LT

2019

European Bank
for Reconstruction and Development

LAW IN TRANSITION JOURNAL

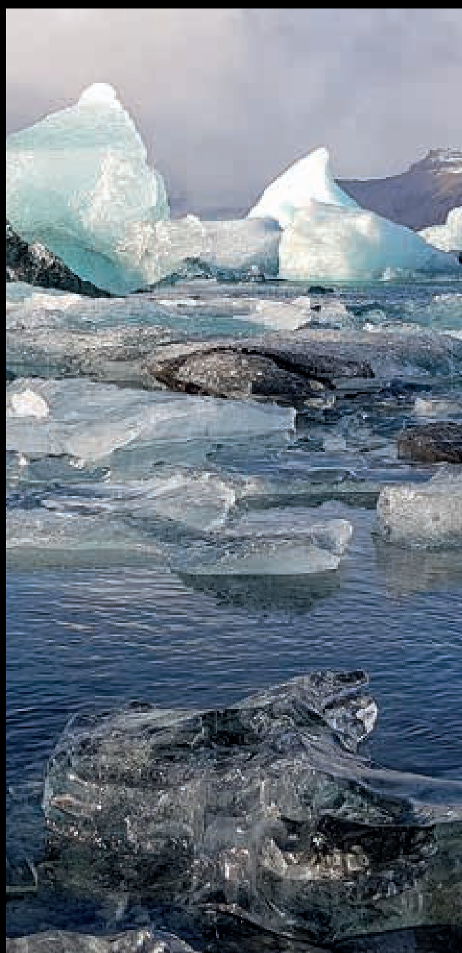
Gender balance in access to justice in the southern and eastern Mediterranean region page 56

Contributors

Ammar Al-Saleh, Veronica Bradautanu, Catherine Bridge Zoller, Gian Piero Cigna, Pavle Djuric, Vesselina Haralampieva, Jelena Madir, Paul Moffatt, Michel Nussbaumer, Alexei Zverev

Ramping up climate action by enhancing companies' governance framework page 32

BETTER LAWS FOR BETTER ECONOMIES



ABOUT THE EBRD

The EBRD is a multilateral bank that promotes the development of the private sector and entrepreneurial initiative in 38 economies across three continents. The Bank is owned by 67 countries as well as the EU and the EIB. EBRD investments are aimed at making the economies in its regions competitive, inclusive, well-governed, environmentally friendly, 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 Legal Transition Programme, *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

BETTER LAWS FOR BETTER ECONOMIES

We live in an age of technological advances, of continuous, high-speed progress through innovation. The improvements in living standards created in this environment should be no less available to those in developing economies than they are in more developed societies.

At the EBRD, we are proud of our role in helping our regions embrace the future. Our mandate is to invest in changing people's lives in 38 economies, across three continents. So where does the EBRD's Legal Transition Programme feature in this picture? How does it fit with the core values that underpin the Bank's activity?

The Bank's mission is to develop open and sustainable market economies and promote private and entrepreneurial initiative. Our investments fuel that development but the impact of our funds depends on the context into which they are deployed. Key to that is the investment climate. Investors value a legal system and a regulatory framework that, together, create a level playing field for all market participants. This is precisely what the EBRD's policy engagements, and our Legal Transition Programme, is about.

The Legal Transition Programme reviews the law on the books and its application in practice, testing for weaknesses. And having identified a need for our support, we partner with our governmental and regulatory "clients" to devise technical cooperation projects, mobilise donor funding and collaborate with international experts to support the necessary legal or regulatory reform that will open up our region to greater investment. Our programme also supports local judiciaries with commercial law training, and develops alternative forms of dispute resolution such as mediation, thereby improving access to justice.

What drives the Bank is a vision of entrepreneurial economies with opportunities for all. Our lawyers understand that legal reform is not an academic exercise. Legal and regulatory systems do not exist in a vacuum. They serve society, including business, and must respond to society's demands accordingly. Entrepreneurs require confidence in fair and predictable court decisions, which can then be reliably enforced. Investors look for the highest standards in corporate governance. A changing world necessitates focus on energy efficiency, ever more inventive alternative forms of finance, greater gender equality, creative partnerships between the public and private sectors. We recognise that these overlapping and sometimes competing priorities can seem overwhelming to policymakers. Our lawyers take pride in guiding their governmental and regulatory "clients" through the issues.

Lastly, the EBRD takes an internationalist approach, espousing the values of economic integration and multilateralism to fight common challenges. Accordingly, our Legal Transition Programme makes extensive use of international standards as a reform tool. It also seeks to establish partnerships with other multilateral organisations to leverage its efforts.

This year's *Law in Transition* journal includes some excellent examples of our legal reform work which help you understand how our programme makes a difference to the lives of people in our regions. I wish you an enlightening and inspiring read.

MARIE-ANNE BIRKEN
GENERAL COUNSEL, EBRD

EDITOR'S MESSAGE

Being able to share knowledge and lessons learned is a key part of any development programme. For more than two decades the EBRD's Legal Transition Programme has used this journal to do just that – report on what it has learned and how it has helped create an investor-friendly legal environment in the economies where the Bank invests.

This year's issue reflects the richness and variety of EBRD initiatives that aim to reform laws and build capacity in the Bank's regions.

To kick things off, **Gian Piero Cigna** and **Pavle Djuric** take a critical look at 12 years of the EBRD's work on improving corporate governance in its investee companies. The efforts are considered in the context of a joint initiative of development finance institutions.

Next, **Catherine Bridge Zoller** offers an analysis of a proposed EU Directive aiming to harmonise insolvency restructurings in EU member states, which is expected to influence a large number of the economies where the EBRD invests.

The EBRD has taken its first steps in FinTech policy and legal work, in particular on crowdfunding platforms and smart contracts. **Jelena Madir** reviews this work and presents two recent EBRD studies on best practice for regulators having to deal with such new instruments.

Vesselina Haralampieva surveys private sector companies to test their readiness to disclose climate-related risks and adopt related strategies. She makes specific recommendations for companies from emerging markets who want to be ahead of the game by managing their climate exposure.

The EBRD often collaborates with other organisations, and **Alexei Zverev**'s piece looks at the Bank's work with the Commonwealth of Independent States (CIS) Inter-Parliamentary Assembly. Going beyond mere model law drafting, the two organisations have recently worked on practical tools that can be used to promote public-private partnerships in all 10 countries that belong to the assembly.

My own contribution to this issue of the *Law in Transition* journal relates to the joint efforts of the EBRD and the International Development Law Organization (IDLO) to promote stronger dispute resolution systems in the EBRD regions, through judicial capacity building and the promotion of commercial mediation in particular.

Veronica Bradautanu presents some of the innovative work by the Legal Transition Programme in collaboration with the Bank's Gender Team. It addresses the issue of gender balance in terms of access to justice in the southern and eastern Mediterranean region where the Bank operates.

The journal's last two stories are on country-specific projects: **Ammar Al-Saleh** tells us about the promotion of factoring as a financing tool in Kosovo, and **Paul Moffatt** writes about reforming mining laws in Georgia.

I hope you find this journal informative, and any feedback is welcome.

MICHEL NUSSBAUMER
DIRECTOR, LEGAL TRANSITION PROGRAMME, EBRD
NussbauM@ebrd.com

IMPROVING CORPORATE GOVERNANCE OF INVESTEE COMPANIES – A COMMON GOAL OF DEVELOPMENT FINANCE INSTITUTIONS

Good corporate governance is essential for companies wishing to access external capital and for countries aiming to stimulate private sector investments. If companies are well run, they will prosper. Poor corporate governance weakens the company's potential and paves the way for financial difficulties and even fraud.

The EBRD has a two-fold approach to raising corporate governance standards. The first is to work with investee companies to identify issues that need to be corrected to ensure sound and prudent corporate governance. The second is to work with regulators in the EBRD region to ensure that the legislative framework is aligned to best standards.

This article focuses on the first approach, which is part of a joint effort by many development finance institutions.

1

2

1
GIAN PIERO CIGNA
SENIOR COUNSEL, EBRD
CignaG@ebrd.com

2
PAVLE DJURIC
PRINCIPAL COUNSEL, EBRD
DjuricP@ebrd.com

"The EBRD has always sought to improve corporate governance standards alongside its investment operations."

As a major investor in companies in central and eastern Europe, Central Asia and the southern and eastern Mediterranean regions, the EBRD has always sought to improve corporate governance standards alongside its investment operations.

DFI COMMON APPROACH FOR IMPROVING CORPORATE GOVERNANCE OF INVESTEE COMPANIES

In early 2006, the EBRD joined forces with other development finance institutions (DFIs) including the International Finance Corporation (IFC), the Dutch Development Bank (FMO), the Asian Development Bank, the Black Sea Trade Development Bank and the Development Bank of Latin America (CAF) to forge a common approach for the promotion of corporate governance in the context of DFIs' investment activities.

At the Annual Meetings of the World Bank Group and the IMF in 2007, 31 DFIs signed and committed to the joint "Approach Statement"[1] which emphasises the importance of good corporate governance practices in the entities in which they are prepared to invest. The Approach Statement calls for DFIs to "*develop or adopt guidelines, policies or procedures on the role of corporate governance considerations in its due diligence and investment supervision operations*".

After the signing, a working group – set up with representatives of major DFIs — including the EBRD — developed the DFI Toolkit on Corporate Governance, a set of tools (including a questionnaire, a progression matrix, instruction sheets and many useful sample documents), aimed at providing a common methodology for assessing corporate governance in the DFIs' investment work.[2]

As a follow-up to the Approach Statement and the toolkit development, in September 2011, a total of 30 DFIs (including the EBRD) signed the Corporate Governance Development Framework[3] as an answer to the G-20's call for DFIs to strengthen their coordination and ensure accomplishment of certain key institutional reforms, such as an increased commitment to transparency, accountability and good corporate governance. Through the framework, the signatories endorsed the toolkit as a common platform for evaluating and enhancing governance practices in their investee companies.

With the aim of raising awareness, both at the private and public sector levels, of the importance of good governance to sustainable economic development, the signatories of the Framework have undertaken to:

- integrate corporate governance in their investment operations by adopting procedures and tools in line with the framework, conduct corporate governance assessments of their investment clients, and develop action plans when appropriate
- identify staff responsible for implementation and oversight of the framework
- provide or procure training to ensure capacity building and share knowledge on corporate governance
- collaborate with other signatories to share experiences and resources on training and implementation
- report annually on the implementation of the framework.

As of December 2018, 35 DFIs[4] had subscribed to the framework. This signals an unwavering commitment by the DFI community to improve corporate governance practices in corporations world-wide.

"In September 2011, a total of 30 development finance institutions (including the EBRD) signed the Corporate Governance Development Framework. As of December 2018, 35 development finance institutions had subscribed to the framework."

THE IMPORTANCE OF CORPORATE GOVERNANCE IMPROVEMENTS IN EBRD'S INVESTEE COMPANIES

The transformation of the EBRD's regions' economies from centrally planned to market economies has exposed enterprises from these countries to the financial interests and expectations of foreign investors, which provoked the need for better governance practices.

But why is corporate governance important to investors?

First, even the most capable management – if not properly directed - can make bad decisions, leading to undesirable results for a company and its shareholders. Good corporate governance helps shareholders to hire the right directors and managers, and helps ensure that they account for their actions.

Further, good corporate governance can help to improve company performance and contributes to companies achieving higher market valuations. Also, corporate governance can help investors to properly measure and evaluate the risks and opportunities of the companies they invest in, which will in turn allow for a more realistic investment pricing and a more efficient allocation of resources, while at the same time helping investors to avoid risks whose impact can be quite high, such as reputational risk. Lastly, it encourages the development of local capital markets and helps to increase the number of market participants, thus diversifying access to finance.

In addition to these issues that are relevant to most investors, the EBRD has other reasons to promote good corporate governance. Namely, fostering transition in the Bank's regions is at the very core of the EBRD's mandate and is firmly rooted in the Agreement Establishing the Bank.

The Bank has operationalised the concept of transition around the so-called "*six qualities of transition*",[5] through which the merits of each proposed investment are assessed. One of those transition qualities is "well-governed", which encompasses both state-level governance and corporate-level governance that relates to the system of rules, practices and processes by which companies are directed and controlled. This means that improving corporate governance of an investee company can be one of the very concrete and tangible sources of transition impact in our regions.

THE EBRD APPROACH

The EBRD promotes "transition" through both its banking operations and the policy dialogue it conducts with country authorities. In its banking operations (both equity and debt), the EBRD has followed the approach set out in the toolkit and incorporated it into its internal process called the "Corporate Governance Review".

Once the banking team determines that a prospective client is either interested in improving its corporate governance practices or that there are some governance deficiencies that need to be addressed, the EBRD undertakes a detailed assessment of the client's practices. To that end, a questionnaire is sent to and answered by the client, embedding key issues on the client's corporate governance practices.

> "The Bank has operationalised the concept of transition around the so-called "six qualities of transition", through which the merits of each proposed investments are assessed."

The information gathered during this exercise – complemented with additional due diligence, as necessary – is then systematised and benchmarked against applicable standards and best practices which depend on the type of client and its strategic plans and aspirations (for example, the OECD/G-20 Principles of Corporate Governance, the UK Corporate Governance Code, but also some other national corporate governance codes, including those of the company's country of incorporation).

This leads to a better understanding of the "gap" that needs to be addressed by improvements. To guide this benchmarking, the Bank relies on internationally recognised best practices, but it also uses the progression matrix similar to the one from the toolkit, to act as a roadmap of sorts, guiding investee companies towards good and best practice corporate governance practices as they evolve over time.

Based on the collected information, the Bank's corporate governance specialists within the Legal Transition Programme (LTP) provide an explanation of the weaknesses (if any) in the client's current practices and prepare a set of potential actions that can be undertaken to improve the investee's corporate governance. These actions are set out and described in a so-called "Corporate Governance Action Plan" (CGAP) which is then sent to and discussed with the client with the aim of being included in the financing documentation.

In order to ensure that the proposed actions are relevant to the client and capable of fostering transition, the EBRD's corporate governance specialists also check whether the actions that are proposed correspond to key corporate governance challenges of the investee company's main country of operations. To support this work, the EBRD conducts an in-depth assessment of the legal framework and disclosed practices of the largest (listed) companies in each economy where it invests. Besides a detailed comparative analysis of both the quality and effectiveness of national corporate governance legislation (including corporate governance codes), the assessment seeks to provide an indication of whether the legal framework is both sound and well implemented, which feeds back to the actions to be implemented through a CGAP.

Once the CGAP actions have been agreed with the client, they are usually referred to in financing documentation in order to demonstrate the client's commitment and set concrete milestones that can then be monitored during the life of the investment.

UNIVERSAL AREAS OF ATTENTION AND SECTORAL SPECIFICITIES

Being a private sector-focused bank, the spectrum of clients whose corporate governance is analysed is vast and spans from simple family-owned small and medium-sized enterprises and larger privately owned companies to listed companies, complex financial institutions, as well as heavily regulated state-owned enterprises (SOEs) such as energy utilities and infrastructure companies.

However, despite a great variety in terms of companies being analysed, there are a few areas which are reoccurring and can be examined across the board. For instance, every company needs to have a qualified and independent main decision-making body (board of directors or a supervisory board in the case of two-tier governance systems) which is properly authorised and empowered to set the strategic direction of the company, determine the resources a company should have

The 2018 Annual DFI Corporate Governance Conference

The importance of corporate governance in investment operations and greater engagement with investee companies was one of the main themes of the 12th Annual Development Finance Institutions Corporate Governance Meeting, held in March 2018 in London, at the EBRD. Of the 35 signatory institutions, representatives from 26 DFIs attended the conference, along with over 60 external guests.

The first day of the conference was open to outside guests and introduced the latest corporate governance topics, such as the impact of technology on corporate governance, the role of institutional investors in the promotion of corporate governance, cyber security risks and board effectiveness and diversity.

Highlights included a keynote speech by Erik Vermeulen, a professor of business and financial law at Tilburg University in The Netherlands, on the impact of technology on companies' business models and its implications for governance in the future. Break-out sessions looked at features of the UK's Stewardship Code and the strategies deployed by investment funds to improve the governance practices of their client companies. In another session, an expert panel discussed cyber security as an emerging governance challenge.

The second day was open to the representatives of DFIs only and focused on progress with the framework implementation by various DFIs. On the side of DFIs, participants showed strong support to continuing implementation of the framework and promoting regional cooperation initiatives among signatories. Also the signatories will aim to promote technical analysis and collaboration (for example, corporate governance in project finance and infrastructure projects) in their future works and will explore the possibilities of opening the initiative up to non-DFI investment communities.

and the risks it should take in pursuit of its business, and monitor the management's implementation of the strategy and more broadly the company's performance.

Also, while the board size and the profile and competences of its members vary according to the size and activity of a company, the principle that a board should be diverse and fit for purpose is emerging as universally relevant. Companies that rely on any kind of external financing must also adhere to certain transparency requirements, in order to provide adequate assurance on the company's operations to investors and other stakeholders. Lastly, every company should have some sort of internal control environment aimed at ensuring proper application of all the policies, processes and practices necessary for the company's proper functioning.

Some improvements will necessarily be more relevant for some types of companies. For instance, prudential regulation for banks has been significantly strengthened in recent years, which requires practices to follow suit, especially with regards to the scope and level of intensity in the board's involvement in key issues affecting a bank and the risks that it is taking. Therefore, it can be expected that potential improvements will address questions of risk appetite and internal control systems (which in banks are usually structured along the "three lines of defence" model that includes controls at the level of business lines, second-line functions such as risk management and compliance, and internal audit as the third line).

Also, governance of SOEs is usually regulated in detail, which means that some of the improvements will focus on the regulation behind the practices. On the other hand, family-owned businesses will need greater assistance in establishing basic governance structures and succession planning, perhaps the most important issue to be addressed for these kind of companies. "For the family business to survive into its next stage, the founders should make the necessary efforts to plan for their succession and start grooming the next leaders of the company".[6]

Companies looking to have an initial public offering will benefit from greater assistance in preparing for such an event and applying the corporate governance code of the planned listing venue.

Of course, the above areas are just common themes that warrant attention in all reviews. Since one size clearly does not fit all, individual responses (in terms of CGAP actions) will always need to be tailored to the particular situation of each investee company and the challenges it is facing, while observing the need for the practices to go "above and beyond" mere compliance with legal requirements to ensure that corporate governance adds value to the company's operations.

LESSONS LEARNED AND WAY FORWARD

With more than 20 years' experience working with investee companies, we believe that the current approach of leveraging policy dialogue with investments provides for good transition outcomes. Policy dialogue at the level of the client, or in the case of SOEs: at the level of both the client and the authorities, ensures that the business case for corporate governance is better understood and accepted, while financial leverage provides a basis for the clients' continuous commitment.

However, agreed CGAPs are just the start of reform efforts that in some cases may take years to complete. In that sense, the CGAP is not an end in itself, but a starting point and a basis for further dialogue. It is essential to maintain good engagement (and if needed, pressure) with the client because what has been agreed needs to be translated into practice to have any real impact.

Because of this, the EBRD is increasingly active in providing technical assistance to investee companies in implementing the CGAP in accordance with descriptions and deadlines provided therein. We see this as a natural extension of the Bank's efforts for meaningful reform. In specific operations, such as equity investment, good progress on delivering reforms can also be achieved by having one or more of the Bank's nominee directors as part of the investee company's board.

1 The Approach Statement is available at:
https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/cg+development+framework/a+corporate+governance+approach+statement+by+development+finance+institutions
(last accessed 21 December 2018).

2 The DFI toolkit is available at:
http://cgdevelopmentframework.com/cg-development-framework/toolkit-corporate-governance/
(last accessed 21 December 2018).

3 The Corporate Governance Development Framework is available at:
http://cgdevelopmentframework.com/wp-content/uploads/2017/02/CorporateGovernanceDevelopmentFramework.pdf
(last accessed 21 December 2018).

4 The 35 DFIs that signed the statements are listed at:
http://cgdevelopmentframework.com/cg-development-framework/signatories-page/
(last accessed 21 December 2018).

5 The six qualities included in the EBRD's concept of transition are: inclusive, well-governed, environmentally friendly, resilient and integrated. Read more about the EBRD transition qualities at:
https://www.ebrd.com/cs/Satellite?c=Content&cid=1395237696921&d=Mobile&pagename=EBRD%2FContent%2FContentLayout
(last accessed 21 December 2018).

6 See IFC Family Business Governance Handbook, available at:
https://www.ifc.org/wps/wcm/connect/region__ext_content/ifc_external_corporate_site/east+asia+and+the+pacific/resources/ifc+family+business+governance+handbook
(last accessed 21 December 2018).

MOVING "IN SYNC"? TOWARDS GREATER INSOLVENCY HARMONISATION

"The proposed EU Directive sets out certain goals which EU member states are expected to reflect in their national insolvency legislation to ensure access to a preventive or early restructuring framework for debtors in financial difficulty."

CATHERINE BRIDGE ZOLLER
SENIOR COUNSEL, EBRD
BridgeC@ebrd.com

EU member states make up almost a third[1] of the 38 economies where the EBRD invests. A further five EBRD countries of operations are candidate countries for joining the EU (European Union).[2] The new European Commission proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures (the proposed Directive), which is expected to be adopted in the first half of 2019, may therefore have a significant impact on the EBRD regions. While EU member states are not required to implement the proposed Directive into national legislation until three years from the date of its entry into force, some member states, such as France and The Netherlands, have already indicated that they may reform in advance of the implementation date. Meanwhile the United Kingdom, although set to exit from the EU, announced in August 2018 a proposed comprehensive reform of its insolvency rescue regime in line with the proposed Directive.[3]

The proposed Directive sets out certain goals which EU member states are expected to reflect in their national insolvency legislation to ensure access to a preventive or early restructuring framework for debtors in financial difficulty. It is to be distinguished from the recently recast European Union Regulation on Insolvency Proceedings,[4] which has direct effect and is aimed at coordinating effective administration of cross-border insolvency proceedings, as

"A key objective of the proposed Directive is the harmonisation of differences in insolvency laws at EU level."

well as from initiatives such as OHADA,[5] which has created a cross-border regime of uniform commercial laws, including insolvency laws that are directly applicable in OHADA member states. As secondary EU legislation, the proposed Directive is derived from principles and objectives set out in EU treaties. A key objective of the proposed Directive is the harmonisation of differences in insolvency laws at EU level, which have been identified as an impediment to the integration of EU capital markets and the Commission's objective of a Capital Markets Union, by establishing certain minimum substantive standards.[6] Consequentially the proposed Directive provides that the EU Directives on settlement finality in payment and security systems, financial collateral arrangements and on over-the-counter derivatives, central counterparties and trade repositories, which guarantee a certain level of financial stability for capital markets, should all prevail in the event of any conflict with the proposed Directive.[7]

While there has been some cross-fertilisation to date among EU member states in the area of insolvency law;[8] the proposed Directive represents the first time that the EU has taken a serious step towards imposing some degree of harmonisation among EU member states in national insolvency law, albeit with significant freedom for manoeuvre. The proposed Directive stops short of harmonisation of all insolvency law and excludes from its scope liquidation procedures which account for the vast majority of insolvency proceedings. It also does not touch

concepts of what constitutes “insolvency” and “likelihood of insolvency”, which are linked to the so-called “trigger” to commence insolvency and rescue procedures and are interpreted differently throughout the EU with reference to cash flow and balance sheet insolvency tests and sometimes a combination of both. Likewise it leaves the definition of small and medium-sized enterprises (SMEs) to national legislators, presumably since this could be problematic to align across the EU given the different profile of many member state economies.

The proposed Directive builds on the Commission’s 2014 recommendation on a new approach to business failure and insolvency (the **Recommendation**),[9] which focused on ensuring that member states had a procedure to enable businesses to restructure at an early stage to prevent insolvency. The Recommendation was founded on the following six principles: early recourse to the restructuring procedure; minimised court involvement; allowing the debtor to remain “in possession” or control of its business during restructuring; a court-ordered stay or moratorium to prevent dissipation of assets; the ability to cram down or bind dissenting creditors to a restructuring plan and protection for new finance provided in accordance with a court-sanctioned restructuring plan.[10] The Recommendation was, however, non-binding, which resulted in limited member state compliance.

The proposed Directive covers three main areas related to business or commercial insolvency: (i) preventive restructuring frameworks for debtors in financial difficulty; (ii) procedures for discharge of debt incurred by insolvent entrepreneurs that is, natural persons who exercise a trade, business, craft or profession;[11] and (iii) measures linked to the increase in efficiency of procedures relating to restructuring, insolvency and the discharge of debt. It does not apply to natural persons who are not entrepreneurs or to certain categories of debtor which are typically treated separately for insolvency purposes, such as insurance undertakings and credit institutions. For the purpose of this Article we will focus on areas (i) and (iii) relating to businesses which are legal persons, as this is core to the Bank’s insolvency-related activities.

The term "restructuring" is broadly defined in the proposed Directive as "*measures that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes or a combination of those elements*". This definition recognises that restructuring does not only concern the rescheduling of financial liabilities but will often require significant operational changes or divestments, including a transfer of ownership of the business. Nevertheless the proposed Directive does not expressly require member states to support a transfer of the business as a going concern within the context of preventive restructuring. It is also not entirely clear to what extent the proposed Directive will, in practice, promote a sale of the business as a going concern and change in ownership, which is often accompanied by a change in management. The proposed Directive requires member states to have in place a preventive restructuring procedure which allows the debtor and its management to remain in possession and does not envisage a creditor-led procedure which would be more likely to lead to a sale of the business.

THE NEW PREVENTIVE RESTRUCTURING FRAMEWORK

The text of the proposed Directive was extensively debated among member states and the EU institutions and the end result is a compromise which allows member states certain flexibility. All member states are required to have a framework for preventive restructuring which enables debtors that are at risk of insolvency, in other words not necessarily insolvent, to restructure and preserve their business. While many countries in the EU allow businesses threatened by insolvency to access statutory restructuring tools, this may not be the case for all; a significant number of countries, including Bulgaria and Hungary, still do not have any preventive restructuring procedure outside of mainstream insolvency proceedings which include the possibility of a reorganisation plan. Title II of the proposed Directive imposes a number of key obligations on member states relating to the preventive restructuring framework. In addition to the requirement for debtors to remain totally or partially in possession of their business referred to above, member states must ensure: (i) the availability of a stay if necessary which may cover all claims, including preferential and secured claims; (ii) an initial duration of any stay on individual enforcement action capped at a maximum of four months, capable of extension, if duly justified, to a maximum of 12 months or termination in certain circumstances, in each case with judicial or other administrative body approval; (iii) limitations on the ability of creditors and other third parties to rely on so-called "ipso facto" clauses, such as contractual termination clauses, against businesses, which are subject to a preventive restructuring procedure and provisions aimed at ensuring the continuation of essential executory contracts. These measures are aimed at providing businesses with a stable platform needed to carry out a restructuring.

Title II of the proposed Directive also sets out certain minimum provisions for restructuring plans relating to debtors, including the basic information which such plans must contain and requires that member states ensure that affected parties are separated into different classes according to "sufficient commonality of interest" for voting on a restructuring plan. As a minimum member states are required to recognise that secured and unsecured creditors must vote as separate classes. This is an interesting development, since a number of EU member states still exclude secured creditors from voting on a restructuring plan unless they relinquish their security rights. Any restructuring plans which affect the claims or interests of dissenting affected parties and provide for new financing must receive judicial or relevant administrative authority approval, which can only be granted provided a number of conditions established by the proposed Directive are met. Another innovative feature of the proposed Directive is that it requires member states to allow a restructuring plan to be imposed across all classes of creditors, provided certain conditions are met, in two scenarios: the first, where a majority of affected classes vote in favour of the plan, provided at least one of such classes is a secured creditor or ranks ahead of ordinary unsecured creditors and the second, where at least one voting class of affected or impaired parties, other than equity holders or out of the money creditors, votes in favour of the plan.[12]

> "All EU member states are required to have a framework for preventive restructuring which enables debtors that are at risk of insolvency to restructure and preserve their business."

While there was general agreement among member states on the importance of a preventive restructuring framework, some member states were concerned about non-viable businesses being able to use this to delay inevitable insolvency (liquidation) proceedings. The compromise text of the proposed Directive allows member states to impose a viability test. It also allows member states to give creditors a greater role by allowing creditors, as well as the debtor, to initiate a preventive restructuring procedure. Member states may also limit the number of times that a debtor may access the procedure or the involvement of any administrative or judicial authority. Although the proposed Directive envisages that member states should have a "debtor-in-possession" restructuring procedure, similar to the US Chapter 11, where the debtor remains fully or at least partially in control of its business, an insolvency practitioner may be appointed by the court or administrative authority where necessary on a case-by-case basis or where required by national law, subject to a number of specific cases where a practitioner must be appointed, including if there is a general stay on enforcement actions and an insolvency practitioner is necessary to safeguard the interests of the parties.[13] The position reflects a compromise between the Commission, which was concerned that making the appointment mandatory could add significant cost, particularly for smaller debtors and frustrate a preventive restructuring, and some member states, which viewed the appointment of the insolvency practitioner as central to the success of any restructuring.

THE JUDICIARY AND INSOLVENCY PRACTITIONERS

Title IV of the proposed Directive requires member states to provide support for certain measures to improve practical implementation of any preventive restructuring framework and increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, including in particular measures to support judicial and administrative authorities and insolvency practitioners, which have long been an important focus area for the Bank's projects in the field of insolvency.[14] Member states are required to ensure that members of the judiciary or any administrative authorities receive appropriate training and have the necessary skills to discharge their duties. This task will be more challenging for member states that do not have a commercial court system or first instance courts with a commercial division, such as Cyprus and Greece. In civil courts of general jurisdiction the pool of judges who may manage an insolvency case is of course larger, making it difficult to target any training needs.

Member states are similarly under an obligation to ensure that insolvency practitioners receive "suitable training" and have the "necessary expertise" for their responsibilities in procedures concerning restructuring, insolvency and discharge of debt. Unlike judges, insolvency practitioners do not necessarily have the status of public servants, since they are for the most part a private sector group of professionals. It is therefore not entirely clear what the recommended course of action is for member states, which allow a measure of independence to the profession, to fulfil this requirement.

The proposed Directive defines an insolvency practitioner as "*any person or body appointed by a judicial or administrative authority to assist the debtor and its creditors to draft or negotiate a restructuring plan, supervise the activity of the debtor during negotiations on a restructuring and/or take partial control over the affairs and assets of the debtor*". While most EU member states require that the insolvency practitioner is a natural person on policy grounds, including the need for personal and direct accountability, this is not the case for all countries. In Poland the insolvency practitioner can be a partnership, as well as a natural person, and in Hungary practitioners are all firms, subject to the requirement to have at least two professionals with liquidation and asset controller qualifications, two economists, two licensed auditors and two qualified lawyers. The definition of "insolvency practitioner" in the proposed Directive does not apply to a liquidator, whose purpose is the liquidation of the debtor business and who will generally take *total* control of the debtor's business. This differentiation is, however, artificial since in most EU member states there is no separation of the profession into liquidators and administrators or restructuring practitioners, or even allowed specialisation within the profession.

> "The proposed Directive specifies that the process for appointing an insolvency practitioner is required to give due consideration to a practitioner's experience and expertise."

The proposed Directive addresses selection, appointment and removal of practitioners, requiring the conditions for eligibility to the profession and the process for appointment, removal and resignation of practitioners to be "clear, transparent and fair". Member states are required to allow the debtor and creditors to be able to object or request the replacement of the insolvency practitioner due to conflicts of interest. However the proposed Directive does not require member states to allow the debtor or the creditors a role in the determination of the initially appointed practitioner, a proposal which is supported by the EBRD.[15] The proposed Directive instead specifies that the process for appointing an insolvency practitioner is required to give due consideration to a practitioner's experience and expertise. This is at odds with the appointment system in a number of EU countries, including Croatia, Latvia and Lithuania, which relies on a "randomised" system of appointment based on computer selection where the past record of the insolvency practitioner is rarely taken into account.

Another important feature of the proposed Directive's focus on the insolvency practitioner profession is the obligation of member states to put in place "appropriate oversight and regulatory mechanisms" for insolvency practitioners. It is not readily apparent from the broad drafting of this provision how member states will, in fact, demonstrate compliance, particularly since the regulatory frameworks are so divergent among member states. In all EBRD EU countries of operations and in France, the insolvency practitioner is required to be licensed or registered and some measure of regulation can be undertaken by the licensing authority. Nevertheless in other jurisdictions, the insolvency practitioner is considered more as a "specialisation" rather than a profession. In Austria and Germany, which are often used as benchmarks for EBRD countries of operations, insolvency practitioners are not required to be licensed or registered. The Bank through its Legal Transition Programme (LTP) is working on a number of insolvency practitioner reform projects with the European Commission via the Structural Reform Support Service in Cyprus, Croatia and Greece, which seek to address regulatory impediments and strengthen expertise within the insolvency practitioner profession.

THE ROLE OF TECHNOLOGY FOR THE FUTURE OF INSOLVENCY

Often the data relating to insolvency procedures is incomplete or missing. An important provision introduced by the proposed Directive to increase efficiency in preventive restructuring procedures is the requirement for member states to improve technology and data collection for procedures concerning restructuring, insolvency and discharge of debt. The proposed Directive provides that member states should ensure that the parties to the procedure, the insolvency practitioner and the judicial or administrative authority are all able to perform a certain number of actions electronically, including filing of claims and notifications to creditors. This is expected to be challenging in certain countries where there are many older members of the insolvency practitioner profession or judiciary, less exposed to the use of modern technology. Member states are also required to collect sufficient minimum data on restructuring, insolvency and discharge of debt procedures, although the proposed Directive does not require such data to be gathered automatically through an electronic system.

In Croatia* and Cyprus* the EBRD is working on strengthening the framework for insolvency and restructuring practitioners (IRPs)

Both projects in Croatia and Cyprus aim to analyse the existing regulatory framework for IRPs to identify the areas that need to be strengthened, including regulation, supervision and discipline, and focus on building a sustainable framework for capacity building and training of IRPs.

The projects incorporate the drafting of a training methodology programme for the main regulatory body of IRPs in accordance with international and European best practice covering training roles and responsibilities, content of training and establishing a continuing professional development culture. Both projects then cover the practical training of IRPs in core areas and a training of trainers.

Croatia and Cyprus are very different in terms of models of insolvency practitioner regulations. In Cyprus one of the key issues is the harmonisation of the regulatory and cooperation framework between the three separate licensing and supervisory bodies and the government ministry responsible for such bodies to ensure a consistent regulatory approach. This is in contrast to Croatia where the Ministry of Justice is responsible for licensing all insolvency practitioners and any continuing professional development and where a principal focus is not only the professional qualifications of existing IRPs, but also prospective IRPs.

* These projects are funded by the European Commission via the Structural Reform Support Service.

If these provisions are implemented properly, the proposed Directive will provide important visibility on the use of insolvency procedures, as well as the issues and trends for each member state. These provisions of the proposed Directive continue the trend towards greater technology set out in the recast European Union Insolvency Regulation.[16] The Regulation required member states to establish and maintain in insolvency registers information concerning insolvency proceedings that would be published as soon as possible after the opening of such proceedings. In addition it provided that the European Commission would establish a decentralised system for the interconnection of insolvency registers to serve as a central, public electronic access point to information with a search service in all the official EU languages. The proposed Directive also requires member states to put in place one or more early warning tools, with the option of using new IT technology, to signal to the debtor the need to take preventive action.[17]

In summary the proposed Directive represents in many ways a remarkable effort to establish certain minimum standards for national insolvency frameworks in the EU. It is significantly more prescriptive than any principles-based guidance published to date on insolvency frameworks by international organisations.[18] The proposed Directive proposes a fundamental shift in European national legislation on business insolvency towards a more US "Chapter 11" model, which remains one of the most widely recognised successful examples of a corporate rescue procedure. It represents an important benchmark for the EBRD regions for preventive restructuring and will be of interest to all economies seeking to improve the prospects of early restructuring of viable businesses within a protective legislative framework, irrespective of whether they are EU member states. Of course the proposed Directive also leaves open a number of questions, including most importantly how truly harmonised EU member states legislation will be once it is implemented and whether this legislative initiative will satisfy major concerns relating to proper functioning of the Capital Markets Union. In this respect the proposed Directive is likely to be the first of many more attempts to create a more coherent approach across the EU towards preventive restructuring, insolvency and discharge procedures.

1. Countries where the EBRD invests, which are also EU member states are: Bulgaria, Croatia, Cyprus, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic and Slovenia.

2. Albania, Montenegro, North Macedonia, Serbia and Turkey.

3. Insolvency and Corporate Governance, Government response dated 26 August 2018.

4. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings OJ L 141, 5.6.2015, p. 19–72.

5. OHADA stands for "Organisation pour l'Harmonisation en Afrique du Droit des Affaires" (Organisation for the Harmonisation of Business Law in Africa). Insolvency proceedings in all 17 sub-Saharan African member states are regulated by the revised Uniform Act organising insolvency proceedings which entered into force on 24 December 2015.

6. Recital (i) of the proposed Directive. It is also of importance to the Single Market and to the Commission's work on the Banking Union, which seeks to prevent the accumulation of non-performing loans in the banking sector.

7. Article 31(1) of the proposed Directive. Directives 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166/45, 11.6.1998; Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2012 on financial collateral arrangements, OJ L 168/43, 27.6.2002; Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201/1, 27.7.2012.

8. For example the English Companies Act scheme of arrangement has been adapted into Spanish law.

9. 12 March 2014, C (2014) 1500.

10. Restructuring law: recommendations from the European Commission by Kristin van Zwieten, EBRD *Law in Transition* online 2014.

11. The proposed Directive requires member states to have at least one procedure which can lead to a full discharge of the debt of an entrepreneur within a maximum of three years, thereby ensuring such person has a second chance at a business.

12. Article 11 of the proposed Directive.

13. Article 31(1) of the proposed Directive.

14. From 2012 to 2014 the EBRD carried out an assessment of the insolvency practitioner profession across 27 countries of operations where the profession was relatively well developed. A comparative overview of the results of the assessment can be found online:
https://www.ebrd.com/what-we-do/sectors/legal-reform/debt-restructuring-and-bankruptcy/sector-assessments.html

> "The proposed Directive is likely to be the first of many more attempts to create a more coherent approach across the EU towards preventive restructuring, insolvency and discharge procedures."

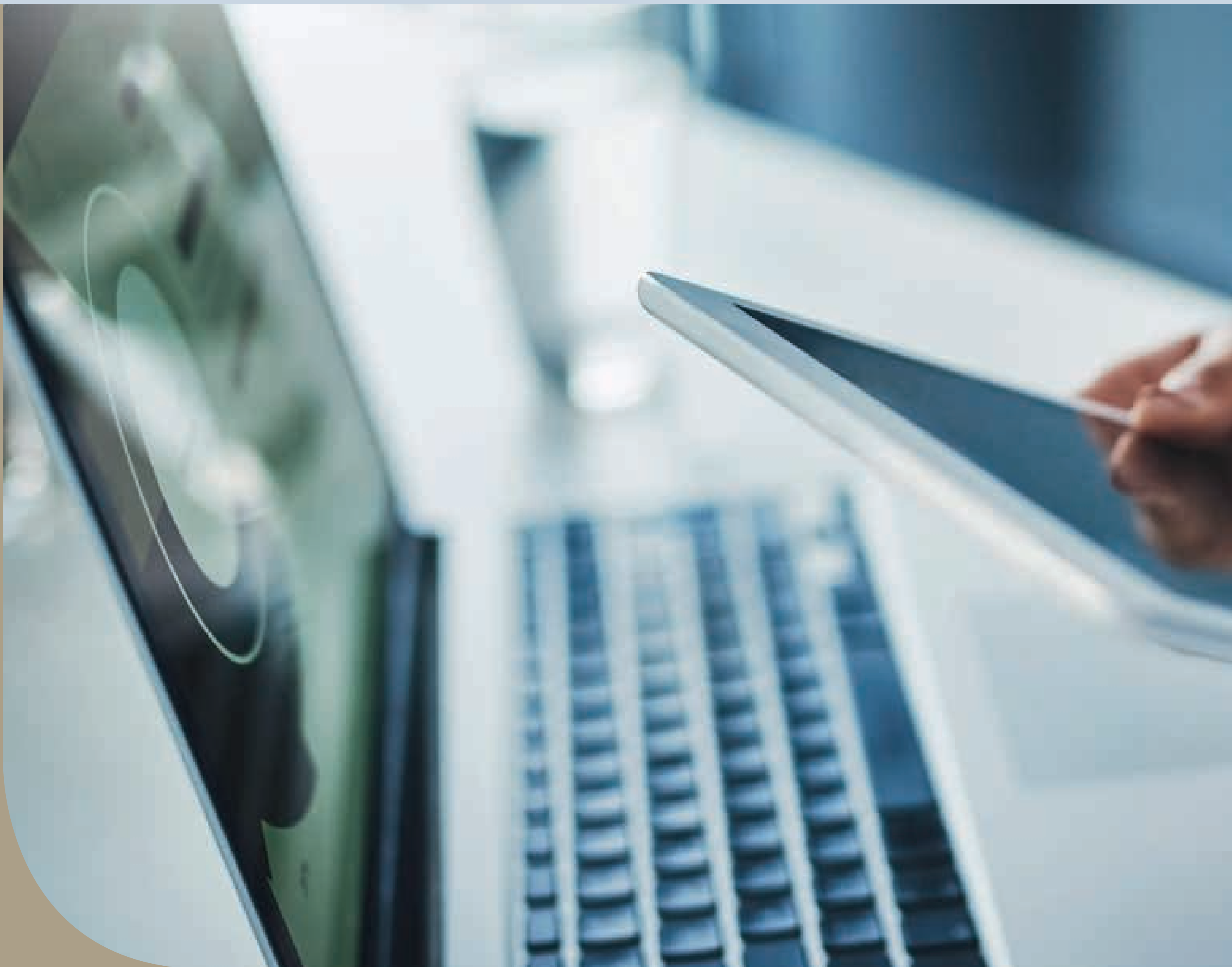
15. EBRD Assessment of Insolvency Office Holders, Section 4.4, Appointment of the insolvency office holder pages 55 to 60 A comparative overview of the results of the assessment can be found online:
https://www.ebrd.com/what-we-do/sectors/legal-reform/debt-restructuring-and-bankruptcy/sector-assessments.html

16. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings OJ L 141, 5.6.2015, p. 19–72.

17. Article 5 of the proposed Directive.

18. For example, the UNCITRAL Legislative Guide on Insolvency Law (2005) or the World Bank Principles for Effective Insolvency and Debtor Creditor Regimes (2015).

AT THE CROSSROADS OF LAW AND INNOVATION: HOW LAW IS FACILITATING A GREAT LEAP FORWARD IN EMERGING MARKETS



"In many ways, the rise of new technologies has the potential to help developing countries leapfrog the more developed economies."

JELENA MADIR
CHIEF COUNSEL, EBRD
MadirJ@ebrd.com

As Alex and Don Tapscott wrote in their recent book, *Blockchain Revolution*: "…it appears that once again, the technological genie has been unleashed from its bottle. Summoned by an unknown person or persons with unclear motives, at an uncertain time in history, the genie is now at our service for another kick at the can – to transform the economic power grid and the old order of human affairs for the better."

Indeed, over the past decade, emerging technologies, coupled with massive changes in regulations, have driven an unprecedented transformation of finance around the world. New players, such as companies engaged in social media, e-commerce, as well as start-ups with large customer data pools and technical capacities, are challenging traditional players in finance, bringing democratisation, inclusion and disruption.

The exponential growth of new business models for financial products and services creates unique opportunities and challenges for lawmakers and regulators as they attempt to create an environment that supports innovation while maintaining appropriate consumer protections. In many ways, the rise of new technologies has the potential to help developing countries leapfrog the more developed economies. While in developed economies, the efficiency levels of the existing financial system are perceived to be acceptable and therefore massive overhauls are not seen as necessary, by contrast, in developing countries, the perspective is that since there are high levels of inefficiency, a massive overhaul is the only way forward.

In that context, governments in many of the EBRD's regions have shown willingness to experiment with solutions and undertake transformative initiatives. In order to help lawmakers and regulators in the EBRD's regions inform appropriate legal, policy and strategic responses, the Bank has published two studies on "Best Practices for the Regulation of Investment-based and Lending-based Crowdfunding" and "Smart Contracts – Legal Framework and Proposed Guidelines for Lawmakers", each of which is described in the following pages.

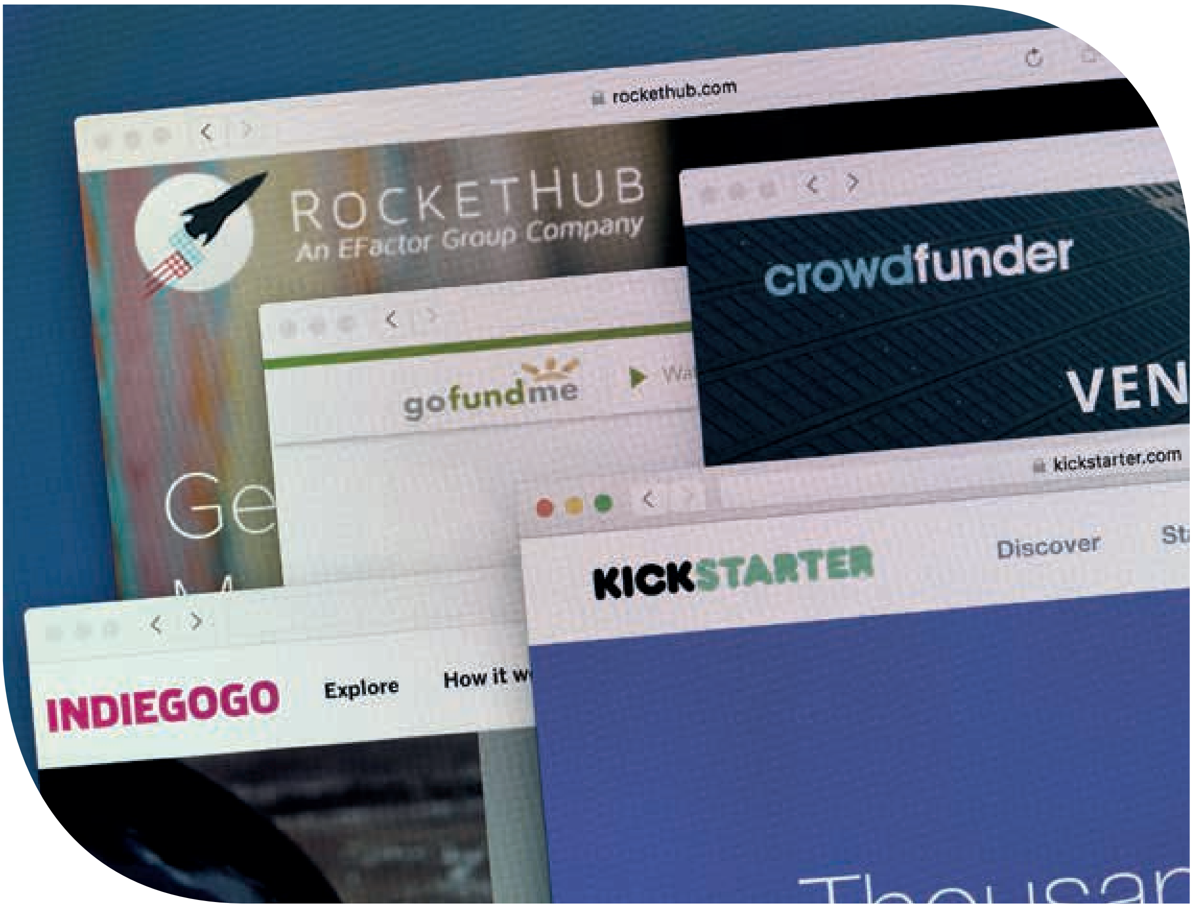
TOWARDS CHEAPER AND FASTER FINANCE FOR SMALL AND MEDIUM-SIZED ENTERPRISES: REGULATING CROWDFUNDING PLATFORMS

Crowdfunding is being talked up as part of the financial technology (FinTech) "revolution" – the disintermediation of finance by ever-greater use of technology, and as a way to, at last, provide enough financing for small and medium-sized enterprises (SMEs) and early-stage businesses in the economy. In fact, in its Crowdfunding Report, the European Commission has recognised crowdfunding as "one of many technological innovations that have the potential to transform the financial system."[1]

As with all investments, crowdfunding also entails a number of risks (such as project and liquidity risks, platform failure and cyber-attack) and concerns (for instance, investors' inexperience, reliability of the investment, undisclosed conflicts of interest, and so on). But, with appropriate safeguards concerning investor protection, crowdfunding can be an important source of non-bank financing in support of job creation, economic growth and competitiveness.

Against this background, several of the EBRD's regions have been very keen to promote crowdfunding and are looking to enact, or have already enacted, crowdfunding legislation (for example, Turkey, Kazakhstan, Morocco, Egypt, Latvia and Lithuania). They have also reached out and requested the Bank's assistance with the drafting of this legislation. Yet, because crowdfunding is still in its infancy, there exists no consensus as to what constitutes best practice in this area, which makes it rather difficult to advise lawmakers.

In that context, with the assistance of Clifford Chance LLP and with the underlying objective of ensuring that the advice we provide to the lawmakers in our region is founded on thorough research and analysis, we embarked on the preparation of the report which seeks to offer best practice recommendations for the regulation of both equity- and lending-based crowdfunding platforms.[2] Our recommendations are based on the analysis of the regulations of six jurisdictions: Austria, the Dubai International Financial Centre (DIFC), France, Germany, the United Kingdom (UK) and the United States of America (USA), which were selected to provide a cross-section of



"The European Commission has recognised crowdfunding as one of many technological innovations that have the potential to transform the financial system."

geographies, approaches and degrees of market maturity. The UK and the USA are considered to be leaders in crowdfunding, whose regulatory regimes form the basis for highly developed markets. Austria, France, Germany and the DIFC are regarded as model jurisdictions in much of the EBRD's regions.

Drawing on commonalities and best practices identified from across these jurisdictions, the report makes recommendations on the following key issues: (i) type of authorisation(s) required for the operation of platforms; (ii) capital and liquidity requirements; (iii) know-your-customer (**KYC**) rules and anti-money laundering (**AML**) checks required; (iv) maximum size of offer/loan; (v) maximum investable amount; (vi) consumer protection measures, including type of investor disclosures; (vii) risk warnings; (viii) due diligence/pre-funding checks; (ix) conflicts of interest inherent in the crowdfunding platforms' role; and (x) platforms' governance requirements.

The report has been reviewed by, and discussed with, our colleagues at the World Bank and the International Organization of Securities

Commissions. It also drew the attention of the British Standards Institute, which in September 2018 hosted a workshop with several crowdfunding platforms and the UK Financial Conduct Authority to discuss our recommendations.

The Bank's lawyers are already putting the recommendations from the report into practice through their ongoing technical cooperation projects on the regulation of crowdfunding platforms in Turkey and the Astana International Financial Centre in Kazakhstan. We hope that, thanks to these recommendations, lawmakers in our regions will become more comfortable with the formulation of the crowdfunding legislation, which in turn should give legitimacy to crowdfunding platforms, while ensuring appropriate investor protection.

BLOCKCHAIN AND SMART CONTRACTS: NEW LAWS FOR NEW TECHNOLOGIES?

Another area where FinTech companies have been at the forefront is distributed ledger technology (DLT), particularly blockchain. Using blockchain, FinTechs have created innovative solutions for different industries including financial services to facilitate convenient, cheaper and innovative ways of working. Possible applications of blockchain are not limited to the financial industry. For example, both the National Public Registry of Georgia and the e-Governance Agency of Ukraine have been working on introducing blockchain-based smart contracts in real estate transactions.[3] Similarly, the Chamber of Digital Commerce's report illustrates 12 possible uses of smart contracts.[4]

Key recommendations from Best Practices for the Regulation of Investment-based and Lending-based Crowdfunding

- Where platforms' activities are aligned with other regulated activities, it may be possible to regulate crowdfunding by adapting an existing framework. However, a truly bespoke regime may be more appropriate.
- Imposing minimum capital requirements on platforms can help to ensure that operational and compliance costs continue to be covered in the event of financial distress. Capital requirements should be based on the nature and scale of the activities undertaken by the relevant platform and should be commensurate with the attendant risk.
- Platforms should be required to establish and maintain risk management systems and controls that can identify, track, report, manage and mitigate risks to their business (including operational risk, risks relating to cybersecurity and the protection of personal data, and the risk that the platform could be used to commit financial crimes).
- Platforms need to ensure that their senior management and employees are fit and proper persons. Platforms need to be able to assess this themselves.
- Platforms should have primary responsibility for identifying, reporting, managing and mitigating any conflicts of interest.
- The financial services regulator should, where appropriate, have the power to prevent platforms from investing.
- Platforms should be subject to specific disclosure requirements, in order to ensure that investors and investees understand how platforms operate and earn revenue.
- Disclosures to investors and warnings regarding risks need to be tailored to the relevant product offered by the platform.
- There may be good reasons to differentiate between retail investors and institutional investors when it comes to providing information. Retail investors may benefit from receiving risk warnings and disclosures that are more explicit than those provided to institutional investors.
- A regime which differentiates between different types of investor is preferable to one that requires detailed suitability checks for all investors. Financial services regulators are best placed to decide on appropriate categories of investor.
- Platforms should be required to enter into agreements with their clients governing all key aspects of the client-platform relationship.
- Platforms should be permitted – but not necessarily obliged – to offer automated tools supporting the diversification of investors' portfolios.
- It is appropriate for lending-based platforms to provide information to investors on their post-investment arrangements and arrangement rights, whether that involves a trustee-type arrangement or a different type of enforcement mechanism.
- Platforms should be required to carry out KYC checks on their clients. The extent of those checks may vary on the basis of a risk assessment performed by the platform. Financial services regulators are best placed to provide platforms with guidance in this regard, which should be in keeping with the KYC requirements of the relevant jurisdiction. Such guidance should also be commensurate with the risk posed by clients.

What exactly are smart contracts? While a traditional contract records the arrangement between parties in written, legal form, a smart contract replaces the traditional written agreement using executable computer code both to record that agreement and to automate its own execution to some extent – for example by transferring payment or property. It has been analogised to a high-tech version of the principle behind a vending machine (if the correct coins are inserted into the slot, tip the bottle into the trough; if there are no bottles, return the coins), but with more consistent results than such machines sometimes produce. While smart contracts can exist entirely independently of blockchain, proposals for the use of smart contracts have multiplied considerably in the context of efforts to reinvent various forms of business activity around blockchain-based processes.[5]

Smart contracts may be particularly effective for sectors that operate using highly standardised contractual terms without material deviation and agreements with clear conditions and repetitive transactions. For instance, a simple conditional clause stipulating the obligation to pay a specific amount or to deliver a specific asset on a specific payment or delivery date might be encoded and automated relatively easily. A very simple form of smart contract could look like this:

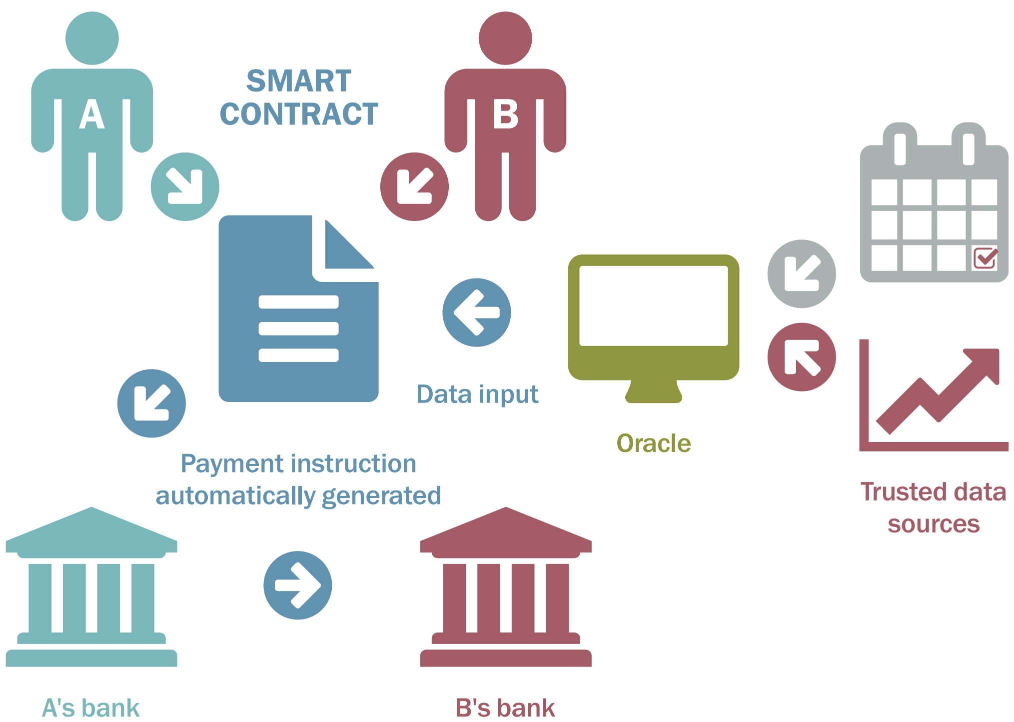
- The bank lends £1,000 to Alice, who promises to repay the bank £1,050 on 1 September 2019. Computer code is generated to represent the following "if this, then that" function.
- If on 1 September 2019, the bank does not receive £1,050 from Alice, transfer £1,050 from Alice's account to the bank's account.
- This computer code would be used on a private network, which would include the computers of the bank. The bank and Alice would sign a coded smart contract.

A slightly more complex smart contract would entail a loan agreement encoded so that the software automatically triggers a monthly loan repayment when the software receives an input confirming that it is the last day of the calendar month (that is, without the need for human intervention or instruction) or so that the software automatically changes the monthly repayment amount when it receives an input confirming that there has been a reduction in the relevant reference interest rate (for example, a central bank interest rate); in each case the conditions can be objectively determined.

This is illustrated in Figure 1 below: Parties A and B enter into a smart loan contract. The software is programmed to receive inputs from trusted data sources via an oracle[6] and to automatically generate payment instructions based on those inputs, in accordance with the terms of the smart contract. When the smart contract receives an input that it is the last day of the month, it uses the interest rate input to calculate the correct monthly repayment amount under the smart loan contract. Then the software automatically sends an electronic instruction to Party A's bank to transfer this amount from Party A's bank account to Party B's bank account. Party A's bank acts on the automatically generated instruction and transfers the payment to Party B's account.

Another example could entail the sale of a house on the blockchain: for instance, after the buyer and the seller have executed the sale agreement, the buyer transfers the deposit amount to be held in escrow by the smart contract. In turn, and immediately prior to settlement, the lender can also send the loan amount to the smart contract escrow. After the total purchase price is sent to the smart contract escrow, the seller may finalise the transfer and trigger the smart contract to disburse the funds to its account and transfer the tokenised house to the buyer. The transfer is recorded on the blockchain and the state of title ownership is updated. There are a few key critical assumptions in this example: first, the house has been tokenised, which means that a blockchain token has been associated with the house. Despite media headlines about house sales on the blockchain,[7] there are a number of legal and technical challenges that need to be overcome for this to happen. Second, the transaction does not involve anything more than a simple transfer of property, free from encumbrances, between two parties. This is rarely the case in practice.

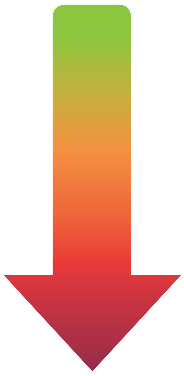
Figure 1: Blockchain-based smart contract



Source: EBRD and Clifford Chance: *Smart Contracts – Legal Framework and Proposed Guidelines for Lawmakers.*

Figure 2: Spectrum of automatibility of contract clauses

Simple



Complex

Monetary transaction: "Transfer £1 from A to B at 12:00 GMT on 1 Jan 2018."

Asset ledger transaction: "Transfer ownership of asset X from A and B."

External input: "Add interest at LIBOR + 2%."

Participant input: "Unless A and B otherwise agree, perform X on 1 Jan 2018."

Dispute resolution: "If A and B do not agree, C shall decide."

Meta-clauses: "If any term of this contract is held to be unenforceable, it will remain in effect to the extent that it is not invalid or unenforceable."

Use of complex legal concepts: "A will use its reasonable endeavours to do X."

Source: EBRD and Clifford Chance: *Smart Contracts – Legal Framework and Proposed Guidelines for Lawmakers.*

In contrast to the above examples, which include conditional "if this, then that" logic, with or without external inputs, conditional clauses requiring an assessment to be conducted "to the satisfaction" of a contracting party or to take action "in a commercially reasonable manner" are unlikely to be automated. These elements require a subjective assessment of the individual circumstances and it may be difficult to express the relevant circumstances in software language or to automate them. For instance, code could be used to represent the agreement that, if an event happened, the price will be adjusted by subtracting the product of x and y. However, it is unlikely that code can be used to represent that, if an event happened, the price is to be adjusted by the party in a commercially reasonable manner.

Similarly, clauses that do not contain conditions, but merely determine arrangements (for example, clauses stipulating governing law or jurisdiction) can be encoded, but may not be automatable because they have no conditional logic. The spectrum of automatibility of contractual clauses can be represented in the above schematic.

Tantalising though they are, smart contracts pose a wealth of legal questions: if code performs in a way that the parties did not expect, what remedies will they have and against whom? In the case of a smart contract between parties in different jurisdictions, which jurisdiction applies in the event of a dispute? How can the pseudonymous nature of some blockchain transactions be reconciled with increasingly strict AML and KYC regulatory requirements?

Given that no one had really offered solutions to these complex issues, the Bank through its Legal Transition Programme embarked on a study aimed at providing practical recommendations for lawmakers on how to go about addressing these issues. Our study finds that, while existing legal frameworks may allow for the use of smart contracts, this may not always result in a desirable outcome from a policy perspective. If not addressed, these types of issues could prevent or slow down the widespread adoption of smart contracts. The recommendations in our study should provide lawmakers with practical steps in assessing whether their existing legal framework accommodates the use of smart contracts and whether certain legislative amendments might be required.

The Bank's lawyers presented the study at the June 2018 International Blockchain Regulation Conference in Astana and the September 2018 Blockchain Symposium organised by the United Nations Office of Project Services in New York, as well as to the US Chamber of Digital Commerce in Washington, DC and to our colleagues at the World Bank, the International Monetary Fund (IMF) and other international development organisations.

Assessing the FinTech sector

By Valdas Vitkauskas (Associate Director, Financial Institutions, EBRD) and Aziza Zakhidova (Principal, Economics, Policy and Governance, EBRD)

The EBRD's Banking teams have kept a keen eye on the emerging FinTech sector in the EBRD's regions. To that end, in 2018, we conducted an assessment of the FinTech sector in selected countries of operations, with a view to identifying potential investment opportunities.

Unsurprisingly, the assessment found that the EBRD's regions are no exception to the global trends: traditional banks struggle to meet banking and financing client needs, especially those of SMEs. Nevertheless, very few FinTech companies match the EBRD's traditional investment criteria. Although the EBRD could invest alone, the preferred approach would be to leverage co-investors' expertise in FinTech, be it local or international venture capital funds or financial institutions. The EBRD is also looking to facilitate donor funding to FinTech companies, which would cover their general needs as they continue to develop their product and grow as well as to support them with the expertise and networks that the Bank developed over the years of extensive engagement with local banking and other financial services.

FinTech, as one form of innovation which is impacting banks' business models, has also been explored in the discussions of the EBRD co-led Vienna Initiative Working Group on Financing for Innovation. The goal of this working group is to explore scaling up of bank and non-bank funding to support innovative firms in central, eastern and south-eastern Europe. The group aims to strengthen cooperation among international financial institutions, banks and alternative providers of finance, including venture capital and private equity funds, as well as FinTech companies.

While it would be impossible to summarise our legal analysis and recommendations on the legislative framework for the use of smart contracts in this limited space, the diagrams on page 31 illustrate how lawmakers may approach assessing whether their existing laws adequately accommodate the use of smart contracts and whether certain amendments might be desirable.

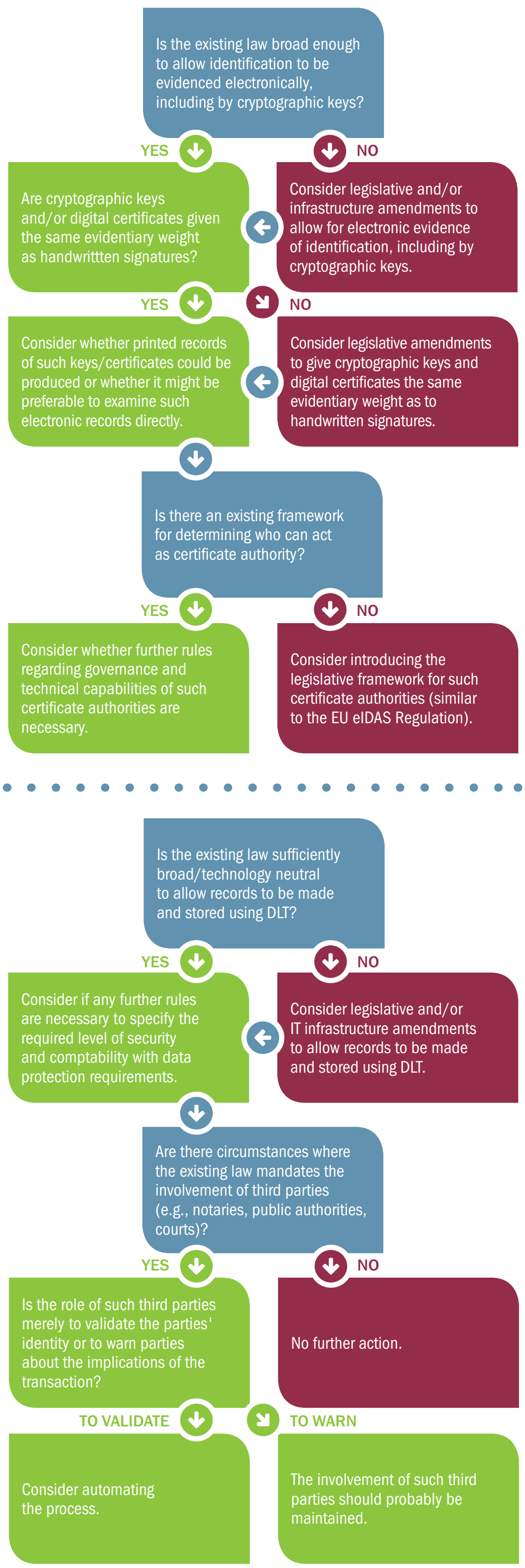
You can access the full study and the accompanying animated videos at: www.ebrd.com/documents/pdf-smart-contracts-legal-framework-and-proposed-guidelines-for-lawmakers.pdf and https://www.ebrd.com/news/video/distributed-ledger-distributed-liability.html, respectively.

FINTECH (R)EVOLUTION: THE GOOD, THE BAD AND THE OPPORTUNITIES THAT LIE AHEAD

On 24 October 2018, the Bank through its Legal Transition Programme organised a FinTech conference at its Headquarters, which brought together experts on FinTech issues from the regulators in the United Kingdom, Belarus, Georgia, Kazakhstan, Latvia, Poland, Slovenia, Turkey and the West Bank and Gaza, FinTech companies and international development organisations (the World Bank Group, the International Monetary Fund, the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) and the United Nations Development Programme, who tackled some of the most topical issues in FinTech innovation – from the regulation of crowdfunding platforms, through the application of blockchain and smart contracts, to the potential of FinTech in emerging markets and the role that development organisations can play in facilitating positive application of FinTech solutions in these markets.

The conference has demonstrated that broad scope exists for development organisations to play an active role in expanding the range and depth of FinTech firms, either on their own or as partners with their existing clients. Moreover, development organisations can also use their policy engagement with governments to advocate required changes in legal and regulatory frameworks. FinTech is an international issue and, with the blurring of boundaries among entities, activities and jurisdictions, international cooperation among development organisations and regulators will be essential. Cross-institutional collaborations could help create global frameworks while also establishing regulatory sandboxes to trial innovative approaches with particular governments, users and developers.

Figure 3: Assessing whether existing legislation can accommodate smart contracts



1. European Commission Staff Working Document: Crowdfunding in the EU Capital Markets Union, SWD (2016) 154 final, available at: https://ec.europa.eu/info/system/files/crowdfunding-report-03052016_en.pdf (last accessed 18 December 2018).

2. The report is available at: https://www.ebrd.com/cs/Satellite?c=Content&cid=1395276190617&pagename=EBRD%2FContent%2FContentLayout&rendermode=live%3Fsrch-pg

3. See *Georgia to use smart contracts in real estate registrations* (February 2018), available at: http://agenda.ge/news/96094/eng
and *A house has been bought on the blockchain for the first time* (October 2017), available at: https://www.newscientist.com/article/mg23631474-500-a-house-has-been-bought-on-the-blockchain-for-the-first-time/ (last accessed 18 December 2018).

4. Chamber of Digital Commerce: *Smart Contracts: 12 Use Cases for Business & Beyond* (December 2016), available at: https://digitalchamber.org/wp-content/uploads/2018/02/Smart-Contracts-12-Use-Cases-for-Business-and-Beyond_Chamber-of-Digital-Commerce.pdf (last accessed 18 December 2018).

5. Dentons: *Global Energy Game Changers – Blockchain in the energy sector: evolving business models and law* (2018), available at: https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2018/october/1/global-energy-game-changers-block-chain-in-the-energy-sector (last accessed 18 December 2018).

6. An oracle is a third-party information source that has the sole function of supplying data to blockchain. For example: Ania and Bob agree to bet on what the temperature will be on Sunday. Ania bets that it will be 20°C or above, while Bob bets that it will be 19°C or below. They create a smart contract (to which they will both send funds), which will automatically pay out to the winner depending on what the temperature is. In order for the smart contract to determine the temperature, and thus, pay out to the winner, it must receive input from a trusted source that is, an oracle, and use the result to execute the smart contract. After receiving input from a local news website for the weather, the weather on Sunday is 24 °C. The smart contract then executes on its conditions and sends all the funds to Ania.

7. See for example, The First House To Be Sold Entirely Through Blockchain (October 2017), available at: https://www.leaprate.com/cryptocurrency/blockchain/first-house-sold-entirely-blockchain/ (last accessed 18 December 2018), and UK's first blockchain property purchase recorded in Manchester (March 2018), available at: https://www.buyassociation.co.uk/2018/03/19/uks-first-blockchain-property-purchase-recorded-in-manchester/ (last accessed 18 December 2018).

RAMPING UP CLIMATE ACTION BY ENHANCING COMPANIES' GOVERNANCE FRAMEWORK

The focus on environmental risks to the global economy has grown in prominence in recent years. Such risks dominated the World Economic Forum *Global Risks Report 2019*, for example, for the third year in a row, accounting for three of the top five risks by likelihood and four by impact. Interestingly, as evidenced by the supporting global survey, a widely shared perception is that increased occurrences of extreme weather events are linked to a "failure of climate-change mitigation and adaptation" policies, especially after Paris.[1]

The 2015 Paris agreement on climate change (the "Paris Agreement") includes a call for action by all with explicit reference to the critical role of non-state actors, including businesses, in its implementation. For a truly sustainable economy investors and companies should understand and measure their environmental impact. At the same time, climate change can affect a company's portfolio and operations, so urgent actions are needed to identify and mitigate company's climate risk exposure.

In its latest report issued in September 2018, the Inter-Governmental Panel on Climate Change (IPCC), the United Nations body for assessing the science related to climate change, drew extremely alarming conclusions: even if the ambitious objective set by the Paris Agreement to contain global warming to 1.5°C was to be achieved, substantial impacts will be felt in every region of the world.[2]

VESSELINA HARALAMPIEVA
SENIOR COUNSEL, EBRD
HaralamV@ebrd.com

The 2017 report of the Task Force on Climate-Related Financial Disclosures (TCFD),[3] a market-driven initiative, examines climate change in a financial stability context and constitutes a solid basis to help companies tackle the adverse impacts of climate change. The TCFD's recommendations are structured around four major thematic areas – governance, strategy, risk management, and metrics and targets – adoptable across sectors and jurisdictions (see Chart 1).

The TCFD recommendations ask for a better understanding of the nature of climate risk and climate-related financial disclosures. For decades organisations have been reporting on the risks they encounter, often as a statutory obligation to do so. Risks can be defined generally as outcomes that can negatively impact different risk targets, including the company's capital resources, revenues, net sales, expenditures and liquidity. Climate-related risk is a possible negative outcome that could affect all or any part of a company's financials (including expenditures, revenues, assets and liabilities, capital and financing) as a result of climate change.

Climate risks can be broadly classified into *transition* and *physical* risks. Transition risks include diverse policy, legal, technology, market and reputational risks that organisations might encounter due to the effect of new laws and policies designed to mitigate climate change, or market changes as economies transition to renewable and low-emission technology. A special sub-set of this category, is litigation risk which can be mitigated by effective governance, risk management and disclosure. Physical risks include acute risks, referring to those driven by events (such as the occurrence and increased severity of extreme weather events) and chronic risks (that is, longer-term shifts in climate patterns, such as sustained higher temperatures that may cause sea level rise, heatwaves, and so on).

Chart 1: Extract of the TCFD final report showing four layers of company's response to climate change

A wide range of organisations are exposed to climate risks, in particular organisations with long-lived fixed assets (for example, fossil fuels), with locations or operations in climate-sensitive regions (for example, coastal and flood zones); that rely on availability of water and that have value chains exposed to the above. So the identification, assessment and management of climate-related risks, in many cases, are an essential part of prudent business strategy and risk management, which suggests that reporting practices should be extended or adapted to apply to climate-related risk.

FINANCIAL IMPLICATIONS OF CLIMATE- RELATED RISKS AND OPPORTUNITIES

There is no doubt that climate change may have a significant financial impact. However, the financial impact of climate-related risks on individual businesses is not always clear and, for many businesses, identifying the issues, assessing potential impacts and ensuring that the material issues are properly managed can be challenging.

Climate change may fundamentally impact market or customer demand for a company's products or services, and possibly the timing of when demand occurs. This is the case with the clothing manufacturer Superdry, which suffered a £10 million profit cut in 2018.[4] The "unseasonably hot weather" observed during the summer and autumn in most of Europe and the east coast of the USA resulted in a severe drop in sweatshirts and jackets sales, which normally account for 45 per cent of the firm's annual sales.

In the context of transition risks, companies may face legal and regulatory risks due to the changing regulatory environment if their business plans and strategies are not aligned with the transition to a low-carbon economy. Investors are increasingly demanding that companies adopt adequate

"Many of the economies where the EBRD invests are particularly vulnerable to climate risks."

strategies to reduce their greenhouse gas (GHG) emissions and to adapt to lower-carbon economic outlooks.[5] In the power sector alone, it is estimated that stranded assets in the 2°C scenario would total US$ 320 billion worldwide over the period to 2050, while only 5 per cent of physical risk losses are covered by insurance in developing countries.[6]

Along with the severe impacts on firms' financials, climate-related risks can impact the cost of sovereign borrowing in developing countries. A recent report prepared by the Imperial College Business School and SOAS University of London concludes that climate vulnerability has already raised the average cost of sovereign bond yields by 1.17 per cent. The report also highlights that the poorest countries are the most likely to suffer from climate change, and thereby pay the highest cost of capital.[7]

EBRD CLIMATE GOVERNANCE INITIATIVE

Companies from emerging economies are often seen as less attractive for investors due to a higher level of risk influenced by geopolitical instability, poor infrastructure, suboptimal technologies, an immature legal and court system, and other factors. In addition, developing countries and emerging economies may be more dependent on natural resources than advanced economies (for example, reliance on the agriculture sector) and often located in regions that may be more exposed to climate-related risks.

Many of the economies where the EBRD invests are particularly vulnerable to climate risks. Deficient regulatory and institutional frameworks and lack of ambitious climate policy agenda result in a scarcity of climate-related data and low market action on building climate resilience. As a private sector investor with a clear environmental mandate[8] the EBRD is well placed to support companies in its regions to enhance their governance responses to climate-related risks and opportunities. Building on the TCFD report, the Legal Transition Programme, together with the Energy Efficiency and Climate Change and the Economics, Policy and Governance units of the EBRD (the "team") launched in April 2018 an initiative to better understand the type of support and guidance companies in emerging economies may need ("Enhancing Organisation's Governance around Climate-related Risks and Opportunities" or the "project"). The EBRD retained a consortium of Ernst & Young, Norton Rose Fulbright LLP and Mott Macdonald to assist in the implementation of the project.

As part of the project, the team carried out an overview of: (i) climate-related financial disclosure standards and frameworks; (ii) main drivers for companies and national governments to ramp up climate action; and (iii) legal risks of non-engagement. In addition, the team conducted a stakeholder consultation with companies from a range of sectors, identified as leaders in climate governance and risk management. The outcome of the consultation helped understand better the drivers that encourage companies to tackle climate risks and introduce governance processes and mechanisms; it also highlighted the success factors and barriers they faced.

The project's objective is to put together recommendations for strengthened governance that lead to better incorporation of climate-related risks and opportunities into the company's business model and strategy.

Another outcome of the project is to highlight the key role of national authorities in helping companies in emerging markets to adopt and implement these recommendations, in order to advance a transition to a low-carbon and resilient economy. This article provides an overview of the research, key findings and success factors for climate action developed as part of this project.

Climate change litigation

As referred to above, inadequate climate action by businesses or national authorities (for example, central or regional government) carries litigation risk concerns. Such concerns have become particularly relevant over the last couple of years as research has revealed that the number of climate change litigation cases is significant and continues to rise rapidly, with over 1,100 cases being brought to date. Climate change litigation can be divided into two main categories: (i) private law claims based on tort, planning, company law and fraud, and (ii) public law actions against governments and public authorities, brought on the grounds of human rights, constitutional and administrative law violations.

A significant number of claims against companies are on the grounds of directors' duties to disclose climate-related risks and adopt well-functioning governance structures to address the transition to lower-carbon scenarios (for example, investor/shareholder claims). Further, climate litigation claims can be based on tort (for example, nuisance, trespass, negligence, which may be brought against pension funds, trustees, directors, surveyors and contractors); product liability (for example, against manufacturers and distributors whose products have serious impacts on the environment), misrepresentation and fraud (for example, against listed companies).

The potential cross-jurisdictional impact of tort liability claims related to climate change can be seen in the case Lliuya v RWE AG, Germany's largest electricity producer.[9] While an application for strike-out was successful initially, in November 2017 this decision was overturned as the appeals court found that a private company could potentially be held liable for the climate change related damages of its greenhouse gas emissions. The case is ongoing and a successful outcome for the claimant could set a precedent for future climate change litigation cases.

Another recent example is the lawsuit brought against ExxonMobil which is considered to be a "turning point" for climate litigation, particularly regarding directors' duties. New York's Attorney General has accused the US oil giant of engaging in a fraudulent scheme to deceive investors, including equity research analysts and underwriters of debt securities, about the company's management of risks posed by climate change regulation. The case was admitted on jurisdiction and is ongoing.[10]

When it comes to claims brought against national governments, these are mainly aimed at compelling states either to cease acting, or take positive action to adopt ambitious mitigation or adaptation policies.

One of the most high-profile examples where a government has been forced to take action is the Urgenda case. In September 2015, Urgenda, a Dutch environmental group, together with 886 Dutch citizens, brought proceedings in the Hague District Court to compel the Dutch government to adopt more ambitious climate mitigation targets. In a landmark decision, the court ordered the Dutch government to enact policies to reduce GHG emissions to minimum 25 per cent below 1990 levels by 2020. On 9 October 2018, the Dutch government's appeal of the ruling was dismissed.[11]

In summary, the key drivers for launching climate change litigation are:

- requiring governments or regulators to take action to meet national or international commitments. Such action may include adopting, upgrading and/or effectively applying climate change related policies and legislation.
- preventing future emissions and contributions to climate change.
- receiving compensation for the costs of adaptation to climate change.
- raising awareness and exerting pressure on corporate actors, regulators or investors.

CLIMATE-RELATED FINANCIAL DISCLOSURE REGIMES

Due to a long-standing lack of attention to climate-related risks at the board level, TCFD reports that information on companies' climate-related resilience strategies and financial implications remains limited and inconsistent. Reducing information asymmetries and improving companies' governance and disclosure arrangements are key to achieving the Paris Agreement's goals. In this context, national authorities are responsible for adequately addressing climate change impacts, which include setting the policy framework and providing data, tools and guidance to private sector actors to effectively measure, evaluate and manage their own risks and those of the market. As such, increasing transparency and mainstreaming reporting on how such risks are identified and dealt with would catalyse action and help monitor progress as it enables information flows between national authorities, companies and investors. Better transparency would contribute to more consistent and coherent identification and assessment of risks.

The team's research has mapped out a gradual move of national governments and regulators towards developing guidelines and regulatory frameworks for enhancing disclosure in relation to climate-related financial risks applicable to financial institutions, insurers, institutional investors, issuers of securities and other companies. While there are country- and sector-specific particularities, it is possible to identify a few notable developments below.

With article 173 of the Law on Energy Transition for Green Growth, France has become the first country to require investors to disclose information relating to their contribution to climate goals. The French legislator has adopted the "comply or explain" approach, which does not impose a specific method of compliance but obliges institutional investors to provide information on and justification of the methodology used. Among other things, this approach discretely pushes companies to tackle identification of and reporting on climate risks.

Financial regulators increasingly make the case of treating climate risk as a matter for regulatory intervention. The UK Financial Conduct Authority's Discussion Paper on Climate Change and Green Finance, clearly provides such arguments with the objective of protecting and enhancing the integrity of the UK financial system. The Prudential Regulation Authority (PRA) has launched a consultation with banks and insurers, which expired in January 2019, on how firms can apply effective governance, risk management, scenario analysis, and disclosures in order to address the financial risks from climate change. The intended outcome of the consultation is that regulated companies take a strategic approach to managing the financial risks from climate change, which may require development or update of PRA supervisory policies in line with its mandate to maintain monetary and financial stability.[12]

> "What can make one company change its strategy on tackling climate-related risks? In some cases it can be a disclosure requirement and in others it is stakeholder pressure. Coming under investor pressure the energy giant Shell recently announced that it will link executive remuneration to reduction of GHG emissions from 2020 onwards."

Some emerging economies have started strengthening extra-financial reporting. In 2017, the Moroccan Authority for Capital Markets (AMMC) and the Casablanca Stock Exchange, for example, released guidance to promote extra-financial culture and disclosure within the corporate sector. This guidance also supports companies using public loans to adapt to possible mandatory environmental, social and governance reporting.

The European Union (EU) is moving towards a disclosure regime. In January 2019, the European Commission Technical Expert Group (TEG) on Sustainable Finance published non-binding guidelines for climate-related disclosure, which includes sector-specific recommendations and additional reporting criteria for companies with significant climate risk exposure.[13] The TEG had been asked to make recommendations for revision of the Commissions' non-binding guidelines of the EU Non-Financial Reporting Directive (NFRD) governing disclosure of climate-related information in line with the TCFD. The TEG's report covers in detail the companies' governance and disclosures with a particular focus on financial sector firms. The arguments provided in the report related to the materiality of climate risks and the need to adopt urgent actions encourage the understanding that such risks, when material, should indeed be captured by financial reporting.

Voluntary climate disclosure initiatives

More companies have opted to provide information about their climate risk exposure beyond regulatory requirements. Research shows that among numerous voluntary disclosure standards, companies opt for the most detailed ones such as the Carbon Disclosure Project (CDP). CDP represents over 650 investors with US$ 87 trillion[14] of assets, which is more than the global GDP. It is a tremendous platform that has transformed corporate governance and carbon management by promoting transparency and accountability. It allows companies to benchmark their performance against peers which will undeniably have positive implications for the individual companies and the sector overall.

Increasingly, investors are taking a position to mitigate the threats of climate change. In recent months, investors overseeing US$ 32 trillion in assets signed up to the Investor Agenda – an initiative created to accelerate actions critical to achieving the goals of the Paris Agreement. Other initiatives include Climate Action 100+, UK's Green Finance Task Force (GFI), the Sustainable Stock Exchange Initiative and many more. An UN-led initiative calls for banks to consider borrowers' voluntary disclosure information in assessing their credit risk.[15]

SUCCESS FACTORS FOR BETTER CORPORATE GOVERNANCE AROUND CLIMATE-RELATED RISKS

Based on the outcome of the stakeholder consultation carried out by the EBRD, the team established that companies' strong governance mechanisms are essential to efficiently identify, assess, manage and report on climate risks and opportunities. It is paramount that companies include the topic of climate change during all board meetings or any meetings when group strategy and business plan are discussed, and therefore make sure that the top management is kept informed on climate change issues. Further, companies should ensure that the implementation of an efficient and appropriate climate policy, prepared by climate change experts, is reviewed and approved at board level. All governance bodies involved at various levels of the company should be well coordinated on the issues of climate change, allowing for example the sustainability committee to work regularly and efficiently with the risk committee, the health and safety executive committee, and others.

Drawing from this work, the EBRD project team developed a set of recommendations, intended to be practical and applicable to companies across sectors in emerging markets. While some companies are at the very beginning of their reflection on how to integrate climate-related risks into their general strategy, action plan and governance structure, others are already quite advanced. These recommendations are intended to support companies at any level of "climate maturity". During interviews the team has established that even the leading companies have to put in substantial efforts in order to improve the management of climate risks. In terms of disclosure a few of the multi-nationals have appealed for better coordination and consistent efforts applied by national regulators and supra-national organisations.

Companies at the very beginning of their reflection on how to manage climate risks, that do not yet have any structure for climate governance in place, need to put in place the initial governance practices presented in the box opposite.

Companies that already have a good basis and need guidance to enhance their management of climate-related risks should focus on more advanced steps.

ROLE OF NATIONAL AUTHORITIES

Despite varying disclosure quality, regulatory and voluntary disclosure frameworks have ensured that companies start identifying and mitigating their climate risk exposure, across both non-financial and financial sectors by strengthening their governance and risk management mechanisms.

In emerging markets, however, private climate action has been slow and research indicates that companies may be subject to a wide array of inconsistent disclosure regimes, with different reporting requirements and scrutiny levels. Insufficient harmonisation of standards and governance benchmarks can hinder the comparability of the information provided by companies and thus prevent effective monitoring by the market and governments.

For this reason, it is important that national authorities engage with stakeholders to elaborate on disclosure guidelines and tools, to enhance consistency and comparability. To help advance this discussion, the team has compiled a list of good practices for climate action, which may facilitate data availability, institutional transparency and good corporate governance around climate risks. In a number of emerging economies, governments should establish a comprehensive framework within which climate action can be advanced, with statutory targets, clear assignation of duties and responsibilities within the state agencies, and regular reporting. The growing attention to climate risk by financial authorities mainly in the developed markets over recent years is exerting a parallel set of pressures for companies to act, even where political commitment has not manifested in clear actions. This means that, in addition to environment ministries, the financial regulators will have an increasing role to play in

First steps towards effective governance around climate-related risks and opportunities

Clearly define the role, responsibility and accountability of all governance bodies involved; ensuring efficient communication and coordination between them by:

- establishing a separate committee tasked with identifying and managing climate-related issues, ideally chaired by the CEO
- announcing the CEO's (or other senior executives') commitments to set out and adhere to a clear policy for tackling climate-related risks and opportunities
- defining the frequency with which climate change risk and opportunities are discussed at Board level and plan regular meetings with CEO/top management to keep them informed on climate-related financial issues.

Further recommended actions for more "mature" organisations

- train key management and executive staff on the topic of climate risks (both transition and physical)
- work with local teams on scenario modelling to use as a key tool for organisation decisions
- collectively engage in sectoral initiatives to develop methodologies and tools
- initiate co-learning events (roundtables, online platforms), allowing for discussions and sharing best practice at the sector and regional level on physical climate risks.

Table 1: Good practices for national authorities to support climate action (with a particular focus on physical climate risk)

Success factor	Best practices for national institutions
Regulatory reporting frameworks have been a key driver for companies to disclose on climate risks	Set a clear national climate policy framework to provide the necessary long-term clarity
	Enact regulatory reporting frameworks, fostering risk and strategy-oriented disclosures
	Provide guidance to support companies in this reporting exercise and help them go beyond simple compliance
	Build clear indicators that would allow companies to assess their contribution against national adaptation targets
Better access to data is a key enabler for understanding physical climate risks	Facilitate access to regional or local-level data that is necessary to understand physical climate risks.
	Facilitate multi-stakeholder initiatives at local level involving all concerned parties likely to provide data and help understanding the impacts of physical climate risks.
Partnerships with expert scientific and analytical organisations can help companies overcome the lack of data and methodologies	Support the development of sectoral methodologies and tools that can act as a baseline for companies to start working with the same understanding of physical climate risks
	Support the development of collective initiatives and partnerships gathering companies and civil society, public institutions, and others. These initiatives contribute to creating momentum and traction on specific issues.
Further guidance on "good governance" can help address climate risks	Internal change management and updating processes to adequately address climate risks is a multi-year process. However this could facilitate the process of more consistent interpretation of climate risks by companies.

setting a stable landscape in which companies can respond with good governance of their own climate risks.

Governance of climate change risks is a complex problem and to develop an effective solution there needs to be a strategic leadership at a company and business level. It also requires cooperation between (i) governance structures at a company level; (ii) institutional structures at a government level (central and regional/local); and (iii) national authorities and companies on climate risks for a particular country, in particular in relation to physical climate risk.

CONCLUSION AND NEXT STEPS

Climate change generates a new set of challenges and opportunities for business. In the coming years, business success will be strongly associated with how well climate risks and opportunities are integrated into core business and strategic planning.

In the journey to adequately mitigate climate change impacts and build resilience, national governments and regulators have a central role to ensure consistency, clear guidance and information-sharing in relation to assessing, reporting and disclosing climate-related financial risks. Given the challenges posed by climate-related risks to companies and national authorities, the EBRD and other multilateral development banks can play a constructive role to support these actors in emerging markets by channelling climate finance while promoting an enabling environment for the transition to a low-carbon economy and supporting capacity-building and knowledge-sharing initiatives across sectors and jurisdictions.

1 *The Global Risks Report 2019* is available at: https://www.weforum.org/reports/the-global-risks-report-2019 (last accessed 4 February 2019).

2 Expected impacts of a 1.5°C global warming include, among others, increased water scarcity, with 4 per cent more people exposed to water stress; altered ecosystems, including up to 90 per cent of coral reefs at risk from bleaching; aggravated risk of flooding in coastal regions, with 31 to 69 million people exposed; significant decrease in crop yield, exposing 32 to 36 million people to food availability issues.

3 See https://www.fsb-tcfd.org/publications/ (last accessed 14 February 2019).

4 The Guardian (15 October 2018), *Superdry issues profit warning after sales fall in heatwave*.

5 This was the case with America's largest two energy companies, ExxonMobil and Chevron. After the historic Paris Agreement came into force in 2016, the two companies were faced with unprecedented investor pressure over climate change disclosure.

6 IEA-IRENA, *Perspectives for the energy transition*, available at: https://www.iea.org/publications/insights/insightpublications/PerspectivesfortheEnergyTransition.pdf (last accessed 4 February 2019);
GFI, *Accelerating Green Finance*, available at: http://greenfinanceinitiative.org/wp-content/uploads/2018/03/Accelerating-Green-Finance-GFT-FINAL-report.pdf (last accessed 4 February 2019);

7 Imperial College Business School and SOAS University of London, *Climate Change and the Cost of Capital in Developing Countries*, available at: https://eprints.soas.ac.uk/26038/1/ClimateCostofCapital_FullReport_Final.pdf (last accessed 4 February 2019);

8 The objective to promote environmentally sound and sustainable development through its activities lies at the heart of the EBRD's mandate: Article 2(1)(vii) AEB.

9 Lliuya v RWE AG, Case No. 2 O 285/15 Essen Regional Court (2015).

10 People of the State of New York v Exxon Mobil Corporation, 452044/2018 N.Y. Sup. Ct.

11 Urgenda Foundation v The State of the Netherlands, C/09/456689/HA ZA 13-1396.

12 Bank of England Prudential Regulation Authority, Consultation Paper 23/18 (October 2018), *Enhancing banks' and insurers' approaches to managing the financial risks from climate change*, available here: https://www.bankofengland.co.uk/prudential-regulation/publication/2018/enhancing-banks-and-insurers-approaches-to-managing-the-financial-risks-from-climate-change (last accessed 13 February 2019).

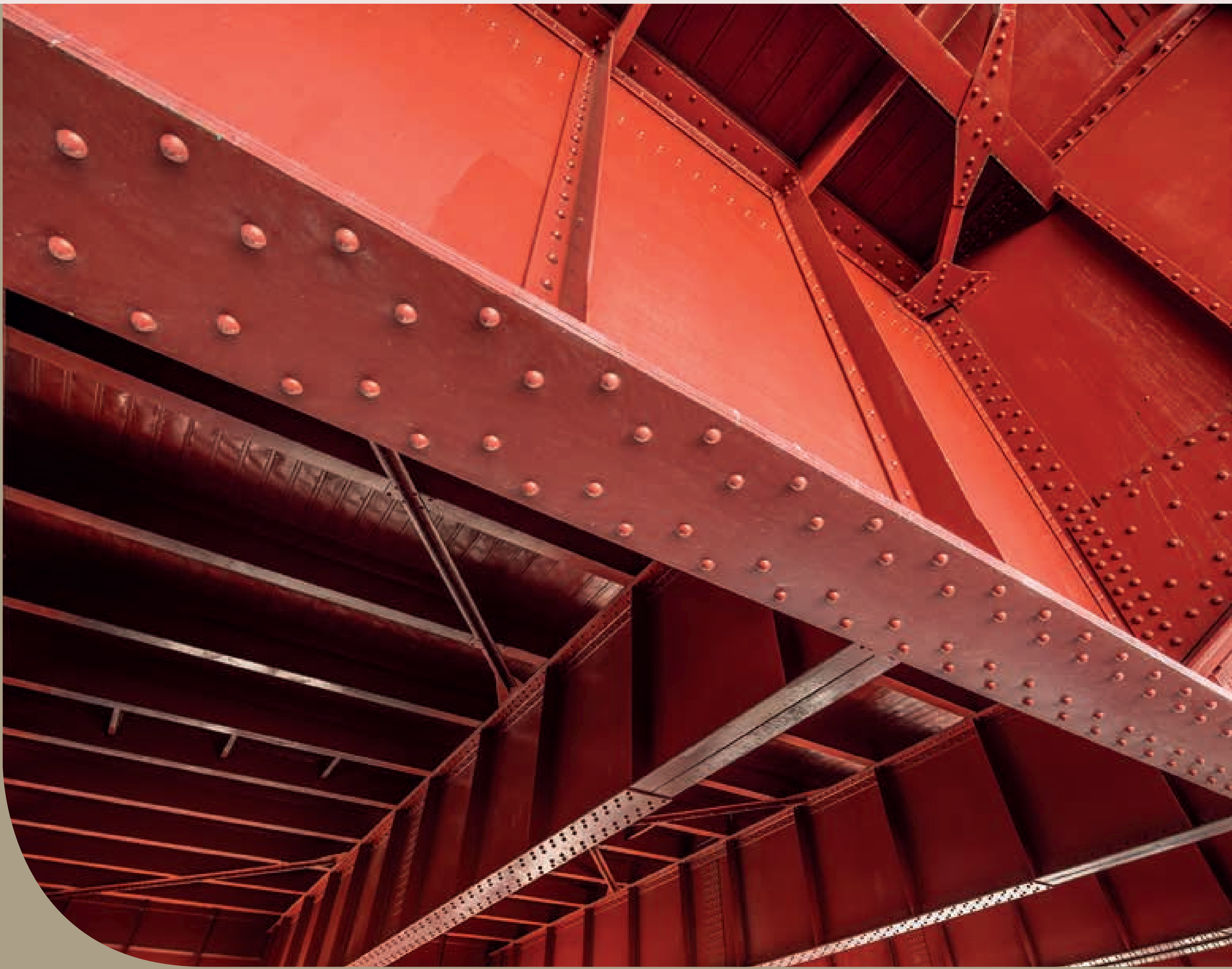
"In the coming years, business success will be strongly associated with how well climate risks and opportunities are integrated into core business and strategic planning."

13 European Commission, Technical Expert Group on Sustainable Finance (January 2019), Report on climate-related disclosures, Brussels.

14 See https://www.cdp.net/en/info/about-us (last accessed 4 February 2019);

15 UNEP-FI, *Navigating a new climate: Assessing credit risk and opportunity in a changing climate: Outputs of a working group of 16 banks piloting the TCFD Recommendations*, available here: http://www.unepfi.org/wordpress/wp-content/uploads/2018/07/NAVIGATING-A-NEW-CLIMATE.pdf (last accessed 4 February 2019).

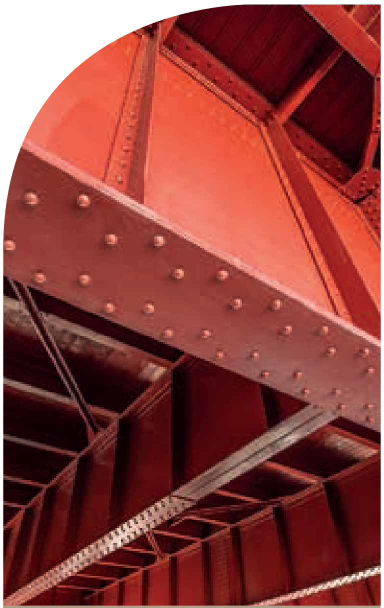
CIS MODEL PUBLIC-PRIVATE PARTNERSHIP: DEVELOPING PRACTICAL GUIDELINES



In the context of global, financial and economic instability, many countries are experiencing difficulties in solving large-scale infrastructure problems due to various public funding restrictions and volume limitations. International practice demonstrates that the mechanism of the public-private partnership (PPP) could be effective for raising much-needed funding and attracting private investment, managerial experience and know-how skills in the infrastructure sector.

The need for the development of public infrastructure is extremely relevant for the Commonwealth of Independent States (CIS) countries. The existing infrastructural restrictions are well known, and in recent years many of those countries have become actively involved in creating conditions for the development of PPPs.

At the same time, there are a number of problems and limitations that do not permit full use of the potential of the PPP mechanism. Most of them are relatively generic for these countries. The most obvious difficulty is the high-quality regulatory framework and PPP-enabling environment. Having assessed the problem and contemplated possible solutions the CIS legislators and the authorities concluded that the development of PPP guidance and methodological materials offers practical assistance to public officials in the identification, preparation, implementation and monitoring of PPP projects.



ALEXEI ZVEREV
SENIOR COUNSEL, EBRD
ZverevA@ebrd.com

EBRD AND CIS IPA

The history of cooperation between the EBRD and the CIS Inter-parliamentary Assembly (IPA) dates back to 1994, when the Taurida Palace in St Petersburg hosted the EBRD's Annual Meeting. The cooperation between the two organisations was furthered later with the signing of a Memorandum of Understanding and cooperation between the two organisations.

Since 1999 there has been a good deal of cooperation in the field of legislative development and harmonisation. With the EBRD's technical expertise and financial support, the CIS IPA developed and approved five CIS Model Laws; among them the Model Law On Public Private Partnership of 28 November 2014 by IACIS[1] (the "**Model Law**").

Without doubt, the latter law is an effective instrument in the unification of the legislation on public-private partnership in CIS countries. The main objectives of the Model Law were to achieve uniform and systematic regulation of PPPs and to bring the national legislation of the CIS countries into compliance with best international practices and the requirements of funding organisations in order to ensure the bankability of PPP projects.

Regulatory acts based on the Model Law stimulate the inflow of private investors, including those who are foreign, who are willing to invest their money in the implementation of projects on the principles of PPP, and affect the increase in the number of ongoing projects. As far as bankability is a key and the most crucial aspect of successful project implementation, the Model Law regulates in detail the issues of equitable risks allocation between the parties and the consequences of termination of the PPP agreement, in particular, compensation payment.

The framework and non-mandatory nature of the provisions of the Model Law allows the governments of the CIS countries to choose the most appropriate regulatory option, taking into account local and territorial specifics. It is also important to note that the Model Law is a conceptual basis for the implementation of cross-border PPP projects in the CIS region.

A high level of legal drafting methodology eliminates the controversial and ambiguous interpretation of the provisions of the Model Law.

Some provisions of the Model Law have already been successfully implemented in the national legislation. After the Model Law was adopted, national laws on PPPs were adopted in such CIS IPA countries as Belarus and Kazakhstan in 2015, and later in 2018 in a number of countries within and beyond CIS who reviewed the Model Law and used many of its concepts for their national legislation; including, in particular, China, Georgia, the Kyrgyz Republic, Russia, Ukraine among others. The adopted laws contain a number of progressive provisions from the Model Law, namely, providing for an open list of PPP objects, public financial support for PPPs by state bodies, provision of a national regime for foreign legal entities, and guarantees of private investor rights and funding organisations, including the following:

- exclusion of discriminatory measures
- the right for compensation of losses
- taking into account private investments during the formation of tariffs
- non-interference of state and municipal bodies into investors' activities
- the possibility of changing the PPP agreement due to a significant change in circumstances
- so-called "grandfather clause".

In particular, the Law on Public-Private Partnership was approved by the Parliament of Georgia in May 2018 (the "**Georgian PPP Law**"). The Georgian PPP Law largely follows the concepts of the Model Law which, in its turn, advances recent trends in modern PPP legislative developments and permits both concessional and non-concessional partnerships, meaning that a private partner can either collect funds directly or indirectly from the end-consumers of the public (municipal) services (alternatively, a private partner can also be compensated by a public partner for these services or the public infrastructure it has created).

Moreover, similar to the Model Law, the Georgian PPP Law provides clear guidance on the rules related to project identification, initiation and preparation, as well as detailed procedures for the selection of private partners, stages of project implementation, monitoring and even

post-implementation relations. The Georgian PPP Law also provides that projects may be initiated not only by the government, but also by potential private investors (this rule mainly concerns the energy sector, which the Georgian PPP Law recognises as one of the most strategically important).

As a result, the Georgian PPP Law incorporates all the elements needed for the comprehensive and effective regulation of relations between the state and investors. Accordingly, the newly created legal framework adequately addresses the requirements of all major stakeholders (the government, the private sector and financial institutions) and will promote investment in Georgia's infrastructure and improve public services.

The Model Law also became the basis for adopting amendments to the PPP Law of the Kyrgyz Republic, introducing an assessment of the effectiveness and comparative advantage of PPP projects, as well as the possibility of initiating a PPP project by a private partner in accordance with the best practices of unsolicited proposals. The model legislation has also had a significant influence in Russia, where changes to the Federal Law No. 115-FZ on Concession Agreements dated 21 July 2005 regarding the establishment of unsolicited proposals, were based on the provisions of the Model Law, which for the first time in the region provided for unsolicited proposals.

The current review of the PPP Law of Kazakhstan takes a similar approach and is largely based on the Model Law, combining widely recognised best standards in governing PPP.

In addition, Ukraine is currently preparing a reform of the Law on Concessions, which will also be carried out taking into account the provisions of the Model Law among other modern international standards and best practices references.

PPP MODEL DOCUMENTATION AND ENABLING TOOLS

The Model Law is an important act of harmonisation. The adoption of the Model Law and preparation of the national laws of the CIS member states on PPPs on its basis allowed the creation of a solid legal footing for the long-term mutually beneficial cooperation of public and private partners in order to achieve the objectives of socio-economic development and improve the availability/quality of public services. Moreover, it also allowed harmonisation of the legislation of the CIS member states and elimination of gaps of national legal regulation.

The commentary to the Model Law, as well as guidance papers and model recommendations on various aspects of the preparation and implementation of PPP projects (that were developed further to adoption of the Model Law) are also of great practical importance for the preparation of specific projects. The importance of this work lies not only in the "educational" nature of the application of these documents, but also in the fact that they are used (and referred to) in the preparation and discussion of projects in various sectors and different countries.

In addition, these model documents are used in the CIS countries while preparing amendments to regulatory and other acts governing relations in the field of PPP, to justify the need for selective innovations.

One of the most recent projects involving cooperation between the Bank and the CIS IPA went for the first time beyond the model legislation development, focusing instead on PPP model practical documentation and

> **"Thanks to the EBRD for the much-needed practical guides to PPP as an alternative to the public procurement mechanism of private sector participation in public infrastructure."**
>
> YURI OSIPOV,
> SECRETARY GENERAL
> OF THE CIS IPA

enabling tools. This project originally envisaged two phases: phase one focused on developing the Model Law and relevant commentaries, phase two is to collate guidance for an appropriate enabling environment for developing and implementing PPP projects in the context of the Model Law following the successful completion of the first phase of the project.

The Model Law was developed based on internationally accepted standards and best practices in PPP legal frameworks. The Model Law was approved by the CIS IPA in November 2014 and recommended for incorporation into national legislation of the CIS member states. A detailed commentary was developed further with the EBRD's assistance. At an international conference presenting the Model Law and commentary authorities from the majority of the CIS countries spoke in favour of expanding the work and extending it to a set of practical tools and guidance materials to help national PPP units' employees, government and municipal officials implement these in their day-to-day work.

The EBRD pays considerable attention to the development of PPP instruments in its regions, notably in the CIS countries. While the adoption of the Model Law is a significant step towards developing a comprehensive and harmonised model PPP legislation for the CIS countries, the effectiveness of PPP implementation depends a lot on the relevant enabling environment in place. To facilitate the implementation of the Model Law and in response to specific requests from a number of CIS countries, in September 2016 the EBRD and the CIS IPA began working on the first set of model documents identified as priority – practical tools and methodologies for the preparation and implementation of PPP projects, including the evaluation of the effectiveness of projects, key performance indicators (KPIs), private partner selection procedure, development of a risk allocation matrix, heads of terms for a PPP agreement, and so on.

As a result of the current phase of cooperation between the EBRD and the CIS IPA, the EBRD through its Legal Transition Programme (LTP) developed the first collection of model documents, guidelines and practices, which includes the following:

- heads of terms for a PPP agreement
- project implementation guidelines

- model PPP policy terms
- termination and compensation checklist
- value for money matrix
- PPP projects effectiveness evaluation guidelines
- risk allocation matrix
- methodology on the KPIs' application to a PPP project
- annotated recommendations on monitoring the quality of services and output in PPP projects.

In the course of a few rounds of consultations the national parliaments, authorities and non-governmental organisations in the CIS provided comments on the draft guidance tools: over 400 comments and suggestions were received after the initial draft of nine modules was presented. It is noteworthy that the group of EBRD consultants and commentators working on the texts did their best to take into account all such comments. As a result there were only seven further comments put forward when the advanced texts were presented for second consideration by the relevant body – the CIS IPA Standing Economic and Finance Commission. As a result the set of all nine PPP Practical Tools was approved at the CIS IPA Plenary Assembly in St Petersburg on 29 November 2018. Following approval the EBRD plans publication of the approved set of guidance and methodological materials early in 2019.

"*Thanks to the EBRD for the much-needed practical guides to PPP as an alternative to the public procurement mechanism of private sector participation in public infrastructure. They will serve as good guidance in the CIS countries in the process of practical work on preparation and implementation of PPP projects,*" said Mr Yuri Osipov, Secretary General of the CIS IPA.

Following numerous requests from a number of CIS countries for the continuation of the work, the EBRD is in discussion with the CIS IPA to identify the next set of guidance materials to be developed. "*One of the beauties of such work is that we are able to reach out to 10 countries in one go,*" said Michel Nussbaumer, EBRD Director of the Bank's Legal Transition Programme.

"One of the beauties of such work is that we are able to reach out to 10 countries in one go."

MICHEL NUSSBAUMER,
EBRD DIRECTOR

1 Model Law On Public-Private Partnership (Appendix to the Decree No. 41-9 of the Inter-parliamentary Assembly of Member Nations of the Commonwealth of Independent States, dated 28 November 2014).

JOINING EFFORTS TO BOOST MORE EFFICIENT COMMERCIAL DISPUTE RESOLUTION: THE EBRD-IDLO COLLABORATION

"What made IDLO highly attractive to the Bank was their approach of adult learning, using innovative and interactive teaching methodologies. The IDLO approach was going to strongly modernise judicial capacity building in the EBRD regions."

Signing of EBRD-IDLO Framework Agreement in July 2017, by Marie-Anne Birken, EBRD General Counsel (left) and Irene Khan, IDLO Director-General (right)

MICHEL NUSSBAUMER
DIRECTOR, LEGAL TRANSITION PROGRAMME, EBRD
NussbauM@ebrd.com

GENESIS: BUILDING JUDICIAL CAPACITY IN CENTRAL ASIA

"Union is strength" as the saying goes. When the EBRD decided to start working on judicial capacity building in its regions in the mid-2000s, it looked for potential partners to help with the new endeavour. By that time, the Bank, through its Legal Transition Programme, had accumulated a great deal of know-how on promoting legal reforms, but there was little internal knowledge on how to build judicial capacity. Yet this was a serious bottleneck in our regions' investment climate.

Year after year, the EBRD country strategy documents would highlight the serious deficit in appropriate dispute resolution mechanisms for investors. This was seen as a significant deterrent for attracting foreign direct investment to the EBRD regions. In other words, investors did not have confidence that they would be able to effectively enforce their legal rights in local courts. Gradually, the Bank concluded that judicial capacity building should be part of its Legal Transition Programme. The International Development Law Organization (IDLO), based in Rome, was an obvious partner for the Bank. IDLO is the only intergovernmental organisation with the exclusive mandate of promoting the rule of law as a development tool. In the 1990s, there had been some early collaboration between the Bank and the then-named International Development Law Institute training commercial lawyers in central Europe. Over the years, IDLO had acquired a solid reputation for building judicial capacity in many countries around the world. After 2001, IDLO also became renowned in particular for re-building the Afghan judiciary after the fall of the Taliban.

What made IDLO highly attractive to the Bank was their approach of adult learning, using innovative and interactive teaching methodologies. This was unheard of in our regions, where judicial training was often provided in stiff, old-fashioned, academic lecture-type courses. The IDLO approach was going to strongly modernise judicial capacity building in the EBRD regions.

"IDLO is the only intergovernmental organisation with the exclusive mandate of promoting the rule of law as a development tool."

The first EBRD-IDLO judicial capacity building project started in the Kyrgyz Republic in 2006. The idea was that the Bank would contribute its country expertise and local contacts, as well as the major part of funding, whereas IDLO would source the technical expertise and implement the project in close cooperation with the Bank. In its early stages, the Kyrgyz project strongly benefited from the collaboration with the then-director of the Kyrgyz Judicial Training Centre, a very charismatic and energetic lady. There was an understanding that "judicial capacity building" was not only about training activities, but that a series of additional measures were needed to boost the commercial law skills of Kyrgyz judges. In a few years, the EBRD-IDLO partnership built capacity at the local Judicial Training Centre, conducted training of trainers, prepared a bench book on commercial law, trained more than 300 Kyrgyz judges on 10 topics of commercial law, sent junior judges on an apprenticeship programme to Russia and Kazakhstan, and established a commercial law library at the Supreme Court. For the EBRD, the learning curve was steep. There were many challenges in delivering the assistance and we learned by doing (see *Law in Transition 2011* journal, pp 38-45).

After the Kyrgyz Republic, the EBRD-IDLO collaboration continued in Tajikistan and Mongolia. Again these were large projects targeting the entire judicial population dealing with commercial cases.

SECOND PHASE: DIVERSIFYING ACTIVITIES

The EBRD and IDLO continued to develop their collaboration in the 2010s. In particular, there was a flurry of smaller-scale projects in the Western Balkans and in the southern and eastern Mediterranean (SEMED) region. The latter had recently become EBRD economies,[1] following the Arab uprising and the big hopes it had generated. Table 1 lists all EBRD-IDLO projects to date.

In all those countries, the needs were different from Central Asia. Judiciaries were more advanced and had often received significant assistance from other organisations already, often in the context of their EU aspirations. Therefore, the EBRD-IDLO training projects tended to focus on highly technical matters such as intellectual property, competition law, enforcement of arbitration awards, tax law and supporting mediation activities.

At the same time, the EBRD expanded its capacity building activities to other court professionals, in particular bailiffs who are critical to court decision enforcement. Projects were completed with IDLO in Tajikistan and Mongolia and are currently running in Ukraine and the Kyrgyz Republic. We have also helped build capacity of competition authorities (Montenegro, Ukraine and soon in Mongolia), mainly through training.

At the time, the Bank also considered addressing the constant concern that courts in the EBRD regions are overburdened. One answer to this problem was the promotion of commercial

Table 1: EBRD projects with IDLO (2004-present)

Country	Project title	Project dates
Armenia	Judicial Capacity Building - New Code of Civil Procedure	2018 - present
Bulgaria	Judicial Training on Implementation and Enforcement of Tax Legislation	2018 - present
Croatia	Judicial Capacity Building	2017-18
Jordan	Commercial Law Judicial Training	2015-16
	Judicial Training on Competition Law	2018 - present
	Commercial Mediation Action Plan	2018 - present
	Women Entrepreneurs' Access to Justice	2017-18
Kyrgyz Republic	Judicial Capacity Building (Phases I – V)	2004-14
	Bailiff Service Capacity Building (Phases I and II)	2015 - present
	Sustainability of Judicial Capacity Building in Kyrgyzstan	2015-17
	Promoting Commercial Mediation	2017 - present
Moldova	Promoting Commercial Mediation and Arbitration	2018 - present
Mongolia	Commercial Law Judicial Curriculum	2012-15
	Promoting Commercial Mediation	2013-15
	Strengthening enforcement of court decisions - Bailiff Service Capacity Building (Phases I and II)	2014-16
	Competition Law Capacity Building	2018 - present
Montenegro	Commercial Law Judicial Training Support	2013-17
	Agency for the Protection of Competition - Capacity Building (Phase I-II)	2014--present
Regional	Regional Forum Supporting the Leadership Role of Women Judges in the Southern and Eastern Mediterranean (SEMED) Region	2017-18
Romania	Commercial Law Judicial Training	2018 - present
Tajikistan	Commercial Law Judicial Training (Phases I and II)	2011-15
	Bailiff Service Capacity Building - Functional Analysis and Legislation Review	2016-17
	Promoting Commercial Mediation	2017-18
Tunisia	Commercial Law Judicial Training on Intellectual Property	2016 - 18
	Judicial Capacity Building on Competition Law	2018 - present
Ukraine	Bailiff Service Capacity Building (Phases I and II)	2016 - present

mediation as an alternative dispute resolution mechanism. The common wisdom is that mediation can resolve disputes in a much faster and cheaper way than courts. A project was completed in Tajikistan (follow-up projects are being considered) and more are currently running in Moldova and the Kyrgyz Republic.

Lastly, the current trend in the collaboration relates to gender. For both organisations, promoting gender parity is crucial to creating inclusive economies in the spirit of the Sustainable Development Goals. A pilot project currently running in Jordan aims at identifying obstacles for access to justice by women entrepreneurs. The project has high replication potential to other countries. The two organisations also launched a platform for women judges in the SEMED region, which had its first outing in Casablanca in December 2017.

INSTITUTIONALISING THE EBRD-IDLO PARTNERSHIP

In 2017, IDLO and the EBRD signed a framework agreement which streamlines their collaboration. Based on the successful track record of the previous decade, the arrangement allows the two institutions to react faster to demand and to combine their respective strengths in a more efficient manner. It should be noted that previously the Bank had been contracting IDLO on the basis of the EBRD procurement rules. Gradually the two organisations concluded that a new, special arrangement was needed. When drafting it, consideration was given to IDLO's special status as an inter-governmental organisation, to its non-profit orientation, as well as to the Bank's duty, under its charter, to seek cooperation with other international organisations. Under the framework agreement, the EBRD benefits from some discounts on fees charged by IDLO, and IDLO is invited to contribute to project costs in-kind or financially, as the case may be.

As a result of the new framework agreement, the volume of projects has increased. The new partnership arrangement has allowed both organisations to exchange expertise in both directions. There are also more systematic efforts to look at results of the joint activities.

IMPACT OF JOINT PROJECTS

Measuring the success of judicial capacity building activities is a huge challenge for aid-providing organisations. How can you establish that you have had an impact on judicial systems and the countries where they operate? Where do you put the marker? Is it about raising the technical skills of judges? Is it about improving the quality of judgments rendered by trained judges? Or is it about customer satisfaction as measured among court users? Or even the perception of court efficiency among the public?

There is no obvious yardstick to measure the effect of technical assistance in the judicial sector. Ideally, all of the above measurements should take place. The problem is that you might end up spending more time (and money!) measuring the results of your actions than delivering the activities themselves. All this to establish a truth that may go without saying, that is, that well-trained judges are likely to do a better job.

The EBRD and IDLO have tried various approaches to measure the success of their joint activities. The first project mentioned above (Kyrgyz judicial capacity building) was reviewed *ex post* by an expert who produced an evaluation report with various conclusions on its impact and a few lessons learned. This is what one could call the "impressionistic approach": by talking to a lot of stakeholders the reviewer gains an overall impression of what the project has achieved.

The Kyrgyz and Mongolian projects were also evaluated through a survey of judges conducted some time after project completion. The survey explored questions such as whether the judges applied the acquired knowledge in their daily work, whether they still had the course materials at hand, and whether they referred to these training materials. The results were very encouraging and showed continuous use of the course materials and knowledge by the Kyrgyz and Mongolian judges.

In the Tajik project mentioned above, the Bank tried to put in place a randomised impact assessment (RIA). Borrowing the approach from the health sector where it is often used to assess the efficiency of vaccination campaigns, the RIA idea is to stagger training so that a control group gets trained later than the rest of the judges, and then you can compare the quality of judicial decisions of trained and untrained judges. This is

what one could call the “Rolls Royce” of evaluation. It is extremely expensive and time-consuming. Unfortunately, the RIA was not conclusive because our researchers were faced with practical difficulties in getting access to court decisions in Tajikistan due to various constitutional limitations. However everything is in place for the evaluation to take place retroactively at a later stage if these obstacles were to be lifted.

Note that case studies or individual testimony can also be very illuminating. We all remember the Bulgarian judge who said that after the training on accounting skills for judges in insolvency matters she had several cases where she realised that she now understood how to assess the financial position of the company, and that prior to the training she had reached the wrong conclusions.

A middle way between the above approaches, that we currently use routinely is to ask the judges to fill in pre- and post-training questionnaires so that we can see the immediate effect of our activities. Sometimes there are sensitivities in the judicial system about testing judges, in which case we only ask the judges to self-assess their knowledge pre- and post-training. Framing this as collating data on training quality, rather than judges’ knowledge, can be helpful in this regard.

Another approach that could be of interest and that we have not explored yet is the repetition of judicial decision assessments such as the one the EBRD conducted in 2011-12 (See *Law in Transition 2011* journal, pp 20-35). The assessment considered a sample of typical court decisions in the commercial sector of a number EBRD countries of operations. It helped identify the main challenges faced by litigants in those countries, such as the predictability or quality of decisions, speed of justice, costs, impartiality, enforcement issues. By repeating the exercise a few years later, one could establish if the countries where capacity building projects have taken place have improved in the assessment, thus suggesting a positive effect.

Table 2: Total number of individuals trained under EBRD-IDLO projects, 2004 - present

Number	Country
29	Bulgaria
147	Croatia
146	Jordan
544	Kyrgyz Republic
1,493	Mongolia
277	Montenegro
46	Regional (Jordan, Lebanon, Morocco, Tunisia, West Bank and Gaza)
118	Romania
699	Tajikistan
107	Tunisia
3,606	Grand total

CHALLENGES AHEAD

Both the EBRD and IDLO have ambitious plans to strengthen their policy dialogue and technical cooperation activities in their zone of operations. Although progress has been made in many countries, judiciaries continue to have insufficient knowledge of commercial matters and business realities to do their jobs.

Combining the two institutions' efforts has generated economies of scale and a multiplying effect in pipeline project development. The hope is that the trend can continue in the years to come. One determining factor for this happening will be the availability of donor funding. Donor support will be crucial to this effort.

Another big challenge is the sustainability aspect. Too often once aid providers such as the EBRD or IDLO have finished implementing capacity-building activities, things tend to go back to the previous situation, in the sense that the local stakeholders do not continue trainings or other activities. The challenge is to get the local stakeholders to take ownership and continue the activities on their own. Of course it might be difficult for them to compete with the standards brought by the EBRD and IDLO, because our donor funding allows us to access experts of international calibre and to provide support in the best conditions. However we always try to lay the foundation for continuation of activities by putting in place sustainable tools such as written manuals and bench books, and also by conducting extensive training of trainers. The idea is to create a cohort of local judges who will be able to deliver training using the modern interactive approach advocated by IDLO and the EBRD.

In the Kyrgyz Republic, a follow-up project was precisely about gauging the ability of the local training centre to continue the capacity building activities. We monitored the way they were working and were thus able to come up with a number of practical recommendations to increase sustainability. The recommendations were mainly that we need long-term commitment to institutional reform to yield profound, change-making results. In particular the EBRD's commitment to supporting the Kyrgyz Judicial Training Centre over the years resulted in them eventually becoming a fully fledged High Institute of Justice with an operational budget, a core staff of trainers and a well-developed and recently updated curriculum (including in commercial law) for both sitting and new judges.

Another challenge that faces organisations working on judicial capacity building is the coordination of projects with other aid providers. Any scoping mission in a given country systematically starts with a visit to other organisations working on the topic. Very often however, we have found that commercial law is not a top priority for such projects led by others. They tend to look at criminal justice as a priority, in line with the human rights approach they often have. This leaves a huge need for organisations to focus on investor protection and commercial activity, as the EBRD-IDLO partnership seeks to do. However the need for coordination will remain a priority and we typically ask the recipient authorities to confirm that there is no duplication of our work with their other partner organisations.

CONCLUSION

Experience has shown that IDLO and the EBRD stand stronger in their efforts to promote the Sustainable Development Goals when they combine their strengths, resources and expertise. This makes the case for upscaling joint activities in the future, perhaps even including more topics in the current strategy. For the time being, the EBRD-IDLO collaboration already has a legacy: thousands of judges, bailiffs and other justice sector actors trained in the EBRD regions, but also local institutions made more sustainable and efficient through experienced trainers, renewed curricula, manuals and bench books, and generally a spirit of renewal and proactivity among local stakeholders. Table 2 provides data on the total number of people trained under EBRD-IDLO joint activities.

"Experience has shown that IDLO and the EBRD stand stronger in their efforts to promote the Sustainable Development Goals when they combine their strengths, resources and expertise."

1 The Bank started operating in Egypt, Jordan, Morocco and Tunisia in 2012, in the West Bank and Gaza in 2017 and in Lebanon in 2017.

GENDER BALANCE IN ACCESS TO JUSTICE IN THE SOUTHERN AND EASTERN MEDITERRANEAN REGION

"In 2015, the EBRD approved its first ever Strategy for the Promotion of Gender Equality 2016-2020 with the objective of increasing women's economic opportunities in the economies where it invests."

VERONICA BRADAUTANU
PRINCIPAL COUNSEL, EBRD
BradautV@ebrd.com

OVERVIEW

In 2015, the EBRD approved its first ever Strategy for the Promotion of Gender Equality 2016-2020 with the objective of increasing women's economic opportunities in the economies where it invests. Moreover, via the dispute resolution line of work we have tried a number of ideas and techniques. In our judicial and related trainings we have inserted a requirement for at least 20 per cent of judges and other trainees to be women and included wording encouraging women's participation via developing a closer relationship with women's business associations. This is particularly useful in the SEMED region where professional women need a boost to increase their role and visibility.

Promoting and establishing commercial mediation as a viable dispute resolution mechanism in various countries helps create job opportunities for women, but also provides easier ways to access justice. In some economies, in the SEMED area in particular, the fact of women attending courts is socially and culturally controversial and may lead to disapproval or harassment. Mediation offers a solution as it is confidential and may be organised in a way which suits the parties most, for example, being held outside the court building, appointing a female mediator, choosing an amicable process, and so on. Some women choose mediation as a profession since it is often associated with social and communications skills. Moreover, to show that the gender of mediators matters, one dispute resolution study found that male and female mediators are equally effective at reaching an initial settlement but female mediators are more effective at reaching binding settlements.[1]

We have also undertaken two initiatives dedicated to promoting gender equality in our regions. Both initiatives are implemented in partnership with the International Development Law Organization (IDLO). The two initiatives aim to address the challenges women face in accessing justice both from the supply-side, by means of organising a Regional Forum Supporting the Leadership Role of Women Judges in the SEMED region, as well as demand side, by undertaking a Research Study on Women Entrepreneur's Access to Justice – in Jordan. Both activities aimed to uncover barriers for women's access to justice, as well as factors that chip away at their capacity to do business or rise in the professional sense. Solutions and policy recommendations were developed on the back of such initiatives.

INSIGHTS FROM THE SEMED REGIONAL FORUM ON WOMEN JUDGES

The aforementioned forum took place on 14 to 15 December 2017, with the official title of "Towards a Women Judges' Platform in the Southern and Eastern Mediterranean Region". The idea was to exchange knowledge and experience and identify approaches to promote women's active participation and leadership in the justice sector. There were a total of 46 judge-participants from the region, including from Jordan, Lebanon, Morocco, the West Bank and Gaza, and Tunisia. Additional participants were from Poland, Sri Lanka and the United States of America (USA), as well as moderators from the United Kingdom (UK), Italy and the USA. Creating networks, forums and platforms

> "The number of female judges in the southern and eastern Mediterranean economies varies, but the percentage of women shrinks dramatically in the higher courts. For example in Egypt, in mid-2018, out of a total of 16,000 judges only 66 were women."

for the exchange of ideas, experience, challenges and achievements is crucial for promoting change.

In all participant economies women may be appointed as judges. The number of female judges in the SEMED economies varies, but the percentage of women shrinks dramatically in the higher courts. For example in Egypt, in mid-2018, out of a total of 16,000 judges only 66 were women.[2] The judges discussed the importance of having role models and leaders in the judicial profession. Another contributing factor to rising through the ranks is the support of male and female colleagues who believe in women's role in the judiciary. It was emphasised what a powerful signal it is to see women acting as judges by the younger generation and society. There was a clear understanding among the participants about the changing nature of attitudes and that it takes time to change social norms and behaviours.

A Moroccan participant stressed the possibilities of changing laws by way of reinterpreting Islamic law. She invited judges to become activists in ensuring that religious teachings are understood to be flexible, capable of changing with time and may be interpreted in line with international human rights. The slogan was to "train judges on human rights".

Overall the forum participants identified an array of issues and challenges for women's advancement in the justice sector, grouped and described below. Nations should attempt to resolve these and international bodies may help them in this endeavour. Gender Equality and Women's Empowerment (Number 5) is one of the Sustainable Development Goals, as is Peace, Justice and Strong Institutions (Number 16).

Limited representation of women in the executive judiciary bodies

There are very few women in executive positions in the justice sector in the region. This includes economies where there is a high number of women judges, as for example in Lebanon (where 50 per cent of judges are women). This is discouraging on a number of levels, including lack of role models, limiting aspirations for female judges, a lack of representation of interests at the executive level, and so on. Forum participants revealed from their experience that male and female mentors within judicial bodies are particularly important for increasing women's status in the judiciary. It is also essential that decision-makers perceive women's participation as being of true value rather than "gap-fillers" for quota or box-ticking purposes.

Method of judicial recruitment is often a barrier due to existing bias in the profession

Entrance into the judicial profession will be less restrictive if based on more objective criteria. For instance, in Tunisia the high rate of women judges on the bench (48 per cent) is a result of favourable legislation that permits entry into the judicial profession through a merit-based mechanism, for example, exam results and other objective criteria. It is perceived that common law systems due to their reliance on selection criteria such as length in service and reputation and experience in law firms, tend to perpetuate existing imbalances in the profession.

Limited presence of female judges reinforces and widens the limited role women have in the justice sphere and often discourages access to justice among women

Not surprisingly, the limited presence of women among judges reflects the role of women in public life and perpetuates such a limited role. On the other hand, women judges serve as inspiration to girls in pursuing a legal career. The presence of women on the bench shall be promoted as the proper carrying-out of fair and representative justice. This sends a powerful signal to society, to the litigants and any person answerable to the law about women being able to pursue their rights (including business rights) in court.

Restricting women judges to certain areas of dispute resolution is not a solution

Another way to perpetuate the limited role of women in the justice sector is to assign them to certain sectors of law for example, children's rights, family law and gender-based violence. This is particularly damaging to women's participation and access to justice in commercial law and connected fields, as a consequence affecting their ability to participate in business and entrepreneurial relationships.

SOLUTIONS

Obviously, resolving the described challenges would require complex approaches affecting the whole of society. However, it is often the case that incremental change has great effects. Forum participants, apart from sharing experience about challenges, also discussed potential solutions that may be suitable for the SEMED context:

1 **Availability of a permanent regional platform/forum for discussion would constitute a major achievement.** This could allow a continuous exchange of ideas and experience, as well as offering support for change. The regional aspect of such a platform would be particularly important as SEMED economies share certain legal and social traditions, history and customs. Such a platform may also incorporate a collection of data and information that is useful for the participants (electronic observatory and database). Examples of useful information may be: the status of women in the region, trainings for women judges, thematic jurisprudence on specific legal areas, and so on. Various institutions and aid providers may feed data into this collection.

2 **Thorough research to identify barriers to female participation in the justice sector and appointment of women as judges emerged as an urgent and necessary first step.** Such barriers are not as obvious as they may seem. It is clear that a number of women are appointed to judicial positions in most SEMED economies. However, in some contexts such numbers are very small, despite women outperforming men in the judicial entrance exams (for example, in the West Bank and Gaza). In other contexts, women are present in high numbers in the judiciary, but their number decreases significantly in senior positions (for example, in Lebanon). See further below regarding such research in Jordan.

3 **Capacity building and training for women judges and legal professionals in a variety of areas was identified as essential.** Areas for such initiatives may be described as follows:

- raising awareness about discriminatory laws and regulations
- linking women to affordable or *pro bono* legal services
- promotion of success stories about women judges/leaders

- training of women judges in specialised, new and emerging areas of law, not yet completely occupied and that are exciting to new generations (for example, commercial law, cyber crime, and so on). For instance, in Morocco six specialised commercial courts have recently been opened, creating opportunities for specialist judges
- training women judges to become trainers in various areas of the law
- continuous efforts to building capacity for women judges in aspects of law related to gender and gender-based violence, in order to allow them to be effective representatives of women.

The forum was instrumental in identifying some of the challenges to women becoming judges, highlighting the effect of limited women's representation in the justice sector on society. This was also a good opportunity to point to a number of available solutions, which may be used by policymakers in each economy as well as development organisations in their efforts to improve gender balance in the judiciary.

"The forum was a good opportunity to point to a number of available solutions, which may be used by policymakers in each economy as well as development organisations in their efforts to improve gender balance in the judiciary. "

CONCLUSIONS FROM THE RESEARCH STUDY IN JORDAN

Members of the EBRD's Legal Transition Programme (LTP) and the Gender and Economic Inclusion Team have led the study on Women Entrepreneur's Access to Justice in Jordan. The justice system is a vital ingredient to sustainable and efficient business operation. The objective is to identify and assess the legal, economic, social and cultural barriers women entrepreneurs face in resolving disputes affecting their businesses. Insights from women and men entrepreneurs, institutions and justice sector professionals were sought and areas for potential policy dialogue engagement were identified. Usual disputes include contract enforcement (for example, debt recovery), opening and closing of businesses, resolving employment disputes and upholding economic rights.

"Quite often a number of legal, economic, practical and social barriers prevent women from accessing the justice sector, either as justice sector professionals or as individuals aiming to resolve disputes. Our work in Jordan has shown that, when trying to start and operate their own business, legal obstacles faced by women can be compounded by high costs and lack of access to financial support, as well as social barriers to conducting business as a woman – including resolving disputes. Under its Strategy for the Promotion of Gender Equality (2016-2020), the EBRD aims to improve the business environment for women entrepreneurs in the economies where it invests; we identify measures to address existing gender gaps, including through promoting women's legal awareness. Such actions are so important when you want to create inclusive, sustainable market economies."

– Barbara Rambousek, Director for Gender and Economic Inclusion, EBRD.

Legal barriers

There are laws in Jordan, which expressly discriminate against women. Discriminatory provisions exist in labour laws, pension laws and personal status laws, leading to severe limitations in freedom of movement, in legal capacity to sign contracts and administer property, in inheritance, and in the ability to testify in civil proceedings. This is exacerbated by variations in treatment in practice reported by women and men entrepreneurs. For instance, a woman is precluded (in practice) to file a legal claim without a male relative's permission; the same is often extended for bank loan applications. With this in mind, according to the study participants, alternative dispute resolution and in particular mediation emerged as a preferred way to solve commercial disputes. This may bring the required degree of informality and flexibility allowing women more freedom and a level playing field.

Recommendation: Activists and policymakers should:

- strive to raise awareness about discriminatory laws and practice with a view to remove such barriers in the legislation and in practice
- promote commercial mediation and raise awareness about this mechanism for dispute resolution with a view to improving women entrepreneurs' access to justice.

Economic barriers

Debt financing and overdue payments emerged as the main source of dispute in the study. The court fees in Jordan are the highest in the region, amplified by expensive legal services. Due to lack of women's limited access to finance as compared with men, they may not pursue legal advice nor go to court due to expense.

Recommendation: Activists and policymakers should:

- reduce costs of dispute resolution by promoting small claims or fast track procedures (including online) and alternative dispute resolution
- improve women entrepreneurs' access to legal aid services, including by creating specialised law school clinics providing free advice
- address gender bias in lending to women by reviewing existing micro financing programmes and ensuring women entrepreneurs' access to finding.

> "The EBRD aims to improve the business environment for women entrepreneurs in the economies where it invests."

Practical and institutional barriers

The study revealed a very low level of business legal awareness. Eighty-two per cent of the responding men and women entrepreneurs claimed "little", "basic" or "no" understanding of the business-related legal and regulatory framework. Further, procedures to open a new business are perceived as overly complicated with little expert legal advice available. Courts again feature as a very weak link, due to being slow, having limited opening hours, and a lack of expertise among judges, but also lawyers. Enforcement of court decisions was singled out as a more positive and easy experience, except for women reporting it as a slightly more difficult procedure than men.

Recommendation: Activists and policymakers should:

- improve legal awareness of women entrepreneurs via trainings, dedicated manuals on various relevant subjects of civil and commercial law
- reduce barriers to registering and operating businesses, by streamlining the process and reducing fees
- improve access to qualified commercial lawyers, including by building the capacity of lawyers on legal matters most relevant for women entrepreneurs
- strengthen judicial capacity on commercial matters.

Cultural and social barriers

The practice of access to justice by women is enmeshed with cultural prejudices. It is viewed as shameful for women to resort to courts to resolve disputes affecting their business or report violation of their rights: for example, clerks may refuse to accept a claim unless countersigned by a husband or a male relative; administrative staff may harass women for addressing the court; women entrepreneurs may also be sued as a tactic to extract money or as a means of harassment. Appearing in court, including in order to testify, attracts social stigma for women. In addition, lawyers may attempt to extract higher fees from women clients. The composition of the legal profession is a reflection of cultural bias. Although, in Jordan, more women than men graduate from law school, women represent less than one-quarter of judges and lawyers. Even so, justice sector professionals revealed that there is little acceptance of women judges.

Recommendation: Activists and policymakers should:

- increase awareness of and counteract gender biases in the justice sector by organising gender-sensitive trainings for judges, mediators, lawyers and other legal professionals

- promote equitable gender composition of legal professionals, including by targeted support to women lawyers and judges, as well as integration of gender awareness in the law-school curriculum
- improve government processes and laws to reflect women entrepreneurs' needs, including by creating advocacy units to bridge the gap between government and entrepreneurs.

The study contributes to the growing body of information aimed at strengthening women's equitable access to justice in order to help create an enabling environment for women entrepreneurs to achieve business success.

Trainings for judges and mediation reform

Apart from dedicated initiatives, we are attempting to promote gender equality and women's access to economic opportunities in other projects in the dispute resolution area. The techniques we used include:

- a participating quota for women: for example, "at least 20 per cent of the judges receiving training will be women" (Competition law judicial training in Jordan)
- a clause encouraging women to participate in the trainings:
    - for example, "The curriculum and criteria for trainer selection will be approached from the gender-sensitive perspective and will include necessary provisions to ensure female participation as mediators" (Commercial mediation judicial training in Moldova – Phase III)
    - "To the extent possible, the Consultant will ensure gender-balanced participation – to this end, the Consultant will liaise closely with the recently established Tunisian Association of Women Judges" (Judicial training and training of trainers on intellectual property in Tunisia)
    - for example, "Promote mediation amongst women entrepreneurs through partnerships with women business associations and other relevant entities" (Commercial mediation judicial training in Moldova – Phase III/Commercial mediation in Jordan).

In most of the abovementioned initiatives a relatively balanced participation was achieved with an average of 60 per cent of women judge participants. This is in contrast to the numbers for example in our Serbian commercial mediation project, where 83 per cent of participants in all judicial and mediators' trainings were women. Before we slide into self-congratulation it must be said that this does not appear very balanced and, in addition, anecdotal evidence from the participants explains this number as due to judges being poorly paid in Serbia, hence more women employed in the judiciary. This reveals that imbalance towards any side may be an indication of an underlying issue we did not suspect nor anticipate.

Related is the fact that we should consider not only quantitative measures but also qualitative aspects of women's participation in the justice sector. With this in mind the EBRD through the LTP is working with the EPG Gender Team towards developing a training module for women judges in the SEMED region promoting leadership skills. The training aims to assist women judges with their ability to progress in their career, as well as improve their visibility and acceptance in the profession. We plan to use the module as an add-on to other judicial trainings in the region. For example, we are considering adding it to the training on mediation planned in Jordan.

CONCLUSION

The 2030 Agenda for Sustainable Development promises to leave no one behind. Women's access to justice is a critical part of this endeavour. With gender-responsive judicial institutions women are more inclined to assert and claim their social, economic, cultural, political and civil rights.

Given the promotion of gender equality has become of central importance to the Bank's mandate, the LTP is attempting to identify ways to contribute to the Bank's efforts in this respect. The techniques used in our projects, information gathered and platforms for exchange offered, point to the means of change, simultaneously making small steps towards empowering women, including in business. In the words of the first African-American woman in the USA to become a federal judge in 1966, Constance Baker Motley: "Something which we think is impossible now is not impossible in another decade."

If we were to compare the legal and judiciary sector in our regions to those in the developed world the change is possible but is ongoing. In the UK, women were first allowed to vote in 1918 and in 1919 were able to enter law school (due to Sex Disqualification (Removal) Act). Today women represent about 63 per cent of newly qualified and nearly 50 per cent of all solicitors, yet at senior levels, women account for only 25 per cent of partners.[3] Equal pay also remains a problem with pay differentials exceeding the national average. In the UK, as at 1 April 2018, 29 per cent of court judges were female.[4] At the same time 46 per cent of tribunal judges were female,[5] with tribunals hearing primarily employment cases and some other more specialised cases (for example, appeals against public authorities, decisions on immigration, social security, mental health, and so on). Another feature of tribunals to consider is a more informal procedure.[6]

To put things further into perspective it is interesting to look at the information available on the European countries. Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) gathers comprehensive information on various aspects of the judicial systems collated into a bi-annual report on "European judicial systems – Efficiency and quality of justice".

According to the latest report: "*The States and entities with the highest percentage of women in*

Table 1: Distribution of professional judges by instance and by gender in 2016

States / Entities	Total of professional judges (FTE)		1st instance professional judges		2nd instance professional judges		Supreme Court professional judges	
	Male	Female	Male	Female	Male	Female	Male	Female
Albania	53%	47%	49%	51%	60%	40%	91%	9%
Andorra	42%	58%	29%	71%	67%	33%	NAP	NAP
Armenia	75%	25%	75%	25%	76%	24%	71%	29%
Austria	51%	49%	48%	52%	56%	44%	70%	30%
Azerbaijan	88%	12%	88%	12%	88%	12%	84%	16%
Belgium	47%	53%	46%	54%	50%	50%	72%	28%
Bosnia and Herzegovina	36%	64%	37%	63%	33%	67%	39%	61%
Bulgaria	NA	NA	NA	NA	NA	NA	NA	NA
Croatia	30%	70%	27%	73%	35%	65%	59%	41%
Cyprus	51%	49%	50%	50%	NAP	NAP	62%	38%
Czech Republic	39%	61%	33%	67%	46%	54%	77%	23%
Denmark	49%	51%	44%	56%	58%	42%	68%	32%
Estonia	37%	63%	30%	70%	44%	56%	74%	26%
Finland	45%	55%	44%	56%	46%	54%	66%	34%
France	36%	64%	33%	67%	40%	60%	51%	49%
Georgia	51%	49%	51%	49%	50%	50%	62%	38%
Germany	NA	NA	NA	NA	NA	NA	71%	29%
Greece	29%	71%	27%	73%	28%	72%	55%	45%
Hungary	31%	69%	28%	72%	34%	20%	50%	50%
Iceland	62%	38%	58%	42%	NAP	NAP	80%	20%
Ireland	65%	35%	64%	36%	80%	20%	56%	44%
Italy	46%	54%	43%	57%	48%	52%	70%	30%
Latvia	22%	78%	19%	81%	24%	76%	32%	68%
Lithuania	38%	62%	35%	65%	57%	43%	69%	31%
Luxembourg	35%	65%	34%	66%	34%	66%	100%	0%
Malta	58%	42%	50%	50%	89%	11%	NAP	NAP
Republic of Moldova	52%	48%	53%	47%	48%	52%	55%	45%
Monaco	57%	43%	40%	60%	33%	67%	81%	19%
Montenegro	42%	58%	42%	58%	43%	57%	33%	67%
Netherlands	42%	58%	39%	61%	54%	46%	NA	NA
North Macedonia	40%	60%	39%	61%	45%	55%	48%	52%
Norway	59%	41%	56%	44%	64%	36%	67%	33%
Poland	NA	NA	36%	64%	47%	53%	NA	NA
Portugal	41%	59%	33%	67%	59%	41%	80%	20%
Romania	26%	74%	28%	72%	26%	74%	17%	83%
Russia	40%	60%	NA	NA	NA	NA	NA	NA
Serbia	30%	70%	30%	70%	25%	75%	42%	58%
Slovak Republic	38%	62%	37%	63%	39%	61%	41%	59%
Slovenia	21%	79%	18%	82%	25%	75%	58%	42%
Spain	47%	53%	40%	60%	63%	37%	88%	12%
Sweden	48%	52%	51%	49%	42%	58%	67%	33%
Switzerland	59%	41%	54%	46%	68%	32%	68%	32%
Turkey	58%	42%	58%	42%	68%	32%	53%	47%
Ukraine	NA	NA	NA	NA	NA	NA	NA	NA
UK-England and Wales	66%	34%	NA	NA	NA	NA	83%	17%
UK-Scotland	74%	26%	74%	26%	65%	35%	NAP	NAP
Israel	48%	52%	45%	55%	54%	46%	71%	29%
Morocco	73%	27%	68%	32%	85%	15%	80%	20%

NAP – not applicable; NA – not available (that is, no information was available). FTE – full-time equivalent. Source: *European Commission for the Efficiency of Justice (CEPEJ)*.

"Although the proportions are on average encouraging in the European countries, further work needs to be done to achieve a true societal representation in the justice sector."

the judiciary are Belgium, Croatia, Czech Republic, Estonia, France, Greece, Hungary, Latvia, Lithuania, The Netherlands, Romania, Serbia, Slovakia, Slovenia. Feminisation has not yet been felt in Armenia, Azerbaijan, Ireland, Malta, Norway, UK-England and Wales and UK-Scotland. Generally, it appears that common law countries continue to present a very high percentage of men in judicial office. This high proportion of men is also found in eastern European countries (such as Armenia)"[7] (see Table 1).

The main remaining issue in Europe sounds very familiar as an issue raised in some of the SEMED economies. In particular, based on the data for 2016, the higher the hierarchical level, the more the number of women (and thus the percentage) decreases. For professional judges of first instance, the average is 43 per cent men and 57 per cent women, the proportion rises to 50-50 for second instance professional judges, which is an improvement compared with 2014 data (the proportion was 53-47 in favour of men). At the level of the supreme courts, the distribution is 63 per cent men and 37 per cent women (against 65-35 in 2014).[8]

Although the proportions are on average encouraging in the European countries, gender inequality continues to be particularly marked regarding access to positions of responsibility. Hence further work needs to be done to achieve a true societal representation in the justice sector.

1. David Maxwell, "Gender Differences in Mediation Style and Their Impact on Mediator Effectiveness," *Conflict Resolution Quarterly*, No. 4 (Summer 1992).
2. See https://egyptianstreets.com/2018/08/09/top-judicial-positions-include-16-egyptian-female-judges/ (last accessed 21 January 2019).
3. "100 Years since women became people", by Christina Blacklaws, 1 November 2017, see: https://www.lawsociety.org.uk/news/blog/one-hundred-years-since-women-became-people/ (last accessed 21 December 2018).
4. Judicial Diversity Statistics 2018, published on 12 July 2018, see: https://www.judiciary.uk/wp-content/uploads/2018/07/judicial-diversity-statistics-2018-1.pdf (last accessed 21 December 2018).
5. *Idem*.
6. HM Courts & Tribunals Service, see: https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about (last accessed 21 December 2018).
7. "European judicial systems – Efficiency and quality of justice - 2018", European Commission for the Efficiency of Justice (CEPEJ), p. 113, see: https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c
8. *Idem*.

DEVELOPING FACTORING AS A FINANCING TOOL IN KOSOVO

Kosovo is one of the most disputed parts of the Western Balkans, with its status the source of controversy for over a decade. In February 2008, Kosovo unilaterally declared its independence from Serbia, which probably makes it one of the youngest countries in the world. In addition, according to government data, it is estimated that more than 65 per cent of the population is under the age of 30, and 50 per cent of the population classified as falling below the poverty line. It is therefore imperative that new financial products are developed to broaden the finance options available, as the development of a financial environment that serves small and medium-sized enterprises (SMEs) can promote inclusive growth, higher wages and a range of other positive outcomes. In addition, the job creation and opportunities are also likely to lead to a sense of belonging for the population.

AMMAR AL-SALEH
SENIOR COUNSEL, EBRD
AlsalehA@ebrd.com

Scarce finance and inadequate economic development stifle many small and medium-sized enterprises (SMEs). According to the EBRD-World Bank Business Environment and Enterprise Performance Survey, BEEPS V (2012-16) access to finance is one of the top three obstacles to doing business in 16 countries in the EBRD regions, with around 50 per cent of SMEs in the EBRD regions unable to access a loan when they required one. Furthermore, penetration levels for non-bank financing instruments such as factoring are less than half the level one finds in the EU (European Union) or OECD countries (3 per cent in the EBRD regions compared with 6 to 7 per cent in the EU/OECD) showing that there is potential for growth (based on World Bank Development Indicators database, 2016 data).

Kosovo has therefore taken an important step in the reform of its legal framework with the adoption of a new regulation on factoring by the Central Bank of Kosovo on 29 October 2018. Factoring is an area that was not previously regulated, and represents an attractive financial instrument which has not been sufficiently used in the country. With the recent entry into force of the regulation, the legal and regulatory framework for this activity will be significantly improved and aligned with international best practices. The adoption follows support by the Bank through its Legal Transition Programme (LTP) in preparation of the regulation.

Factoring is a financial service based on the sale of accounts receivable, and is a useful tool for capital-deprived SMEs with low credit standing. It unravels the potential of an asset that all SMEs have — their invoices – and supports SMEs in receiving capital faster and under more flexible terms than a conventional bank loan, rather than having to wait for customers to pay their invoices, thus easing their access to trade finance and promoting their inclusion in value chains.

In a new factoring environment such as Kosovo, it is not surprising that the biggest challenges are the absence of a supportive legal environment and the lack of awareness and understanding of factoring in the business community. For factoring to function it requires a legal environment that permits the sale or assignments of accounts receivables and enforces the underlying contracts. In this regard, a reference to factoring in the law, or even a "Factoring Act", which recognises it as a financial service, can clarify the nature of the factoring transactions and the ruling in case of default of sellers or customers.[1] Another driver of the legislative reform is Kosovo's process of EU accession which dictates alignment of financial sector regulation with EU directives.

Acknowledging the EBRD's track record working on factoring legal frameworks in the region, the Central Bank of Kosovo approached the Bank in 2017 with a request for technical assistance for developing its legal factoring framework.

On securing all of the necessary internal approvals and funding from the government of Luxembourg, the EBRD procured the services of local and international experts to assist the working group created by the central bank, with laying down the recommendations for improvement, drafting the factoring regulation and conducting outreach activities to promote factoring in the local market.

"Acknowledging the EBRD's track record working on factoring legal frameworks in the region, the Central Bank of Kosovo approached the Bank in 2017 with a request for technical assistance for developing its legal factoring framework."

Before drafting of legislation can commence there has to be a broad consensus among the relevant stakeholders on what the law has to achieve and how it can achieve it. Legislative reform was therefore undertaken in close coordination with market players, regulatory bodies and foreign experts in financial services. Coordination was reached by consultations at each stage of the process and provided stakeholders with the opportunity to comment on proposals and advise alternative solutions that, at a later stage, were transposed into legislation.

The preliminary stage involved preparation of a concept paper, which lays out international best practices on the regulation of factoring, accompanied by concrete recommendations tailored to the local market, looking in addition at what had been adopted and worked (or did not) in neighbouring countries.

In our reform process in Kosovo, the concept paper covered:

- types of factoring
- elements which enable a factoring framework – this included regulation of the industry, assignment of receivables, e-signatures and tax treatment
- review of factoring legislation locally, regionally and internationally.

The concept paper also serves to assist the authorities with future reform endeavours, as implementation of a new law is just as important as the passing of the law itself. Therefore follow-up activities to the project will include promoting factoring as an alternative financing tool for SMEs and ensuring that market participants are well-informed about the legislative changes.

As a result of the findings and the consensus for reform during the preliminary stages, the EBRD proceeded with drafting the provisions of the factoring regulation which were also presented and discussed at length with the working group members.

Bicycle producer plans ahead with factoring

Albimi SHPK is a company that was established in 1998 in the city of Gjilan, in Kosovo.

"It all started with a passion for bicycles and assembling bikes imported from different European countries," says Ibrahim Krivaca, the company's owner.

Thanks to a very dedicated and professional team, Albimi SHPK has grown and in 2008 it became an exclusive representative of the internationally renowned Shimano brand.

Albimi has also created its own brand, Pilot, which is very successful in the local market. Pilot is 100 per cent made in Kosovo: from design to the finished product.

"Being present in all the cities of Kosovo and having contracts with more than 50 retailers, managing payment delays is very difficult," says Mr Krivaca.

But using factoring has made a huge impact on his business this year. Instead of waiting up to 100 days for an invoice to become due, the company gets paid by Raiffeisen Bank, which provides factoring services, shortly after making the delivery.

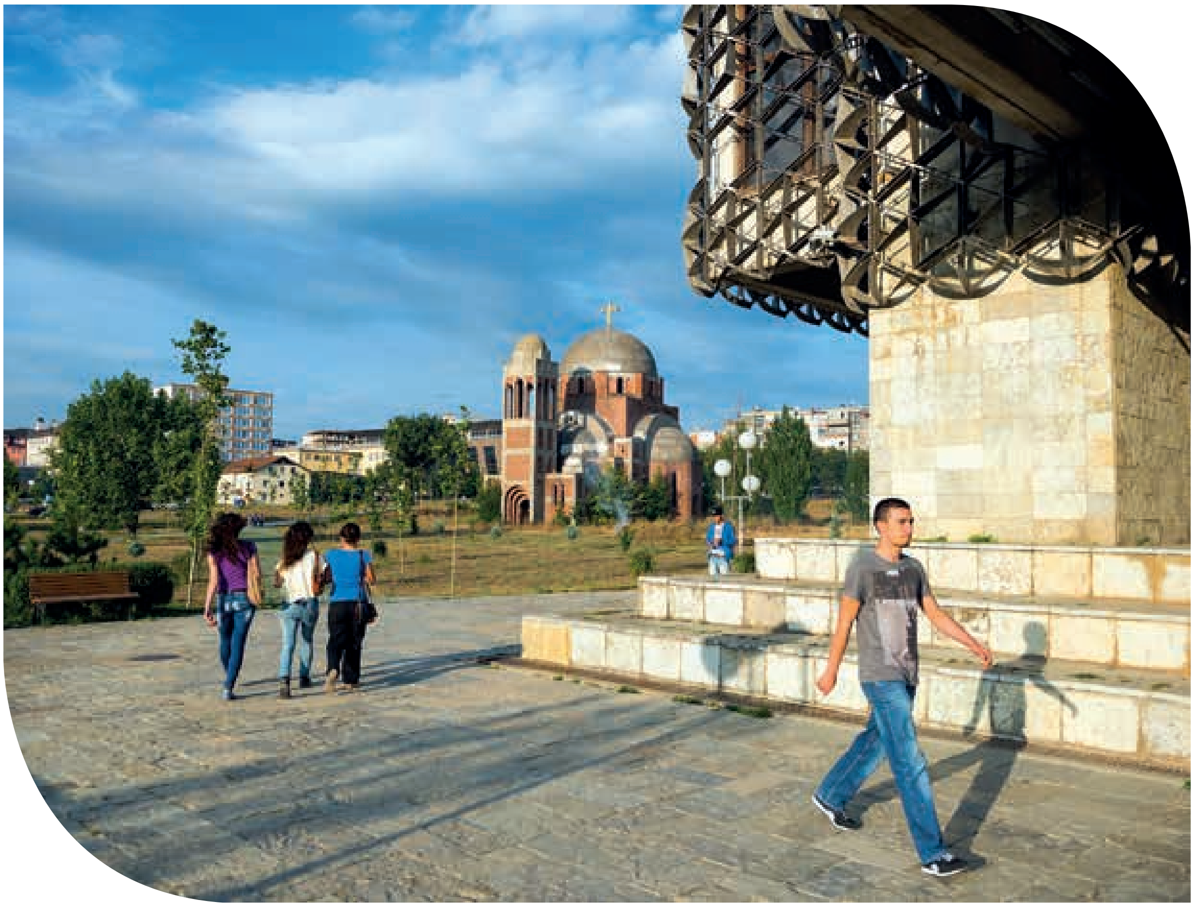
"With factoring I can plan my budget and foresee investments much more easily", continues Mr Krivaca. "It is a much-needed source of finance and development support for small and medium-sized businesses here in Kosovo." Now Mr Krivaca hopes that factoring will further develop across the country and will support local producers with international trade.

CONCLUSION

The legal and judicial environments play a key role in the success of factoring. The legal provisions of general laws such as the civil code do not necessarily recognise factoring as a financial service, nor are they tailored to the needs of factoring services. This can limit the scope of factoring transactions or increase factoring transaction risks, including creditors' priority rights for instance.

A factoring framework introduces meaningful oversight that guarantees the stability and legitimacy of the sector and its growth. It is thus advisable for regulators to create a sound, clear and predictable legal framework to encourage the development of factoring activities and avoid unnecessary disputes due to a lack of regulation.

"The legal and judicial environments play a key role in the success of factoring. The legal provisions of general laws such as the civil code do not necessarily recognise factoring as a financial service, nor are they tailored to the needs of factoring services. "



However, designing and implementing effective regulation, which balances financial stability and investor protection, represents a challenge for policymakers and regulatory authorities. A key take-away from the legislative reform process in Kosovo, which applies to any such process, is that a pre-condition for successful and functional reform is the involvement of all stakeholders from the start and their close cooperation throughout.

1 Source:
http://www.oecd.org/cfe/smes/New-Approaches-SME-full-report.pdf
(last accessed 27 December 2018).

REFORMS NEEDED TO BALANCE BENEFITS OF MINING IN GEORGIA

Mining is a globally interconnected industry with great potential to create employment, drive innovation and attract large-scale investment and deployment of infrastructure over the longer term. The mining sector's large contribution to economic growth and social development in a number of the EBRD's resource-rich countries of operations, such as Kazakhstan, Kyrgyz Republic, Mongolia and Ukraine, is well-known. Perhaps less appreciated is the contribution and potential of the sector in those EBRD countries of operations less traditionally associated with mining activities.

Georgia is one such country, and the EBRD, through its Legal Transition Programme (LTP), recently launched a comprehensive technical cooperation programme with the government of Georgia (the "government"). The aim of this programme is to reform governance and regulation of the sector to enable the sector to properly contribute to the country's economic development and to its public finances, while also addressing the sector's not insignificant environmental legacy. The EBRD's support programme comes in three phases: policy development, legal reform and capacity and institution building, with current support activities centring on policy development.

PAUL MOFFATT
SENIOR COUNSEL, EBRD
MoffattP@ebrd.com

MINING IN GEORGIA

Mining activities in Georgia date back centuries, by some accounts to the Palaeolithic era (the Old Stone Age). By the mid-1800s, steel and minerals used in the fabrication process were being mined commercially. State mine operations became part of Soviet-era industrial policy which relied on inter-Soviet state industrial relations to drive supply and demand. Following the collapse of the Soviet Union and the independence of Georgia, state investments in mining dried up. Today only private investors are active in the sector, mostly characterised by several significant deposits and investments in manganese, copper and gold and small-to-medium sized quarry operations, primarily marble and construction materials.

The sector's current contribution to the gross domestic product (GDP) is a not-insubstantial 5 per cent, with a remarkable 35 per cent of export revenues being generated from mineral and mining-related exports. While some of these investments include value-additions to the actual mineral production, the true potential of the country's mineral resources in this respect is yet to be realised. The common view of the government and investors alike is that Georgia can better capitalise on existing investments and improve its governance frameworks to support new mining investments.

GOVERNMENT REFORM PROGRAMME

Recognising the existing contribution, the impediments to expansion and potential for the sector, the government has committed to a programme of mining sector development involving three main pillars: (i) preparation of a policy for responsible development of the sector; (ii) renewal of the legislative framework for the sector based on the new policy; and, (iii) ensuring efficient and effective implementation of policy and law through institution strengthening and capacity building for state agencies.

EBRD TECHNICAL COOPERATION PROGRAMME

It is against this backdrop that the EBRD's technical cooperation support is being implemented. To help achieve its goals for the sector, the government requested the support of the EBRD. In response, the Bank included development of the mining sector as an area of focus in its current Georgia country strategy, and has agreed to support the government in its reform efforts with the programme of technical cooperation.

This programme has three phases, mirroring the pillars of government reform: (i) policy development; (ii) preparation and adoption of laws and regulations; and, (iii) institution strengthening and capacity building.

Work with the government, represented by the Ministry for Economy and Sustainable Development (MoESD) and the National Agency for Mines (NAM) on phase I, development of sector policy, began in June 2018. The modus operandi of phase I is to establish an agreed baseline sector status to advise on; identify effective practices from other successful mining jurisdictions; develop a range of policy options for adoption of best practice in Georgia; make specific recommendations from the assembled options; and, finalise those recommendations in a formal government policy.

EXISTING GOVERNANCE AND REGULATION

While the government is generally seen as successfully pursuing liberalising policy reforms and is keen on maximising foreign investment, growth in the mining sector has lagged that of other sectors. This can generally be seen as the result of the current policy, legislative, regulatory and fiscal framework for the sector providing insufficient incentive for investment. In fact, in some cases, the current framework may actually be discouraging investment.

Notable Soviet-era industrial practices remain in place in Georgia, particularly in the areas of reserves management, production reporting, and imposition of fees. In the environmental sphere, historic mining impacts (for example, acidic water seeping from aged tunnels) linger across the mining value chain and have not been adequately assessed or sufficiently addressed.

To date, mining activities in Georgia have generally been guided by overall policy and legal frameworks that are not specific to mining. This includes the handling of land, labour, environment, and social issues. Some separation of mining taxes and payments is legislated for, but significant additional improvements could also be made.

Thus, considerable opportunity exists to improve efficiencies, streamline and strengthen regulatory oversight, and better optimise mining investments, reforms which should enable Georgia to balance the significant risks and the large benefits of mineral development. Overall, the current policy and governance context in which minerals are developed in Georgia does little to adequately reflect the non-renewable, dynamic and temporary nature of mining investments.

SECTOR REVIEW CONCLUSIONS

Georgia is an open and functioning mining market, with 5,000 plus licences having already been issued, including mines, quarries and groundwater. The sector employs almost 30,000 Georgian citizens and contributes approximately 5 per cent of overall country GDP. An incredible 35 per cent of export revenues are generated from mineral and mining-related exports.

Notwithstanding that positive contribution, significant legacy issues currently impede responsible development. In particular, there appears to be no distinction between mines and quarries and there is little to no emphasis on the commerciality of minerals. Institutional arrangements are fragmented and dispersed among many ministries, agencies, commissions and other entities. Financial payments required from licensees are too rigidly proscribed and lack the flexibility expected of today's dynamic minerals marketplace. Worryingly, there appears to be insufficient focus on health and safety, fair labour practices and there is a significant legacy of mine-related environmental damage.

Additionally, although the modern mining sector is driven by quality data availability, Georgia currently has no country-wide geological map and geo-data management practices (that is, the rules for handling data, storage facilities, libraries) are not adequately developed.

That said, the government is actively strengthening sector operations and is committed to overhauling and modernising sector regulation. Examples include the establishment of a dedicated sector regulator in the form of the National Agency of Mines in 2017, improved environmental reporting legislation and oversight, and work on building cadastre information and mapping. The government has also shown keenness in promoting stakeholder consultations on sector development, and has not been afraid to seek external assistance from the EBRD and others.

OVERVIEW OF APPLICABLE POLICY PRINCIPLE FOR GEORGIA

Drawing on mature international experience, the articulation of key policy principles has become relatively easy to formulate. However, although many principles can have universal application, the challenge lies in adequately and appropriately adopting those principles to a specific local environment. Notwithstanding this challenge the applicable principles for Georgia would likely include the following:

Governance frameworks

Institutional roles and responsibilities could be clearer, and legislation and regulations to support market-based minerals development could be stronger, with critical mine safety and labour protection issues meriting close attention. Types of minerals and mining areas could be better categorised, and the introduction of a dispute resolution process would bolster investor confidence in sector governance and administration. To best take advantage of modern sector practices and trends, a market-based fiscal regime and revenue reporting could be adopted. Given the international nature of the sector, terminology tends to be standardised and the understanding of particular terms among sector participants is critical and, accordingly, efforts could be made at harmonisation of terminology to be used in the sector.

Licensing processes

The licensing process in its current form does not seem to sufficiently serve the objectives of the government. Accordingly, a modernised system of licensing could be introduced, based on a improved categorisation of licences, with better distinction between different mining categories (for example, mines, quarries and groundwater). As part of the licensing process, there could be clearer rules and better enforcement on land issues. Additionally, clearer rules could be developed for suspension and termination of licence. Online auction rules could be revisited to ensure better investments win rather than the highest bidder. Alternative licence award methodologies could also be introduced (for example, tender applications), with those additional methodologies often being more suitable than auctions for the award of licences at a particular stage of the mining development cycle.

Environmental and social safeguards

Environmental and social safeguards could be heightened, starting with increased efforts from the government to raise the level of coordination and awareness at the national and mine-community level. In particular, the government could ensure that all categories of mining have environmental monitoring and reporting obligations. Efforts could also be made to improve environmental and social inspection and enforcement (for example, introduction of testing equipment). Critically, given the lingering damage from past practices, a programme to address legacy environmental damage could be introduced. Given the community dimensions to mining activities, consultation with those communities could be strengthened.

Production and reserves reporting

Market-based reporting based on commerciality could be a more appropriate methodology for Georgia given the government's objective of using a market-based system to attract more private investment. Allied to this move to market-based reporting, the fiscal framework for the sector could

> "The EBRD and the government are of common mind with respect to the potential for the sector to play a bigger role in the economy."

> **"The EBRD advice has been well received and the experience of cooperation on both sides provides a clear and firm basis for further cooperation."**

be revised to remove the requirement for advanced fees, instead introducing production-based royalty payments. Modern reserves reporting information and requirements can be included as part of the licence itself.

Value chain and alternative livelihoods

The presence of a viable mining sector and the nature of the mining cycle and its related infrastructure requirements present opportunities to amplify the contribution of the sector beyond the mere value of the minerals themselves. In this respect, as part of mine investments, care and attention could be focused on mine-related development (for example, roads, electricity, infrastructure, and so on). Additionally, consideration can also be given to favouring investments that include value-additions, although there needs to be a clear assessment of market costs for value-addition businesses (for example, processing, cutting, polishing, and so on). Importantly, in exploiting the mining value chain, sufficient attention could be paid to post-mining livelihoods, notably in remote areas.

Inspection, cadastre and geological survey

These activities are critical to effective governance of the sector. In particular, a modern Mine Inspectorate could be established to conduct regular mine inspections, country-wide. Similarly, cadastre operations could be strengthened and supported and afforded equipment upgrades, back-up and capacity. Active consideration could be given to establishing a National Geological Survey as part of government operations.

Revenue management

Translating the revenues of the sector into tangible and sustainable benefits for Georgians is key to successfully and responsibly exploiting the sector. Critical aspects of modern revenue management include the introduction of measures to track beneficial ownership; substantive consideration of near- and long-term management of mining revenues (for example, education funds, environmental clean-up fund); and, ensuring legally required revenues are paid, for example, application of transparent reporting and revenue management.

FUTURE OF EBRD-GOVERNMENT OF GEORGIA COOPERATION IN MINING

The EBRD and the government are of common mind with respect to the potential for the sector to play a bigger role in the economy; the impediments to the sector playing such a role; the necessity for substantial reform to the sector and the manner in which it is governed; and the necessity for such reform before investors will be confident enough to commit viable levels of investment to the sector.

The EBRD has advised the government on policy principles, content and policy process for the sector. This advice has been, thus far, well received and the experience of cooperation on both sides provides a clear and firm basis for further cooperation: (i) in the modernisation of legislation so it can be an effective vehicle for policy implementation; and, (ii) in supporting and building capacity in and among the governing and regulating entities in the sector.

The trigger for follow-on cooperation between the EBRD and the government will be the adoption of the recommended policy as a governmental policy.

GLOSSARY

AML
anti-money laundering

BEEPS EBRD
World Bank Business Environment and Enterprise Performance Survey

CGAP
Corporate Governance Action Plan

DFI
development finance institution

EBRD
European Bank for Reconstruction and Development

EU
European Union

FinTech
financial technology

IDLO
International Development Law Organization

IFI
international financial institution

IMF
International Monetary Fund

IPO
initial public offering

IRP
insolvency and restructuring practitioner

KYC
know-your-customer

LTP
Legal Transition Programme

PPP
public-private partnership

SEMED
southern and eastern Mediterranean

SMEs
small and medium-sized enterprises

SOE
state-owned enterprise

TC
technical cooperation

EBRD LAW IN TRANSITION JOURNAL

General Counsel of the EBRD
Marie-Anne Birken

Editor-in-chief
Michel Nussbaumer

Founding Editor
Gerard Sanders

Support
Oya Osman-Nguyen

Editorial Production
Dermot Doorly, Natasha Treloar

Design and Print Management
Gaëlle Alliot, Daniel Kelly

Photography credits
©iStockphoto

Printed in England by CPI Colour, which operates an environmental waste and paper recycling programme.

Law in Transition journal is printed on Galerie Satin from responsibly managed, FSC® certified forests. The pulp used in this product is bleached using an Elemental Chlorine Free (ECF) process, and the inks are vegetable oil based and environmentally friendly.

CPI Colour is an EMAS certified company and its Environmental Management System is certified to ISO 14001.

1041 *Law in Transition* journal 2019 (E, 2,500) ISSN 1683-9161

FSC
www.fsc.org
MIX
Paper from responsible sources
FSC® C001785

European Bank for Reconstruction and Development
One Exchange Square London EC2A 2JN United Kingdom
Tel: +44 20 7338 6000 Fax: +44 20 7338 6100
Requests for publications: pubsdesk@ebrd.com

www.ebrd.com/law

Law in Transition journal is a publication of the Office of the General Counsel of the EBRD. The editors welcome ideas, contributions and letters, but assume no responsibility regarding them. Submissions should be sent to Michel Nussbaumer, Office of the General Counsel, EBRD, One Exchange Square, London EC2A 2JN, United Kingdom; or nussbaum@ebrd.com

European Bank
for Reconstruction and Development