however, vary in each jurisdiction. In a number of countries, secured creditors do not receive the highest priority in a liquidation proceeding. The costs of liquidation, unpaid employee remuneration, and certain taxes and other charges are examples of the types of claims which may have priority over the claims of secured creditors in liquidation. This is not unique to central and eastern Europe or the CIS. Many jurisdictions in Europe and elsewhere also allow for the payment of liquidation costs and other amounts to be made prior to the payment of secured claims.

In many countries, bankruptcy laws confer on liquidators' wide powers of investigation coupled with relatively extensive powers to deal with the assets of the bankrupt. However, few countries provide for liquidators to be qualified or for their conduct to be regulated (other than by the courts).

In a last category of countries, bankruptcy laws do not provide for certainty or clarity with respect to the definition of an insolvent debtor, the scope of reorganisation

proceedings or the priority of distribution to creditors following liquidation.

CONCLUSIONS

Effectiveness of laws

To achieve effective implementation and enforcement of new and amended commercial laws and regulations, countries in the region will need to devote substantial resources to the proper administration and enforcement of laws. In many instances, countries have undertaken significant reforms of their commercial laws. These changes, however, have not always been accompanied by effective means for implementation and enforcement. For example, large notary fees continue to impede secured lending in countries that have reformed their civil codes and pledge laws. In some jurisdictions, there are significant disincentives to the commencement of reorganisation or bankruptcy proceedings, including high costs, extensive involvement of the courts at each step of the proceedings, the lack of qualified insolvency practitioners and the lack of certainty of the outcome of such proceedings. Similarly, with secured transactions, many of the jurisdictions surveyed still require that a pledged asset be sold by the court at public auction or permit private sale only in limited circumstances.

Effectiveness of financial institutions

In the financial sector, a broad consensus has emerged across countries at all stages of transition on the need to strengthen and consolidate commercial banks, to introduce international banking standards, and to improve prudential regulation and supervision.

Creating effective financial markets will also require, in most transition economies, a more aggressive policy of restructuring of existing state-owned banks. Being traditionally closely connected with large state-owned enterprises, these banks entered transition with portfolios that were both insufficiently diversified and overburdened with non-performing loans. This has had the effect of restricting potential lending to new private firms and inhibiting therefore the creation and expansion of new private sector enterprises, while at the same time contributing to financial sector instability. The reform of existing state-owned banks will enhance growth by reducing financial instability and improving access to credit for new private businesses. At the same time, it will strengthen the ability of domestic banks to compete effectively when financial markets are open to foreign competition, as is mandated by the Europe Agreements. The strengthening of financial institutions will be a crucial part of the process of accession to the European Union.

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