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for Reconstruction and Development

LAW IN TRANSITION JOURNAL

The impact of climate change on lawyers page 12

Powering the energy, digital and green transitions page 22

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Green procurement for green investment page 32

Are you ready for online courts? page 80

Building resilience through legal reform

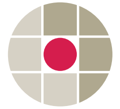
READ THE ONLINE VERSION HERE:

ABOUT THE EBRD

The EBRD is a multilateral bank that promotes the development of the private sector and entrepreneurial initiative in 36 economies across three continents. The Bank is owned by 71 countries as well as the EU and the EIB. EBRD investments are aimed at making the economies in its regions competitive, well-governed, green, inclusive, resilient and integrated.

ABOUT THIS JOURNAL

Legal reform is a unique dimension of the EBRD's work. Legal reform activities focus on the development of the legal rules, institutions and culture on which a vibrant market-oriented economy depends. Published once a year by the Office of the General Counsel, the *Law in Transition* journal covers legal developments in the region, and by sharing lessons learned aims to stimulate debate on legal reform in transition economies.



CONTENTS

2
FOREWORD

3
EDITOR'S MESSAGE

GREEN TRANSITION

4
ADVANCING CORPORATE CLIMATE GOVERNANCE TO MEET THE PARIS AGREEMENT OBJECTIVES

12
THE IMPACT OF CLIMATE CHANGE ON LAWYERS

22
POWERING THE ENERGY, DIGITAL AND GREEN TRANSITIONS: EBRD SUPPORT FOR THE CRITICAL RAW MATERIALS MARKET IN ITS REGIONS

32
GREEN PROCUREMENT FOR GREEN INVESTMENT

FINANCE AND GOVERNANCE

44
ENABLING DIGITAL TRADE THROUGH LEGAL REFORM

52
EBRD SUPPORT FOR NON-PERFORMING LOAN RESOLUTION

64
ADDRESSING THE SECTORAL AND CORPORATE GOVERNANCE REFORM NEEDS OF STATE-OWNED ENTERPRISES: THE EBRD APPROACH

72
PUBLIC-PRIVATE PARTNERSHIPS FOR PROMOTING SUSTAINABLE DEVELOPMENT GOALS

80
ARE YOU READY FOR ONLINE COURTS?

96
GLOSSARY

BUILDING RESILIENCE THROUGH LEGAL REFORM

As Russia's war on Ukraine continues, the world is reminded daily of the true meaning of the word "resilience". The Ukrainian people, in defending their homeland and continuing with their daily lives while already advancing plans for reconstruction, demonstrate this resilience in every way. The EBRD has long been a dedicated partner of Ukraine through investment and technical cooperation, stepping up its support in this time of greater need.

Looking to the future, the EBRD is preparing to help with Ukraine's reconstruction and to assist with adopting the reforms necessary to support that process. As a demonstration of that readiness, the Bank hosted a conference at its London headquarters in June 2023 to reaffirm its commitment to supporting the resilience of Ukraine's real economy.

With that in mind, this journal's theme is both timely and important, with several contributions containing stories about Ukraine that emphasise how the EBRD Legal Transition Programme (LTP) continues to help implement the types of reforms needed to underpin reconstruction. This includes its work on:

- regulating the critical raw materials sector, which should greatly increase transparency and ease access for investors to valuable information on mining resources in Ukraine, resources essential to both reconstruction and greening, and digitisation of the economy
- creating green procurement processes for public-private partnerships, also crucial for reconstruction
- improving the governance of state-owned enterprises to make them eligible for investment by international financial institutions
- promoting online courts for small claims

All these stories demonstrate the critical role the EBRD can and will play in helping Ukraine not only recover from the war, but build back better.

Besides responding to the challenges in Ukraine, other recent projects in the LTP portfolio have focused on recovering from the post-pandemic economic slowdown and delivering sustainable development and the climate change agenda. In both of these areas, the LTP has made an important contribution towards the Bank's strategic priorities of promoting economic resilience and fighting climate change.

As the world recovers from Covid-19, there are many ways to ensure the economies where we work are resilient and continue to benefit from the lessons learned during the pandemic. In that respect, the LTP plays a catalytic role, with its efforts reflected in the activities that comprise the "virtuous circle" of legal reform, which the Bank has advocated for many years.

This journal reflects on the various activities in this virtuous circle. One story details the LTP's standard-setting activities in the field of public-private partnerships,

where we have published a compilation of model laws and other reference documents. Another article covers assessment activities, in particular a review of the readiness of our countries of operations to implement online courts. Other articles describe our technical cooperation work, through which we advise governments on their reforms.

The work of the LTP continues to make significant contributions to strengthening the investment climate in our regions – an essential point at a time when resources to fund technical cooperation projects are more constrained and the Bank seeks to establish even closer linkages to its investments.

For example, judicial capacity-building activities, public procurement reforms and insolvency law reforms (to name just a few of the LTP's portfolio of activities) provide essential support for private-sector development, in furtherance of the Bank's overarching mission. It goes without saying that a well-trained judiciary facilitates dispute resolution for private investors, solid public procurement regimes limit corruption and quality insolvency systems allow for the orderly liquidation or reorganisation of insolvent companies. All these elements are crucial to the development of a vibrant private sector and sound investment climate.

Beyond supporting the key legal enabling environments for investment in our countries of operations, the LTP's activities create direct value and impact in these economies. The reforms we help put in place catalyse specific investments, such as our work establishing crowdfunding legislation, which governs the platforms used by micro-investors. The investments made on these platforms often amount to millions of euros, demonstrating a strong multiplier effect from the EBRD's intervention.

With that in mind, this journal spotlights the ways that the LTP helps the Bank deliver on its mandate, creating a predictable, transparent and investor-friendly legal environment for business.

Much done, much more to do.

MICHAEL STRAUSS
GENERAL COUNSEL, EBRD

EDITOR'S MESSAGE

It is my great pleasure to present to you the 2023 edition of the *Law in Transition* journal. As usual, the publication reflects on the work of the EBRD Legal Transition Programme (LTP) in the last year or so. Our programme aims to support the economies where the Bank operates in establishing better legal frameworks for business and investment. This edition is full of lessons learned from our recent activities, which in the past year have focused primarily on climate work and post-Covid recovery.

We have arranged the articles in two parts: the first is dedicated to the green transition and the second focuses on finance and governance.

The first story, by Divya Chawla and Maya Hennerkes, looks into the available tools for companies to meet the Paris Agreement objectives. One of these tools, advocated by the EBRD, is developing and implementing corporate climate governance action plans. The article takes stock of early lessons from this new line of activities developed by the LTP in collaboration with other EBRD departments. It gives concrete examples of such corporate climate governance plans from the Bank's investment portfolio.

In the second article, Mike Strauss and Vesselina Haralampieva consider the role of lawyers in tackling the impacts of climate change. The story highlights what lawyers can and should do in that context, taking a close look at the role of in-house counsel (including those working for international organisations). When it comes to addressing the climate crisis, lawyers are going to be very busy indeed.

In the article that follows, Paul Moffatt, with contributions from Andrea Garaiova, writes about EBRD support for the critical raw materials market. The Bank's activities help build policy, law, regulation and governance with the aim of attracting more and better investment to EBRD countries of operations. This enables the sector to develop and make a greater contribution to broader economic growth.

In the next article, Eliza Niewiadomska and Angela Delfino, with contributions from Maya Almog, explain how buying green infrastructure and ensuring a more sustainable and greener supply chain are vital for countries in the EBRD regions. They argue that this requires harnessing innovation and technology, but that most governments are only just starting to look into the matter. The article showcases some results from the EBRD Green Cities programme.

The next story opens the part on finance and governance. Written by Milot Ahma, with contributions from Gamze Kahyaoglu and Andrei Mazur, it makes the case for digitalising trade, using the UN Model Law on Electronic Transferable Records for that purpose. The authors argue that using digital documents instead of paper-based processes would significantly improve the efficiency of small and medium-sized enterprises.

Catherine Bridge Zoller presents a review of the current situation with non-performing loans in the EBRD regions. She takes stock of what has been accomplished by the Vienna Initiative in that context. The piece also contains an interview with Eric Cloutier by Dejan Vasiljev about recent trends and future perspectives regarding such loans.

Pavle Djuric, Giuseppe Grimaldi and Yuliya Zemlytska then reflect on the role of state-owned enterprises in countries in which the Bank operates. The story showcases a new technical cooperation programme designed to help the EBRD provide policy advice that combines governance and sector reforms for these enterprises.

Alexei Zverev, Chris Tassis and Zeynep Boba reflect on the role of public-private partnerships (PPPs) in promoting the UN Sustainable Development Goals. Their article considers the work of the LTP in that context and focuses on a recent publication called The EBRD PPP Regulatory Guidelines Collection, which is a comprehensive resource for policymakers and practitioners working on PPPs.

Lastly, Yulia Shapovalova and Patricia Zghibarta look into the readiness of EBRD economies to introduce online courts. Their contribution is based on a recent assessment conducted by the Bank in 17 jurisdictions, with a view to mapping the needs for technical cooperation in that area. As readers will appreciate, online courts have been crucial for ensuring access to justice during the pandemic.

I hope these stories will inspire policymakers and others working on legal reforms and institution building to continue their good work. Please do send feedback on this journal if you can.

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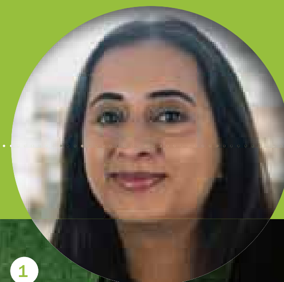
ADVANCING CORPORATE CLIMATE GOVERNANCE TO MEET THE PARIS AGREEMENT OBJECTIVES

“The heightened focus on climate and sustainability-related disclosures has set in motion an urgent process of internal transformation in entities. Strong corporate climate governance is at the heart of this transformation.”



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This article explores how corporate climate governance is critical to achieve the transition to a low-carbon and climate-resilient economy and highlights the pressing need for companies and financial institutions to take climate action. It also discusses the EBRD's technical cooperation projects, focusing specifically on the Bank's support for the development and implementation of corporate climate governance action plans.

CLIMATE ACTION: THE NEED OF THE HOUR

The Paris Agreement sets the objective of limiting average global temperature rise to between 1.5°C and well below 2°C above pre-industrial levels.[1] To achieve greenhouse gas (GHG) emission reduction in line with this temperature increase goal, states have formulated forward-looking plans with clear climate commitments referred to as nationally determined contributions (NDCs).[2] The Paris Agreement explicitly references the private sector's role in implementing NDCs and the Intergovernmental Panel on Climate Change (IPCC) also recognises that partnerships involving non-state public and private actors, among others, would facilitate actions and responses consistent with the temperature increase goal of the Paris Agreement.[3, 4]

In the latest IPCC report, however, a lack of private sector engagement and insufficient private sector sources of climate finance have been identified as key barriers, with public and private finance flows for fossil fuel projects being greater than those for climate mitigation and adaptation.[5] As such, an urgent systemic transformation is needed, and it is vital that private and public sector entities identify and establish climate-related targets for their assets, portfolios and supply chains. With growing consensus that climate and sustainability-related data are essential to monitor progress towards achieving the Paris Agreement goals, mandatory regulatory requirements and voluntary market-driven standards have emerged that set requirements for entities to identify, assess, manage and report on sustainability and climate-related matters.

The recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD) are a pioneering market-driven initiative in this regard. These recommendations span four thematic areas that are central to the functioning of public and private enterprises: governance, strategy, risk management, and metrics and targets. The TCFD provides guidance on what information entities should disclose to support investors, lenders and insurance underwriters in assessing and pricing climate-related risks.[6] The aim is to encourage

1. United Nations Framework Convention on Climate Change, Article 2(1a). Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf, (last accessed on 19 September 2023).
2. United Nations Framework Convention on Climate Change, Article 4. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf, (last accessed on 19 September 2023).
3. United Nations Framework Convention on Climate Change, Article 6(8b). Available at:https://unfccc.int/sites/default/files/english_paris_agreement.pdf, (last accessed on 19 September 2023).
4. IPCC (6 October 2018), *Special Report: Global Warming of 1.5°C, Summary for Policymakers*, At D.7.1. Available at: https://www.ipcc.ch/sr15/chapter/spm/, (last accessed on 19 September 2023).
5. IPCC (March 2023A), *AR6 Synthesis Report: Climate Change 2023, Summary for Policymakers*, Sixth Assessment Report. Available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf, (last accessed on 19 September 2023).
6. TCFD, https://www.fsb-tcfd.org/recommendations/, (last accessed on 19 September 2023).

entities to identify the financial risks and opportunities related to climate change as part of their risk management and strategic planning processes.

In a more recent market-driven endeavour, sustainability standards have been published by the International Sustainability Standards Board (ISSB). These standards build on the recommendations of the TCFD, but require more specificity for climate-related disclosures. The ISSB seeks to set a high-quality, comprehensive global baseline of sustainability disclosures focused on the needs of investors and the financial markets. While both the ISSB standards and TCFD recommendations are voluntary, jurisdictions such as the United Kingdom,[7] Singapore,[8] Nigeria,[9] Australia and others have already expressed strong support for reporting in line with them.[10] In addition to voluntary initiatives, stricter national and regional regulations are coming into force across jurisdictions such as the European Union (EU), Egypt, Georgia and the United States.

The heightened focus on climate and sustainability-related disclosures has set in motion an urgent process of internal transformation in entities. Strong corporate climate governance (CCG) is at the heart of this transformation as, to make accurate and reliable climate and sustainability-related disclosures, entities would need to (1) establish the appropriate internal governance and operational arrangements; (2) establish relevant policies, processes and management practice guides; and (3) develop strong internal capacity.

THE EBRD'S CORPORATE CLIMATE GOVERNANCE FACILITY: SUPPORTING CLIENTS AND RAISING AWARENESS

CCG is the set of rules, practices and processes that an entity puts in place to identify, manage and improve decision-making and disclosures related to the impacts of climate change. The EBRD is the first international financial institution to set up a CCG facility that brings together lawyers, economists and policy experts to help private sector and state-owned enterprises (SOEs) develop and strengthen their climate-related governance, strategy, risk management, target setting and disclosure practices. In particular, the EBRD provides dedicated support to clients to develop and implement corporate climate governance action plans (CCGAPs). These plans involve the two key components discussed below.

A. Assessment: Identifying corporate governance gaps with respect to climate

The first step is to understand the entity's corporate governance practices and to assess their suitability for identifying and addressing climate-related risks and opportunities. International standards and, where applicable, regional and national regulations form the benchmark for this analysis. This assessment looks at the entity's practices in the context of the TCFD's four thematic areas in order to identify material sustainability and climate related risks and opportunities. It is interesting to see that prevailing regulations and standards have different expectations regarding the assessment of the "materiality" of identified climate-related risks and opportunities.

> "The EBRD is the first international financial institution to set up a corporate climate governance facility that brings together lawyers, economists and policy experts to help private sector and state-owned enterprises develop and strengthen their climate-related governance."

7 Financial Conduct Authority, Policy Statement 21/23, *Enhancing climate-related disclosures by standard listed companies*. Available at: https://www.fca.org.uk/publication/policy/ps21-23.pdf, (last accessed on 19 September 2023).

8 Accounting and Corporate Regulatory Authority, *Public Consultation on Turning Climate Ambition into Action in Singapore - Recommendations by the Sustainability Reporting Advisory Committee*. Available at: https://rb.gy/f4qdg, (last accessed on 19 September 2023).

9 Nigerian Stock Exchange, *Strengthening the Competitiveness of African Economies*. Available at: https://ngxgroup.com/ngx-regulation-urges-public-private-sector-to-implement-initiatives-against-climate-change/; and Financial Reporting Council of Nigeria, *FRC, ISSB & NGX Regulation Limited Launch IFRS S1 & S2 Sustainability Disclosure Standards in Nigeria*. Available at: https://rb.gy/nm0i8, (last accessed on 19 September 2023).

10 Environmental Finance (18 July 2023), "Australia to align standards with ISSB". Available at: https://rb.gy/9fxdj, (last accessed on 19 September 2023).

For example, the ISSB standards focus on "financial materiality" by applying only to sustainability and climate-related risks and opportunities that affect an entity's cash flows, its access to finance or cost of capital. This is because the ISSB standards focus on the needs of investors and providers of capital. On the other hand, the European Sustainability Reporting Standards require disclosure of information which is material both in terms of the impact on an entity's financial value and the entity's impact on people and the environment – "impact materiality" or "double materiality" – thereby focusing on a broader set of stakeholders than merely investors.[11]

In any event, entities must consider both physical climate risks (the impacts on physical assets arising from the occurrence of extreme weather events and gradual shifts in climate patterns) and transition climate risks (the financial risks, such as the risk of stranded assets, which result from the process of adjustment towards a low-carbon economy). The assessment process would include scoping of portfolios and value chains (both upstream and downstream) as well as infrastructure and physical assets to identify potential climate sensitivities. This would cover both sensitivity to transition risks (for example, reliance on carbon-intensive inputs or exposure to climate litigation) and to physical risks (such as water-intensive activities or exposure of key facilities to extreme weather events).

From a strategic and risk management perspective, the damage to or destruction of a company's physical assets can reduce its productivity and output as well as adversely impact its financial position. Financial institutions having contractual ties with such affected companies may also suffer financially owing, for instance, to the affected company's inability to service debt repayments, diminished equity returns and/or a depreciation in collateral value. On the other hand, financial losses from transition risks can arise in several ways for both companies and financial institutions. These include climate-related mitigation policies (such as the introduction of a "green" tax), shifts in public sentiment (such as increased climate-related litigation) and evolving regulatory/supervisory expectations (such as the introduction of more stringent climate-related reporting requirements).

11 The ESRS are drafted by the European Financial Reporting Advisory Group pursuant to the EU Corporate Sustainability Reporting Directive. The ESRS were adopted on 31 July 2023.

The EBRD has developed a corporate climate governance matrix and associated questionnaire to assist with the assessment of a client's maturity level across three stages with respect to corporate climate governance practices.

B. Capacity building: Improving CCG and disclosure practices

The EBRD has developed a CCG matrix and associated questionnaire to assist with the assessment of a client's maturity level across three stages – early stage, developing stage and advanced stage – with respect to CCG practices. The matrix and questionnaire are based on existing and emerging voluntary standards and regulations, and are designed to help companies identify their current maturity level as well as graduate from one maturity level to the next. Once an entity's CCG maturity is identified, the Bank's next step is to help formulate a CCGAP commensurate with the maturity level of the entity's current corporate (climate) governance practices.

- **Governance**: The allocation of responsibilities and accountability mechanisms of the board, operational committees and senior management in identifying, managing and monitoring climate-related matters must be clearly established and disclosed. To govern climate risks and opportunities effectively, organisational procedures for communicating identified risks to the board and relevant committees for due consideration should be clearly defined. To develop the competence of the board and executive officers, steps should be taken to improve their knowledge of and resources for climate risks and opportunities. In terms of more advanced practice, executive incentives could be linked to climate-related targets and indicators, where appropriate.

Supporting climate governance for a Tunisian energy utility

Tunisia's mitigation efforts under its NDC focus on the energy sector, as it is one of the biggest contributors to GHG emissions in the country. Tunisia's state-owned utility – Société Tunisienne de l'Electricité et du Gaz (STEG) – is the central player in the domestic energy sector as it is solely responsible for distribution and transmission of electricity and gas, acts as the single buyer for all generation output and controls electricity generation. As such, STEG's long-term sustainability is critical for the green energy transition in Tunisia.

Since December 2020, the EBRD has been providing technical cooperation to STEG to implement a detailed reform and energy sustainability roadmap to improve its CCG. Under the CCGAP developed with STEG, clear reporting and accountability structures across its operational departments were established and, notably, the responsibility for approving climate-related risk and strategy (including key climate-related performance indicators) was allocated to the board. This is a major step forward for STEG and is an example for other SOEs in the region, especially considering the challenges that such enterprises face in making governance changes. As an outcome of the CCGAP project, STEG adopted a new corporate climate strategy in 2022, which provides a clear strategic roadmap for reaching the objectives of Tunisia's NDC targets.

- **Strategy:** As climate-related impacts are becoming clearer to entities, organisational procedures must be reinvented to ensure the identified climate-related impacts systemically inform investment planning and decision-making processes. As part of this, disclosures should include transition plans. A transition plan is a time-bound action plan that clearly outlines how the entity will pivot its assets, operations and business model to align with the goals set by the Paris Agreement.[12] Transition plans are encouraged so the entity has the benefit of a blueprint to tackle climate issues. This would also enable investors and other stakeholders to assess the entity's commitment to achieving a low-carbon and climate-resilient pathway.

Supporting transition planning for financial institutions

In December 2022 the EBRD published its Paris Agreement alignment methodology, which sets out the Bank's commitment to screen all its lending operations to ensure they are on track to limit global warming to no more than 1.5°C.[13] In particular, as part of this effort in the context of the EBRD's indirect lending operations (that is, EBRD finance extended to financial institutions which on-lend the funds to local projects or investments), the Bank provides technical cooperation to such financial institutions to prepare and implement their own transition plans. The aim is for these financial institutions to ensure their entire portfolio aligns with the goals of the Paris Agreement, well beyond the EBRD's own financial support, thereby bringing about a systemic change. Bank al Etihad, the fourth-largest bank in Jordan in institution to sign up to develop a pilot institutional transition plan with EBRD support to align its business practices and financial flows with the goals of the Paris Agreement.[14]

12 CDP, https://www.cdp.net/en/guidance/guidance-for-companies/climate-transition-plans, (last accessed on 19 September 2023).

13 Methodology to determine the Paris Agreement alignment of EBRD investments (December 2022). Available at: https://www.ebrd.com/ebrd-activities-paris-alignment, (last accessed on 19 September 2023).

14 EBRD press release, "EBRD and Bank al Etihad support growth of small and women-led businesses in Jordan" (December 2022). Available at: https://www.ebrd.com/news/2022/ebrd-and-bank-al-etihad-support-growth-of-small-and-womenled-businesses-in-jordan.html, (last accessed on 19 September 2023).

- **Risk management:** Entities must carry out a materiality assessment to define how the identified climate-related risks and opportunities affect their business, strategy and financial planning. It should also be clearly established which business divisions or units are responsible for identifying, disclosing and managing material climate-related risks and their reporting lines to senior management. The principle of double materiality requires that businesses consider not just the financial impact of climate-related risks and opportunities on the entity, but also the entity's impact on people and the environment.

Strengthening the climate resilience of supply chains in Türkiye

Olam International is a leading food and agribusiness company supplying food, ingredients, feed and fibre in more than 60 countries worldwide. Olam Food Ingredients (ofi), a member of the Olam Group, operates in several supply chains – hazelnuts, coffee, palm oil, cocoa and others – where material social and environmental challenges exist. With the EBRD's assistance, ofi has undertaken a climate-related risk scenario analysis to thoroughly understand the risks and opportunities associated with low-carbon transition and physical climate impacts in ofi's hazelnuts operations in Türkiye. To put this in context, it is estimated that 70 per cent of the world's hazelnut supply is sourced from Türkiye.[15] The scenario analysis exercise with ofi led to the formulation of recommendations on how climate actions can be implemented within value chains to improve climate adaptation and resilience for Turkish hazelnut farms that form part of ofi's supply.[16]

Supporting target-setting for a Bulgarian utility

Since 2022, the EBRD has been helping a Bulgarian electricity distribution company develop and implement a CCGAP. Climate change vulnerability and risk analysis for Bulgaria shows that the energy sector (including critical infrastructure) will be among the most affected sectors in the country.[17] Electricity utilities are particularly susceptible to the physical risks of climate change, such as the exposure of network infrastructure to extreme weather events, as well as transition risks, including the evolving regulatory landscape relating to climate change and green energy in the EU. As part of the CCGAP, the distribution company was encouraged to consolidate, among other indicators, information on GHG emissions, energy consumption, renewable energy capacity and climate-related incidents affecting operations. It was suggested to monitor the evolution of each indicator and to set targets over the short (<2 years), medium (<5 years) and long term (>5 years).

- **Metrics and targets:** Entities must disclose the key metrics used to assess climate-related risks and opportunities in line with their risk management and transition planning ambitions. Ideally, climate-related targets should be formulated across multiple time scales (short, medium and long term) and include interim targets. Disclosures should also involve a description of the methodologies used to calculate metrics and targets. As an entity's disclosure practices become more sophisticated, the metrics must be comprehensive and granular enough to cover different regions, businesses and/or products.

IMPLEMENTATION CHALLENGES

The process of implementing CCGAPs is not without challenges, such as:

- **Availability of data:** CCG enables entities to use climate-related information in internal processes and decision-making, thereby promoting systemic changes that help to develop low-carbon and climate-resilient pathways for business operations. However, to accurately identify and evaluate climate-

15 ofi, *Sustainability in hazelnuts*. Available at: https://www.ofi.com/sustainability/responsible-and-sustainable-sourcing/sustainability-in-hazelnuts.html, (last accessed on 19 September 2023).

16 *Olam Group Limited Annual Report 2022*. Available at: https://www.olamgroup.com/content/dam/olamgroup/investor-relations/ir-library/annual-reports/annual-reports-pdfs/2022/olam_annual_report_2022.pdf, (last accessed on 19 September 2023).

17 *National Climate Change Adaptation Strategy and Action Plan* (2019), Annex 3 (Energy sector). Available at: https://rb.gy/630ne6, (last accessed on 19 September 2023).

related risks and opportunities and undertake climate-related stress testing and materiality assessments, the available information must be high-quality, reliable and comparable. Further improvements in the quantity, quality, reliability and comparability of disclosures are urgently required. In 2020 the EBRD launched a policy initiative to help stock exchanges in our regions develop sustainability reporting guidelines based on applicable national and regional frameworks, with the aim of improving the quality of data reported by companies and helping market participants align with best practice standards for disclosure and reporting. Under this initiative, the Bank has provided support to the Prague Stock Exchange (2023), the Bucharest Stock Exchange (2022), the North Macedonia Stock Exchange (2022) and the Warsaw Stock Exchange (2021) in their development of sustainability-reporting guidelines.

- **Lack of standardisation and alignment:** There is considerable variation across entities and sectors with regard to the content, methodology of preparation and form of presenting climate-related information in disclosures, as well as transition plans. There is also a lack of transparency with regard to the methodologies and approaches applied. The fragmentation of climate reporting has resulted from the multitude of third-party reporting frameworks and gaps in interoperability. Transition planning is still a nascent activity and what these plans should include – and how individual low carbon pathways fit within sector or country pathways – is not always clear. However, the efforts of the ISSB and the European Commission towards ensuring interoperability and developing guidance may address this issue.
- **Lack of capacity and awareness:** Boards and operational teams must be equipped with the right tools and skills to fulfil their obligations with respect to climate-related governance, strategy and reporting. This requires ongoing training and capacity-building support. The nature of support will need to be tailored to the relevant sector, market, country-specific regulatory framework and maturity level of the entity. The EBRD has been successfully working with the Climate Governance Initiative (CGI) since 2022 to provide such support in its regions.[18] For example, the CGI and the EBRD jointly launched Chapter Zero for Ukraine and the Caucasus in 2022 to accelerate knowledge delivery, peer-to-peer learning and sharing of best practices among boards and senior management in these regions.[19]
- **Businesses are oriented to focus on short-term results and value creation:** Businesses are traditionally oriented to deliver short-term value and returns for stakeholders. This can tend to be at odds with the long-term objective setting and risk management required for climate-related matters. As the board's positioning of the entity on short-term decisions can have important long-term implications for organisational resilience to climate change, it is critical to consider how climate change might alter the future business landscape.

CONCLUSION

Private sector and public sector enterprises have a critical role to play in the transition to a low-carbon and climate-resilient economy. Strategic and risk management decisions and action will either slow or accelerate the pace of climate change and how we adapt to it, which will in turn shape risks and opportunities for businesses. Failing to reorient the business environment to address climate change or inability to clearly demonstrate positive action could have a major impact on the sustainability, financial performance, reputation and risk profile of entities.

The EBRD has a vital role to play in helping its clients address climate-related risks and identify business opportunities with reference to the relevant international standards and mandatory regulatory requirements. The Bank is also uniquely placed to offer such support given its focus on, and close relationship with, the private sector and public sector enterprises in its regions. By providing such assistance, the EBRD can enable its clients to identify the most effective pathways towards alignment with the Paris Agreement goals.

18 EBRD press release, "CGI partner up to promote corporate climate governance" (April 2022). Available at: https://www.ebrd.com/news/2022/ebrd-cgi-partner-up-to-promote-corporate-climate-governance.html, (last accessed on 19 September 2023).

19 EBRD press release, "Climate governance platform launched for business leaders in Ukraine, Georgia and Armenia" (September 2022). Available at: https://www.ebrd.com/news/2022/climate-governance-platform-launched-for-business-leaders-in-ukraine-georgia-and-armenia.html, (last accessed on 13 September 2023).

THE IMPACT OF CLIMATE CHANGE ON LAWYERS

> "The climate crisis is having profound implications on the rule of law, as well as the access to – and administration of – justice."

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The growing threat of climate change will define this century and our generation more dramatically than any other challenge. Scientists and environmentalists widely recognise that we have a small window of opportunity to halt the warming of the Earth to prevent a collapse of the vital ecosystems and natural resources on which modern societies are built.

INTRODUCTION: THE CLIMATE EMERGENCY

The Intergovernmental Panel on Climate Change (IPCC), a United Nations scientific body, has released no fewer than six reports presenting a comprehensive assessment of the latest scientific knowledge on climate change, the human role in causing global warming and the potential impacts on nature and biodiversity, societies and economies. In the IPCC's last synthesis report of March 2023, scientists underscored the urgency of taking more ambitious action to reduce GHG emissions.[1] They argued that this was the last assessment period during which the world still had a chance of limiting global temperature rise to 1.5°C above pre-industrial levels, the threshold beyond which the adverse impacts to our planet's natural and human systems will rapidly become irreversible. Global warming can be expected to cause yet more extreme weather and large-scale extinctions, phenomena that have already pushed millions of people into hunger, destroyed homes and livelihoods, and culminated in waves of migration and political instability.

Against this backdrop, the climate crisis is having profound implications on the rule of law, as well as the access to – and administration of – justice. The UN Human Rights Council, the International Covenant on Civil and Political Rights, domestic courts and international bodies recognise that climate change poses serious risks to fundamental human rights.[2] In July 2022 the UN General Assembly declared access to a clean and healthy environment a universal human right. This decision should accelerate the implementation of national legislation and enforcement.

The number and complexity of claims for climate justice have increased. On the international level, the Court of Justice of the European Union is expected to issue a first-of-its kind advisory opinion regarding countries' responsibility for climate change.[3] At national courts, the profile of claimants ranges from farmers seeking to preserve their livelihoods and children requesting intergenerational justice to affected parties asking to hold large carbon emitters responsible for higher levels of carbon dioxide concentration in the atmosphere.

In this context, the role of the legal profession in tackling the impacts of climate change has come to the fore. Climate and sustainability disclosure standards and expanded regulation now aim at increasing corporate transparency and accountability relating to entities' carbon (and broader environmental) footprints and their management of climate risks. And all the while, the risks of exposure to climate-related litigation are growing more acute and more clearly quantifiable. When it comes to addressing the climate crisis, lawyers are going to be very busy indeed.

1. IPCC (20 March 2023), *Urgent Climate Action Can Secure a Liveable Future for All*. Available at: https://www.ipcc.ch/2023/03/20/press-release-ar6-synthesis-report/, (last accessed on 9 June 2023).
2. United Nations Human Rights Office of the High Commissioner, *Human Rights Council Resolutions on Human Rights and Climate Change*. Available at: https://www.ohchr.org/en/climate-change/human-rights-council-resolutions-human-rights-and-climate-change, (last accessed on 28 May 2023).
3. See BBC article "Climate change: World's top court to weigh in" (23 March 2023). Available at: https://www.bbc.co.uk/news/science-environment-65097831, (last accessed on 2 June 2023).

SHIFTING MARKET, POLICY AND REGULATORY CONTEXTS

Averting the worst possible consequences of climate change will require no less than a transformation of both economy and society, underpinned by a redirection of capital to new types of products, services and infrastructure. Financial markets and institutional investors are shifting towards sustainable investments with ever more urgency and purpose.

The Task Force on Climate-related Financial Disclosures (TCFD), established by the Financial Stability Board, published its recommendations on disclosures in 2017. Since then, many companies, investors and regulators around the world have adopted these standards. The Glasgow Financial Alliance for Net Zero (GFANZ) – the world's biggest coalition of financial institutions, sitting on upwards of US$ 130 trillion of capital – committed to adopting high-ambition, science-based targets, including achieving net-zero emissions by 2050.[4] More than 80 per cent of Financial Times Stock Exchange 100 companies and other big organisations have announced similar commitments over the last couple of years.[5]

In this context, asset owners, with a collective heft of US$ 11 trillion in assets, have pledged to align their investment portfolios to a net-zero target by 2050, while asset managers have committed to helping their clients decarbonise.[6]

4. GFANZ was launched at the 2021 United Nations Framework Convention on Climate Change (UNFCCC) Conference of Parties. Its more than 550 member firms represent an astonishing 40 per cent of the world's financial assets under management. They will all now work to meet global net zero by 2050. See "Amount of finance committed to achieving 1.5°C now at scale needed to deliver the transition", Glasgow Financial Alliance for Net Zero (2021). Available at: https://www.gfanzero.com/press/amount-of-finance-committed-to-achieving-1-5c-now-at-scale-needed-to-deliver-the-transition/, (last accessed on 19 September 2023).

5. Including the non-profit We Mean Business coalition, which works with more than 10,000 companies to set climate actions and take action to deliver them, and Climate Action 100+, which works with more than 171 focus companies that are considered the largest corporate GHG emitters.

6. The UN-convened Net Zero Asset Owner Alliance is a member-led initiative of 86 institutional investors who have committed to moving their portfolios to net zero by 2050. See https://www.unepfi.org/net-zero-alliance/. The Net Zero Asset Managers Initiative is a group of 301 investment managers with US$ 59 trillion in assets under management who are committed to helping their asset owner clients decarbonise by 2050. See https://www.netzeroassetmanagers.org/, (last accessed on 19 September 2023).

Voluntary commitments, while laudable, will not alone suffice to avert the climate crisis. Policymakers and regulators are increasingly aware that market stability requires that organisations disclose their governance and management of climate-related risks. A growing number of policy, legal and regulatory measures have been taken on a national level since the 2015 Paris Agreement on climate change, including the following:

1. **Climate change legislation:** There has been a 20-fold increase in the number of global climate change laws since 1997. These include the United Kingdom's 2008 Climate Change Act, which commits the British government to reducing GHG emissions by 100 per cent from their 1990 levels (net zero) by 2050, to the European Green Deal and the European Climate Law.[7] Policymakers have responded to a "ramping up" in pressure to establish legally based targets and obligations on climate mitigation and adaptation goals. This has tightened the regulatory regimes and expectations from companies working in all sectors of the economy.
2. **Mandatory disclosure regimes:** The EU has developed a comprehensive sustainable finance legislative package that includes numerous measures and instruments. The Sustainable Finance Disclosure Regulation, for example, which came into effect in March 2021, requires financial market participants and advisers to reveal how they integrate environmental, social and governance (ESG) factors into their investment decision-making process and how they assess the likely impacts of sustainability risks on the returns of their investments. The United Kingdom has adopted mandatory climate-related financial disclosure regulations for publicly quoted firms, large private companies and limited liability partnerships; these requirements came into force in March 2021.[8] The US Securities and Exchange Commission has also announced the development of climate disclosure standards that may become mandatory in public company filings. The International Organization of Securities Commissions has issued similar statements encouraging issuers to provide high-quality and decision-useful ESG disclosures to investors.
3. **Policies and emerging standards:** Public markets and listing rules increasingly require more transparency around climate and broader ESG risks. The London Stock Exchange demands climate-related financial disclosures from premium-listed commercial companies, while some smaller stock exchanges have issued recommendations to their clients for coherent, decision-useful and consistent ESG reporting (for example, the Warsaw Stock Exchange and the Prague Stock Exchange).[9] On 26 June 2023, the International Financial Reporting Foundation's ISSB launched its climate and sustainability standards, which the G20 recognises as a global baseline. The European Sustainability Reporting Standards, expected to be approved later in 2023, underpin the mandatory reporting of the EU's 2022 Corporate Sustainability Reporting Directive, which, in turn, will apply to more than 40,000 companies at the end of its five-year "phased-in" application starting in January 2024.

A growing number of policy, legal and regulatory measures have been taken on a national level since the 2015 Paris Agreement on climate change.

7 Grantham Research Institute on Climate Change and the Environment, *Law and Policy Search - Climate Change Laws of the World*. Available at: https://climate-laws.org/, (last accessed on 9 June 2023).

8 See Department for Business, Energy, and Industrial Strategy (February 2022), *Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs*. Available at: https://www.gov.uk/government/publications/climate-related-financial-disclosures-for-companies-and-limited-liability-partnerships-llps, (last accessed on 9 June 2023).

9 The EBRD has provided technical cooperation to stock exchanges to develop frameworks for ESG disclosure in line with EU sustainable finance standards and good international practices. See EBRD press release, "EBRD helps North Macedonia exchange to develop ESG guidelines". Available at: https://www.ebrd.com/news/2022/ebrd-helps-north-macedonia-exchange-to-develop-esg-guidelines-.html https://rb.gy/630ne6, (last accessed on 19 September 2023).

4. **Climate change in the courtroom:** Increasingly, litigation is used to influence climate action. Courts hear climate change arguments against companies, policymakers and regulators and have been asked to uphold the principles of climate justice. In many cases, courts rule in favour of climate action, with some cases leading to new climate policies and actions.[10] Climate litigation in Europe has advanced climate action, with 113 favourable and 86 unfavourable decisions.[11] This trend is likely to continue, with the courts, in some cases, complementing the work of legislators in tackling the impacts of climate change.[12] Climate cases can also have major indirect effects on the decision-making of private sector actors due to unforeseen costs involved, public perceptions or a decrease of company share value.[13]

In the face of these policy, legal and market shifts, there has never been a better time for lawyers to contribute to the climate and broader sustainability agenda. The world is changing rapidly as societies embark on an unprecedented journey to combat the climate crisis, consisting of efforts centred around the concepts of low-carbon and just, resilient and sustainable development. And, as in every societal and economic transformation, inequalities and inequities will emerge and even persist. In the face of this, the law – and lawyers – will therefore inevitably and appropriately be called upon to ensure that the scales of justice are balanced.

A CRITICAL ROLE FOR THE LEGAL PROFESSION

Over the last couple of years, various bar associations and law societies – including the American Bar Association,[14] the International Bar Association,[15] the Law Society of England and Wales[16] and the Council of Bars of Europe[17] – have begun to underline the crucial role of the lawyer in the climate transition.[18] Indeed, in their joint international meeting on climate change in March 2022, more than 15 bodies representing the legal profession recognised the key role lawyers can play in “leading climate action” and “leading on climate justice to protect the rule of law, access to justice and the public interest”.[19] Since then, more joint statements have been released in support of the climate agenda. There is emerging recognition that lawyers should practise in a “climate-conscious” way, which is central to the Climate Change Resolution of the Law Society of England and Wales of November 2021.

10 An assessment of direct judicial outcomes in climate change cases indicates that around 55 per cent of the 549 cases in which either an interim or final decision has already been rendered have outcomes favourable to climate action. See J. Setzer and C. Higham (June 2023), Global trends in climate change litigation: 2023 snapshot, Grantham Research Institute on climate change and the environment (lse.ac.uk). Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf, (last accessed on 19 September 2023).

11 J. Setzer, H. Narulla, C. Higham and E. Bradeen (December 2022), *Climate litigation in Europe: A summary report for the European Union Forum of Judges for the Environment, Grantham Research Institute on Climate Change and the Environment*. Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/12/Climate-litigation-in-Europe_A-summary-report-for-the-EU-Forum-of-Judges-for-the-Environment.pdf, (last accessed on 19 September 2023).

12 J. Setzer and C. Higham (June 2022), *Global trends in climate change litigation: 2022 snapshot, Grantham Research Institute on Climate Change and the Environment*. Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf, (last accessed on 10 July 2023).

13 A filing or unfavourable court decision in a climate case has been shown to lower a company’s value, with the largest stock market responses seen for cases filed against Carbon Majors, which faced a 0.57 per cent drop in firm value following case filings and a 1.5 per cent drop in firm value following unfavourable judgments. Setzer and Higham, *op. cit*.

14 American Bar Association House of Delegates, “Resolution Adopted August 12-13, 2019”. Available at https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/111-annual-2019.pdf, (last accessed on 23 May 2023).

15 International Bar Association, Climate Crisis web page (https://www.ibanet.org/LPRU/Climate-Crisis), (last accessed on 23 May 2023).

16 The Law Society of England and Wales, Creating a climate-conscious approach to legal practice . Available at: https://www.lawsociety.org.uk/topics/climate-change/creating-a-climate-conscious-approach-to-legal-practice#download-the-resolution, (last accessed on 23 May 2023).

17 See Council of Bars of Europe, CCBE initial statement on climate change. Available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ENVIRONMENT_AND_CLIMATE_CHANGE/ENVCC_Statements/EN_ENVCC_20230216_CCBE-initial-Statement-on-Climate-Change.pdf., (last accessed on 22 July 2023).

18 Other professionals (for example, financial advisers and accountants) have also been asked to promote responsible practices in the public interest and contribute to long-term value creation. See ACCA Global (2021), Climate Action and the Accountancy Profession: Building a Sustainable Future. Available at: https://www.accaglobal.com/gb/en/professional-insights/pro-accountants-the-future/climate-action-accountancy-profession.html, (last accessed on 9 June 2023).

19 Procedural minutes of the international meetings between bars and law societies on climate change, 1 March 2022. Copy is with Vesselina Haralampieva, who joined in her capacity as a representative of the Climate Change Working Group of the Law Society of England and Wales.

Climate-conscious lawyering rests on the understanding that climate change is a growing source of financial risk to businesses and national economies, as well as to society more broadly and to the natural world.[20] Organisations' risk registers typically assess the likelihood of a risk occurring and the scale of its impact. Climate risk increasingly scores high for both measures.[21] Climate change may not present the most important risks for every client of every lawyer, but it will affect most clients in some way. Solicitors in England and Wales, in particular, are increasingly expected to practise the legal profession in a way that supports the 1.5°C Paris Agreement goal.[22]

In particular, the Law Society of England and Wales, the International Bar Association and a growing cohort of professional legal organisations urge their members to:

- Consider the likely impact of any legal matter on the climate crisis and provide competent advice to their clients, taking into account the climate mitigation and adaptation objectives of the Paris Agreement;
- Consider the likely climate-related risks and liabilities for their clients and businesses;
- Advise clients, where applicable, about the benefits of disclosure of climate-related risks and opportunities related to their entire business operation;
- Continue their legal education on matters pertaining to climate change;
- Engage in pro bono activities that support the Paris Agreement objectives.

In light of these recommendations, lawyers should consider the extent to which these risks and other climate-related matters will be material to their clients or employers and their practice. While the response and engagement will probably vary across different areas of the profession, ultimately the lack of engagement on behalf of a solicitor may lead to the question of whether lawyers are truly acting in the best interests of their clients or employers (the latter in respect of in-house lawyers). As awareness of the impact of climate change on various practice areas grows, it is reasonable to expect that a competent lawyer would be able to advise clients how to mitigate their litigation and regulatory risks. Such advice may involve, for example, developing credible transition plans (for carbon-intensive businesses or financial institutions) and increasing the transparency of climate risk management and disclosure (to reduce climate litigation risks). Climate-conscious lawyering is, in fact, by its design meant to be consistent with a lawyer's duties, including duties of care and the paramount duty to act in the best interests of a client or employer.

THE LEGAL PROFESSION IS PART OF THE SOLUTION

As climate-related pressures on the legal profession mount, the Law Society of England and Wales has taken a leadership role in issuing its landmark "Guidance on the Impact of Climate Change on Solicitors" (herein the "Guidance"),[23] which is likely to inform legal practices globally. The document builds on the Climate Change Resolution and helps

[20] As emphasised by the Bank of England and financial regulators and supervisors worldwide. See Network for Greening the Financial System (2018), *NGFS First Progress Report*. Available at: https://www.ngfs.net/en/first-progress-report. Accessed 9 June 2023; World Economic Forum (15 November 2021), *Climate Change Is Driving a Financial Crisis – Here's What Needs to Change*. Available at: https://www.weforum.org/agenda/2021/11/cop26-climate-change-is-driving-a-financial-crisis-heres-what-needs-to-change-risk-mitigation-investment/. Accessed 9 June 2023; and UNFCCC, *COP26 Outcomes: Finance for Climate Adaptation*. Available at: https://unfccc.int/process-and-meetings/the-paris-agreement/the-glasgow-climate-pact/cop26-outcomes-finance-for-climate-adaptation, (last accessed 9 June 2023).

[21] For a categorisation of climate-related risks, see the Bank of England's Explainer, "Climate change: what are the risks to financial stability?" Available at https://www.bankofengland.co.uk/explainers/climate-change-what-are-the-risks-to-financial-stability, (last accessed 23 May 2023).

[22] The Law Society of England and Wales (2021), *Creating a climate conscious approach to legal practice*. Available at: https://www.lawsociety.org.uk/topics/climate-change/creating-a-climate-conscious-approach-to-legal-practice#download-the-resolution, (last accessed 9 June 2023).

[23] The Law Society of England and Wales (2023), *Impact of Climate Change on Solicitors*. Available at: https://www.lawsociety.org.uk/topics/climate-change/impact-of-climate-change-on-solicitors, (last accessed 19 September 2023).

solicitors manage their practice in a way that aligns with a transition to a decarbonised economy. This includes a description of Scope 1, 2 and 3 GHG emissions and an indication of actions lawyers can take to reduce the carbon footprint of their law firm and their organisation (for in-house lawyers).

The Guidance also underlines the important role lawyers should play to avoid accusations of "greenwashing" by ensuring that their firms' and organisations' green targets, claims and commitments are based soundly on science and regulations.[24] For example, marketing and pitch documents should not overstate climate and sustainability targets or progress; these should be meaningful and substantiated. A firm's climate stance will likely affect its ability to attract and retain employees, as lawyers are increasingly asking about the green credentials of their future firm or employer. In addition, the Guidance explains lawyers' "advised" emissions – that is, the GHG emissions associated with the matters on which a lawyer advises. This is probably the most significant source of climate impact for lawyers and is attracting increased attention in relation to professional services.

Climate change will affect most clients and most practice areas. It gives rise to physical, transition and/or liability climate risks, which in turn could become legal risks. For example, extreme weather events (a physical climate risk) can have impacts on the built and natural environment. This may affect asset resilience, value and insurability in commercial and corporate transactions. New climate-related disclosure or reporting regulations (associated with transition risks), for example, can scale up competency requirements and shift client expectations. Finally, the growing number of greenwashing claims and shareholders' or fiduciary duties clearly increase the liability risks that lawyers are expected to manage and mitigate. Solicitors should be able to take into account relevant climate-change considerations in providing client advice, and they should be alert as to the possible impact of climate-related legal risks on their professional duties. The Guidance recognises that the effects of climate change are wide-reaching and constantly evolving, which has a major impact on legal practices of all sorts. Lawyers should understand this changing context, enhance their knowledge and ensure that their advice is competent.

> "Climate-conscious lawyering rests on the understanding that climate change is a growing source of financial risk to businesses and national economies, as well as to society more broadly and to the natural world."

THE ROLE OF THE IN-HOUSE COUNSEL

In-house lawyers have a unique role to play in responding to the climate crisis. They are closer to the business of their "clients" and thus can be expected to understand the likely effects of the changing policy and regulatory context. The general counsel in particular is often a trusted adviser to boards on matters related to good governance, reputation and integrity in the context of climate and broader ESG considerations. There is a natural role for the general counsel to advise an organisation on how to avoid misleading consumers, shareholders or broader groups of stakeholders about the environmental, social or other impacts of the organisation's products

24 Greenwashing is a behaviour or activity designed to signal that an organisation or a product is more environmentally friendly, green or sustainable than it is in reality.

and activities. More importantly, in-house lawyers may also steer senior management and board discussions towards favouring decisions that progress net-zero commitments and long-term value creation, eschewing choices that would tend to serve short-term commercial interests.

Below are a few actions in-house lawyers may consider taking in this new context:[25]

- Advising their boards of the need to develop leadership to respond to the climate crisis, to adopt a net-zero strategy with ambitious interim goals and, importantly, to be transparent about all of these.
- Helping their organisations embed climate and sustainability considerations in their strategic documents, integrating them into the broader business operations and policy engagement or dialogue.
- Demanding climate-conscious provisions in legal agreements and standard contracts, as and where appropriate.
- Requesting procured goods and services to be net-zero aligned and working with outside lawyers to ensure they adopt sustainable and climate-conscious practices.
- Developing climate literacy to advise the business, including in respect of the mitigation of climate risks.
- Seeking advice from specialised lawyers as required.

The Guidance also emphasises the role of in-house counsels in curbing greenwashing and delivering on the net-zero ambition or other green commitments of their organisation. In addition, in-house lawyers working in multinational businesses will need to include as part of their due diligence processes any impending policy, legal and regulatory changes in various jurisdictions that may give rise to climate risks (including transition or liability risks).

Several legal initiatives have started to raise awareness on the role of – and increased expectations for – in-house lawyers. Lawyers for Net Zero and the Chancery Lane Project, for example, provide resources to in-house and private-practice lawyers to help them take action and navigate the challenges that climate change raises. This is in addition to the Law Society of England and Wales' new and growing resources web page.[26]

THE ROLE OF THE IN-HOUSE COUNSEL IN INTERNATIONAL ORGANISATIONS

In-house lawyers in international organisations face an even more specialised version of this set of concerns and duties. These lawyers are generally asked to support the mandate of their organisation – which, in many cases, focuses on promoting sustainable development and improving lives in emerging markets or developing economies.[27] Similarly, most international organisations are expected to act in a socially responsible way.[28] In an operational context, this generally means having a material positive impact on society and the environment and having regard for the interests of relevant stakeholders. Given that in-house lawyers provide essential support to their organisations, it is reasonable to expect them to aim to offer advice that leads to sustainable and responsible practices across all operations of their organisations.

A number of multilateral development banks (MDBs), for example, have jointly committed to support the Paris Agreement goals and address the challenges of sustainable development, climate change and biodiversity loss in an integrated way.[29] The MDBs and the International Monetary Fund (IMF) are committed partners in countries' efforts to achieve the Sustainable Development Goals (SDGs).[30] The financing that MDBs channel – both directly and by catalysing additional public and private resources – delivers

25 The ESG context is far broader than the issue of climate change and deserves a separate discussion, including the impact of a changing climate on human development and human rights.

26 See Climate change | The Law Society, (last accessed 22 July 2023).

27 Usually defined as "meeting the needs of the present without compromising the ability of future generations to meet their own needs". See United Nations (1987), *Report of the World Commission on Environment and Development*.

28 These commitments are expressed in an international organisation's establishing treaty, charter, and/or relevant policies. The main purpose of international organisations is to provide a mechanism for people to work more successfully together in the areas of peace and security and also to deal with economic and social questions.

29 See EBRD press release (November 2022), "MDBs to expand support for countries seeking climate-resilient sustainable transition". Available at: https://www.ebrd.com/news/2022/mdbs-to-expand-support-for-countries-seeking-climateresilient-sustainable-transition-.html, (last accessed 2 June 2023).

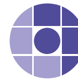
30 See United Nations (2020), *Financing the Sustainable Development Goals: The Contributions of the Multilateral Development Banks*. Available at: https://www.un.org/ohrlls/sites/www.un.org.ohrlls/files/mdb.pdf, (last accessed 14 June 2023).

a major sustainable development impact. The technical capacity, policy and regulatory tools and knowledge they provide help countries unlock investment and remove obstacles on the pathway to achieving climate objectives and the SDGs. In furtherance of their commitment to climate transition, some MDBs have developed Paris Agreement alignment methodologies for their investments and other operations. To support the expanding mandate of their institutions, in-house lawyers may need to enhance their expertise to integrate climate and ESG considerations in legal documentation, institutional operations and countries' legal/policy reform. In-house lawyers in international organisations therefore naturally play a leadership role in developing and promoting climate-conscious lawyering – and, indeed, sustainable development more broadly.

CONCLUSION

Climate change may well be the defining challenge of our time, and lawyers – whether in firms or in-house – have an essential role to play in addressing it. Legal professional organisations have urged their members to reduce their firms' carbon footprint and reassess their practices in the context of the risks and impacts caused by climate change. Contrary to the certainty and predictability principles on which the rule of law is built, climate change is causing uncertain and unpredictable impacts on a broad range of affected parties – and to natural systems as a whole.

Amid a rapidly evolving policy and legal context, lawyers will have to exercise their best judgement as they seek to uphold the rule of law and defend justice. Due to their role as both reputation guardians and trusted partners to clients within an institution, lawyers are increasingly expected to advise businesses on their sustainability and climate transition. International organisations' in-house lawyers are value-adders and are expected to support the mission of their employers. By deploying their skills and expertise, in-house lawyers must be prepared to ensure the credibility and the necessary level of granularity in their organisations' climate and sustainability strategy.



POWERING THE ENERGY, DIGITAL AND GREEN TRANSITIONS: EBRD SUPPORT FOR THE CRITICAL RAW MATERIALS MARKET IN ITS REGIONS

“Simply put, our modern life – in all its dimensions, be it personal, social, commercial or family – is in thrall to the rocks and liquids that provide the raw material input for the technologies on which our daily lives depend.”

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Despite the economic importance of the raw materials that underpin electrification, digitalisation and greening, until recently surprisingly little attention had been paid to the growing challenges of securing timely, diverse and sustained access to metals, minerals and other natural materials. Covid-19, Russia's war on Ukraine and renewed geopolitical competition has focused increased attention on the sourcing of these critical raw materials. This article looks at the increasing demands for those vital minerals and the challenges in securing reliable supplies, highlighting the EBRD's role and activities in this crucial area.

The security of supply of fossil fuels has been a serious concern to politicians and economists for years, and has taken on even greater importance due to the Russian invasion of Ukraine. Yet the growing challenge of securing timely, diverse and sustained access to metals, minerals and other natural materials has received limited attention until recently.

Many non-energy raw materials are not only vital to produce a broad range of goods and applications used in everyday life, but also to develop high-tech products and emerging innovations, for example, towards more environmentally friendly technologies. Simply put, our modern life – in all its dimensions, be it personal, social, commercial or family – is in thrall to the rocks and liquids that provide the raw material input for the technologies on which our daily lives depend. Those rocks and liquids, of course, consist of various metals, minerals and natural raw materials that pepper the periodic table.

As we move to a world defined by the energy, digital and green transitions, our world becomes one increasingly powered by technology filled with those raw materials. Cobalt, graphite and lithium for batteries to power our electric cars; tungsten to make our mobile phones vibrate; gallium and indium to light our LEDs; silicon for our semiconductors; and platinum for hydrogen fuel cells and electrolysers, to name a few.

As that technology evolves, we rely even more on the raw materials that are essential to its functioning. Given the economic importance of the raw materials that underpin electrification, digitalisation and greening, where they have a limited or high-risk supply source, they have become known as critical raw materials (CRMs).

The International Energy Agency tells us that in 2040 the world is expected to need four times as many critical minerals for clean energy technologies as it does today.[1]

> “Critical raw material supply chains are often opaque and complex, and subject to increasing risk of disruption from ongoing global events.”

Very little mining of these materials currently occurs in Europe, and production from recycling is unable to meet the growing demand, boosting reliance on external sources.

Unfortunately, however, CRM supply chains are often opaque and complex, and subject to increasing risk of disruption from recent long-tailed, and ongoing, global events – the Covid-19 pandemic, rising competition between western economies and China, and Russia's invasion of Ukraine.

These events have created market volatilities and distortions, enabling some supplier countries to consolidate strong positions in the CRM market, while also isolating others from the supply chain. This leads to a situation where economies, their jobs and industries that rely on CRMs become vulnerable to those volatilities and distortions.

1 https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions, (last access on 19 September 2023).

Governments the world over are therefore understandably keen to diversify their sources of CRMs for the green/digital transitions and ensure that their CRM supply chains are resilient enough to support the industries of the future, deliver on the energy transition and protect our national security.

Against this background, the Bank is keen to help its economies play a role in meeting the challenges of CRM supply volatility. It does this by helping those economies that are actual or potential suppliers of CRM to develop their resource base and become part of a more diverse supply of CRMs feeding that global demand.

The Bank can do this in two ways. First, by lending or investing in sector exploration or production companies and second, by helping to modernise governance and regulation of the minerals sector, as a means of improving the investment climate. Such an improvement will make it easier to attract more and better investment as a means of driving sector development and expansion.

The EBRD's role in lending and investing in the minerals sector is relatively well known. Less known is its role in helping to modernise governance and regulatory frameworks as a means of enhancing the business environment, and thus driving investment in minerals sector development.

Governments the world over are therefore understandably keen to diversify their sources of critical raw materials for the green/digital transitions and ensure that their critical raw material supply chains are resilient enough to support the industries of the future, deliver on the energy transition and protect our national security.

THE **WHY**, **WHEN**, **WHO**, **WHAT** AND **HOW** OF EBRD TECHNICAL COOPERATION IN THE MINERALS SECTOR SUPPORTING GOVERNANCE AND REGULATORY REFORM:

Why: The EBRD's minerals sector technical cooperation helps build or strengthen policy, law, regulation and governance with the aim of attracting more and better investment as a means of driving sector development and enabling the sector to make a greater contribution to broader economic growth.

When: The EBRD's minerals sector technical cooperation usually precedes the Bank's lending/investment activities in the sector, or can run alongside that lending/investment, with the aim of amplifying the positive impact or mitigating any potential negative impact of that lending/investment.

Who: The EBRD's minerals sector technical cooperation supports policymaking authorities (cabinet, ministries), regulatory authorities (mining regulator, geological surveys) and other implementation authorities.

What: The EBRD's minerals sector technical cooperation helps to identify, adopt and operationalise proven best practice policies, laws, regulation, governance and methodologies/approaches, as well as training and capacity-building.

How: The EBRD's minerals sector technical cooperation programmes are designed jointly by EBRD sector specialists and in-country counterparties, implemented by highly qualified and extensively experienced external consulting advisers, supervised by EBRD sector specialists and are largely or wholly grant-funded.

The EBRD's minerals sector technical cooperation supports a broad spectrum of activities across a full range of mineral sector issues. Examples of types of activities and partner countries include the following:

Policy/strategy development: Mineral sector policy helps governments clarify and publicise the overall objectives and approaches for how minerals will be developed and is intended to guide the development of a country's mineral resources as a foundation for national economic development. Policy should aim to address several interconnected priorities: establishing clear investment policies to encourage investment, ensuring clear delineation of institutional responsibilities, creating a well-balanced fiscal regime for mining activities, setting up environmental and social safeguards consistent with international best practices, and introducing critical standards for transparency and good governance of the sector. Mineral sector policy should guide development of a country's mineral resources in a comprehensive way that considers the technical, economic, environmental, social and other mining-related aspects of the sector. The Bank's support activities here can include help both to establish the policy development framework and to develop the policy itself.

Example:

In **Georgia** and **Uzbekistan**, working with the government to develop a modern mineral sector policy and policy development framework designed to attract investment, establish responsible operations, protect the environment and increase revenues to government.

Preparing minerals sector legal framework: Upon adoption of new or revised mineral sector policies, new or revised laws are required to provide a firm legal basis for implementation of approved policies.

Bank support activities here can include help in preparing new primary laws and amendments to existing primary (mining, subsoil) laws.

Example:

In **Georgia**, **Mongolia** and **Uzbekistan**, working with the governments to prepare new mining laws, with the aim of creating a favourable legal environment and as a means to operationalise new, more modern, policies to attract more and better investment.

Preparing regulations to implement new primary law, together with support in implementing the law and regulations: Upon adoption of new or revised primary laws, new or revised secondary legislation – in particular regulations, guidance, methodologies and so on – will be necessary to practically implement and operationalise approved policy.

Bank support activities here can include help preparing new regulations, guidance and methodological frameworks to add the necessary detail to the general provisions of primary law. These regulations enable the functional implementation and operationalisation of policy in each topic area. Drawing on the provisions of law and policy, among the subtopic areas covered are:

- Institutional arrangements and regulatory governance
- Award and licensing of mineral rights
- Fiscal/tax provisions
- Geodata management
- Cadastral management
- Environment protection
- Land access and use
- Labour and safety
- Social and cultural safeguards
- Value addition and mining-related development
- Categorisation of minerals
- Classification and reporting of exploration results, and mineral resources and reserves
- Mine closure, reclamation and reinstatement

Capacity-building, training and support in practical implementation: Besides preparing the regulations and methodologies needed to operationalise policy in the subtopic areas noted above, capacity-building and training for officials involved in implementing specific regulatory areas are also necessary, along with help with practical implementation of the new regulations and approaches.

Examples of EBRD support for practical implementation activities among the subtopic areas outlined above include the following.

Geodata management: Modern systems and methodologies to capture, store, process and disseminate geoscience documents, maps and data – ideally in digital online form – are among the crucial tools available to accelerate inward investment into the minerals sector. Accessible geoscientific data (geodata), information and advice encourage mineral resource companies to invest by reducing exploration risk and the entry cost for them. This leads to higher expenditures to explore for mineral deposits – the first step to sustainable mining investments. Accessible digital geodata also help national governments understand their resource potential, which allows them to regulate activities and plan economic developments in a sustainable manner.

“ The EBRD’s role in lending and investing in the minerals sector is relatively well known. Less known is its role in helping to modernise governance and regulatory frameworks as a means of enhancing the business environment, and thus driving investment in minerals sector development. ”

Unfortunately, obsolete methods are often used to record and store geodata, with much of the information available only in antiquated/non-digital form (for example, paper or disk). As the digitisation of geodata should contribute substantially to improving the transparency and wider accessibility of this vital resource to develop the sector, this is an area of keen interest for EBRD technical cooperation support.

EBRD support activities here can include establishing/strengthening viable geodata management practices such as database and data management, analysis capacity and clear rules for ownership and use of geodata.

Example:

In **Mongolia**, working with the Mineral Resources and Petroleum Authority of Mongolia to establish a National Geoscience Database. Before operationalisation of the database, valuable geoscientific information was fractured and maintained across a number of paper and digital databases. Integrating these sources into one coherent system ensures all information is accessible and consistent – a key step to attract increased investment. This project covered design, hardware, software, installation and training.

Example:

In **Ukraine**, working with the Ukraine Geology Service (UGS) to accelerate the digitisation of the country's huge collection of geological reports in its hardcopy archive.

This archive is an irreplaceable treasure trove of geoscience information, captured over decades in the context of state-funded and private exploration campaigns whose total cost may reach several billion euros and whose contents are also estimated to be worth billions of euros. EBRD support for UGS has four goals:

1. Increasing accessibility of geoscientific data, information and advice to encourage mineral resource companies to invest.
2. Enabling the government to better understand its resource potential, allowing it to regulate activities and plan economic developments in a sustainable manner.
3. Helping to protect the Ukrainian hard-copy archive from the more immediate risk of damage or destruction during the conflict with Russia.
4. Ensuring the digitalised documents can be readily available, as soon as possible, to contribute to ongoing physical infrastructure damage limitation and reconstruction efforts. Geodata are critical for those efforts in three ways, in that they identify the location, nature and grade of:

a) raw materials that will be essential for the physical reconstruction of the country (construction materials for roads, buildings)

b) CRMs that will be a key input for the digitalisation, electrification and greening of the Ukrainian economy (such as copper, cobalt, graphite, titanium and lithium), which are expected inevitably to be part of the country's reconstruction effort

c) CRMs that can be exported to the EU and other foreign countries to generate significant revenue for the reconstruction effort, and to reduce the EU's dependency on a few suppliers (rare earths, lithium and so on).

Having the geodata documents digitalised and ready in a public portal to attract investment to the sector once the security situation in Ukraine improves – without having to wait the likely years it could take without the intervention of this project – should make a major and quick contribution towards the reconstruction and recovery of the Ukrainian economy.

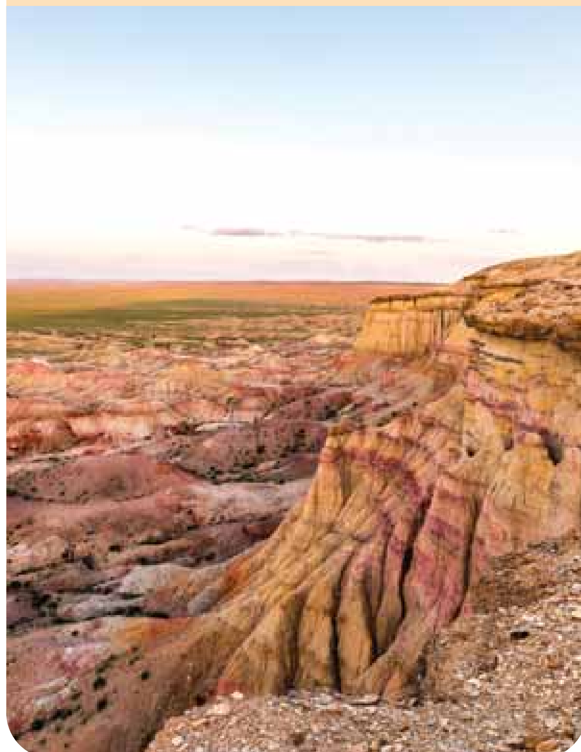
Fiscal regime and revenue management: A fair and predictable mining taxation regime is critical to increase market competitiveness, attract legitimate and responsible investment, and enhance the sector's near- and long-term development and economic growth prospects.

Bank support activities here can include design of a modern royalty/tax-based system of payments. Additional work can include implementing revenue management approaches to facilitate more equitable distribution of mining benefits and prudent investment of mining revenues, as well as investor eligibility requirements and measures to track beneficial ownership and transfer pricing.

Examples:

In **Georgia**, working with the Ministry of Finance to design and implement a market-based reporting and revenue monitoring system and introduce a modern royalty/tax-based system of payments.

In **Mongolia**, working with the Ministry for Mining and Heavy Industry and EITI Mongolia to design, adopt and implement a framework to track, and account for and publish sector revenue, ownership, production and operational data.



Standards for classifying and reporting exploration results and mineral resources and reserves: Adopting a global best practice independent reporting standard for the sector will improve the accuracy and reliability of reporting. This, in turn, will improve access to better information for existing or new investors in the sector.

EBRD support activities here can include helping with the transition from older (Soviet-era) standards to more modern, investor-focused standards (for instance, CRIRSCO/JORC based standards); helping to restate and reassess deposits according to newer standards; helping to establish a framework to identify and certify competent experts; providing support to develop the reporting code; and helping to prepare relevant laws, decrees and regulations.[2, 3]

The capacities, capabilities and experience of the EBRD in supporting the modernisation of sector governance and regulation described above – allied with its investment resources – places the Bank on a very strong footing to have a major impact on the development of the sector.

Given the centrality of CRMs to broader economic development in its green, digital and electrified forms, the Bank's role in the sector is likely to expand, along with its impact across the EBRD regions.

Example:

In **Kazakhstan** and **the Kyrgyz Republic**, working with the government on the adoption and implementation of best practice standards for classification and public reporting of mineral exploration results, mineral resources and mineral reserves – a key means to bolster investor confidence in the sector in Kazakhstan and the Kyrgyz Republic. EBRD support is helping these two countries transition from Soviet-era reporting standards to more modern investor-focused standards.

2 Environmental Finance (18 July 2023), "Australia to align standards with ISSB". Available at: https://rb.gy/9fxdj, (last accessed 19 September 2023)

3 The ESRS are being drafted by the European Financial Reporting Advisory Group pursuant to the EU Corporate Sustainability Reporting Directive, which entered into force in January 2023.

THE EBRD'S REFORM SUPPORT TEAM AND MINERALS SECTOR DEVELOPMENT IN UKRAINE

In addition to its broad support for minerals sector reform and development across its economies, the EBRD also implements a Ukraine-focused programme which helps the government tackle various mineral sector development issues. An overview of this programme's work is set out below.

Before Russia's invasion of Ukraine, the Ukrainian construction industry relied mostly on domestically produced raw materials. Now, reconstruction of roads, buildings and facilities depends largely on imported building materials. Difficult times, however, require innovative solutions, with waste from infrastructure destroyed by the war becoming an important source of input materials for the reconstruction of Ukraine.[4] With that in mind, enhancing circularity in the minerals industry and attracting more investments into operations in the CRM value chain are key directions of the post-war reconstruction of Ukraine.

The EBRD is supporting the reform and development of the minerals sector in several ways, with the goal of drawing investment. One way the Bank helps sector reform and development is through the work of EBRD- supported reform support teams (RSTs). These teams are composed of professionals from outside the Ukrainian civil service who are retained to work in ministries on a temporary basis to implement priority reforms and transform the ministries themselves.

In addition to its broad support for minerals sector reform and development across its economies, the EBRD also implements a Ukraine-focused programme which helps the government tackle various mineral sector development issues.

One such RST, supporting mineral sector reform, is based at the Ministry of Ecology and works closely with the ministry and the Ukrainian Geological Survey. From the outset of the war, UGS and the RST have been working to develop a map of raw materials used in construction, as a means to speed up identification and extraction of materials that can be used in reconstruction efforts. These materials include more than 20 different types of minerals and 6,000 subsoil areas (mineral deposits), the lion's share of which represent approved reserves and promising resources that can be distributed to interested developers.

4 https://www.epravda.com.ua/publications/2023/03/28/698387/, (last accessed on 19 September 2023).

Additionally, RST advisers on minerals support a newly formed government entity in developing stimulus measures to attract investment into extraction of construction minerals used to restore objects damaged due to the ongoing conflict.[5]

RST advisers are also helping to coordinate and monitor an EBRD technical cooperation project that supports UGS in the digitisation of Ukraine's vast archive of geological data. Advisers' work will help ensure the protection of these data from damage or destruction and their continued availability to support mineral extraction in aid of reconstruction.

Together with UGS, RST advisers helped to develop a Partnership Roadmap 2023-24 which the European Commission endorsed on 20 March 2023. The actions agreed as part of this action plan – once the conditions on the ground allow for their implementation – will help to rebuild and modernise Ukraine's economy while also supporting the country to align with the EU's policies and regulatory frameworks. These include the application of EU and international ESG standards, as foreseen in the Memorandum of Understanding with the European Union on a strategic partnership on raw materials.[6]

On 5 April 2023, the Verkhovna Rada Committee on Environmental Policy and Nature Management established a working group to study international experience and develop legislative proposals to improve the legislative regulation of strategic and critical minerals in Ukraine.[7] RST advisers on minerals have been included as participants in the working group's work focus on aligning Ukrainian legislation in the area of raw materials to the EU best practice and regulations.

5 Operational headquarters for the provision of construction materials (products) for the purpose of restoring objects damaged as a result of the armed aggression of the Russian Federation - Decree of the Cabinet of Ministers of Ukraine of 13 July 2022 No. 790. Available at: https://www.kmu.gov.ua/npas/pro-utvorennia-operatyvnoho-shtabu-iz-zabezpechennia-budivelnymy-materialamy-t130722, (last accessed on 19 September 2023).

6 https://ec.europa.eu/docsroom/documents/46300/attachments/1/translations/en/renditions/native, (last accessed on 19 September 2023).

7 https://komekolog.rada.gov.ua/news/Povidomlennja/76187.html, (last accessed on 19 September 2023).

GREEN PROCUREMENT FOR GREEN INVESTMENT

> “As long as green procurement is not defined and mandated by law, buying “green infrastructure” is a strictly declaratory exercise, with no monitoring of the project and procurement cycle from planning through to contract implementation and no measuring of the project’s environmental impact.”

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Buying green infrastructure and ensuring a more sustainable and greener supply chain are vital, but cannot happen without considering inclusive and equal economic growth and harnessing innovation and technology to achieve fair and equitable public services. Most governments in the EBRD regions are only just embarking on their journeys towards green procurement and sustainable public infrastructure. Local governments around the world are being recognised for developing a better understanding of how sustainability fits into their local community considerations, priorities and governance processes. Municipalities can frame sustainability benchmarks in a clear and meaningful way and use them to manage their public infrastructure investments.

INTRODUCTION

Since the 2021 United Nations Climate Change Conference known as COP26, there has never been more interest in sustainability. But there has probably never been more frustration, either. With commitments covering a coal phasedown, deforestation, methane and finance in particular, governments now need to translate their climate change pledges into real delivery. This is where sustainability of investment and public contracts comes in.

Public procurement makes up a significant part of the global economy and, depending on levels of economic development, may represent 16-19 per cent of a country's gross domestic product, according to the Organisation for Economic Co-operation and Development (OECD).

What is less frequently mentioned is that government commerce – that is, what governments buy and sell – is responsible for 15 per cent of all GHG emissions annually, according to World Economic Group estimates. That's seven times as much as the global aviation industry.

To tackle this, governments must commit to delivering public infrastructure and public services in a fundamentally different way. It is no longer a choice – whether it is a case of "building back" to recover from the impact of natural disasters or war, or a new public-sector investment programme, public infrastructure and public services must be sustainable to meet climate change pledges.

Sustainability in public procurement refers to several different policy areas and priorities. For governments, it means the challenge of regulating not only how to buy, but also what to buy, to determine how taxpayer dollars or euros are going to be invested in green projects and sustainability. For procurement officials, meeting the public sector's climate change pledges means carrying out complex and knowledge-intensive public procurements better and more frequently. If the current practice of procuring infrastructure is left unchanged, it will put a brake on environmental progress and leave transition economies most vulnerable.

EU EXAMPLE OF CLIMATE CHANGE GOALS

The EU's Green Deal aims to create an economy that produces no net emissions of GHGs by 2050 and where economic growth is decoupled from resource use and no person or place is left behind. The EU has acknowledged on the regulatory level that economic development can take a less environmentally damaging path than the one followed by countries that finished industrialising in the 20th century. There have been headline commitments, including across the entire European Union Resilience and Recovery Facility. EU leaders believe procurement can play a major role in sustainable development as 250,000 public bodies spend around 15 per cent of the bloc's annual gross domestic product procuring goods, services and works. Used strategically, procurement can dictate trends in markets – especially those of the food, textile and technology sectors and for public infrastructure. The Green Deal is clear: the European Commission will propose further legislation and guidance on green public purchasing.

IT'S A LONG WAY FROM A CLIMATE CHANGE PLEDGE TO A SUSTAINABLE INFRASTRUCTURE PROJECT

EU member states realised the potential behind public infrastructure procurement budgets in the early 2000s and several governments started using green procurement strategically. Since then, green public procurement has become the most institutionalised and ambitious strategic procurement area in the EU with, arguably, the highest uptake levels. New EU public procurement directives adopted in 2014 redefined its "most economically advantageous tender" process as "price and other criteria" selection to make it easier to procure goods, services and infrastructure based not only on the lowest-cost criterion, but also considering quality, sustainability, social impact and innovation.

Circular procurement is one of the more recent trends that provides specific opportunities, and countless institutions are working on the green agenda across the EU. Despite the opportunities for green procurement provided in the 2014 EU directives, the daily procurement practices of most public buyers in Europe, especially municipalities, have changed very little. Sustainability is still an afterthought and not a default way to design and procure public infrastructure projects. So, what are the institutional blocks and barriers – both regulatory and non-regulatory – to wider uptake, and how do we tackle them?

LEGAL BARRIERS IMPOSED BY PUBLIC PROCUREMENT REGULATION

If we were still in the early 1990s, with public procurement laws highlighting the importance of "value for money" in the short term, legal frameworks could be seen as barriers to reducing GHG emissions. A regulatory concept of green public procurement was born in the 2000s and today, international public procurement legal instruments, starting with the World Trade Organization's revised 2012 Agreement on Government Procurement, are freeing governments up to focus explicitly on reducing carbon emissions and setting ambitious green public procurement goals.

Several countries have introduced compulsory regulatory instruments to reduce GHG emissions in government commerce, including public

procurement carbon footprint registries (Spain), decarbonising the transport and construction sectors (Norway), promoting life-cycle costing in public infrastructure (Sweden) and reinventing environmental product declarations to inform about product carbon footprint (Germany). Looking at practices in their domestic markets, however, it should be noted that following green public procurement principles remains voluntary for public authorities in the EU. The lack of obligation means there are vast differences in green procurement implementation across the EU.

In some member states, such as Bulgaria, Poland, Romania and the Slovak Republic, fewer than 5 per cent of public contracts include any green procurement considerations. There is no evidence of ambition among EU governments to achieve green targets, with green procurement limited to minor spending categories. In many European countries, green procurement is mandatory only in certain product and service categories. These include Denmark (wood products), Estonia (furniture, cleaning products, information technology (IT)), France (energy efficiency, waste requirements), Greece (transport, road lighting), Latvia (street lighting, food), Malta (office buildings, roads) Norway (construction, food catering), the Slovak Republic (roads) and Slovenia (buildings, roads).

At the same time, there is a clear correlation between the levels of green achievement in public infrastructure and making green procurement principles mandatory for all or most public procurement of goods, services and works. Green procurement principles must be incorporated at all levels of government in Cyprus, Czech Republic, Italy and Norway, but not for all public procurement. Green procurement principles are mandatory for central government procurement in Austria, Croatia, Cyprus, Czech Republic, Finland, Germany, Italy, Norway, Spain, Switzerland and the United Kingdom. Levels of green requirements differ widely, though, from use of minimum sustainability criteria, giving preference to the most environment-friendly bid, to mandating life-cycle analysis. Ireland required all public procurement to incorporate green criteria in January 2023.

Like low-carbon energy debates, green public procurement is a divide between developed and low- and middle-income countries. As they have contributed the least to global GHG emissions, low- and middle-income countries – including several EBRD economies – have resisted linking climate change pledges to their public budget spending and modernising their public procurement systems with green procurement principles in mind.

KNOWLEDGE ASYMMETRY AND COMPLEXITY BARRIERS

When it comes to market knowledge, public procurement markets in developed economies (excluding for defence procurement) frequently suffer from knowledge asymmetry between the private and public sectors. This prevents public-sector procurement from innovating and performing at the same level as commercial firms. In transition economies, when public procurement regulations are modernised in line with international legal instruments and the public sector introduces new purchasing methodologies and techniques to domestic commercial markets, green procurement is often a complex topic for both public and private-sector market stakeholders. This is where "green procurement" knowledge products, such as methodologies and tools, are becoming important.

At the same time, few procurement transformation strategies unlock green innovations from markets. Many resources are publicly available under open licences and intensively promoted by various international organisations, from the EU to the United Nations. These include eco-labels, International Organization for Standardization standards, sector- and product-specific technical specifications, sustainability award criteria, life-cycle costing-based calculators, carbon footprint tools, environmental management systems, environmental product declarations and environmental spend analysis. However, it is difficult to discern where and how often these tools are used and at what stage of the procurement process, and their specific application to infrastructure procurement.

As a result, green procurement skills and the expertise of individual public bodies are perceived as low and the public sector continues to search for suitable tools to meet needs in terms of procuring infrastructure. The reason for this may be the complexity of this knowledge. Green procurement is far more information-intensive and complex than standard price-based sourcing and average public-sector bodies with average budgets (also in developed countries) are not incentivised to invest in the development of green procurement expertise in-house, unless strictly mandated by law.

GREEN PROCUREMENT CAPACITY BARRIERS

The “green excellence” of national centralised purchasing bodies, especially in Austria, Italy and the Netherlands, underscores the impact of green procurement capacity barriers. Centralised purchasing bodies are typically given regulatory or financial incentives to develop green procurement expertise in-house and/or have budgets adequate to purchase top-level expertise from the market.

These entities are more likely to know where to start and how to calculate carbon emissions and source more sustainable building materials for infrastructure projects for the domestic market. They are also more likely to develop and retain expertise and the skills needed to plan, tender, award and deliver truly sustainable public infrastructure. This gives rise to the question of whether investing in centralised green purchasing is the best way to move the public sector towards sustainability and inclusion in public infrastructure projects. Despite the resounding success of centralised green procurement, the question is valid because of the widely known market risks of creating any type of state budget-supported monopoly.

INSUFFICIENT TRANSPARENCY OF PUBLIC PROCUREMENT INFORMATION TRANSLATES INTO MARKET ACCESS BARRIERS TO GREEN INVESTMENT

The ability to define what constitutes green procurement is closely linked to measuring the environmental impact of green procurement and tracking the domestic economy’s progress towards green objectives. Even the best advice on buying green and using procurement to “green” markets does not immediately translate into new sustainable infrastructure without a comprehensive and standardised infrastructure project governance process and accessible comparable data across the public infrastructure life-cycle, from design to decommissioning.

The speed at which green procurement of infrastructure can become an established mainstream policy depends on political and regulatory decisions, budgetary/financing commitments and digital transition. The OECD says 69 per cent of its members identify procurement as having the highest potential environmental impact, budgetary importance and potential to influence the market, set ambitious green procurement goals

and track progress towards them. Still, mainstreaming green procurement is not happening at the pace and scale needed and evidence of new and green infrastructure mitigating the worst impacts of climate change is relatively limited. For most OECD member states, only indicative green procurement information is available as a percentage of total public procurement spending. Beyond that, there is no reliable information, regular data collection or clear reporting on reduced waste or carbon emissions.

GREEN, NOT GREENWASHED

With climate pledges taking the political spotlight, it is increasingly clear that fuzzy definitions of what constitutes green procurement and insufficient transparency of information on public procurement are creating market access barriers to genuinely green procurement. For example, Latvia calls its public procurement "green" when just one green criterion is applied to qualify a supplier or award the public contract and it represents at least 5 per cent of the total contract amount. This means that Latvia can claim to have achieved 100 per cent green procurement in the public procurement market when only 5 per cent of these procurements are green in reality.

As long as green procurement is not defined and mandated by law, buying "green infrastructure" is a strictly declaratory exercise, with no monitoring of the project and procurement cycle from planning through to contract implementation and no measuring of the project's environmental impact. The lack of common legal standards and no pressure to provide publicly available data on green versus non-green procurement discourages markets from offering green products, services and works. It hampers the capacity of national governments to implement and deliver plans that will turn climate pledge commitments into actual investments in genuinely green public infrastructure.

In this context, it should be mentioned that while national governments are struggling, cities in many countries stand out for their advancement in green procurement at the municipal level.

CITIES THAT (MAY) LEAD THE WAY

While the sustainable infrastructure challenge is complex politically, economically and institutionally, there may be a way to bridge the divide. Local governments around the world are being recognised for developing a better understanding of how sustainability fits into their local community considerations, priorities and governance processes. This is because cities are major contributors to climate change. Their global share of GHG emissions stands at 70 per cent and is rising. Urban populations are also highly vulnerable to the effects of climate change, and without a redesigning of the delivery of municipal services such as infrastructure, housing, health and safety, cities' capabilities to grow sustainably and inclusively are hampered. Faced with challenges, municipalities are potentially quicker to identify the barriers or limitations that arise when investing sustainably and understand why past sustainable procurement initiatives have failed or succeeded. With some help, cities can frame sustainability benchmarks in a clear and meaningful way and use them to manage their public infrastructure investments.

Copenhagen, Helsinki, Oslo and Stockholm target zero-emission construction sites, have rigorous circular economy standards for construction and civil works, and advance climate neutrality and zero-waste projects through local green public procurement strategies. Barcelona, Berlin, Bremen, Hamburg and Vienna have made green procurement of public infrastructure mandatory for all local government investments, whether privately or state-budget funded. What all these cities have in common is careful selective drawing on market expertise, investing in in-house green procurement skills and advancing digitalised governance of public infrastructure projects. And yes, they are all in developed countries, when the effects of climate change are worse in poor and low-income communities.

Would it be possible for local governments and municipalities in transition countries to follow their example – to become a building block of sustainable public infrastructure and public services for their domestic economies? With this question in mind, the next sections examine the EBRD green investment, finance and technical cooperation available to municipalities in our regions. There is a role to play to provide significant, long-term support to cities to help them invest and adopt policies aimed at preventing or mitigating the negative effects of climate change.

EBRD Green Cities has harnessed the strategic institutional orientation towards a green transition and positioned sustainable infrastructure at the forefront of climate finance.

EBRD GREEN CITIES

The EBRD has been implementing the Green Cities programme since 2016. This programme promotes municipal leadership in developing sustainable infrastructure in the EBRD regions. Rapid urban growth has greatly increased demand for resources, which, in turn, affects both the environment and the quality of life of urban residents. Worldwide, cities account for 70 per cent of energy use and 80 per cent of GHG emissions. In the EBRD regions, these challenges are particularly acute due to demographic changes, insufficient investment in infrastructure and historical legacies of high energy and carbon intensity.

The Bank developed EBRD Green Cities to build a better and more sustainable future for cities and their residents. The programme helps identify, prioritise and link cities' environmental challenges with sustainable infrastructure investments and policy measures. EBRD Green Cities uses four interventions to help cities achieve sustainable local development with a reduced carbon footprint:

- *Green City Action Plan:* Assessing and prioritising environmental challenges based on specific indicators and developing an action plan to tackle the challenges through policy interventions and sustainable infrastructure investments.
- *Green infrastructure investment:* Facilitating and stimulating public or private green investments in water and wastewater, urban transport, district energy, energy efficiency in buildings, renewable energy, solid waste and climate resilience.

- *Green finance:* Providing green finance for locally delivered projects reducing the carbon footprint.
- *Capacity building:* Providing technical support to city administrations to ensure that sustainable infrastructure investments and green finance are implemented effectively.

At the time of writing, EBRD Green Cities covers 54 cities – most recently, Gaziantep in Türkiye. All participating cities, with EBRD help, work on a Green City Action Plan to create a tailor-made list of environmental investments and policy actions addressing their individual environmental challenges. The Bank aims to mobilise €5 billion to replace dated infrastructure causing environmental degradation and higher GHG emissions and, through these investments, help save 1.2 million tonnes of carbon dioxide equivalent a year.

EBRD Green Cities draws on the Bank's unique internal expertise as an international financial organisation offering green investment. It provides technical support, giving partnering cities market knowledge and on-demand sustainability market expertise and helping them to develop in-house sustainable infrastructure and the necessary digital transformation skills to digitalise governance of public infrastructure projects.

GREEN PROCUREMENT STRATEGY FOR SUSTAINABLE MUNICIPAL INFRASTRUCTURE AND SERVICES

EBRD Green Cities has harnessed the strategic institutional orientation towards a green transition and positioned sustainable infrastructure at the forefront of climate finance. If required – as demonstrated by the success stories of Barcelona, Berlin, Bremen, Hamburg and Vienna – EBRD Green Cities' technical cooperation may support the development of green procurement strategies to underpin delivery of municipal sustainable infrastructure specified in individual action plans, as well as other projects, including the projects supported by EBRD green finance.

A green procurement strategy with a horizontal impact on several municipal services may strengthen the impact of the Green City Action Plan and harness the benefit from synergies across sectors to maximise the value of green investments. Developing a municipal-level green procurement strategy in the context of a Green City Action Plan has several practical advantages. First and foremost, with priority green infrastructure

investments identified by the action plan that cover both public budget and private sustainable infrastructure investments, the green procurement strategy is fit-for-purpose and is inevitably very sector- and product-focused, to support delivery of specific investments. The framework of the Green City Action Plan should help the municipal administration better navigate knowledge asymmetry and complexity challenges and tailor its green procurement strategy to fit targets of planned sustainable infrastructure. With clearly specified sustainability targets, the municipal administration can better manage the selection of relevant green procurement best practice as well as methodologies and appropriate resources.

As a result of the EBRD's commitment to facilitating and/or stimulating public or private green investments in line with the action plan, municipal-level green procurement strategies also have access to the Bank's procurement expertise for green municipal investments. Importantly, the green infrastructure investments facilitated and/or stimulated by the Bank within the framework of the priorities specified in the action plan give the partnering city an opportunity to pilot and verify the approach of the green procurement strategy in practice. Piloting the green procurement strategy with green investments facilitated and/or stimulated by the Bank creates unprecedented opportunities to learn and improve to fit specific market needs and adopt tested green procurement instruments for regular use with other relevant municipal infrastructure investments.

DIGITAL TRANSFORMATION ACCELERATES SUSTAINABLE INFRASTRUCTURE

Finally, in the context of a Green City Action Plan and building on technical cooperation knowledge products and resources developed by the Bank to support the modernisation of national public procurement systems, the Bank can help partnering cities develop in-house sustainable infrastructure capacities and new green procurement skills and tools harnessing the technology to accelerate green transition in municipal infrastructure. These include SOURCE – an online platform for managing private-sector investment in sustainable infrastructure projects – as well as several green procurement digital tools developed as part of the Bank's technical cooperation projects to help public-sector organisations overcome complexity and capacity challenges in implementing energy performance contracts (EnPCs), life-cycle costing and purchasing energy-efficient products for municipal services.

Sustainable Infrastructure Platform of the EBRD Infrastructure Project Preparation Facility

The EBRD LTP promotes modern regulatory standards for concessions and PPPs and to develop new legislative solutions with governments of the EBRD regions. The EBRD Infrastructure Project Preparation Facility seeks to improve public-sector capacities in preparing and managing quality sustainable infrastructure projects. International finance institutions set up the Sustainable Infrastructure Platform (SOURCE) in 2016 to harmonise regulatory, governance and sustainability standards for infrastructure project preparation and to create a reliable database for infrastructure projects.

Current efforts to improve the functionality of SOURCE will enable interoperable digital solutions that can be integrated with national digital registers, e-procurement systems and online contracting and payment solutions for creating an end-to-end digital governance process for PPPs and concession projects. The update will also enable SOURCE to focus on gender and inclusion issues to support further infrastructure sustainability from the initial design stages. Pilot projects are being developed to integrate the platform with the national e-government systems of the EBRD regions.

Green procurement digital tools piloted by EBRD LTP technical cooperation projects

The EBRD LTP promotes adoption of new laws and regulations targeting energy efficiency and reversing climate change, including EnPCs, life-cycle costing and eco-labelling. To be effective, regulatory change must be accompanied by accessible implementation tools. The best way to improve the understanding of new environment-friendly regulatory instruments and ensure they are highly accessible to market stakeholders is to use the technology. The programme's experience from technical cooperation indicates that digital green procurement tools can show that life-cycle costing represents a better indicator of value for money than the initial product price, the eco-labelled products purchased by the government lower public budgets and aid the environment, and a large-scale use of EnPCs helps private-sector investment reverse climate change in municipal communities.

For example, within 12 months from January 2021, a "green online shopping" technical cooperation pilot project with Prozorro Market introduced 23 energy-efficient product categories to public-sector buyers and qualified 203 suppliers of eco-labelled products to participate in public tenders in Ukraine. As a result, energy-efficient products bought in 319 public tenders in Prozorro Market saved the state budget UAH 10 million (€242,530) and generated annual energy savings of 3,856,307 kWh. Similarly, upon adoption of new legislation on EnPCs in Ukraine, a technical cooperation pilot developed and digitalised standard bidding documents and introduced Prozorro ESCOlator – an online automated energy performance public tender for EnPCs. This enabled transparent and competitive online synchronous bidding for ESCO companies with excellent results: within 12 months of the pilot, which started in November 2017, Ukrainian municipalities advertised 172 EnPC contracts and 72 contracts worth UAH 40 million (€970,120) were signed, with energy use expected to be halved.

> A green procurement strategy with a horizontal impact on several municipal services may strengthen the impact of the Green City Action Plan and harness the benefit from synergies across sectors to maximise the value of green investments.

CONCLUSION

EBRD Green Cities helps build the municipal-level capacities and skills necessary to carry out green infrastructure projects and use new digital tools for sustainable infrastructure. If extended to cover developing green procurement strategies, it opens the door for a municipality to access modern digital tools for sustainable infrastructure project management and green procurement tools, which are necessary to implement green investment and green finance programmes successfully.

Developing a green procurement strategy under a Green City Action Plan can help municipal administrations identify the relevant green procurement best practice to implement their green finance and green infrastructure investment projects. The Bank's technical cooperation may support municipal administrations as they identify and prioritise necessary green investments under a Green City Action Plan, designing municipal green investment programmes and facilitating and/or stimulating green investments.

EBRD Green Cities – Chisinau building project

An EBRD feasibility study in Chisinau Municipality in Moldova identified 119 buildings to be renovated to save enough energy costs to attract private sector investment. The EBRD Green Cities project in the municipality covers Bank loans of up to €25 million and a total project size (loans) and co-financing grants amounting to €37.5 million.

The loans and technical cooperation grants finance energy-efficiency measures in public buildings to be carried out through energy performance contracts. An EnPC mechanism was tailored for Moldova, drawing on the lessons learned in Ukraine to maximise private sector interest. The EBRD Green Cities project with Chisinau included technical cooperation grants to develop a Green City Action Plan, prepare a feasibility study covering technical, environmental and social due diligence, and provide project implementation support that covers (i) energy audits of selected buildings, (ii) selection of buildings to be renovated under the EnPCs and (iii) engineering design, procurement, contract award and administration. The project aims to reduce energy consumption and carbon dioxide equivalent in the buildings.

Chisinau has prepared and adopted the action plan to guide green investment at city level and the first EnPC contracts for 47 buildings are in progress. Despite initial challenges, the private sector has introduced incentive-based outsourcing or management contracts. A solid waste project was developed in 2020, drawing on the action plan.

As the EBRD Green Cities project seeks to promote a replicable financial product for similar energy-efficiency projects across Moldova and enable the private sector to help design and implement energy-saving projects through EnPCs, the EnPC mechanism developed and tested by the project was introduced to national procurement practice. Lessons learned in Ukraine were again helpful. The EBRD LTP has been working with Moldova's Ministry of Finance since 2016 to introduce a new e-procurement system, MTender, which builds on the success of Prozorro Market in Ukraine.[1] Potentially, digital green procurement tools for EnPC, life-cycle costing and purchasing energy-efficient products in online shopping can be used for technical cooperation with Chisinau Municipality.

1 See https://mtender.gov.md, (last accessed on 19 September 2023).

A green procurement strategy gives municipal governments reliable and best practice sustainability information, methodologies and "easy wins" that can make a big difference for local communities. It goes beyond strategic guidance, suggesting concrete steps to take and practical tools to use, because the Bank is harnessing the technological revolution to help local leaders unlock the power of technology and create green change for cities and their residents.

The EBRD's technical cooperation projects in the area of sustainable infrastructure and green procurement focus on adopting green procurement strategies through digital tools that drive sustainable procurement by helping public and private market stakeholders overcome knowledge and complexity barriers. This will make it easier to capture and share procurement sustainability data and remove market access barriers to green infrastructure investment.

The Bank's technical cooperation is creating innovative green procurement knowledge and digital products in the hope of making green procurement knowledge tools easily available to market stakeholders through user-friendly online portals. The objective is for green sector and product-specific technical specifications, evaluation methodologies and sustainability award criteria, life-cycle costing-based calculators, carbon footprint tools, eco-labels and environmental spend analysis of public contracts to become both standard and frequently used components of national e-procurement systems.

ENABLING DIGITAL TRADE THROUGH LEGAL REFORM

> "In the United Kingdom alone, digitalising trade documents would generate £25 billion in new economic growth for SMEs, together with £1 billion in new trade finance."

1
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This article explains the benefits of digitalising international trade and analyses how the current legal obstacles mandating the use of paper-based documentation could be addressed through adopting the UNCITRAL Model Law on Electronic Transferable Records.

THE CASE FOR DIGITAL TRADE

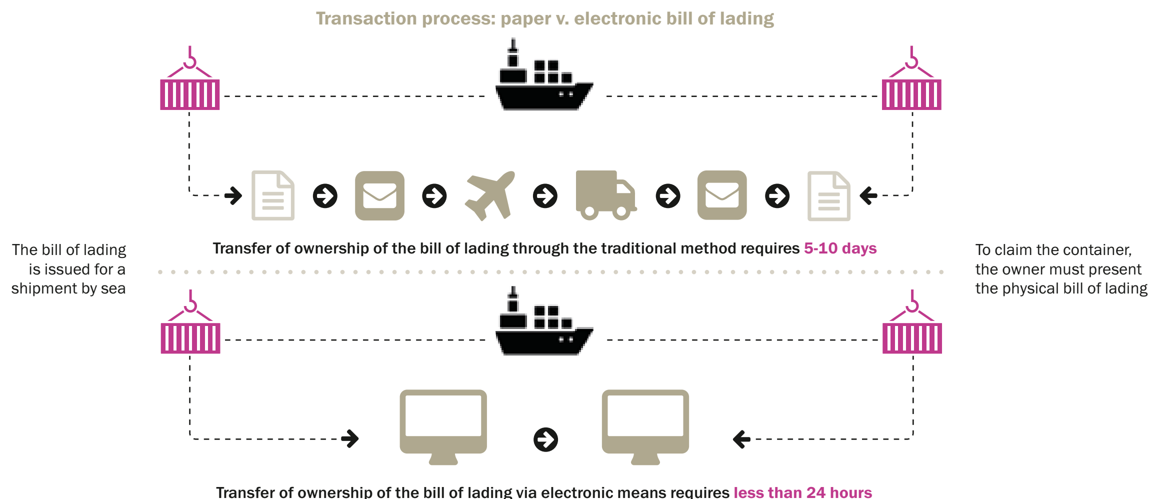
International trade is the engine that drives economic development around the world. Through trade, economies tap into one another to make up for shortfalls and address domestic demand for goods and services.

Economies have traded with each other since ancient times. Over the years, decades and centuries, driven by growing populations, economic outputs and – as a result – trade volumes, the means of trading internationally have evolved to address the increased demand. While the means of carrying goods across the borders have evolved, however, the practices and processes involved in the trade process have failed to follow suit. This is primarily because most trade processes still, at one point or another, require the production and exchange of paper-based documents to effect trade fully. This results in delays and inefficiencies. Digital technologies have the potential to deliver enormous benefits and transform the way (domestic and international) trade and trade finance work.

In the United Kingdom alone, using digital documents instead of the paper-based processes would improve the efficiency of small and medium-sized enterprises (SMEs) by 35 per cent, according to the International Chamber of Commerce. It would also reduce the number of processing days by 75 per cent and free up efficiency savings of £224 billion (€254 billion). Digitalising trade documents would generate £25 billion (€28 billion) in new economic growth for SMEs, together with £1 billion (€1.14 billion) in new trade finance.[1]

The Digital Container Shipping Association estimates that ocean carriers issue 16 million bills of lading a year, costing the industry US$ 11 billion (€10 billion) annually. Fewer than 0.3 per cent were electronic bills of lading. A 50 per cent adoption of electronic bills of lading would save more than US$ 4 billion (€3.6 billion) a year.[2]

Figure 1. **Electronic bill of lading greatly reduces time to transfer ownership**



Note: Figure depicts the Singapore/Rotterdam Corridor experience with an electronic bill of lading
Source: ICC France White Paper[3] citing TradeTrust Newsletter issue 05 IMDA[4]

1. UK Law Commission (2022), Recommendations to Allow Electronic Documents Would Revolutionise Trade. Available at: https://www.lawcom.gov.uk/recommendations-to-allow-electronic-documents-would-revolutionise-trade/, (last accessed on 19 September 2023).
2. See https://www.shippingandfreightresource.com/conversion-of-bill-of-lading-to-electronic-bills-gains-traction-with-bimcos-25-by-25-pledge, (last accessed on 19 September 2023).
3. See https://www.icc-france.fr/wp-content/uploads/2022/09/ICC_France_WhitePaper_.pdf, (last accessed on 19 September 2023).
4. See https://www.tradetrust.io/news, (last accessed on 19 September 2023).

TRADE DOCUMENTS AND INSTRUMENTS

Trade and trade finance transactions are effected through the transfer and exchange of various documents and instruments such as bills of exchange, promissory notes, bills of lading, ship's delivery orders, marine insurance policies, cargo insurance certificates and warehouse receipts.[5] They create the necessary trust between the parties and mitigate the inherent risks of cross-border trade. The specifics of these documents vary, but the common feature they all share is that only the "holder/possessor" of such document/instrument can exercise the underlying rights that come with it.[6]

In international trade transactions, for the reasons mentioned above, parties transfer possession of such documents and instruments (together with their underlying rights) between each other. The legal concept of possession, however – in the vast majority of jurisdictions – comprises only *physical* possession of goods/things. This is the key element that dictates and mandates the physical production, transfer and exchange of such documents and instruments. As such it presents a barrier to the production, transfer and exchange of electronically issued documents and instruments.

LEGAL AND REGULATORY ENVIRONMENT

Recognising that statutory reform of domestic legislation is the best way to remove the impediments arising from the legal requirements for "possession," the United Nations Commission on International Trade Law (UNCITRAL) prepared the Model Law on Electronic Transferable Records (MLETR). This law seeks to enable the legal use of electronic trade documents and instruments, both domestically and across borders.

In pursuit of this aim, the MLETR relies on the following principles:

- **Non-discrimination against the use of electronic means** – thus not allowing electronic trade documents and instruments to be deemed invalid solely on the grounds that they exist or are issued in electronic form.
- **Functional equivalence** – thus granting electronic trade documents and instruments the same status as paper-based counterparts.
- **Technology neutrality** – thus accommodating the use of all technologies and all models, such as registries, tokens and distributed ledgers.

" One of the key novelties under the Model Law on Electronic Transferable Records is the introduction of the notion of "control" representing the functional equivalent of "possession" of a document or instrument. "

Perhaps one of the key novelties under the MLETR is the introduction of the notion of "control" representing the functional equivalent of "possession" of a document or instrument. Under the model law, an electronic document/instrument meets the possession requirement if a reliable method is used to (a) establish exclusive control of that electronic transferable record by a person and (b) identify that person as the person in control. The MLETR also provides guidance on assessing the reliability of the method used to manage an electronic transferable record and on change of medium (electronic to paper and the reverse), among other things.

The digitalisation of trade documents would benefit many business areas, especially those that relate to transport and logistics. It also promises to facilitate access to credit, as it enables more innovative supply chain financing techniques (for example, deep-tier supply chain finance) that reach the SMEs in the deeper supply chain tiers.[7] Furthermore, digitalising trade documents opens up opportunities for trade finance assets to become a liquid, investible asset class.[8]

5 This list is taken from Section 2(1) of the UK Electronic Trade Documents Bill, the text of which is annexed to the Law Commission Report.

6 Usually, rights to claim performance of the obligation to pay money (instruments) or to deliver goods (documents).

7 ADB Briefs No. 129, Deep-Tier Supply Chain Finance. Available at: http://dx.doi.org/10.22617/BRF220397-2, (last accessed on 19 September 2023).

8 See Christoph Gugelmann (February 2023), "Breaking down the barriers to investing", Private Debt Investor. Available at https://www.privatedebtinvestor.com/breaking-down-the-barriers-to-investing/. See also Eleanor Wragg (November 2022), "AllianzGI launches investment-grade trade finance fund", *Global Trade Review*. Available at https://www.gtreview.com/news/global/allianzgi-launches-investment-grade-trade-finance-fund/; and McKinsey and Company (October 2022), *The multi-billion-dollar paper jam: Unlocking trade by digitalizing documentation*. Available at: https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/the-multi-billion-dollar-paper-jam-unlocking-trade-by-digitalizing-documentation, (last accessed on 19 September 2023).

Uptake of the MLETR: Singapore case study[9]

On 1 February 2021, Singapore became the second country to adopt the MLETR principles when it amended its Electronic Transactions Act (ETA) by adopting the Electronic Transactions (Amendment) Bill ("Amended 2021 ETA"). The country did not fully adopt the text of the MLETR, but aligned its laws with MLETR provisions.

Singapore has also taken practical steps to facilitate digital trade. The government has built a public Distributed Ledger Technology platform (TradeTrust) to support the exchange of electronic trade documents. It also proposed and is actively collaborating with the United Nations Centre for Trade Facilitation and Electronic Business to issue a white paper containing guidance on the transfer of MLETR-compliant titles.[10]

The first electronic bill of lading transaction governed by Singaporean law was issued in accordance with the Singapore ETA.

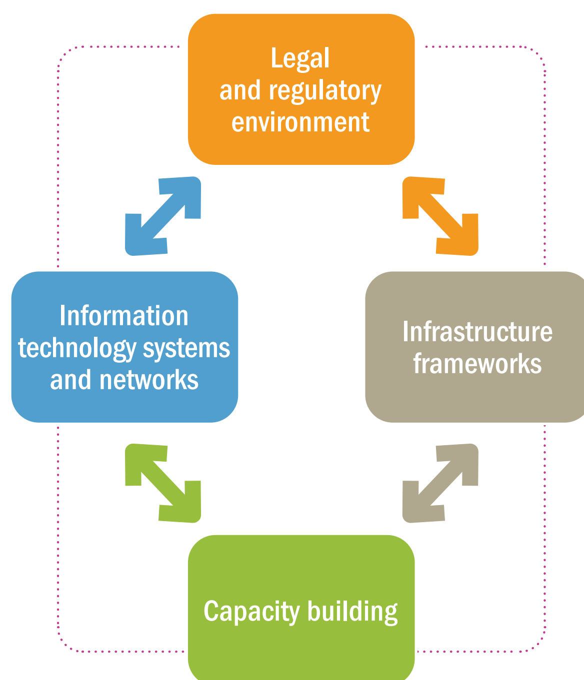
On 11 November 2021, Singapore's Infocomm Media Development Authority (IMDA), the Monetary Authority of Singapore and the Financial Services Regulatory Authority of Abu Dhabi Global Market, in collaboration with commercial partners, carried out the world's first cross-border digital trade financing test transaction.[11] The IMDA's TradeTrust platform was used to transfer the electronic records between Singapore and Abu Dhabi. The pilot was made possible because both jurisdictions had aligned their laws with the MLETR.[12]

The digitalisation of trade documents would benefit many business areas, especially those that relate to transport and logistics. It also promises to facilitate access to credit, as it enables more innovative supply chain financing techniques

BUILDING BLOCKS FOR DIGITAL TRADE[13]

Numerous building blocks affect the uptake of digital trade. These are illustrated simply in the following diagram.

Figure 2. **Four building blocks are key to digital trade**



Source: Theodora A. Christou and John L. Taylor (2023), *Blueprint Paper on Digital Trade and the UNCITRAL Model Law on Electronic Transferable Records*. Available at: https://www.ebrd.com/documents/legal-reform/blueprint-paper-on-digital-trade.pdf, (last accessed on 19 September 2023).

9 Theodora A. Christou and John L. Taylor (2023), *Blueprint Paper on Digital Trade and the UNCITRAL Model Law on Electronic Transferable Records*. Available at: https://www.ebrd.com/documents/legal-reform/blueprint-paper-on-digital-trade.pdf, (last accessed on 19 September 2023).

10 United Nations Economic Commission for Europe, *Transfer of MLETR-Compliant Titles*. Available at: https://uncefact.unece.org/display/uncefactpublic/Transfer+of+MLETR-compliant+titles, (last accessed on 19 September 2023).

11 Statements on the pilot can be found at https://www.adgm.com/media/announcements/worlds-first-digital-trade-financing-pilot-between-mletr-harmonised-jurisdictions and at https://www.mas.gov.sg/news/media-releases/2021/worlds-first-digital-trade-financing-pilot-between-mletr-harmonised-jurisdictions, (last accessed on 19 September 2023).

12 Eleanor Wragg (November 2021), "Singapore and Abu Dhabi pilot first MLETR-enabled trade transaction", *Global Trade Review*. Available at: https://www.gtreview.com/news/fintech/singapore-and-abu-dhabi-pilot-first-mletr-enabled-trade-transaction/, (last accessed on 19 September 2023).

13 *Ibid*. pp. 16-18.

An enabling **legal and regulatory environment** that is conducive to digital trade is one of the main building blocks. We are aware, however, that three other – very important – building blocks need to complement the legal and regulatory aspect.

IT systems and networks that provide for safe and transparent interaction among all public and private actors involved in digital trade facilitate the electronic transmission and receipt of transferable records essential for digital trade. The IT platforms provide the (often sole) point of contact between public actors (port authorities, customs, tax and sometimes numerous government agencies) and private actors (the traders themselves, financial institutions, logistics, freight and shipping companies, and various service providers), each of which uses a range of IT solutions of their own. Interoperability between these different communication and transmission channels is essential for digital trade to work.

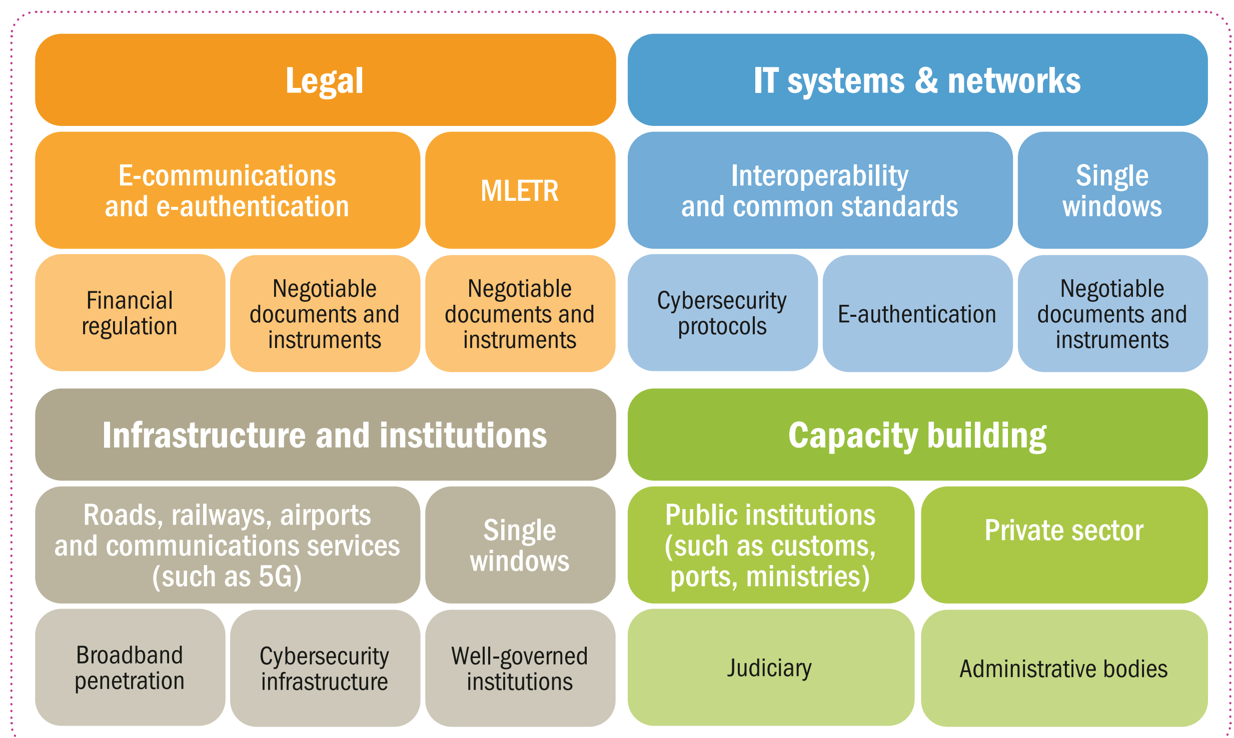
The broader infrastructure frameworks that should also be fit for purpose with the governments creating, and investing in, the necessary infrastructure and interconnector resources (such as roads, railways, ports, airports and communications services) that make it possible to carry out trade and trade finance digitally end-to-end.

Capacity building is an important building block which will improve awareness and build confidence in the digital environment. The upskilling of those engaging in trade, in both the private and public sector, will be necessary.

THE BLUEPRINT PAPER ON DIGITAL TRADE

The EBRD/CASTL *Blueprint Paper on Digital Trade and the UNCITRAL Model Law on Electronic Transferable Records* provides a comprehensive roadmap which governments can use in their quests to facilitate the uptake of digital trade through legal, regulatory and institutional reform. In the initial chapters, the paper sets out a clear case for paperless, digital trade by contrasting some of the inefficient paper-based trade processes that prevail worldwide with the much faster, simpler, more secure and environmentally friendly digital trade processes that modern technology offers.

Figure 3. **What does each building block involve?**



Source: Theodora A. Christou and John L. Taylor (2023), *Blueprint Paper on Digital Trade and the UNCITRAL Model Law on Electronic Transferable Records*. Available at: https://www.ebrd.com/documents/legal-reform/blueprint-paper-on-digital-trade.pdf, (last accessed on 19 September 2023).

The Blueprint Paper then examines the building blocks that underpin the transition to an end-to-end digital trade process. It identifies outdated legal and regulatory frameworks as one of the stumbling blocks to the uptake of digital trade and analyses how adopting the MLETR would address current issues. The paper summarises the efforts made by some countries that have reformed, or are in the process of reforming, their laws to align with the MLETR and provides – among other things – a "readiness matrix" that can be used to assess the level of alignment of local legal regimes with the MLETR.

The Blueprint Paper was presented and published at a public event on 25 April 2023. You can download the document by scanning the following code with your device's camera app:

THE EBRD'S WORK ON DIGITAL TRADE: CASE STUDIES

In line with the EBRD's Strategic Capital Framework and country strategy priorities, the Bank is supporting a rapidly growing portfolio of digitalisation technical cooperation projects. These projects support a range of digitalisation initiatives to improve cross-border trade/logistics processes, enhance financial inclusion, promote cashless economy and support the development of an e-commerce sector.

Designing an end-to-end export process using blockchain technology in Türkiye

Delivered between 2021 and 2023, this technical cooperation project aimed to support the Turkish Ministry of Trade with the design of a cross-institutional, end-to-end blockchain network that covered all stages of an export process, from the issuance of the initial receipt until the final transaction and the release of the goods from the Turkish customs/border.

The main focus of the project was to prove the feasibility of using blockchain in export processes and show the associated efficiency gains to the key decision-makers in Türkiye. To address this technical part, we analysed the current export processes and compared it to how such processes would work if they were migrated to blockchain and delivered via a blockchain-based platform. To demonstrate the feasibility and efficiency gains, we developed two demo blockchain platforms as proof of concepts (addressing exports of two different goods in two phases). Apart from the technical (IT-focused) components of the project, we also identified the legal and governance-related impediments that hinder the use of blockchain in the export process and provided recommendations for improvement. We are exploring the possibility to complement this "within-the-country" exercise with digital cross-border trade pilot implementation as the next step.

Digitising customs services in Moldova

Since the Moldova-EU Association Agreement took effect in 2016 the Moldovan Customs Service (MCS) has been modernising its operating systems in line with EU requirements to enable customs administrations and traders to comply with international standards in import, export and transit-related procedures. To support these efforts, the Moldovan government asked for EBRD support to expand the operational capacity of the MCS's ASYCUDAWorld system. The project Republic of Moldova: Support for the Digitisation of Custom Procedures is a package of four complementary assignments for the MCS and the Chamber of Commerce and Industry that are designed to help the government transition towards fully electronic customs procedures.

Expanding the ASYCUDAWorld system functionalities for MCS will help increase the speed and efficiency of customs clearance processes, facilitate e-commerce and cross-border trade, increase revenue receipts for the government, minimise the risk of consignment fraud and improve the efficiency of Moldovan customs operations. The project will also contribute to the government's digitisation programme (eEconomy roadmap) and efforts to enhance transparency and efficiency in cross-border trade, reduce costs for businesses and help build resilience to the economic impacts of COVID-19. In addition, this new institutional arrangement should pave the way for better collaboration between the EBRD and the United Nations Conference on Trade and Development to help address key transition challenges across the EBRD regions. The project is funded by the EBRD's Shareholder's Special Fund and EBRD – Türkiye cooperation fund.

EBRD SUPPORT FOR NON-PERFORMING LOAN RESOLUTION

> “It is essential for both economic well-being and financial sector stability that financial regulators and banks take pre-emptive action to deal with non-performing loans.”

1
CATHERINE BRIDGE ZOLLER
SENIOR COUNSEL, EBRD
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The EBRD has been leading policy dialogue on non-performing loan (NPL) resolution with banks and banking regulators in its regions since the global financial crisis. Under the NPL chapter of the Vienna Initiative, the Legal Transition Programme has developed NPL resolution strategies for banking regulators in Hungary and Serbia to improve banking sector resilience. Recently our work has expanded to include legal reforms aimed at activating private NPL markets. With credit risks rising, now is a good time to take stock of recent NPL management best practices in Europe and beyond, and to develop effective strategies to reduce the accumulation of future NPLs.[1]

BACKGROUND

NPLs are highly relevant for policymakers and have been in the spotlight for the last 15 years. NPLs occur when a borrower under a bank loan has defaulted by being overdue on principal or interest payments, or is unlikely to pay its credit obligations in full without recourse to actions such as the sale of any assets. There are divergences, however, in national definitions with respect to the period or timeframe when a defaulted loan qualifies as an NPL. In the EU, this period is usually 90 days from when the payment is past due.[2]

Further complexities arise with respect to NPLs owing to other relevant definitions. For instance, supervisory authorities refer to a broader definition of "non-performing exposures" (NPEs), introduced by the Basel Committee, to help supervisory authorities and banks adopt a consistent approach to monitoring and assessing banks' asset quality.

The NPE definition includes 90 days past due but also considers factors, such as forbearance measures, that would return an NPL to performing status.[3] In addition, NPL specialists must contend with the prudential definition of "default" in the EU, which helps to ensure a sound identification of credit-impaired assets on bank balance sheets and enable banks to control risks and hold adequate capital, as well as the accounting definition of "impaired" (International Accounting Standard 39) for financial reporting purposes.

While the risk of non-performance is a part of every banking transaction, when those risks materialise and multiply, they can result in high volumes of NPLs in the banking sector. The consequences of high NPL volumes can then extend beyond the banking sector and have negative effects on the real economy. NPLs restrict the supply of fresh credit to businesses, reduce market confidence and slow economic growth.[4] Evidence suggests that countries experience deeper and more protracted recessions when they do not act to contain the level of NPLs in the banking sector.[5]

NPLs trigger losses, which undermine bank profitability. Therefore, regulators typically require banks to provision against losses. A bank will estimate an expected future loss on the loan in its accounts and will use its capital to absorb these losses. In high volumes in a single bank, NPLs can even endanger the solvency of that bank, posing a risk to the entire financial system. Consequently, it is essential for both economic well-being and financial sector stability that financial regulators and banks take pre-emptive action to deal with NPLs. This means ensuring that effective legal and regulatory tools are in place to enable – and in

1. With special thanks to Eric Cloutier, Senior Adviser to the EBRD on the Vienna Initiative 2.0, Vassiliy Zenov, Partner, Dentons Kazakhstan LLP, Namgee Han, Secondee from KAMCO to the EBRD, and Natalia Pagkou, Legal Consultant, EBRD, for their comments and suggestions.
2. The 90 days past due definition is also the reference point for the IMF Financial Soundness Indicators, a set of key macro-financial indicators that assess the soundness of a country's financial system and are used by country authorities when reporting to the IMF.
3. See https://www.bis.org/bcbs/publ/d403.pdf for further details, (last accessed on 19 September 2023).
4. Maria Balgova, Michel Nies and Alexander Plekhanov (October 2016), "The Economic Impact of Reducing Non-Performing Loans", EBRD Working Paper No. 193. Available at: https://www.ebrd.com/publications/working-papers/economic-impact.html, (last accessed on 19 September 2023).
5. See, for instance, https://www.ecb.europa.eu/pub/economic-research/resbull/2020/html/ecb.rb200527~3fe177d27d.en.html#:~:text=The%20results%20underscore%20that%20NPL%20resolution%20is%20critical,percentage%20points%20lower%20than%20in%20countries%20that%20don%E2%80%99t, (last accessed on 19 September 2023).

some cases require – banks to address the NPL cycle. As part of this exercise, national authorities and policymakers can benefit from strategic technical cooperation offered by the EBRD and partner international organisations to improve their NPL resolution frameworks and underlying processes for managing NPLs.

WHY ARE NON-PERFORMING LOANS NOT INCREASING GIVEN THE RECENT CHALLENGING ECONOMIC CONDITIONS?

Many analysts and commentators predicted a rise in NPLs (and insolvencies) in response to the major economic shock caused by the Covid-19 pandemic, which led to a 2.4 per cent contraction in output across the EBRD regions in 2020.[6] When this did not materialise immediately, there was an expectation that NPLs would increase in 2022. The war on Ukraine led to a surge in energy and food prices, driving inflation into the double digits for 80% of the economies where the EBRD invests.[7] However, NPLs have remained low and the banking sector in many EBRD and European economies has proved to be largely resilient in the face of these challenges, with stronger capital buffers and regulatory safety valves and more profitable and liquid banks than at the time of the 2009 global financial crisis. Another factor preventing an increase in NPLs has been the unprecedented levels of emergency government assistance and liquidity, as well as the legislative and non-legislative moratoria (standstill) on loan repayments provided to businesses and consumers during the pandemic.

While many of the Covid-19 emergency support measures have been phased out, they unquestionably kept a number of weaker businesses artificially alive for a period.[8] A 2022 survey by the EBRD LTP on NPL-related emergency measures introduced as a Covid-19 response in the EBRD regions revealed that 85 per cent of EBRD economies introduced temporary banking and tax related emergency measures to mitigate the negative impacts of the pandemic. Banking measures included capital injections, prohibitions on the payment of dividends to bank shareholders, grace periods for loan servicing for households and businesses (including full or partial relief from repaying loan principal), capitalisation of interest, prohibition on increasing interest rates, interest-rate subsidies and state credit guarantee programmes. Tax measures, on the other hand, covered temporary tax relief or reductions in personal and corporate income tax, in particular for micro, small and medium-sized enterprises, as well as the waiver of fines for late submission of tax declarations and late payment of taxes.[9]

> In Europe, non-performing loans have been on a downward trajectory since 2015, but credit risks are rising due to higher interest rates and a challenging business environment.

NON-PERFORMING LOANS ARE DECLINING IN MANY COUNTRIES

In Europe, NPLs have been on a downward trajectory since 2015, but credit risks are rising due to higher interest rates and a challenging business environment. In most countries where the EBRD invests, the stock of NPLs is low, with the notable exception of Ukraine, where the Russian invasion has wiped out the country's success in recent years in reducing NPL levels.[10] In the central, eastern and south-eastern Europe (CESEE) region, NPLs have continued to decline despite the Covid-19 crisis and the recent economic downturn. As of the third quarter of 2022, the average ratio of NPLs in the banking sector across the CESEE region, while higher than the EU average, was at a record low 2.5 per cent. Overall, this mirrors a decreasing trend in NPLs across Europe in the first half of 2022, which

6 EBRD regions include Central Asia, central Europe and the Baltic states, Greece, eastern Europe and the Caucasus, south-eastern Europe, the southern and eastern Mediterranean and Türkiye. See https://www.ebrd.com/where-we-are.html, (last accessed on 19 September 2023).

7 Regional Economic Prospects, EBRD, February 2023. According to this forecast, the average rate of inflation in the EBRD peaked at 17.5 per cent in October 2022 and dropped to 16.5 per cent in December 2022.

8 See https://2022.tr-ebrd.com/corporate-debt-and-business-dynamism/, (last accessed on 19 September 2023).

9 See https://npl.vienna-initiative.com/assets/Uploads/2022/NPL-Monitor-H1-2022-fv.pdf, (last accessed on 19 September 2023). Annex 3-2 NPLs – Covid-19 response in the EBRD regions. Not all of the 33 countries that introduced banking sector emergency measures introduced tax measures and vice versa.

10 A comprehensive assessment of asset quality in the Ukrainian banking sector will only be possible once hostilities cease and will be complicated by the level of destruction and damage to bank collateral. See page 11 of https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4327054. The Kyiv School of Economics has been assessing the level of Russian damage to the Ukrainian economy: https://kse.ua/about-the-school/news/zbitki-naneseni-infrastrukturi-ukrayini-v-hodi-viyni-skladayut-mayzhe-63-mlrd/, (last accessed on 19 September 2023).

the European Banking Authority (EBA) attributed in large part to NPL securitisations and asset disposals in its November 2022 Financial Stability Review.[11]

In some countries, the decrease in NPL ratios in recent years has been remarkable. In Serbia, NPL levels dropped from about 20 per cent of total bank assets to about 3 per cent from 2012 to 2022. In Greece, on the other hand, where NPLs reached systemic levels after the 2007-08 global financial crisis, the government-sponsored NPL securitisation scheme appeared to have yielded positive results. As of the second quarter of 2022, the Greek NPL ratio stood at 5.2 per cent, with the Bank of Greece reporting a 40 per cent reduction in the corporate NPL ratio between June 2018 and June 2022.[12]

Nonetheless, there is an expectation that new NPL flows will increase across some EBRD economies in 2023 and 2024. This is in line with the trend in the central and eastern European region in relation to the accounting classification of "Stage 2 loans", which rose by 0.95 per cent from 11.2 per cent in December 2021 to 12.15 per cent in December 2022.[13] According to the International Accounting Standards Board's International Financial Reporting Standard 9 on recognition and measurement of financial assets, these loans are not yet impaired (Stage 3) and are therefore not NPLs, but they are loans where the credit risk has increased significantly.[14] As interest rates remain high and economic uncertainties linger, there is an expectation that some of these Stage 2 loans will deteriorate further, becoming Stage 3 non-performing exposures.

Despite increasing credit risks, many national banking regulators are better prepared to address and deter a rise in non-performing loans in the banking system than they were 10 years ago.

THE VIENNA INITIATIVE HAS CONTRIBUTED TO BETTER CRISIS PREPAREDNESS AND COUNTRIES ARE BETTER PREPARED THAN DURING THE GLOBAL FINANCIAL CRISIS

Despite increasing credit risks, many national banking regulators are better prepared to address and deter a rise in NPLs in the banking system than they were 10 years ago. The 2007-08 global financial crisis tested the resilience of financial institutions and the reactiveness of financial regulators across the world. It resulted in large levels of NPLs accumulating on banks' balance sheets over the following years, as borrowers struggled to fulfil their original repayment obligations and threatened bank solvency as well as the financial system at large. Many countries turned to the IMF for assistance and loans, as the crisis spread and access to the financial markets became restricted.[15] At the same time, many governments sought to safeguard their national banking systems by providing extensive liquidity measures to credit institutions. The global financial crisis and its aftermath had a severe impact on the regions where the EBRD invests and challenged the Bank's core mandate of fostering the transition to well-functioning market economies in its regions of operations.[16] However, it also galvanised regulators to action and boosted efforts to find both national and cross-border regulatory solutions.

11. See https://www.ecb.europa.eu/pub/financial-stability/fsr/html/ecb.fsr202211~6383d08c21.en.html#:~:text=The%20November%202022%20Financial%20Stability%20Review%20%28FSR%29%20sets,increased%20the%20risks%20to%20euro%20area%20financial%20stability, (last accessed on 19 September 2023). Based on a sample of 93 significant institutions. The ECB notes, however, that the default rates on credit risk exposures to Russia and Ukraine rose sharply in the first half of 2022, particularly in the second quarter.
12. See page 36 of https://npl.vienna-initiative.com/assets/Uploads/2022/NPL-Monitor-H2-2022-fv.pdf, (last accessed on 19 September 2023).
13. EBA Risk Dashboard 2022 Q4.
14. For more details see https://www.ifrs.org/issued-standards/list-of-standards/ifrs-9-financial-instruments/, (last accessed on 19 September 2023).
15. See https://www.imf.org/en/News/Articles/2015/09/28/04/53/sonew041511a, (last accessed on 19 September 2023). The first wave of countries seeking the IMF's assistance from 2008 to mid-2009 included EBRD economies Armenia, Belarus, Bosnia and Herzegovina, Georgia, Hungary, Latvia, Mongolia, Romania, Serbia and Ukraine (as well as non-EBRD countries Costa Rica, El Salvador, Guatemala, Iceland, Pakistan, Seychelles and Sri Lanka). The second wave of IMF financial assistance from late 2009 to 2011 extended to EBRD economies Greece, Kosovo, Macedonia and Moldova (as well as Angola, Antigua and Barbuda, Dominican Republic, Honduras, Iraq, Ireland, Jamaica and Maldives).
16. For further details on the EBRD's transition mandate, see the Agreement Establishing the European Bank for Reconstruction and Development dated 29 May 1990 https://www.ebrd.com/news/publications/institutional-documents/basic-documents-of-the-ebrd.html%20, (last accessed on 19 September 2023).

In response to the global financial crisis, the EBRD launched the Vienna Initiative, together with the European Commission, the European Central Bank (ECB), the European Investment Bank, the EU, the IMF and the World Bank to help coordinate regulatory decision-making in emerging Europe and prevent a systemic banking crisis. By 2011, with significant deleveraging across the banking sector, the Vienna Initiative 2.0 was established and expanded to support national regulators with the resolution of NPLs in the banking sector to protect the countries' economies and re-activate bank lending. At the end of 2014, a dedicated regional NPL initiative was created (as a subset of the broader Vienna Initiative 2.0), for the EBRD central and South-eastern Europe region. This initiative focused on resolving the high stock of NPLs in EBRD partner countries.[17] Vienna Initiative 2.0 activities relating to NPLs continue to be relevant today, with regulators in the EBRD CESEE region meeting periodically to exchange ideas and best practices and consult, sharing the latest NPL information on the EBRD Vienna Initiative website, including the NPL Monitor – a biannual publication of the NPL initiative.

> “Following the global financial crisis, EU institutions have led a number of important legislative and regulatory initiatives in the non-performing loan field. These have been a source of inspiration for national authorities in EU accession countries and beyond.”

Following the global financial crisis, EU institutions have led a number of important legislative and regulatory initiatives in the NPL field. These have been a source of inspiration for national authorities in EU accession countries and beyond.

17 EBRD partner countries for the NPL Vienna Initiative 2.0 include Albania, Croatia, Hungary, Montenegro and Serbia.

THE 2017 EU NON-PERFORMING LOAN ACTION PLAN

In response to the threat to financial stability caused by NPLs in the EU, the European Council in 2017 approved an action plan to address the problem of accumulating NPLs in the banking sector. The plan outlined different policy actions to help reduce the stocks of NPLs and prevent their future emergence.

As part of this plan, the initial focus was on better understanding the scale of the NPL problem through the standardisation of bank financial reporting for comparability and supervisory assessment purposes. Regulatory scrutiny was on the accumulation of NPLs on banks' balance sheets, for which multiple priorities were set, including ensuring the existence of adequate data on NPLs, improving NPL provisioning and defining the supervisory expectations from banks with regard to NPL management and prevention. EU authorities also placed strong emphasis on the further development of the EU secondary market for NPLs. Following the approval of the 2017 EU NPL Action Plan:

1. The EBA developed voluntary NPL data templates for NPL sales to improve the standardisation of data in the EU and to facilitate the NPL transaction process.[18]
2. The ECB developed provisioning calendars to accelerate provisioning with respect to NPL stocks for banks under its supervision. It also introduced possible (Pillar 2) implications for non-compliance. This was then further standardised and expanded to all EU credit institutions, with a provisioning backstop (that is, a Pillar 1 mechanism) in the EU Capital Requirements Regulation and applicable to exposures originated from 17 April 2019 and subsequently becoming non-performing.[19]
3. Several EU policy and regulatory actions were introduced with the aim of improving the banks' management of NPLs and preventing a future NPL build-up. These included (in order of delivery): the ECB's *Guidance to banks on NPL management*,[20] the EBA's *Guidelines on the management of non-performing and forborne exposures*,[21] the EBA's *Guidelines on loan origination and monitoring*,[22] and additional NPL reporting and disclosure templates produced by the EBA.[23]

THE 2020 EU NON-PERFORMING LOAN ACTION PLAN

Another phase of NPL activity followed the pandemic. In December 2020 the European Commission published a new NPL action plan due to the Covid-19 crisis and expected rise in NPLs.[24] Under the 2020 EU NPL Action Plan:

1. In October 2022 the European Commission and members of its NPL Advisory Panel published a set of practical, non-binding guidelines on a best execution process for NPL sale transactions on secondary markets.[25] These guidelines aim to fill a gap in relevant market experience and knowledge.
2. The EBA produced new standardised and mandatory data templates, based on its previous (voluntary) 2018 templates. All EU credit institutions are now required to complete these templates and provide a certain minimum level of information to purchasers when selling NPLs.[26] It is not entirely clear how the use of templates will be monitored from a banking supervisory perspective. Furthermore, it remains to be seen to what extent the templates will encourage banks to improve ex ante their data collection systems from the point of origination and their loan documentation.

18 See https://npl.vienna-initiative.com/assets/Uploads/2020/334602ac2d/NPL-Monitor-2020-H2.pdf, (last accessed on 19 September 2023).

19 Regulation (EU) 2019/630 amending Regulation (EU) No 575/2013 for minimum loss coverage for non-performing exposures

20 See https://www.bankingsupervision.europa.eu/ecb/pub/pdf/guidance_on_npl.cs.pdf, (last accessed on 19 September 2023).

21 See https://www.eba.europa.eu/sites/default/documents/files/documents/10180/2425705/371ff4ba-d7db-4fa9-a3c7-231cb9c2a26a/Final%20Guidelines%20on%20management%20of%20non-performing%20and%20forborne%20exposures.pdf, (last accessed on 19 September 2023).

22 See https://www.eba.europa.eu/regulation-and-policy/credit-risk/guidelines-on-loan-origination-and-monitoring, (last accessed on 19 September 2023).

23 For example, the Commission Implementing Regulation (EU) 2021/637, in effect since 28 June 2021, includes requirements to disclose information on non-performing and forborne exposures, which apply to large and other listed institutions and thereby implement the disclosure requirements in Article 442 of Regulation (EU) No 575/2013. The guidelines on disclosure of non-performing and forborne exposures (EBA/GL/2018/10) apply only to listed small and non-complex institutions and to other institutions, that is, medium-sized institutions that are non-listed.

24 See https://npl.vienna-initiative.com/assets/Uploads/2021/5f15903737/npl_monitor_2021_h1.pdf, (last accessed on 19 September 2023).

25 See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2022:405:FULL&from=EN, (last accessed on 19 September 2023).

26 Final EBA draft ITS on NPL transaction data templates (EBA/ITS/2022/05), (last accessed on 19 September 2023).

In addition to these measures, the EU authorities published the 2021 Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers (the Credit Servicing Directive).[27] This represents yet another important EU innovation in the NPL field, with its focus on the professional management of NPLs. In its initial form, the proposal adopted by the European Commission in March 2018 proved quite controversial as it also included a so-called accelerated enforcement mechanism. The mechanism recognised the effectiveness of out-of-court enforcement and sale for NPLs where contractually agreed between commercial parties, but was unpopular with a number of EU member states. In its current and final form, the directive focuses on harmonising the secondary markets for NPLs (consumer and business) and improving professional standards concerning the management of NPLs. For instance, the directive establishes certain requirements across the EU regarding the sale of NPLs to non-EU credit institutions and the activities undertaken by so-called credit servicers, which will require a licence to carry out their activities. The definition of credit servicing activities in the directive is broad and includes debt collection activities involving the collection or recovery from the borrower, in accordance with national law, of any payments due related to a creditor's rights under a credit agreement or to the credit agreement itself. From previous studies in the consumer field, it is clear that there are gaps in the existing EU member state domestic legal and regulatory frameworks concerning the management of NPLs, including in the consumer sphere.[28]

In December 2020 the European Commission published a new non-performing loan action plan due to the Covid-19 crisis and expected rise in non-performing loans.

It is widely expected that the Credit Servicing Directive will result in consolidation of the existing (fragmented) credit servicing market as only larger, more professional service firms will be able to afford to make the changes needed to comply with the increasing regulatory requirements in the industry. The deadline for the transposition of the directive is set for 29 December 2023. However, as of April 2023, only France had taken steps to align its legal framework with the provisions of the directive. For a discussion on current trends and an interview with a leading NPL industry professional, see page 62.

More recently, the EBA has published a consultation paper for draft guidelines to assess the knowledge and experience of the management or administrative body of a NPL credit servicer. The final form of these guidelines is expected to be published by the end of 2023 and enter into force from early 2024. The guidelines would constitute an important step for the implementation of the requirements of the Credit Servicing Directive.

27 See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021L2167&from=EN, (last accessed on 19 September 2023).

28 See, for example, “Regulation of Abusive Debt Collection Practices in the EU Member States: An Empirical Account”, C.-G. Stănescu, *Journal of Consumer Policy* (2021) 44:179–216. Available at: https://link.springer.com/article/10.1007/s10603-020-09476-8, (last accessed on 19 September 2023).

ONGOING CHALLENGES TO NON-PERFORMING LOAN RESOLUTION AND NON-PERFORMING LOAN RESOLUTION STRATEGIES

Banking regulators have a key role to play in setting NPL resolution strategies and ensuring that banks properly recognise their NPLs and provision for any potential losses. Nevertheless, while many national regulators seek to align with the standards proposed by the Basel Committee on Banking Supervision by the Bank for International Settlements, there is no universally accepted definition of NPLs or NPEs globally. Outside of the EU, the approach of different national regulators to various NPL-related matters can diverge greatly.

Since 2011, the EBRD's LTP has led several country-specific NPL diagnostics and strategies in conjunction with EBRD economists and policymakers. These projects have included the provision of advice and country legal, tax, financial and regulatory analysis to the Hungarian National Bank, the National Bank of Serbia and the Banking Regulation and Supervision Agency in Türkiye. Most recently, the EBRD has collaborated with the Agency for Regulation and Development of the Financial Market and the National Bank of the Republic of Kazakhstan (NBK) to develop a strategy and concept to create a market for distressed assets (see page 63).

Many common ongoing challenges remain to the development of NPL markets across EBRD economies, notwithstanding national differences. Broadly, these can be grouped under two main categories. The first is *specific NPL resolution issues* – in other words, the various strategies available to an NPL holder or purchaser to resolve or work through its NPLs. These include restructuring, compromising or postponing the loan maturities and voluntarily selling any underlying secured asset, collecting or enforcing the loan (whether unsecured or secured) and, in some cases, where all the forgoing are unsuccessful or where it cannot otherwise be avoided, insolvency. In many emerging markets and jurisdictions, and even in the EU, an NPL holder wishing to implement a resolution strategy faces major limitations and costs. These include high procedural requirements, such as in-court enforcement and mandatory public auction sale (especially for immovables such as land), advisory and long court processes for both enforcement and insolvency.[29]

> Since 2011, the EBRD's Legal Transition Programme has led several country-specific non-performing loan diagnostics and strategies in conjunction with EBRD economists and policymakers.

The second category of challenges focuses on *NPL market development issues*, which determine the level of access and opportunities available to both a potential NPL seller, such as a bank, and an NPL purchaser or investor. These include matters such as market size and the potential volumes needed to attract professional investors, information quality and the availability of the necessary data for an investor to invest and/or to avoid a substantial discount, and macroeconomic factors such as the stability of the currency that have an impact on investor appetite. Moreover, the development of the NPL market depends on legislation and regulations, which often restrict the type of entity that may acquire a loan. It is common for NPLs to be transferable only to other domestically licensed banks, especially in the consumer sphere. In new NPL markets, there is always an additional level of uncertainty and unpredictability for an NPL investor. This can be exacerbated by the relative lack of local experience – for instance, in the local credit servicing industry. The right regulatory approach and market signals from regulators and targeted legal reforms can overcome some of these obstacles, however, providing opportunities for the international

29 See, for example, the EBA report on the benchmarking of national loan enforcement frameworks: https://bit.ly/3LhPDoz , (last accessed on 19 September 2023).

> “While the focus may have shifted to prevention rather than cure, support for the management of non-performing loans across the EBRD regions remains an important policy goal for the Bank.”

or regional investor. Furthermore, there is potential for the development of digital, cross-border solutions, including electronic platforms for the sale of distressed loans and related assets. Coupled with standardised information on NPLs, these may increase transparency for investors and, hopefully, investor participation.

While the focus may have shifted to prevention rather than cure, support for the management of NPLs across the EBRD regions remains an important policy goal for the Bank. The Vienna Initiative continues to be an active forum for regulators to convene and exchange information. This was the case in the 2020 regulatory response to the coronavirus and may be the case again, as credit risks materialise and NPLs follow their inevitable, cyclical increase. In this context, it is positive to note that the level of awareness and thinking on potential NPL solutions is high. There have been many new standards and ideas, including those emanating from regulators and national governments, such as Greece and Italy, in the EU. National regulators in the EBRD regions can consider and evaluate these different initiatives, as part of developing their own tailored approach and country strategy for the resolution and sale of NPLs.

Interview with Eric Cloutier,
Partner, KPMG and Senior Adviser to the EBRD Vienna Initiative
by Dejan Vasiljev, Acting Director, Financial Sector Policy,
Capital and Financial Markets Development, EBRD

Eric, what do you think are the most important current policy trends in NPL resolution?

The most relevant policy trends are, at least in the EU, around further improving and standardising the existing rules for sound NPL transactions, including rules related to credit purchasing and servicing, NPL data and NPL securitisation. There has also been a lot of discussion within the EU on harmonising the enforcement regimes and insolvency laws of different member states, but this will likely take time. We can also observe a very rapid evolution of policies around ESG themes, with increasing consideration of climate risks in NPL portfolio assessments and investment decisions. There is also a concern to ensure that NPL resolution is socially responsible. Further regulating the use of blockchain and crypto in the financial service industry is also relevant for advances in NPL transactions and securitisation. And artificial intelligence (AI) is very topical for credit management and NPL resolution – we can anticipate that AI policy discussions will develop in the coming years.

How are advisory firms like KPMG supporting clients on NPL matters?

Overall, firms like KPMG are providing a wide range of services to support their clients on NPL matters, helping them to navigate the complex and rapidly evolving landscape of distressed debt transactions and resolution. We provide advice on regulatory and compliance matters related to NPLs, as well as helping clients implement best practices for credit risks and NPL management. One of the key areas where KPMG operates is as a “sell” and “buy side” adviser to banks and investors, providing support on due diligence and loan portfolios structuring strategies. We also provide advisory services on NPL portfolio management, helping clients to develop strategies for managing their NPLs, including restructuring and workout plans, loan sales and securitisation. As a large advisory firm, KPMG has its own data management technology and data analytics to support NPL transactions and loan management.

How do NPL management standards compare with leading markets outside the EU, for example, North America and Asia?

While there are many similarities, I would say that the EU has a more structured and comprehensive framework for NPL management. In other markets, the approach is more decentralised and varies by country or regulator. This is partly due to how the EU, with its 27 countries, is structured, and the need to ensure harmonisation of rules and practices across member states. Over the last few years, significant progress has been made by EU regulators and supervisors in setting clear regulatory expectations with regard to how banks manage their credit risks and NPLs and close monitoring of bank compliance. We are also seeing an evolution in the regulatory approach within the EU to standardise credit purchasing and servicing. In my view, the EU is now leading on NPL policymaking globally and, consequently, we see a lot of interest from other countries to learn from what are considered as “EU best practices”.

How important will technology be for future NPL markets?

Technology is very important for the future of the NPL markets, and we have already witnessed fundamental changes in recent years. Looking forward, we can expect that the use of technology will further drive innovation, reduce costs, increase efficiency and improve the overall quality of NPL portfolio management. As technology continues to evolve, including with the broader and more mainstream use of AI and machine learning, we can only anticipate further (and significant) streamlining and automation across all aspects of NPL management and transactions. There has been a substantial growth in advanced analytics tools for portfolio assessment, data remediation, pricing and investment decisions. While not new, the role of online NPL marketplaces and platforms is likely to continue to increase, as new tools become available. However, due to the high level of tailoring needed during a live transaction, I expect that human involvement in the deals will remain necessary for some time.

What do you see happening at the EU level over the next few years?

In the next few years, we can expect continued innovation in NPL management and transaction practices, driven by technology and regulatory changes. However, the pace of the changes depends on the volume of new NPL flows. The lagging effects of the pandemic and the current macroeconomic and geopolitical environment are still yet to translate into more NPLs, and NPL levels have stabilised at a low NPL ratio of 1.8 per cent in the EU (EBA Risk Dashboard Q4 2022). Regulators are warning of residual risks related to the end of over a decade of very low interest rates – this makes a deterioration in asset quality and a rise in NPLs still likely. The evolution and duration of the war in Ukraine will also have an impact on the NPL environment. Only time will tell, but we can expect that the EU banking regulators and supervisors will continue to monitor the situation closely to avoid any new accumulation of NPLs in the European banking system. As a minimum, the ongoing regulatory activities related to NPLs will continue, including the implementation of the requirements of the European Commission Credit Servicing Directive on NPLs and the EBA NPL templates.[30] We also expect a broad range of new regulatory initiatives in response to technological innovations and ESG, as discussed previously, which will shape the future of NPL markets.

[30] Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU, (last accessed on 19 September 2023).

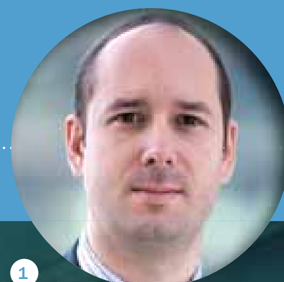
Developing the distressed assets market in Kazakhstan

In October 2020 the Agency for Regulation and Development of the Financial Market of the Republic of Kazakhstan (the Agency) and the NBK requested the EBRD's assistance in promoting the sale and transfer of distressed assets in Kazakhstan to private investors. The first phase of the project, funded by the EBRD's Special Shareholder Fund and the NBK, resulted in a legal, financial and regulatory analysis of the NPL landscape in Kazakhstan, benchmarked against EU best practices, and recommendations for opening the NPL market to domestic and international investors. In particular, the most important and urgent recommendations were to (1) expand the list of buyers that are authorised to purchase impaired loans in Kazakhstan and (2) establish a new regulated entity, and associated legal concept, of "credit servicer". These recommendations were reflected in the law On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Development of the Market of Distressed Assets No. 133-VII, which was adopted by the government in July 2022 and came into effect in September 2022. The EBRD then followed up with further technical cooperation to the Agency and the NBK to support the alignment of the Agency's regulations with ECB guidance to banks on the management of NPLs.

In January 2022 the president of Kazakhstan ordered the creation of a secondary market for banks' distressed assets and tasked the Agency and the government with the establishment of a digital platform and the necessary infrastructure for the online sale of distressed assets. In response, the EBRD team began to develop a model for an electronic platform to sell NPLs and foreclosed assets and to stimulate the development of the private NPL sales market. The EBRD is finalising this model, tailored to the requirements of the Kazakh market. As part of this exercise, the working team led by the EBRD has developed data templates, aligned with the NPL data templates recently mandated by the EBA but with mandatory fields suitable for the Kazakh banking sector. It is expected that these data templates will be used, subject to some specific exceptions, for the sale of all impaired loans and foreclosed assets by Kazakh banks via the digital platform. The use of such data templates will improve the availability of information and the transparency of sales in Kazakhstan for potential investors.

ADDRESSING THE SECTORAL AND CORPORATE GOVERNANCE REFORM NEEDS OF STATE-OWNED ENTERPRISES: THE EBRD APPROACH

> "In parallel with providing finance for major infrastructure improvements, there is also a great need to advance the reforms in both the governance and sectoral legal frameworks as well as market structures."



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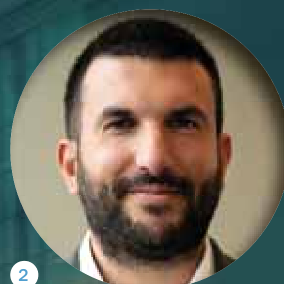

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State-owned enterprises (SOEs) still play an important role in many economies in which the EBRD invests, especially in key industries such as energy, water, gas, road and railway infrastructure, railway transport and postal services, but also in sectors where the need for the state's involvement is less obvious,including telecoms shipping and even manufacturing services.

Against a backdrop of ever-increasing complexities in global supply chains and a succession of crises such as Covid-19 pandemic, the Russian invasion of Ukraine and spiralling inflation, SOEs have been an important source of stability in many developed and emerging economies. They have also been instrumental in maintaining the flow of essential goods and services to citizens and the economy. This is why, in recent years, international financial institutions including the EBRD have stepped up their focus on policy engagements with SOEs. While the core mandate of the Bank remains private sector development, increasing the quality of policy interventions with SOEs improves the investment climate and enables more private ownership.

In the past, SOEs were seen mainly as obstacles to economic development, especially when the state mandate extended into areas where the private sector proved to be much more efficient and innovative. Recent crises have revealed another side of SOEs' function. For example, the climate crisis has shown that for renewable energy to scale up to the level required by the Paris Agreement, electricity networks must be able to manage the flows of energy – and those networks are state-owned in most countries. In the case of Ukraine, SOEs have been crucial in ensuring the flow of indispensable goods and services throughout the country, such as maintenance of electricity and transport networks that were, in some cases, badly damaged and by maintaining functioning of railway transport and postal services. Once the aggression ends, SOEs will be just as important in helping to rebuild the country.

While ensuring stability in matters such as energy and food security is paramount in the short term, we should not lose sight of the bigger picture: the need to achieve balanced and sustainable development and move the dial in terms of the reliability and quality of services of public interest. In parallel with providing finance for major infrastructure improvements, there is also a great need to advance the reforms in both the governance and sectoral legal frameworks as well

In the case of Ukraine, state-owned enterprises have been crucial in ensuring the flow of indispensable goods and services throughout the country.

as market structures. This provides a unique opportunity to combine sector-level reforms and improve the efficiency and capacity of SOEs involved in those sectors.

SECTOR AND GOVERNANCE REFORMS OF STATE-OWNED ENTERPRISES: TWO PIECES OF THE SAME PUZZLE

SOE governance, sectoral policies and market reforms are closely related. The notion of sectoral reforms refers to changes made in an industry or market – frequently with heavy state participation – such as the energy or transport sectors. This often includes interventions such as unbundling, setting up an independent regulator, introducing public service contracts and tariff reforms. SOE governance reforms focus on improving the management and accountability of SOEs (including through enhanced corporate governance structures) and the way these enterprises are overseen by the state as the shareholder. By combining these two types of reforms, governments can address systemic problems that affect both the quality of public services and the efficiency of SOEs. In sectors where public services are crucial, such as infrastructure,

> “ Important synergies can be achieved by combining these policy tools and realising that the interplay between state-owned enterprise governance reforms and sector reforms can be seen through several perspectives. ”

SOEs are typically used as vehicles to ensure delivery of policy and social goals in terms of development and performance.

In some cases, the borders between SOE reforms and sector reforms can be blurred and it can be hard to tell where one starts and the other finishes – especially if we are looking at an SOE with a natural monopoly in a given sector of a country. Changing something in the SOE would have an immediate impact on the whole sector and vice versa.

Important synergies can be achieved by combining these policy tools and realising that the interplay between SOE governance reforms and sector reforms can be seen through several perspectives.

First, when it comes to promoting both financial and operational efficiency, SOEs often operate in sectors that are essential for the economy and society. If these enterprises are inefficient or ineffective, it can (and often does) result in lower productivity, higher costs and reduced quality of goods and services. Policy action can mitigate this risk for essential sectors and natural monopolies. In other cases, however, SOE reform could just serve to diminish the role of the state in the economy. For example, unbundling SOEs in the infrastructure sector, including the energy industry, is often a policy tool to foster private-sector participation and improve efficiency and productivity.

Second, when it comes to the relationship between SOEs and public finances, companies that do not operate effectively present a fiscal risk and can become a drain on the state budget. They may also be the reason behind inefficient allocation of state budgets. This often happens when the state subsidises the SOE because it performs a service of public importance, but without clear parameters of the quality and cost of the service provided, which translates into less funding being available for other priorities of the government. SOE privatisation can also offer an opportunity to improve the state budget by realising income and reducing liabilities. Other times, SOEs are at risk of becoming a vehicle for political or populist goals – for example, when a certain good or service is supplied below cost recovery, thus hampering market competition and ultimately the economic development of the country, or when the SOE is used for clientelism.

It is important to have clearly defined dividend policies that take all of these considerations into account and that are also aligned with the state-owned enterprise's strategy and investment plans.

It is therefore in the government's own interest to ensure that SOEs deliver on what is expected of them and do so in the most efficient manner possible. Here, sector reform can be helpful in strictly defining the nature and quality of the services to be provided by the SOE in the form of a public service obligation or different performance contracts, which are costed according to a methodology agreed between the SOE and the state and which then become a contractual obligation of the SOE to the state. This helps to clarify expectations from the company and also provides transparency on the actual cost to the government for requiring these services. In case of deviations from the defined targets, it is easier to distinguish justifiable deviations from mismanagement or even corruption, thereby strengthening the accountability of the SOE's decision-makers.

On the other hand, the state may look at profitable SOEs as a source of revenue for the state budget. While this is legitimate, it is also very important that any potential dividends from the SOE are considered within a broader context and that the company's profit can – to the extent needed – be used for its further growth and development, which includes contributing towards meeting sectoral objectives. For example, a profitable energy company that depends on coal should certainly be encouraged, if not expected, to use part of its profits to decrease its carbon footprint. This is why it is important to have clearly defined dividend policies that take all of these considerations into account and that are also aligned with the SOE's strategy and investment plans.

EBRD'S WORK TO STRENGTHEN SECTOR REGULATION AND STATE-OWNED ENTERPRISE GOVERNANCE

The EBRD has a long record of investment and policy dialogue in key sectors across economies where it invests, as well as supporting SOE company-level transformations. This is also recognised by the EBRD Strategic and Capital Framework 2020-25,[1] which defines "stepping up support for commercialisation of SOEs in countries with potential for privatisation" as a priority action and in numerous EBRD country strategies.[2]

This is why the Bank developed a new technical cooperation programme called SOEs Management Assistance Reform and Transformation (SMART). The programme is designed to help the EBRD provide the most appropriate and tailored policy advice to support delivery of strategic transactions with states or SOEs combining governance and sector reforms.

The SMART programme includes support measures that can be undertaken on three levels. First, upstream reform support of SOEs' governance envisages engagement with the state and individual authorities as owners of SOEs, with the aim of improving broader rules governing SOEs such as laws, regulations and standards, as well as building an institutional framework and capacity for overseeing SOEs and setting clear objectives by the ownership function. One level below, on the sector level, the programme envisages support for regulatory improvements that can consist of the redesign of the governance architecture for the sector, amendments to sectoral laws and regulations, development of various tariff methodologies, contractual arrangements between sectoral actors, unbundling, as well as institutional reform and capacity building to sectoral regulators.

The third possible level of intervention is at the level of SOEs themselves. Here, the measures may include corporate governance action plans – tailored plans to improve corporate governance structures and practices at SOEs – as well as corporate development programmes that go beyond the governance structures of the SOE and aim to improve its operational and financial efficiency, strategic and business planning processes, and asset management, and support necessary organisational restructuring within the SOE.

> "By providing this targeted programme, the EBRD aims to accelerate the mobilisation of resources and be able to react more quickly to appetite for reforms that are complementary to the Bank's financing."

Finally, as a component that underpins these three levels of engagement, the programme also includes various state, sectoral and SOE-level diagnostic engagements. These are meant to provide the Bank with an understanding of relevant rules, practices and challenges on the ground and inform further policy interventions so the reform needs of economies and clients can be answered effectively.

1. The EBRD Strategic and Capital Framework 2020-2025 can be accessed at https://www.ebrd.com/what-we-do/strategy-capital-framework, (last accessed on 19 September 2023).
2. The argument for SOE reform and improvements in corporate/sector-level governance is further strengthened by the fact that SOE reforms feature as priority activity in the vast majority (30 of 36) current country strategies. In particular, many country strategies envisage support in the commercialisation of SOEs, including improvements in the corporate governance in specific sectors, depending on the country context.

By providing this targeted programme, the EBRD aims to accelerate the mobilisation of resources and be able to react more quickly to appetite for reforms that are complementary to the Bank's financing. In addition, by being able to cover more areas within a single reform package, the EBRD can also bring focused interventions and leverage on the work of other international financial institutions.

SMART FOR UKRAINE: ASSISTANCE WHERE IT'S NEEDED MOST

In addition to the horrific human cost of the invasion, Ukraine also faces unprecedented financial and economic costs. The recent *Ukraine Rapid Damage and Needs Assessment* report,[3] prepared jointly by the government of Ukraine, the United Nations, the European Commission and the World Bank, estimates the total reconstruction and recovery needs at US$ 411 billion as of 24 February 2023. The report also estimates the implementation priorities for 2023 alone amount to US$ 14 billion, with a primary focus on the most urgent needs such as energy, housing, and critical and social infrastructure.

> "Following the EBRD's ambition to commit up to €3 billion in 2022 and 2023 to help Ukraine's economy continue functioning, the SMART programme was designed to include a specific set of actions in addition to the ones mentioned above, to assist with the wartime resilience of Ukrainian state-owned enterprises as well as their contribution to reconstruction efforts."

3 World Bank, Government of Ukraine, European Union, United Nations (February 2022-2023), *Ukraine - Rapid Damage and Needs Assessment*, (English). Washington, D.C., World Bank Group. Available at: http://documents.worldbank.org/curated/en/099184503212328877/P1801740d1177f03c0ab180057556615497, (last accessed on 19 September 2023).

Following the EBRD's ambition to commit up to €3 billion in 2022 and 2023 to help Ukraine's economy continue functioning, the SMART programme was designed to include a specific set of actions in addition to the ones mentioned above, to assist with the wartime resilience of Ukrainian SOEs as well as their contribution to reconstruction efforts. The possible reform interventions here therefore include support to the companies and/or ministry with war-time crisis response and recovery – such as resilience and recovery needs assessment, planning and management of supply chain, logistics, workforce and assets in the wartime and recovery context, support for cyber security, debt and risk management and contingency planning, measures aimed at facilitating procurement in both emergency and recovery contexts as well as integrity support and anti-corruption measures to ensure funds are used for the purposes for which they were intended.

SMART for Ukraine was inspired by EBRD assistance to Ukravtodor, the national road agency with core procurement functions and anti-corruption reforms. First initiated on the back of a loan signed in 2020, these reforms took on a whole new meaning when Ukravtodor was transformed into the State Agency for Restoration and Development of Infrastructure in January 2023. Further policy assistance may be deployed to help the government build anti-corruption and compliance capacity in other core SOEs, including Ukrainian Railways, and to train board directors to oversee SOE activities meaningfully and independently. This builds nicely on the EBRD's long-term involvement in the SOE reforms in Ukraine, which included the roll-out of corporate governance transformations in most of the top 10 Ukrainian SOEs and development of comprehensive amendments to the national regulatory framework for state companies.

CONCLUSION

The Covid-19 pandemic, followed by the energy crisis and the war in Ukraine, reminded everyone of the need to build back better, fuelling the need for both financial and policy support and highlighting the importance of the role SOEs will play in these efforts. Hence, there is a need to enable our clients (both governments and SOEs) to turn challenges into opportunities and embark on reforms that may redefine those markets for decades to come. The EBRD stands ready to support these ambitions with a balanced mix of sector and governance reforms that can help put states and SOEs on a path towards responsible and sustainable development for the benefit of our economies and their citizens.

PUBLIC-PRIVATE PARTNERSHIPS FOR PROMOTING SUSTAINABLE DEVELOPMENT GOALS

> “PPP structure can help foster economic growth and social development in ways that promote the Sustainable Development Goals, leading to a better and more sustainable future for all.”

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Achieving the UN's Sustainable Development Goals (SDGs) requires long term investment. PPPs can provide some of this investment by utilising private sector skills, know-how and finance to implement long-term public infrastructure projects. For longitudinal project partnerships to be attractive to private investors, there needs to be a stable and predictable legislative and regulatory framework in place for PPPs. To facilitate the development of effective PPP frameworks, the EBRD has produced the PPP Regulatory Guidelines Collection for policymakers and practitioners to use to create legal environments that are conducive to PPPs, in line with international best practice.

NEED TO FINANCE THE SUSTAINABLE DEVELOPMENT GOALS

The SDGs are a set of 17 goals that aim to end poverty, protect the planet and ensure prosperity for all by 2030. Achieving the common objectives enshrined in the SDGs – also known as the Global Goals – is a long-term endeavour, with sufficient and targeted financing being a catalyst.

The value of capitalising on private sector financing for the SDGs has been recognised since 2015 in the United Nations ***Addis Ababa Action Agenda of the Third International Conference on Financing for Development***. It was further highlighted in the document ***From Billions to Trillions: Transforming Development Finance Post-2015 Financing for Development: Multilateral Development Finance*** prepared jointly by the African Development Bank, the Asian Development Bank, the EBRD, the European Investment Bank, the Inter-American Development Bank, the IMF and the World Bank.

The private sector plays a key role in implementing the SDGs, particularly SDG 17 (partnerships), with the expectation that it will contribute with capital investment in the face of dwindling public resources. In recent years, PPPs have become increasingly important as governments around the world seek to address the immense challenges associated with pandemics, population growth, climate change and economic inequality. PPPs play a vital role in efforts to identify and implement new and cost-effective solutions by bringing together the resources of the public sector and the creative thinking, efficiency, modern technology and expertise of the private sector.

PPPs have many benefits. When properly structured and implemented, PPPs can fulfil a range of valuable purposes and objectives for the benefit of society and the common good.

THE ROLE OF PPPs IN FOSTERING SUSTAINABLE DEVELOPMENT

The World Commission on Environment and Development's 1987 Brundtland Commission report Our Common Future defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". From this definition, the inter-temporal element of development becomes clear. PPPs as instruments and financial structures encompass a long-term nature that typically includes, importantly, a servicing element. Therefore, this unique characteristic allows effective and sustainability-aligned changes to take place in the long run.

PPPs have many benefits. When properly structured and implemented, PPPs can fulfil a range of valuable purposes and objectives for the benefit of society and the common good. They can advance the efficient and cost-effective development, provision and operation of public

infrastructure and public services, by harnessing the skills, resources, know-how and/or finance of the private sector most effectively and sustainably on a long-term basis, and structuring projects in ways that
allocate the risks and responsibilities involved most appropriately over the project's duration. This can strengthen the efficacy of project delivery (whether of design, construction, rehabilitation, operation and/or maintenance), stimulate new funding and investment opportunities, help bridge the public infrastructure and service gap, raise the quality of public services, improve the public's access to those services, and so help to achieve wider economic, environmental and social goals.

PPP structure can help foster economic growth and social development in ways that promote the SDGs, leading to a better and more sustainable future for all. By bringing together different stakeholders, PPPs can create efficiencies, increase access to capital and promote innovation. Furthermore, they can help create a long-term framework for sustainability, as public and private entities work together to ensure the success of their projects, becoming more prevalent in the sustainability realm. As governments around the world recognise the importance of private sector involvement to achieve the SDGs, there has been an increase in the number of PPPs and the scope of their projects. In a similar vein, the EBRD has been actively working to help governments develop legal and regulatory frameworks for PPPs in a good number of countries in its regions. This has enabled governments to better leverage the resources of the private sector in developing sustainable projects that benefit local communities.

In a similar vein, adequate and well-allocated financing is a critical enabler for the development and the success of a PPP, which in turn will advance the host country's development agenda. To this end, the Bank recently commissioned a study on the sources and types of financing for PPPs in the EBRD regions. In the context of global financial and economic instability, many countries are experiencing difficulties in financing infrastructure projects, especially large-scale ones. Similar to the identification of alternative mechanisms and processes to achieve sustainable development (for instance, turn to renewable energy and responsive financial regulation), diversification of financing sources for PPPs is most welcome.

Looking beyond traditional bank lending, there is room to explore alternative ways to finance PPP projects. Global awareness of sustainable PPP projects has grown among institutional investors, especially as governments have been trying to scale up investments to meet the SDGs. Introducing innovative financing and new forms of PPP structures could offer a broader range of PPP financing mechanisms, which could better address the needs and financing/funding gaps in so many jurisdictions. Indicatively, alternative types of financing might include blended finance and receivables financing and alternative sources of financing might include pension funds, sovereign wealth funds and impact investors. In a nutshell, alternative means of PPP financing shall be explored as they are of great importance for supporting the viability of SDG-oriented projects.

PPP LEGAL FRAMEWORKS

Sound PPP legal frameworks and policies are of paramount importance for the PPP sector's development. A stable and predictable legislative and regulatory environment makes it easier to attract investment in PPP projects and further lays the ground for the successful completion of PPPs.

Until recently, almost all PPP legal frameworks primarily focused on commercial business practices, which, to an extent, would ensure the commercial viability of the project. While the actual objective of the project may have been society-oriented or environmental in nature (healthcare or education social infrastructure projects, for instance), the focus of the legal framework was geared towards the mechanics of the project per se and aimed at enhancing well-recognised legal values, such as transparency, predictability and accountability.

In line with the global shift towards proactively infusing sustainability considerations in legal and regulatory texts and policies, the EBRD's work on PPPs has been critical in helping develop and implement the Paris Agreement on Climate Change. The Bank has provided technical cooperation to its economies to help them identify and implement projects that reduce emissions and promote renewable energy sources. This has included activities such as developing legal and regulatory frameworks for PPPs, providing capacity building to local stakeholders and facilitating access to finance for green projects.

Most importantly, the EBRD has developed a collection of PPP regulatory guidelines over the past few years that represents some five years of hard work by a dedicated group of experts, most of whom took an active part in this formidable effort on a pro bono basis. The publication aims to address the needs of the many governments and authorities in the EBRD economies that shared their feedback and priorities with the EBRD regarding their desire and even the necessity to assemble examples of internationally accepted standards and best practices in the area of PPPs as far as its regulatory, institutional and enabling frameworks are concerned.

> “A stable and predictable legislative and regulatory environment makes it easier to attract investment in PPP projects and further lays the ground for the successful completion of PPPs.”

The EBRD Legal Transition Team has carried out PPP regulatory advisory technical cooperation projects in more than 30 countries, helping to upgrade a legislative and/or enabling framework or institutional infrastructure, and to enhance the public sector's PPP capacity. By way of example, the team has provided a comprehensive programme of technical cooperation to the Serbian authorities since 2011. Serbia is one of a very few countries where the Bank exercised a well-structured approach, from helping the authorities design and draft PPP policy to drafting PPP law, creating regulatory and institutional frameworks and an enabling environment, and offering training in the country's regional centres. This contributed to the development of a good number of banking projects. The Bank used an integrated approach in Serbia and coordinated with the EBRD Banking Department on regulatory framework advisory, which helped identify gaps and room for improvement (the Bank then considered Belgrade underground parking and a number of other potential municipal and transport infrastructure investments). As a result, within three years of the new law's enactment, the pipeline of PPP projects grew significantly, from just a handful to more than 50, and Serbia's PPP programme keeps expanding.

THE EBRD'S PPP REGULATORY GUIDELINES COLLECTION

The EBRD's PPP Regulatory Guidelines Collection (hereinafter the EBRD PPP Guidelines) is a nearly comprehensive massive resource for policymakers and practitioners involved in developing and implementing PPP projects. The collection offers guidance on the key legal, regulatory and contractual aspects of PPPs, including PPP policy formulation and law drafting, key elements of the PPP regime, procurement, risk allocation, project appraisal and monitoring and dispute resolution. It is based on the EBRD's extensive experience with both regulatory advisory and supporting PPP projects across its regions of operation, and reflects internationally recognised standards and best practices. The collection is a valuable tool for governments seeking to promote private sector participation in infrastructure development and for private sector stakeholders looking to navigate through the complexities of PPPs. By providing a clear and practical enabling framework for developing PPP projects, the EBRD PPP Guidelines can help to promote transparency, accountability and good governance in infrastructure development, and can contribute to the sustainable development of economies. The publication consists of three volumes and will be issued as an electronic version and in a limited number of hard copies.

The EBRD PPP Guidelines consist of a set of model laws, policies, explanatory materials and templates that have been produced according to best practices and can be used by governments as benchmark and reference material.

Central to Volume I of the guidelines is the EBRD/UNECE Model PPP Law for SDG-compliant PPP Projects (the Model Law). The Model Law was drawn up as part of the wide-ranging corpus of guidance documents, modules and studies on PPPs being produced on behalf of both the United Nations Economic Commission for Europe (UNECE) Working Party on PPPs and the LTP of the EBRD to help governments seeking to develop PPP systems of their own – both those doing so for the first time and those willing to upgrade their own regime.

The Model Law is followed by a supporting commentary that narrates short summaries of the Law's articles and provisions and provides brief explanations of the thinking behind them and some discussion of the core issues to which they typically give rise in practice. The commentary, written in non-legal language, offers some additional elucidation of the Law's text and where it might be helpful, but does not attempt to restate or explain every one of its provisions.

Similarly, parts of the EBRD PPP Guidelines are devoted to six modules/chapters containing notes on regulations and guidelines to support the Model Law. These guidance notes are designed to show governments, regulators, PPP units and others involved in developing or refining the subsidiary documents that often support and accompany PPP laws how to prepare and draft them. Supporting documents of this kind will typically fall into two broad categories, namely regulations and guidelines. Both are defined in the Model Law, the former being designed as legally binding secondary legislation, covering the detailed procedures and mechanisms necessary to give effect to a PPP Law, the latter as guidance texts that describe, explain and advise on their application.

The EBRD PPP Guidelines are an essential resource for policymakers, legal practitioners and investors involved in PPP projects.

The guidance notes cover six main categories that represent the areas where the supporting documents are likely to have their principal focus. These are: PPP criteria and requirements; forms of government support; tendering procedures and requirements; unsolicited proposals and direct negotiations; appraisal and approval procedures; and review and challenge procedures.

Volume I also includes the CIS Model Law on PPPs, adopted by the Inter-Parliamentary Assembly of the Commonwealth of Independent States (CIS IPA) in 2014. This model law serves as a guiding framework for PPP projects in the CIS region, providing legal and regulatory guidance on all aspects of PPPs. It aims to promote the adoption of best practices and standardisation across the region. The model law includes provisions on project preparation and selection, procurement, contract management and dispute resolution, among others. It is the first comprehensive text of PPP model laws that could be used with (or even without) adjustments and national specifics additions by CIS countries, given the common legal systems background and similarities in emerging economies development. The CIS IPA has adopted several enabling regulations and documents to support its implementation. These include Guidelines for the Preparation and Implementation of PPP Projects, the Model PPP Contract and Guidelines for the Development of PPP Legislation at the National Level. These documents, as well as the CIS Model PPP Law itself, were developed with the EBRD's assistance. They provide detailed guidance on the practical implementation of the CIS Model Law, including the key steps and processes involved in preparing and implementing PPP projects. These enabling regulations and guidelines will be part of Volume II of the EBRD PPP Guidelines Collection.

The EBRD recently participated in the seventh UNECE International PPP Forum in Athens. The 3-5 May 2023 event brought together more than 700 participants from around the world, including policymakers, practitioners and experts in the field of PPPs. One of the highlights was the EBRD session specifically dedicated to the presentation of its PPP Regulatory Guidelines Collection. The forum provided an important platform for stakeholders in the field of PPPs to exchange ideas and best practices, and the EBRD's participation and presentation of the publication underscored its commitment to promoting good governance and sustainable development in infrastructure investment.

The EBRD PPP Guidelines are an essential resource for policymakers, legal practitioners and investors involved in PPP projects. The collection is available on the EBRD LTP web page (www.ebrd.com/law). The web page, which is accessible to all visitors to the EBRD website, hosts a variety of legal resources, including publications, research and reports on various legal subjects. For more than 25 years, PPP support has been a core part of the EBRD LTP designed to provide regulatory and institutional support to authorities in the EBRD regions and help them create an enabling environment in a few carefully selected areas of important commercial law. Working with colleagues in the Banking and Policy departments' advisory on regulatory aspects of PPP has always been an integral part of EBRD undertakings. The SDGs have become the central focus and will remain such in the foreseeable future.

ARE YOU READY FOR ONLINE COURTS?

> An online court is defined as a dispute resolution proceeding conducted through a court digital platform that, by default, allows parties to resolve their disputes directly and entirely online, from filing a claim to the delivery of a judgment.

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The idea of leveraging technology to streamline and improve the delivery of justice has been gaining traction. In the area of commercial justice, developing online courts can ease access to justice for SMEs and provide fast, cost-effective and efficient resolution of their cases in courts. The Legal Transition Programme has recently focused on promoting the development of online small claims courts in the EBRD regions, and in 2022-23 assessed the extent to which the regions are ready to introduce, or have already developed, online courts. This article presents the findings from 17 economies where the EBRD operates.[1]

INTRODUCTION

Effective dispute resolution and a properly functioning judiciary are essential to a healthy business environment. The Covid-19 pandemic has greatly limited access to court services, especially for businesses, and strained the courts. The problems are well known: courts were largely non-functional, with a few exceptions, resulting in delays, heavier caseloads and backlogs, lengthy and complex proceedings, excessive reliance on the physical presence of parties at every stage of the process (including hearings) and the inability of the layperson to navigate court processes without the use of specialised and often expensive legal services.

While the use of AI in judicial systems has been discussed extensively, the pandemic has shown that most courts were not ready even for a quick transition to a simple remote/online mode of operation.[2] One of the main reasons was the lack of digitalisation of court procedures that would allow remote/online work without the need to file paper documents or the parties' personal presence at the hearing. Michael Strauss and Veronica Bradautanu reflected on the importance and impact of court digitalisation for businesses in a 2021 article,[3] noting that countries such as Canada and the United Kingdom have introduced online courts to offer litigants a fully digital dispute resolution process.[4] During the pandemic, these online courts demonstrated the ability to function effectively and ensure access to justice for litigants, as well as ease the burden of overloaded courts.

> During the pandemic, online courts demonstrated the ability to function effectively and ensure access to justice for litigants, as well as ease the burden of overloaded courts.

The EBRD decided to assess the degree to which its economies are ready to introduce, or have already developed, online courts. This would enable the Bank to support the development of online courts, with a focus on ensuring that SMEs) had access to court services. This article provides an overview of the assessment methodology and results of the assessment of 17 EBRD economies.

1. Special thanks to Dentons experts Svetozara Petkova, Jarosław Bełdowski and Vihar Georgiev, who led the assessment and drafted the assessment report that served as the primary source for this article, and to Illia Chernohorenko, Legal Consultant in the LTP, for his contribution to this article and the assessment of Ukraine.
2. See https://www.coe.int/en/web/cepej/tools-for-courts-and-judicial-professionals-for-the-practical-implementation-of-ai, (last accessed on 19 September 2023).
3. M. Strauss and V. Bradautanu (2021), “Emerging Markets Embracing Online Courts – Commercial Courts for Small Value Claims”, *Law in Transition* journal *2021*. See https://2021.lit-ebrd.com/articles/#130-1, (last accessed on 19 September 2023).
4. Civil Resolution Tribunal, British Columbia, Canada. See https://civilresolutionbc.ca/, (last accessed on 19 September 2023); Online Civil Money Claims, United Kingdom. See https://www.gov.uk/make-court-claim-for-money, (last accessed on 19 September 2023).

WHAT IS AN ONLINE COURT?

The terms **online court** and court-related **online dispute resolution (ODR)** are increasingly used in discussions about access to justice and effective resolution of disputes. An online court is defined as a dispute resolution proceeding conducted through a court digital platform that, by default, allows parties to resolve their disputes directly and entirely online, from filing a claim to the delivery of a judgment. It can be complemented by various services and tools to assist in dispute resolution, such as direct negotiations between parties, mediation services and filling out forms.

The benefits of ODR are clear; it is simply more cost-effective and convenient for litigants, especially SMEs. The cases of Amazon, eBay and PayPal underscored the potential of ODR to settle disputes arising from online, cross-border, low-value transactions.[5] The UNCITRAL and the EU also acknowledged this potential.[6]

The key features of online court or court-related ODR are as follows:

- It operates within the formal justice system.
- It is specifically designed to help parties resolve their dispute online without the need for them to be present in person; this is not an electronic case management system to support judicial or court staff decision-making.
- It is applied to certain categories of cases.
- It integrates and extends dispute resolution services offered by the judicial branch into the digital space to serve litigants efficiently, effectively, transparently and fairly.[7]

5 See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374465, p. 91, 101, (last accessed on 19 September 2023).

6 In 2013 the EU adopted its Regulation online dispute resolution for consumer disputes, (last accessed on 19 September 2023). In 2016 the UNCITRAL adopted its non-binding Technical Notes on Online Dispute Resolution, (last accessed on 19 September 2023).

7 See https://www.ncsc.org/odr/guidance-and-tools#:~:text=Court%2Drelated%20Online%20Dispute%20Resolution,the%20program%20operates%20exclusively%20online, (last accessed on 19 September 2023).

EBRD SUPPORT IN ONLINE SMALL CLAIMS COURT DEVELOPMENT FOR SMEs

SMEs, which make up almost 99% of the business communities in the EBRD economies, have been particularly vulnerable to the Covid-19 crisis, facing significant barriers to accessing courts and settling their disputes during and after the pandemic period.

To support SMEs with easy access to justice and fast, cost-effective and efficient resolution of their cases, the LTP has decided to focus on the development of **online courts for small claims (from €5,000 to €10,000)**. In small claims, the costs and time delays are often disproportionate compared with the value of the claim. This is the type of claim with which SMEs typically deal and the area where the benefits of digitalisation can be felt most. The solution was inspired by the above-mentioned jurisdictions in which successful online courts specialising in the resolution of civil and commercial matters were created.

> “The benefits of online dispute resolution are clear; it is simply more cost-effective and convenient for litigants, especially SMEs.”

After a year of preparatory work, in 2021 the EBRD launched the project Regional Framework Project on Digital Transformation of Courts – Development of Online Courts for Small Claims. This project, which focuses on SMEs, aims to support the establishment of online small claims courts in the EBRD regions and thus improve small firms' access to justice and reduce the workload of courts.

To identify the countries where the EBRD can help with the development of online small claims courts, the LTP first had to identify the preconditions and factors that would make this process possible. This also included assessing the needs of EBRD regions and the degree to which they are ready for such reforms. This is why, within the framework of this programme, the LTP initiated a **cross-regional court performance assessment** of 17 jurisdictions. We will discuss this study and its results in more detail below.

> The assessment is designed to encourage countries within and beyond the EBRD's reach to evaluate their own performance, align their practices and learn from the experiences of other jurisdictions how to innovate their dispute resolution processes.

THE CROSS-REGIONAL COURT PERFORMANCE ASSESSMENT

What is the purpose of the assessment?

The assessment evaluates the extent to which various EBRD economies are ready to introduce, or have already introduced, online courts. It does so by mapping out the performance of these jurisdictions in several dimensions, including the IT infrastructure and governance and the extent to which commercial dispute resolution processes and procedures, such as uncontested and small claims, are streamlined.

Besides providing a roadmap for the EBRD's work in the area of digital transformation, the assessment is designed to encourage countries within and beyond the EBRD's reach to evaluate their own performance, align their practices and learn from the experiences of other jurisdictions how to innovate their dispute resolution processes.

The assessment, however, should not be seen as a ranking system for EBRD economies. The scores received should not be viewed in isolation. The well-defined focus on online court development is the lens through which all the data and findings should be viewed.

Development of online small claims court concept in Ukraine

In 2021, in addition to the assessment, the LTP launched its first pilot project to develop a concept and roadmap for the implementation of an online court for small claims in Ukraine, funded by the **EBRD Ukraine Multi-Donor Account**. Initially launched as a response to Covid-19, this project seems even more necessary and timely due to the unprecedented full-scale Russian invasion of Ukraine in February 2022 and the damage to the country's judicial infrastructure, as well as the forced internal and external displacement of millions of Ukrainians along with small and medium-sized businesses.

As part of the project, a team of international and local experts, in close cooperation with key Ukrainian stakeholders and with the involvement of the International Advisory Panel, developed the concept of an online small claims court based on best practices, an implementation plan and terms of reference with technical specifications to set up an IT platform for a small claims court. The concept provides for the creation of an online platform integrated with the Unified Judicial Information and Telecommunication System of the State Court Administration of Ukraine to resolve small commercial claims between businesses, up to an amount equal to the monthly minimum living wage per person multiplied by 100, or UAH 210,200 (€5,150 of May 2023), under the "simplified proceedings" and the uncontested claims proceeding, such as debt collection, provided for in the Code of Commercial Procedure of Ukraine. Such disputes constitute a major share of all disputes pending in commercial courts. The concept highlights the use of online negotiation and mediation and a user-friendly approach. Key Ukrainian stakeholders including the State Court Administration, the Ministry of Digital Transformation and the Supreme Court of Ukraine approved the concept, which was also discussed with representatives of Parliament, judges, mediators and business representatives.

The next phase of the project, which is expected to be implemented from the third quarter of 2023 to end-2024, is to develop the IT platform for a small claims court and pilot it. The Government of Ukraine defined further development and expansion of e-court functions as a priority for the justice sector in the draft plan for the post-war reconstruction of Ukraine (presented in Lugano in July 2022).[8]

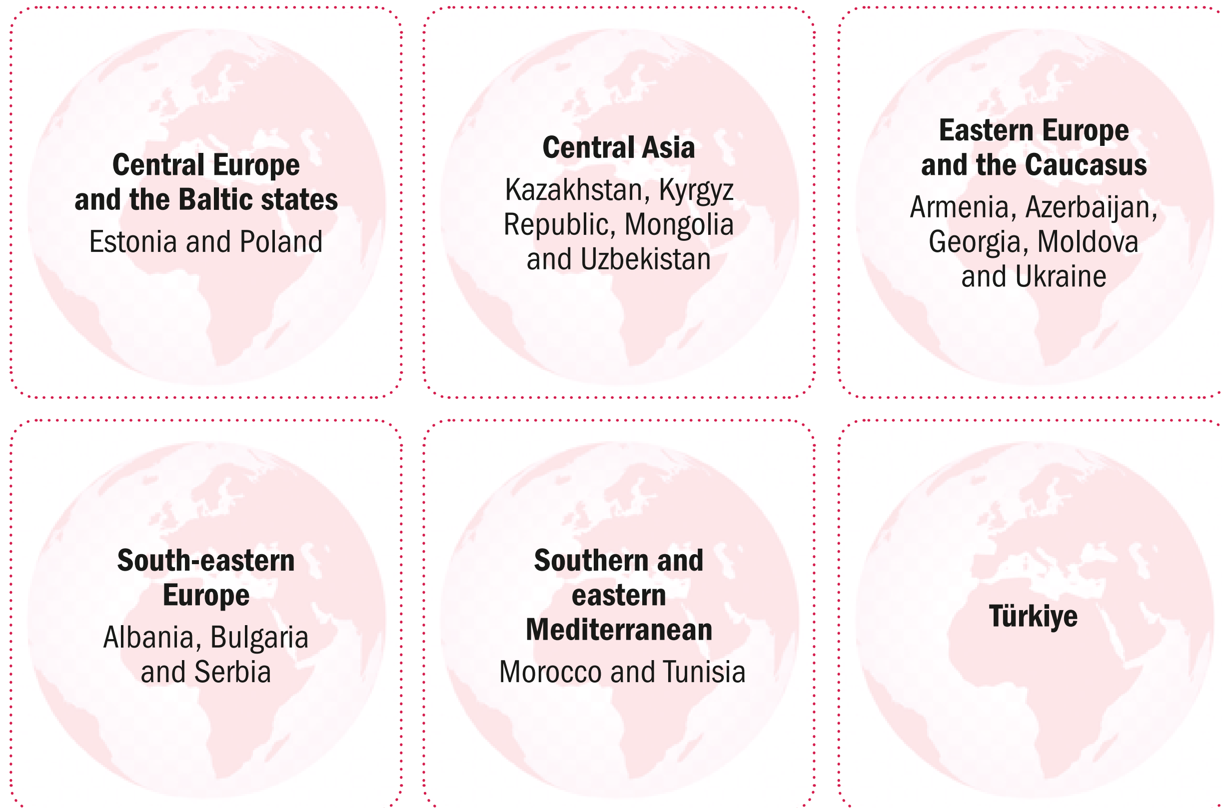
The successful piloting of an online small claims court in Ukraine will serve as a model for replicating and rolling out this initiative in other EBRD economies.

8 See https://uploads-ssl.webflow.com/621f88db25fbf24758792dd8/62c1773aac8e862139acf978_Justice.pdf, (last accessed on 19 September 2023).

The well-defined focus on online court development is the lens through which all the data and findings should be viewed.

Which countries were covered by the assessment?

The assessment initially covered 17 EBRD economies in six regions.



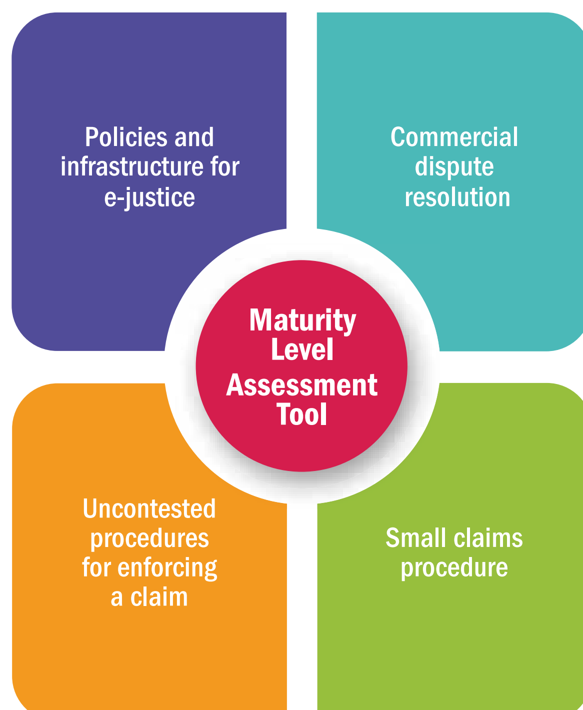
Target jurisdictions were selected in the interest of achieving a relatively broad geographic distribution and diversity in terms of development level. Moving forward, the assessment will expand to other EBRD jurisdictions.

What methodology and tools were used?

The assessment used a Maturity Level Assessment Tool (MLAT) developed by the team specifically for this purpose.[9] The MLAT covered **four key dimensions, divided into indicators and sub-indicators**, and scored from 1 (lowest) to 3 (highest). Importantly, the sub-indicators covered both qualitative and quantitative data.

The assessment focuses on the following dimensions, detailed on the next pages.

Chart 1. **Assessment tool covered four key dimensions**



> “Small claims is the type of claim with which SMEs typically deal and the area where the benefits of digitalisation can be felt most.”

[9] EBRD (2022), Assessment Methodology: Maturity Level Assessment Tool (MLAT) for Online Courts. Available at https://www.ebrd.com/sites/Satellite?c=Content&cid=1395238675306&pagename=EBRD%2FContent%2FContentLayout (last accessed on 18 September 2023).

Dimension 1: Policies and infrastructure for e-justice

This dimension offers insights into the basic IT-related prerequisites, such as internet connection, access to e-services and electronic identification, but also the often neglected electronic governance and strategic approach of governments when it comes to IT solutions in the justice sector. The development of an online court is contingent on the existence of good IT infrastructure and governance.

Dimension 1: Policies and infrastructure for e-justice
Indicator 1.1 Level of development of e-governance and e-infrastructure
• Level of broadband internet access • Level of development of e-documents • Level of development of e-signatures • Level of development of national e-identification • Level of internet penetration • Level of online access to administrative services
Indicator 1.2 Level of development of justice system digitalisation
• Status of e-justice strategy • Case management system deployment rate • Level of integration of the case management system • Official information about the justice system available over the internet • Publication of court judgments and free online access to them
Indicator 1.3 Digitalisation of court processes
• Availability and use of e-filing • Availability and use of electronic service of process (e-service) • Possibility to check case files and track case progress remotely • Possibility to hold online/videoconference hearings (for any type of case) • Court fees • Ability to initiate enforcement based on electronic enforceable titles
Indicator 1.4 Stakeholder engagement
• Existence of an obligation for professional court users to interact with the court only electronically • Availability of monetary incentives for conducting certain court actions electronically • Availability of user guides, help desk and guidance in the e-filing system • Whether court user surveys are conducted by the courts/the judicial system on a regular basis

Dimension 2: Commercial dispute resolution

This dimension examined the extent to which dispute resolution processes, particularly commercial ones, are streamlined. Understanding how commercial dispute resolution, including alternative dispute resolution (ADR) mechanisms, work in a jurisdiction is vital to designing online courts. This is because online courts should not merely reflect existing processes in electronic form, but attempt to improve and transform these processes.

Dimension 2: Commercial dispute resolution
Indicator 2.1 Level of specialisation of commercial dispute resolution
• Availability of a specialised commercial court or specialised commercial divisions in courts • Modifications of the general procedural rules in respect of commercial cases compared to general civil cases • Inception training in commercial law for commercial judges • Continuous (regular) commercial law training for commercial judges • Capacity building for commercial judges' judicial assistants or for other types of specialised judicial clerks engaged in commercial justice
Indicator 2.2 Use of mediation/ADR tools
• Availability of mediation in civil/commercial disputes • Availability of an official register of mediators accessible online • Availability of incentives for mediation • Enforceability of mediation settlement agreements • Availability and use of online solutions for out-of-court settlement

Dimension 2: Commercial dispute resolution (continuation)

Indicator 2.3 Efficiency and effectiveness of commercial litigation

- Clearance rate of first instance commercial cases for the latest year for which statistics are available
- Disposition time of first instance commercial cases compared to the Council of Europe median for first instance civil/commercial cases
- Disposition time of commercial cases compared to that of general first instance civil cases in the latest year for which statistics are available
- Dynamic of commercial cases disposition time over a three-year period (the latest three years for which data are available)

Dimension 3: Uncontested procedures for enforcing a claim and Dimension 4: Small claims procedures
While not necessarily prerequisites for the introduction of online courts, these two dimensions are nevertheless important. All the existing online courts had, as a starting point, a simplified procedure which served as an environment for testing before scaling up to cover other types of claims and procedures. In the case of civil and commercial justice, simplified procedures such as uncontested or small claims were fit for this purpose.

Dimension 3: Uncontested procedures for enforcing a claim

Indicator 3.1 Ease of filing

- Effective self-representation
- Availability and use of forms for filing the claim
- Availability and use of online filing
- Level of court fees for filing a claim
- Simplified rules on attachment of evidence to the claim

Indicator 3.2 Efficient processing

- Predictability of the timelines for pronouncement
- Length of the timelines for pronouncement
- Availability of options for service to the debtor without proof of receipt
- Ease of debtor's objection

Indicator 3.3 Effective linkages between the uncontested procedure and the procedure following a statement of opposition

- Consequence of debtor's lack of objection
- Launching the litigious stage of the procedure
- Link between the fees due in the uncontested claims procedure and in the litigious procedure
- Management of statements of opposition

Dimension 4: Small claims procedures (if available)

Indicator 4.1 Ease of filing

- Effective self-representation
- Existence of forms for filing the claim
- Availability and use of online filing
- Guidance to self-represented litigants

Indicator 4.2 Availability of meaningful procedural simplifications of the small claims procedure

- Statutory timelines in the small claims procedure
- Simplified evidentiary rules
- Simplified rules on hearings
- Special rules on encouraging conciliation or mediation
- Simplified content of the judgment
- Modifications to the rules on appealing the judgment in the small claims procedure

Who contributed to the assessment?

The EBRD LTP team working in dispute resolution and the key project consultant, represented by **Dentons Poland**, oversaw the assessment process. **One or more local evaluators** with a legal background and expertise in commercial and/or civil law and procedure, as well as knowledge of the local institutional and policy framework, conducted the assessment in each jurisdiction. To test the findings of the assessment and ensure a rigorous review, the project team set up an **External Advisory Panel (EAP)** consisting of prominent practitioners and experts in the area of court performance, commercial justice and court innovation. EAP members include representatives of the World Bank, the International Union of Judicial Officers, the World Justice Project, the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe and members of academia.

How were the data collected and evaluated?

In March-September 2022 local evaluators were required to fill out an extensive questionnaire focused on both the legal framework and the existing local practice. Where necessary, local experts also conducted interviews with legal practitioners. In some cases, publicly available evaluations or indices, such as CEPEJ or the Speedtest Global Index, served as data sources. The evaluators also consulted strategic documents to provide the necessary information in areas relating to government policies.

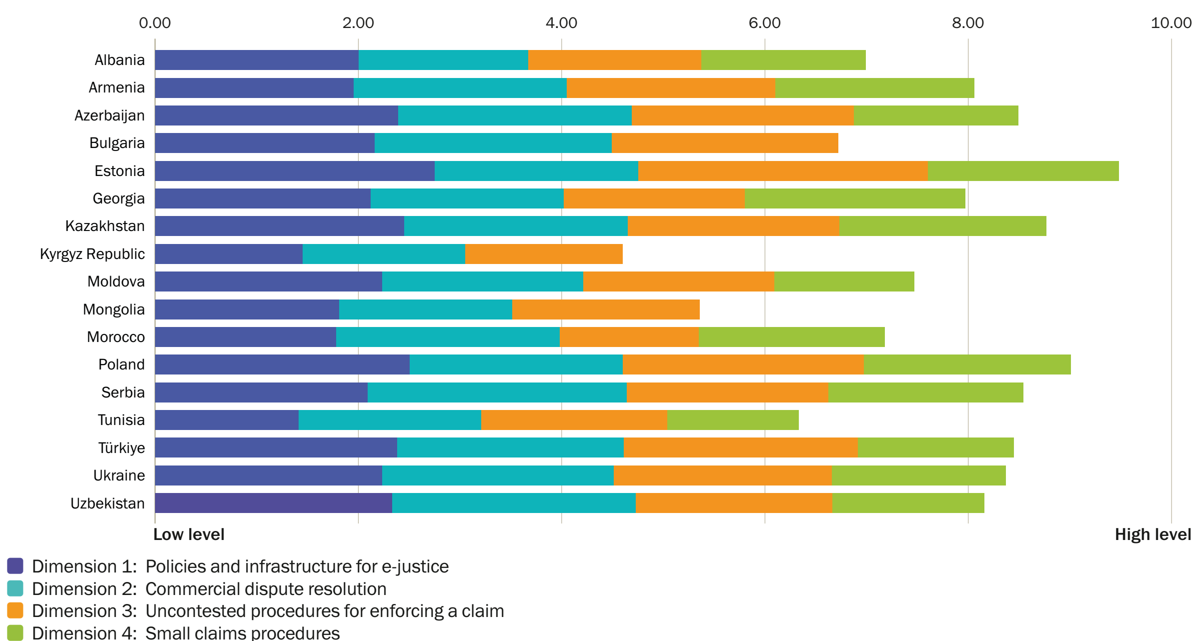
ASSESSMENT RESULTS

What are the main findings of the assessment?

The assessment reveals a rather nuanced landscape among EBRD regions and the jurisdictions in them.[10] **Both the available IT infrastructure and the effectiveness of commercial dispute resolution processes vary across EBRD economies.** The results for central Europe and the Baltic states as well as Türkiye, for instance, indicate a suitable level of preparedness for the initiation of online court projects. South-eastern Europe and eastern Europe and the Caucasus show inconsistent results, with some jurisdictions exhibiting a larger degree of readiness than others. Finally, in some jurisdictions in Central Asia and the southern and eastern Mediterranean regions, significant changes are required before starting the development of online courts.

[10] EBRD (June 2023), Cross-regional court performance assessment project: Assessment report. Available at https://www.ebrd.com/sites/Satellite?c=Content&cid=1395238675306&pagename=EBRD%2FContent%2FContentLayout, (last accessed on 18 September 2023).

Chart 2. **Overall countries' readiness for online courts**



Note: The chart shows the overall performance of all 17 assessed EBRD economies across the four dimensions. The final score obtained by a jurisdiction for each dimension ranges from 1 (lowest) to 3 (highest) and is an average of the score results obtained for the indicators under the dimension. Where no data was available, no score was given (e.g. Dimension 4 in the case of Bulgaria, the Kyrgyz Republic and Mongolia).

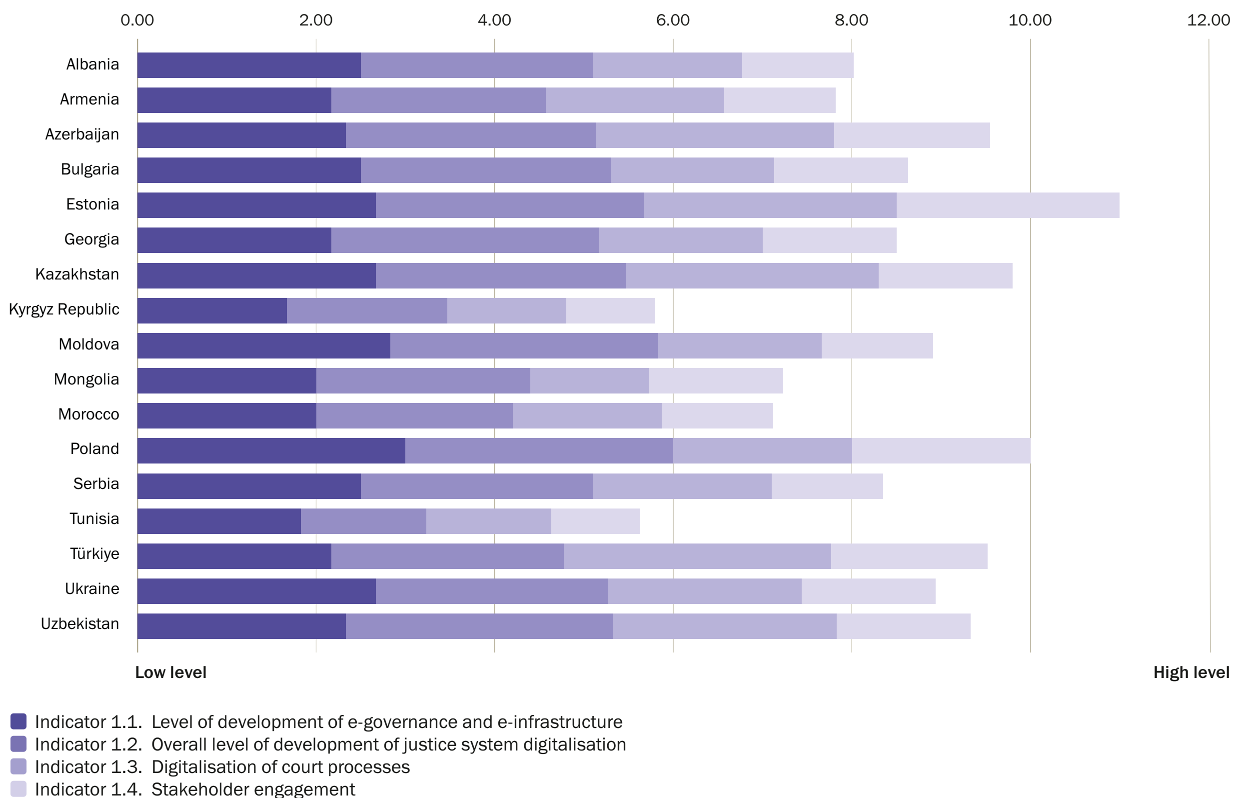
Source: EBRD Cross-Regional Court Performance Assessment across 17 economies (2022)

Dimension 1: Policies and infrastructure for e-justice

As highlighted above, the strategic development and appropriate infrastructure for e-justice are building blocks for an online court. The analysis of the assessment results under this dimension shows that most assessed jurisdictions are making major progress in digital transformation. This is true for both the broader public sector services and particularly for the justice sector. Interestingly, **the examined countries display the best performance in the overall level of development of justice system digitalisation. In contrast, countries – including those with excellent IT infrastructure – exhibit the poorest performance in stakeholder engagement.** The involvement of justice sector users in the digital transformation process is lagging behind and human-centred justice is only emerging in most examined EBRD economies. There is a clear need to engage proactively with court users and other stakeholders, promote digital solutions and systems, and collect actionable feedback on their usability, functions and other relevant concerns. Similarly, there seems to be a strong need for education and training on the benefits and application of IT solutions in the justice sector.

> “The examined countries display the best performance in the overall level of development of justice system digitalisation.”

Chart 3. **Level of justice system digitalisation**



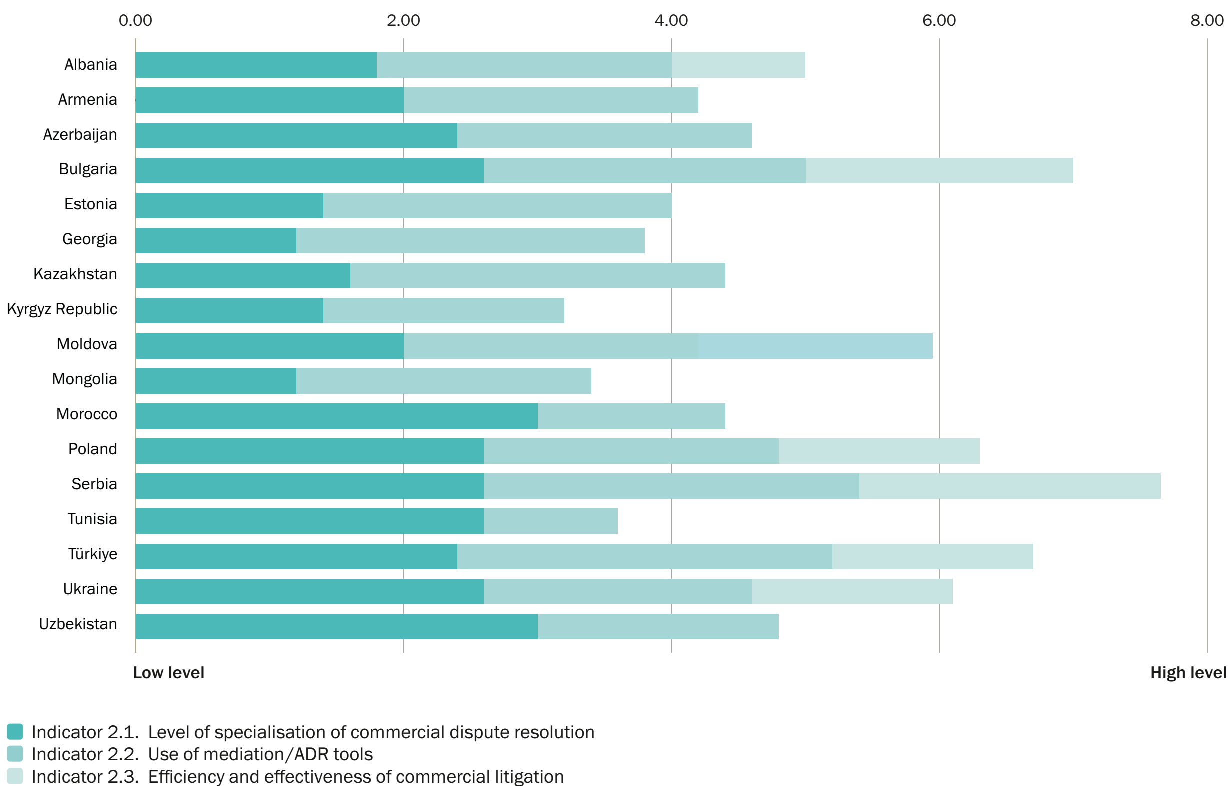
Note: The chart shows the performance of all 17 assessed EBRD economies for Dimension 1 – Policies and infrastructure for e-justice. Compared to the other dimensions, the examined economies show the best performance here. The performance of a jurisdiction for this dimension is represented by the aggregated scores obtained for each of the four indicators that form this dimension. In turn, the score for each indicator is calculated based on an average ranging from 1 (lowest) to 3 (highest). However, the overwhelming majority of the assessed EBRD economies have a low level of stakeholder engagement in e-justice, including those with excellent IT infrastructure.

Source: EBRD Cross-Regional Court Performance Assessment across 17 economies (2022)

Dimension 2: Commercial dispute resolution

Streamlined dispute resolution processes are essential for effective justice and court user satisfaction. They are also an important element in designing online courts. The assessment was based on the assumption that specialised commercial courts and/or procedures usually result in better and more uniform commercial contract enforcement. The assessment of this dimension indicates **varied levels of specialisation and development of commercial litigation in targeted jurisdictions.** Importantly, the assessment revealed that in 10 countries, no statistical data are available to compare the efficiency of civil and commercial litigation. While in some cases the reason may be the lack of disaggregation between civil and commercial litigation (e.g., in Estonia), other times the court-related statistics in the respective country may not be sufficiently granular, or the authorities may not make the collected data publicly available for research and analysis. At the same time, a **positive finding of the assessment is that most countries have a robust framework and use mediation and other ADR mechanisms.** ADR has proven to be a cornerstone of existing online courts as it may decrease the court backlog while offering more autonomy to the disputing parties to settle their dispute and preserve their business relationships.

Chart 4. **Level of commercial dispute resolution development**



Note: The chart shows the performance of all 17 assessed EBRD economies for Dimension 2 – Commercial dispute resolution. The performance of a jurisdiction for this dimension is represented by the aggregated scores obtained for each of the three indicators that form this dimension. In turn, the score for each indicator is calculated based on an average ranging from 1 (lowest) to 3 (highest). Where no data was available, no score was given (e.g., Indicator 2.3 in the case of Armenia, Azerbaijan, Estonia, Georgia, Kazakhstan, the Kyrgyz Republic, Mongolia, Morocco, Tunisia and Uzbekistan). The chart reflects the fact that most countries have a robust framework, and use mediation and other ADR mechanisms. However, more than half of the assessed EBRD economies do not have disaggregated data on the efficiency and effectiveness of commercial litigation.

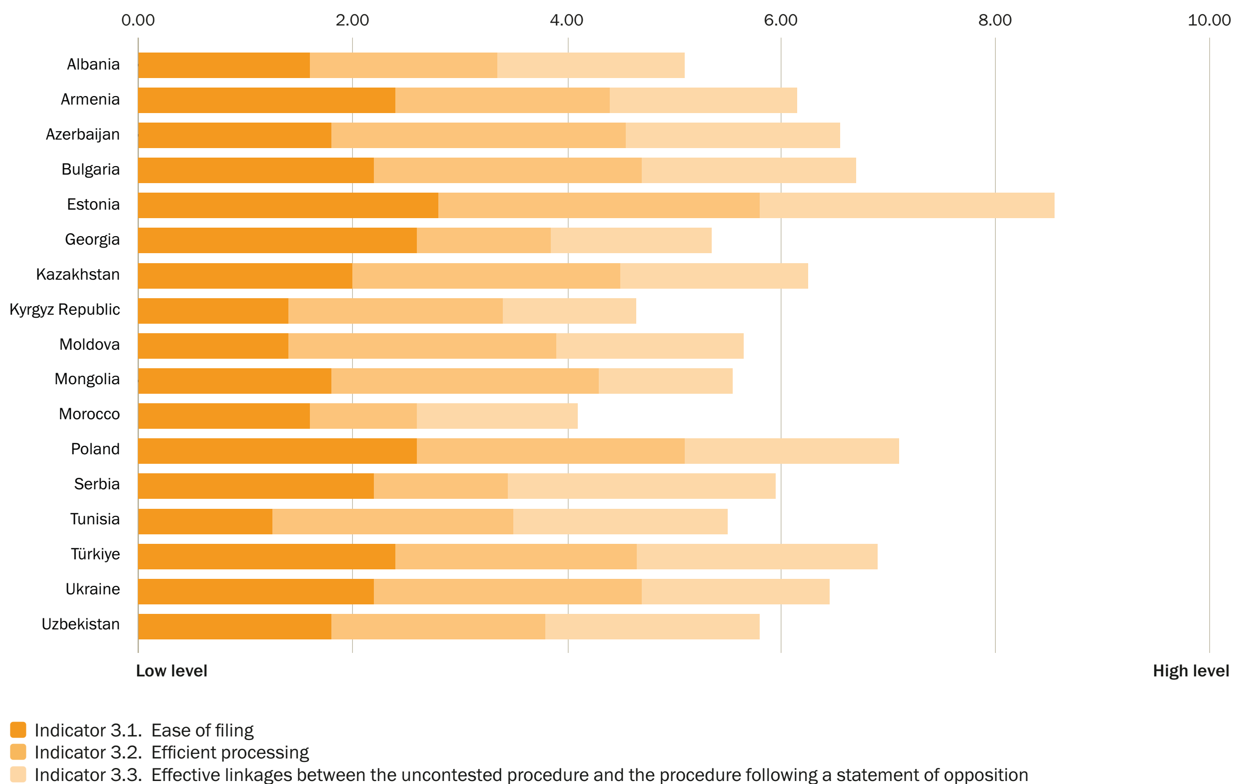
Source: EBRD Cross-Regional Court Performance Assessment across 17 economies (2022)

Dimension 3: Uncontested procedures for enforcing a claim

Uncontested procedures may serve as a good starting point for developing and piloting an online court as they can be conducted asynchronously in a structured and clear manner even for self-represented litigants. **The performance of countries within this dimension varies greatly.** The clear leader is Estonia: it has fully digitalised its order for payment procedure, which has been centralised under a single court department responsible for the entire country. The other targeted jurisdictions display quite inconsistent performance and show that uncontested procedures, contrary to the initial hypothesis, may not be an appropriate ground for online court development. More broadly, this may show that simplified procedures are becoming unfit for purpose and should be redesigned.

> “Uncontested procedures may serve as a good starting point for developing and piloting an online court.”

Chart 5. **Level of effectiveness of uncontested procedures**



- Indicator 3.1. Ease of filing
- Indicator 3.2. Efficient processing
- Indicator 3.3. Effective linkages between the uncontested procedure and the procedure following a statement of opposition

Note: The chart shows the performance of all 17 assessed EBRD economies for Dimension 3 – Uncontested procedures for enforcing a claim. The erformance of a jurisdiction for this dimension is represented by the aggregated scores obtained for each of the three indicators that form this dimension. In turn, the score for each indicator is calculated based on an average ranging from 1 (lowest) to 3 (highest). The chart reflects the fact that the level of effectiveness of uncontested procedures for enforcing a claim varies considerably across the 17 EBRD economies, with Estonia performing the best.

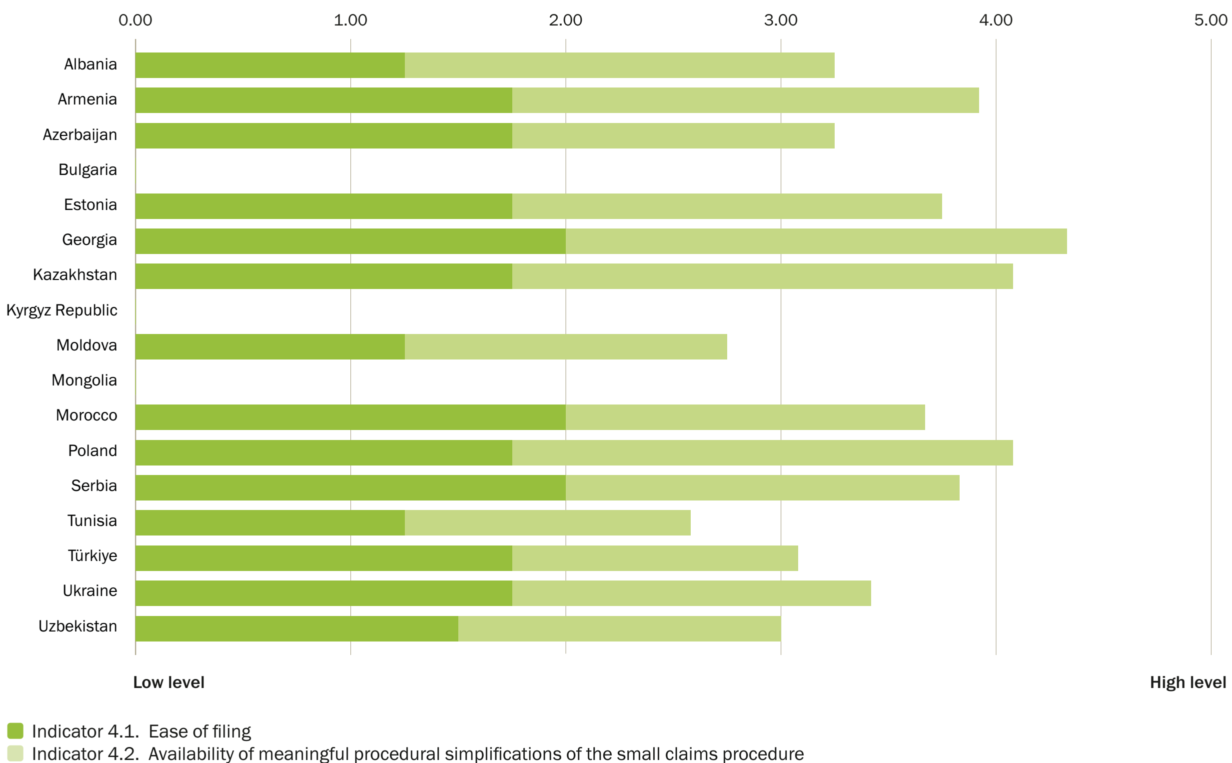
Source: EBRD Cross-Regional Court Performance Assessment across 17 economies (2022)

Dimension 4: Small claims procedures

Like uncontested procedures, small claims seemed to be an appropriate starting point for online courts. However, **this is the area where jurisdictions display the poorest performance in the entire assessment.** There are a few exceptions, such as Georgia, but many jurisdictions display consistently low scores under both indicators included in this dimension. In essence, this means the level of development of small claims procedures in the examined countries is low and not suitable for online court development. More generally, it seems that small claims procedures – presumed to be extensively used by SMEs, which formed the biggest market in EBRD economies – are generally unable to ensure the swift and inexpensive justice they were designed to dispense.

> “ Small claims procedures is the area where jurisdictions display the poorest performance in the entire assessment. ”

Chart 6. **Small claims procedures**



Indicator 4.1. Ease of filing
Indicator 4.2. Availability of meaningful procedural simplifications of the small claims procedure

Note: The chart shows the performance of all 17 assessed EBRD economies for Dimension 4 – Small claims procedures. The performance of a jurisdiction for this dimension is represented by the aggregated scores obtained for each of the two indicators that form this dimension. In turn, the score for each indicator is calculated based on an average ranging from 1 (lowest) to 3 (highest). Jurisdictions that do not have a small claims procedure, such as Bulgaria, the Kyrgyz Republic and Mongolia) were not scored.

Source: EBRD Cross-Regional Court Performance Assessment across 17 economies (2022)

CONCLUSION

The assessment examined the degree to which EBRD jurisdictions are prepared to transition to fully digital dispute resolution processes. It also looked at the types of court procedures presumed to be most suitable for testing online courts.

The MLAT used to carry out this assessment sees digital transformation as an evolutionary process. In this process, online courts are an additional avenue for dispute resolution with numerous advantages. They can be developed, however, only after certain prerequisites have been met.

The assessment shows that the level of EBRD regions' preparedness varies considerably. In line with technological advancement, they seem to perform well in terms of IT infrastructure. However, they have focused less on rethinking and improving existing commercial dispute resolution processes. This shows that, in paving the way to introduce online courts, more efforts should be directed towards streamlining and improving processes and ensuring that the focus on accessible and effective dispute resolution is not lost in the chase for mere digitisation. This is one of the key takeaways highlighted in the guide that the project team developed based on the assessment to help the jurisdictions interested in developing online courts.[11] As the EBRD become an increasingly important actor in the area of digital transformation, the assessment is only the starting point in the LTP team's mission to expand that digital transformation to speedy and efficient dispute resolution services for businesses across all economies where we operate.

> “In paving the way to introduce online courts, more efforts should be directed towards streamlining and improving processes and ensuring that the focus on accessible and effective dispute resolution is not lost in the chase for mere digitisation.”

11 EBRD (June 2023), *Are you ready for online courts? Guide on readiness for the introduction of online courts*, forthcoming.

GLOSSARY

AI	artificial intelligence
ADR	alternative dispute resolution
CEPEJ	European Commission for the Efficiency of Justice
CGI	Climate Governance Initiative
CRM	critical raw material
CESEE	central, eastern and south-eastern Europe
CIS IPA	Inter-Parliamentary Assembly of the Commonwealth of Independent States
CCG	corporate climate governance
CCGAP	corporate climate governance action plans
EBRD	European Bank for Reconstruction and Development
ESG	environmental, social and governance
EU	European Union
EnPCs	energy performance contracts
ETA	Electronic Transactions Act
ECB	European Central Bank
EBA	European Banking Authority
EAP	External Advisory Panel
GFANZ	Glasgow Financial Alliance for Net Zero
GHG	greenhouse gas
IPCC	Intergovernmental Panel on Climate Change
ISSB	International Sustainability Standards Board
IT	information technology
IMDA	Infocomm Media Development Authority
IMF	International Monetary Fund
LTP	Legal Transition Programme
MDB	multilateral development bank
MLETR	Model Law on Electronic Transferable Records
MCS	Moldovan Customs Service
MLAT	Maturity Level Assessment Tool
NDC	nationally determined contribution
NPL	non-performing loan
NPE	non-performing exposure
NBK	National Bank of the Republic of Kazakhstan
OECD	Organisation for Economic Co-operation and Development
ODR	online dispute resolution
ofi	Olam Food Ingredients
PPP	public-private partnership
RST	reform support team
SDG	Sustainable Development Goal
SME	small and medium-sized enterprise
SOE	state-owned enterprise
SMART	SOEs Management Assistance Reform and Transformation
STEG	Société Tunisienne de l'Electricité et du Gaz
TCFD	Task Force on Climate-Related Financial Disclosures
UGS	Ukraine Geology Service
UNCITRAL	United Nations Commission on International Trade Law
UNFCCC	United Nations Framework Convention on Climate Change
UNECE	United Nations Economic Commission for Europe

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