



LAW IN TRANSITION JOURNAL

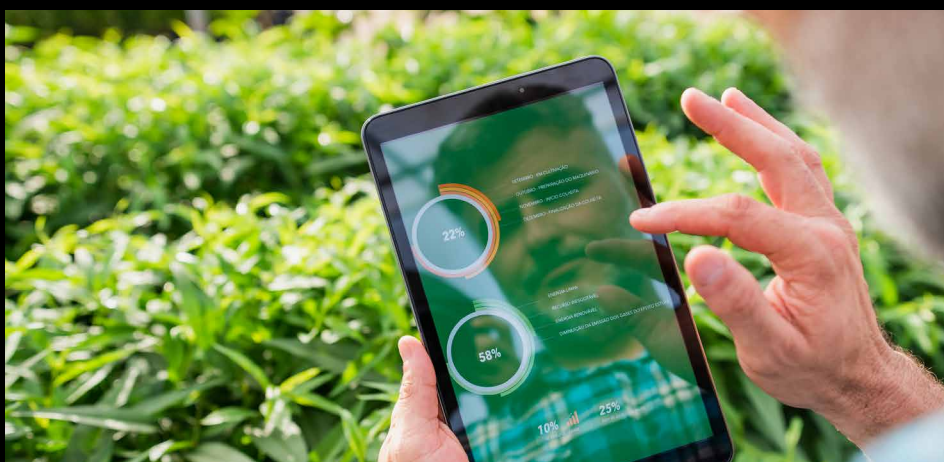
**Digital transition
with open government
at heart** page 6

**Enforcement of court
decisions** page 36

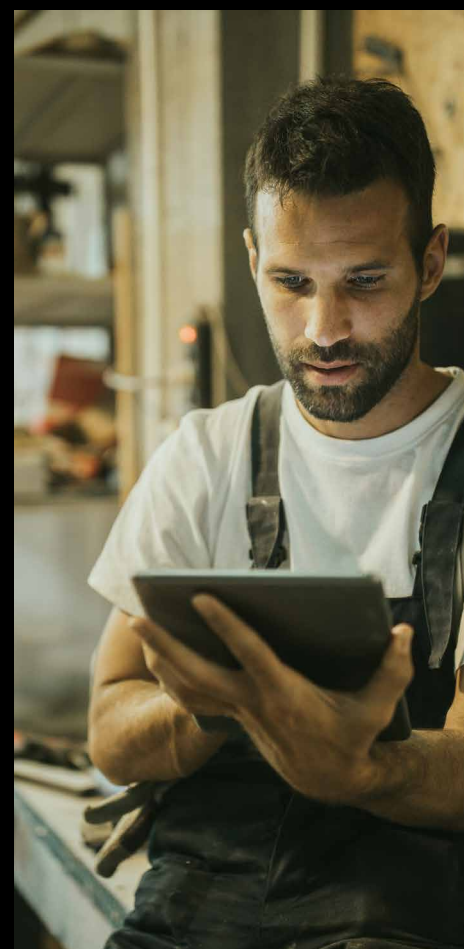
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**A new digital resource
for SMEs** page 52
**Delivering impact
through sustainability
reporting** page 70



**DIGITALISING
GOVERNMENT
SERVICES**





● 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 71 countries as well as the EU and the EIB. EBRD investments are aimed at making the economies in its regions competitive, well-governed, green, inclusive, resilient and integrated.

● ABOUT THIS JOURNAL

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



CONTENTS

2

FOREWORD

3

EDITOR'S MESSAGE



DIGITALISATION

6

DIGITAL TRANSITION WITH OPEN GOVERNMENT AT HEART

18

ACCELERATING THE POLISH DIGITAL TRANSFORMATION AGENDA BY FACILITATING THE USE OF CLOUD AND BLOCKCHAIN IN THE PUBLIC SECTOR

26

HOW CAN ePROCUREMENT SERVE PUBLIC-PRIVATE PARTNERSHIP PROJECTS, INCLUDING CONCESSIONS?

36

ENFORCEMENT OF COURT DECISIONS AND THE WAY FORWARD TO DIGITAL ENFORCEMENT

44

MAPPING THE DIGITAL TRANSITION IN MONGOLIA'S MINING SECTOR: SUPPORTING THE ESTABLISHMENT OF A DIGITAL GEOLOGICAL DATABASE

52

INFORMATION MATTERS - A NEW DIGITAL RESOURCE FOR SMEs ACROSS THE EBRD REGIONS



GREEN TRANSITION

60

THE EBRD'S CLIMATE AND SUSTAINABILITY AGENDA: THE ROLE OF LAW AND LAWYERS IN DELIVERING ON THE PARIS AGENDA

70

BEYOND THE HYPE: DELIVERING IMPACT THROUGH SUSTAINABILITY REPORTING

78

BIODIVERSITY AND NATURAL CAPITAL

88

GLOSSARY



FOSTERING THE DIGITAL AGENDA

We are living in turbulent times. After more than two years of the Covid-19 pandemic, Russia's invasion of Ukraine presents a new challenge, which has jeopardised political stability and is upending lives and livelihoods in the economies where we invest. The EBRD strongly condemned Russia's war on Ukraine within hours of the invasion and suspended access to its resources for Russia and Belarus. The Bank also put in place a €2 billion resilience package to address the huge needs of Ukraine and neighbouring countries. This facility is helping citizens, companies and governments to overcome difficulties resulting from the war.

At the same time, the Bank has been careful not to lose sight of the directions its Governors set in the Strategic and Capital Framework 2021-2025: creating a world that is more **green**, **digital** and **equal**. Across the economies where we operate, the Bank has continued to make investments and expand policy engagement to advance these dimensions of the development agenda. In the digital sector, highlighted in this issue of the *Law in Transition Journal*, the Bank's activities focus on three areas:

- Promoting the **foundations** of a sustainable and inclusive digital economy through the adoption of appropriate policies and regulations, access to connectivity through infrastructure, and a skilled workforce.
- Facilitating organisations' **adaptation** by providing access to finance, technical cooperation and advisory services that support digitalisation of services, assets, business processes and value chains.
- Fostering **innovation** and sustainable growth among digital-first clients through an ecosystem of policy and advisory services, as well as debt finance and direct and indirect equity investments.

I believe the EBRD can add exceptional value to the development of these areas in the economies where we invest. The work of the Legal Transition Programme, which is integrated with the EBRD's policy work in our countries of operations, is particularly relevant to the first

area, as it actively promotes policies and regulations for the digitalisation of government services. The stories in this issue of the *Law in Transition Journal* showcase our work on this theme. From cloud computing and blockchain in government services in Poland, to digitising mining geodata in Mongolia, to digitalising the work of court bailiffs and promoting open contracting data standards in public contracts, our specialists have shared a wealth of expertise.

To help accelerate the digital transition, the Bank created a Digital Hub in January 2022. The Hub should help the Bank further develop a coordinated and coherent digitalisation offer to countries and clients. As a concrete example, the Hub is already providing support in pilot policy products such as a cyber-security tool kit. The Hub will also take the lead on external engagement and outreach, prioritising cooperation and partnership with other international financial institutions.

Besides its digital focus, this issue of the journal also touches on another direction of our Strategic and Capital Framework 2021-2025. The green agenda has been, and will continue being, a leading priority of our work. I am delighted that this journal also discusses questions relating to climate change and sustainability, in particular the EBRD's efforts to contribute to the COP26 commitments made in Glasgow last year.

More than ever, there is a need to strengthen legislative and policy frameworks in the economies where the EBRD works to help them weather the current crisis and those yet to come. As UN Secretary General António Guterres so correctly observed: "*Facing dramatic global challenges, we need a global capacity to address them that reaffirms the importance of multilateralism and the importance of a rules-based set of international relations, based on the rule of law and in accordance with the UN Charter.*" Through our policy dialogue and technical cooperation, we are proud to contribute to this process and the pursuit of the UN Sustainable Development Goals.



ODILE RENAUD-BASSO
EBRD PRESIDENT

EDITOR'S MESSAGE

I am pleased to present to you the 2022 edition of the *Law in Transition Journal*. This publication reflects on, and showcases, the achievements of the EBRD Legal Transition Programme. The programme itself is an initiative by the Bank to promote the development of the legal rules, institutions and culture on which a vibrant, market-oriented economy depends. The many crises our world has faced in recent years only make it more urgent to build societies based on the rule of law. In the economic sphere, it is crucial to strengthen investors' confidence that they can conduct their activities in a safe and predictable environment. The trend towards digitalisation of government services is an essential step in that direction. That process was, in fact, accelerated by practical considerations linked to the pandemic. When social contacts are limited, it is imperative for citizens to be able to continue interacting with government structures through digital tools.

The first part of this journal focuses precisely on that theme: how can government services be digitalised so they are accessible to all and more efficient. Let's look at the contents of this part and how the stories relate to each other:

The first article, by Eliza Niewiadomska and Alenka Cerne, explores the challenges of digital transformation of public-sector services from the angle of open government, in particular in the post-pandemic environment.

The second story, by Milot Ahma, tells us about the assistance the EBRD provided to the Polish government on the use of the cloud computing and blockchain technology, with concrete examples in the financial sector, in healthcare and in education.

In a third contribution, Alexei Zverev and Eliza Niewiadomska discuss the feasibility of using electronic public procurement to select a private party in concessions and public-private partnership projects. This is a very innovative approach, not tested much in practice, and the authors therefore highlight the many challenges facing governments in this approach.

Yulia Shapovalova and Veronica Bradautanu reflect on the Bank's work in helping court bailiffs improve their processes. Based on experiences in the Kyrgyz Republic, Moldova and Ukraine, they advocate the use of digital tools to strengthen professional practices by bailiffs, with a view to increasing enforcement rates of court decisions. This is a very important aspect of the business environment that foreign investors consider before deciding to invest in a given country – hence the need to get it right.



Paul Moffatt then tells us how the Bank helped Mongolia create a cutting-edge digital platform to capture, store, process, analyse and disseminate critical geological information on the country's mineral resources. Moving from paper documents to digital tools is expected to facilitate investment in this sector, which is fundamental to the country's economy.

Finally, Catherine Bridge Zoller and Hester Coutanche present an EBRD initiative designed to give small and medium-sized enterprises digital tools with advice on how to remain resilient in the Covid-19 and post-pandemic environments. The initiative, first launched in Georgia, Moldova and Ukraine, has reached many small firms, helping to strengthen this vital part of the countries' economic life.

The secondary focus of this issue of the *Law in Transition Journal* is on the green agenda, another crucial dimension of the EBRD's strategic focus for the current period. There are three stories in this part: first, a contribution by Mike Strauss and Harry Boyd-Carpenter looking at the EBRD's agenda to address climate change and the role lawyers can play in achieving the Paris Agreement's goals. They argue that lawyers have not only the capacity, but also a duty, to contribute to the global effort to save the planet.

The second article in this green agenda section is by Vesselina Haralampieva and Robert Adamczyk. It deals with environmental, social and governance (ESG) issues in connection with companies' reporting. The authors highlight the need to bring together corporate and market action as well as government and regulatory pressure to ensure delivery of the sustainability goals at all levels. They share experiences in preparing ESG guidelines for stock markets in Poland and North Macedonia (for this last country, with a special contribution by Pavle Djuric).

The final story by Paul Alexander and Adonai Herrera-Martinez explains how technology, standards and regulations are rapidly evolving to help save biodiversity and our natural capital.

Thank you for turning your attention to this publication and its messages. We hope we manage to convince you, if necessary, of the importance of digital transition and the green agenda in the development process. These priorities are not only valid for the economies where we operate, but equally for the entire world. As always, we welcome your feedback on our stories.

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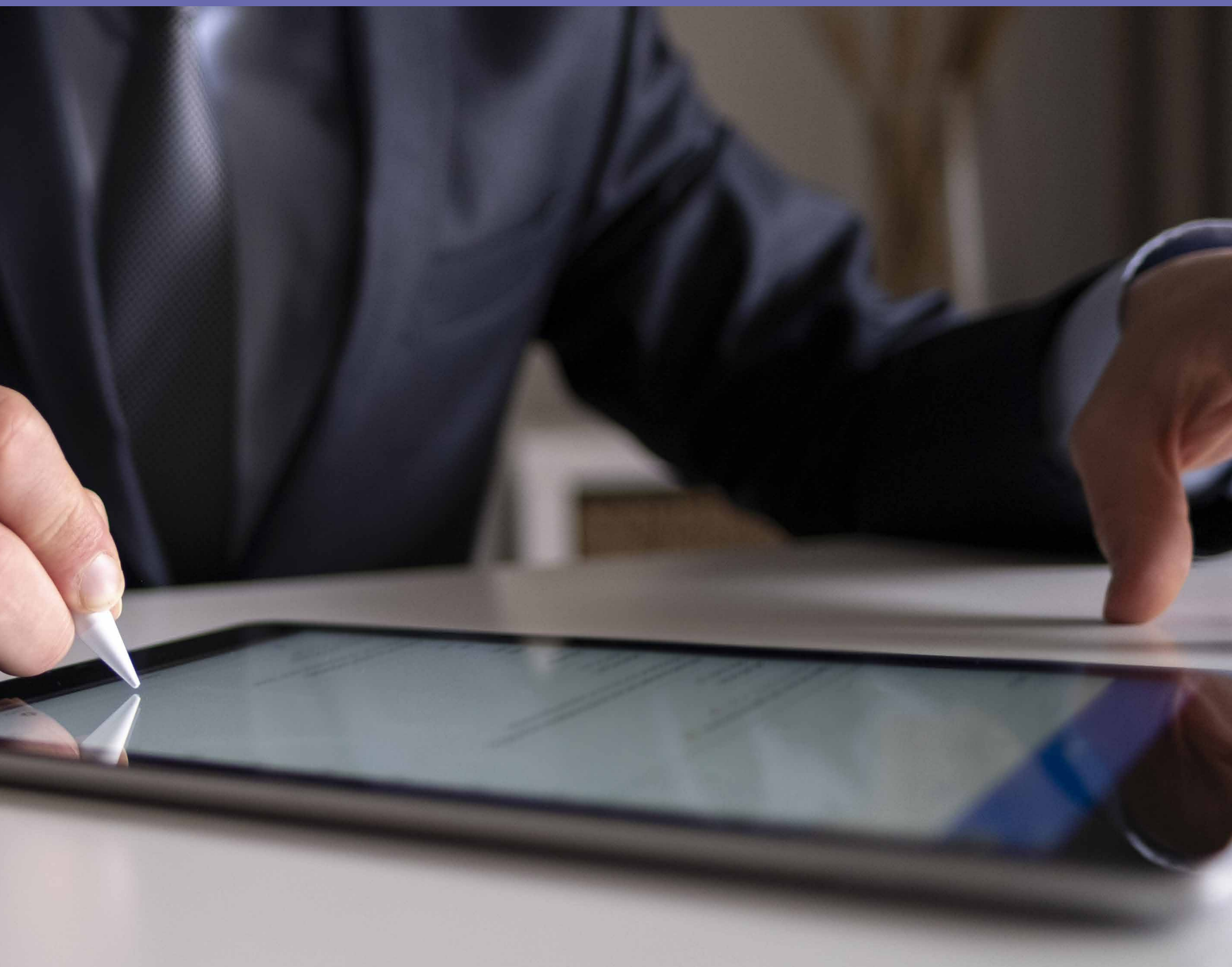


DIGITALISATION



“ The work of the Legal Transition Programme, which is integrated with the EBRD's policy work in our countries of operations, (...) actively promotes policies and regulations for the digitalisation of government services. ”

EBRD PRESIDENT ODILE RENAUD-BASSO





DIGITAL TRANSITION WITH OPEN GOVERNMENT AT HEART





This article explores how open government and digital transition relate to each other and identifies the challenges of the digital transformation of public-sector services. It first looks at what open government means in practice and examines its three pillars – transparency, civic participation and collaboration in delivery of public services. It then explores how information and communication technology has redefined the open government concept and discusses principles of open government data. Lastly, it looks at open government today, amid rising civic expectations in democratic systems, waning trust in governments and increased digitisation of public services due to the Covid-19 pandemic, with an example of a digital transformation project taking open government ideas to new levels.

“TODAY, OPEN GOVERNMENT FOCUSES ON HOW TO BETTER NAVIGATE THE CHALLENGES OF THE DIGITAL ECONOMY AND THE INCREASINGLY DIGITALISED COLLECTIVE PUBLIC LIFE OF COMMUNITIES AND NATIONS.”

INTRODUCTION

The concept of open government emerged in a post-World War II context, where transparency about decision-making on public matters and disclosure of information by governments were seen as extremely important. The key messages of open government are establishing transparent and collaborative governance systems in the public sector that differ from market-oriented commercial relationships or bureaucratic principles² of traditional hierarchical governments and bridging the gap between the governing and the governed.

The expansion of information and communication technologies redefined the open government idea. Today, open government focuses on how to



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² Kuang-Tin, p.1. Please see the Bibliography section on page 17 for details on the references in the footnotes.

better navigate the challenges of the digital economy and the increasingly digitalised collective public life of communities and nations. The digital transformation of the public sector with open government at the core changes the way governments interact with society, the way information is disclosed and how people engage in public affairs.

US President Barack Obama steered efforts to embed open government in digital transformation policies and issued a memorandum on public data to ensure that the US government was transparent.³ Today, notions of open government are likely to be more visible and respected by citizens in countries emerging from autocracies and dictatorships and adopting democratic rule. Unsurprisingly, open government thinking is a cornerstone of public-sector digital transformation policies in Argentina, Brazil, Chile and Portugal. In Europe, open government remains at the heart of the European Union's (EU) digital agenda, but has only gradually found its way into the regulatory frameworks of former Soviet bloc countries.

“A GOVERNMENT IS CONSIDERED OPEN WHEN INFORMATION TRANSPARENCY, CIVIC PARTICIPATION AND COLLABORATION MECHANISMS GUIDE REGULATORY FRAMEWORKS AND LEGISLATIVE PROCESSES FOR ALL PUBLIC MATTERS.”

WHEN GOVERNMENTS ARE OPEN

Open government is a public-sector governance strategy that aims to establish structures at all levels of government that build on information transparency to citizens and their engagement in public decision-making to encourage participative and collaborative governance systems in the public sector. For example, a main proposition of the US open government directive is “to establish a transparent governing structure allowing empowered citizens to participate”.⁴ Key policy instruments, such as the US Memorandum on Transparency and Open Government and the US Open Government Directive, conceptualise it as “a new governing structure, highlighting proactive information dissemination (transparency) and accessible participatory mediums for decision-making or public service provision (participation/collaboration)”.⁵

A government is considered open – that is, it works based on open government principles – when **information transparency, civic participation and collaboration mechanisms** guide regulatory frameworks and legislative processes for all public matters, from government relationships with citizens and business to regulation of the delivery of public services.

THREE PILLARS OF OPEN GOVERNMENT

Transparency

Government transparency is a way to create openness by disclosing information about government actions and processes. Transparency increases individuals' trust in government and enhances the legitimacy of government, as citizens are aware of the decisions it adopts. Transparency is a new model of government, with information transparency policies⁶ on all public matters. This means unrestricted access to information, accountability and open data.⁷ The conditions for accessing data, as well as documents about the actions and decision-making processes of public officials, define the rights and obligations of individuals.⁸

Transparency policies have developed rapidly with the rise of new technologies. Transparency implies that government data are published online, as there is a critical difference between a mere ex-post disclosure of information and online publication of information that actually

³ Adnan, Hidayanto, Purwandari, Kosandi, Fitriani and Kurnia, p. 369.

⁴ Kuang-Ting, p. 7.

⁵ Ibid., p. 11.

⁶ Ruvalcaba-Gómez and Rentería, p. 325.

⁷ Ibid.

⁸ Ibid.

promotes transparency of governance processes by enabling citizens to act in due time.⁹ It is therefore important to have laws that clearly define the context and type of information that must be disclosed online and when. While transparency is a condition for fulfilling the other criteria of participation and collaboration, it is not in itself sufficient to achieve the goal of open government in public-sector governance.

“MODERN TECHNOLOGIES
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WAYS TO INTERACT
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ESTABLISH WORKING
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BETWEEN CITIZENS
AND GOVERNMENT
OFFICIALS, NOT LIMITED
TO DIRECT POLITICAL
PARTICIPATION.”

Participation

Citizens (and organisations from the private sector and civil society) use social collective actions to influence government decision-making. These are not linked to a general election and other political mechanisms, but aim to provide feedback on public policy and government decisions. Still, even democracies struggle to invent effective means for citizen and civic participation in government decision-making, and this is where technology can play a big role.

Modern technologies enable diverse ways to interact and, in particular, establish working relationships between citizens and government officials, not limited to direct political participation. This is a challenge for governments – the need to develop policies and e-government tools creating new interaction channels, allowing citizens' voices to be heard on government decision-making. Another challenge is related to providing regulatory and operational frameworks for collaboration with the government in delivery of public interest services.

Collaboration

Collaboration with government on public service delivery is associated with the concepts of interoperability, co-production and civic tech innovation. Civic activists would like to influence the design, provision and evaluation of public services, in particular when governments start to deliver public services in a digital format, to achieve a better fit with the needs of their local communities. Collaboration of citizens and business communities with government bodies on the delivery of public services remains unexplored territory. This is mainly because an idea of civic co-production with government departments requires different protocols of engagement compared to traditional in-house public service delivery or public procurement contract-based sourcing from the market. As regulatory frameworks for operational interaction between public bodies and civil society organisations and pro-bono business communities are very new and untested, they are a novel regulatory concept for many governments.

In terms of regulatory challenges, it is easiest to introduce transparency requirements for government decisions. Several governments in the world excel in ex-post transparency communications and call themselves very transparent. It is more difficult to design and regulate a non-political transparency procedure that works ex-ante and enables civic and business participation in the process before decisions are made. Still more difficult is setting up rules for collaboration with civic activists or not-for-profit organisations seeking to contribute to the delivery of specific public services to their local communities. This is particularly difficult when these civic organisations do not fall into any of the well-established legal definitions of (a) a charity, (b) public procurement supplier or contractor or (c) political lobbyist. And the challenge increases when civic collaboration is proposed on sensitive (and expensive for the taxpayer) public services, such as education and healthcare.

WHEN GOVERNMENT DATA ARE OPEN

While regulation of open government strategies involves much more, it is true that at the bottom of all transparency, participation or collaboration mechanisms in the public sector, there is a question of access and re-use of government-created and held information. In other words, there is no open government without open government data, and this is where part of the difficulty begins.

⁹ Dorobat and Posea, p. 1; Ruvalcaba-Gómez and Renteria, p. 325.

First, there is no legal definition of open government data – data created and administered by public entities – as a *common good* in the directly binding international legal instruments. Open government data are still defined by an original industry standard of 2007: *complete, primary, timely, accessible, machine-processable, non-discriminatory, non-proprietary and licence-free*.¹⁰ The closest substitute is a G8 Open Data Charter signed in 2013 that outlines five principles of open government data: *open data by default, quality and quantity, useable by all, releasing data for improved governance and releasing data for innovation*.¹¹

Second, legal openness of government information means different things in different countries. The less democratic rule, the less government-generated information falls into the category of government open data. The latest EU policy on the concept describes open data as information that is obtainable by everyone, machine-readable, offered online at zero cost and has no restrictions on re-use and distribution. Readiness to open and share government data is a next step, as a regulatory framework for governing the re-use by third parties of datasets produced by public institutions is an important political tool to encourage democratic citizens' participation in public affairs.¹² Aiming to improve transparency, citizen involvement and cooperation, as well as social and economic value, data created and administered by public entities shall be both legally and technically available for use electronically.¹³ Therefore, it is the technical/technological capacity of the government to effectively open and share data for re-use that shifts public-sector open government strategies from "legally enabling access" to "facilitating active participation" of citizens in public matters.

Third, data created and administered by public entities are what governments use to make governance decisions about citizens and businesses.¹⁴ One of the reasons citizens expect this information to be published as open government data is to ensure that these data equally benefit all entities dealing with the government, namely citizens, businesses and government itself.¹⁵ As such, government open data are at the core of e-government – that is, "the use of information technologies to deliver to all citizens government services, information and knowledge to facilitate greater access to the governing process and deeper citizen participation".¹⁶

While all understand that data access and data sharing are key to effective governance and the running of public services, citizens (as well as businesses) are sceptical of government data use. Levels of trust vary, but at the bottom of this distrust is the fact that development of e-government services has not been accompanied by a proportionate increase in transparency of government data. Although e-government originated in open government concepts, government technology policies and strategies were often developed to serve primarily government departments, not citizens' needs. As such, there was no care about government open data quality and no appreciation of the value of government open data and its sharing for the benefit of all stakeholders, including the government as a whole. Historically, this was partly due to inadequacies and prohibitive costs of technology and perceived risks in data sharing.

To gain citizens' trust, governments proclaimed high standards of security of government-handled data and promoted policies restricting access to government data. Development of protocols for secure government data opening and sharing was perceived as a risk. Lack of regulatory standards for opening data created and/or administered by the government also played a role. Today, progress in technology has brought forward several methodological and policy concepts for data interoperability, automated online data collection and online publication of data generated in the e-government systems. However, there are still no well-established regulatory standards for real-time government data extraction from e-government systems and their online publication for opening and sharing in the machine-readable format.

¹⁰ Wang and Shepherd, p. 101404.

¹¹ Ibid.

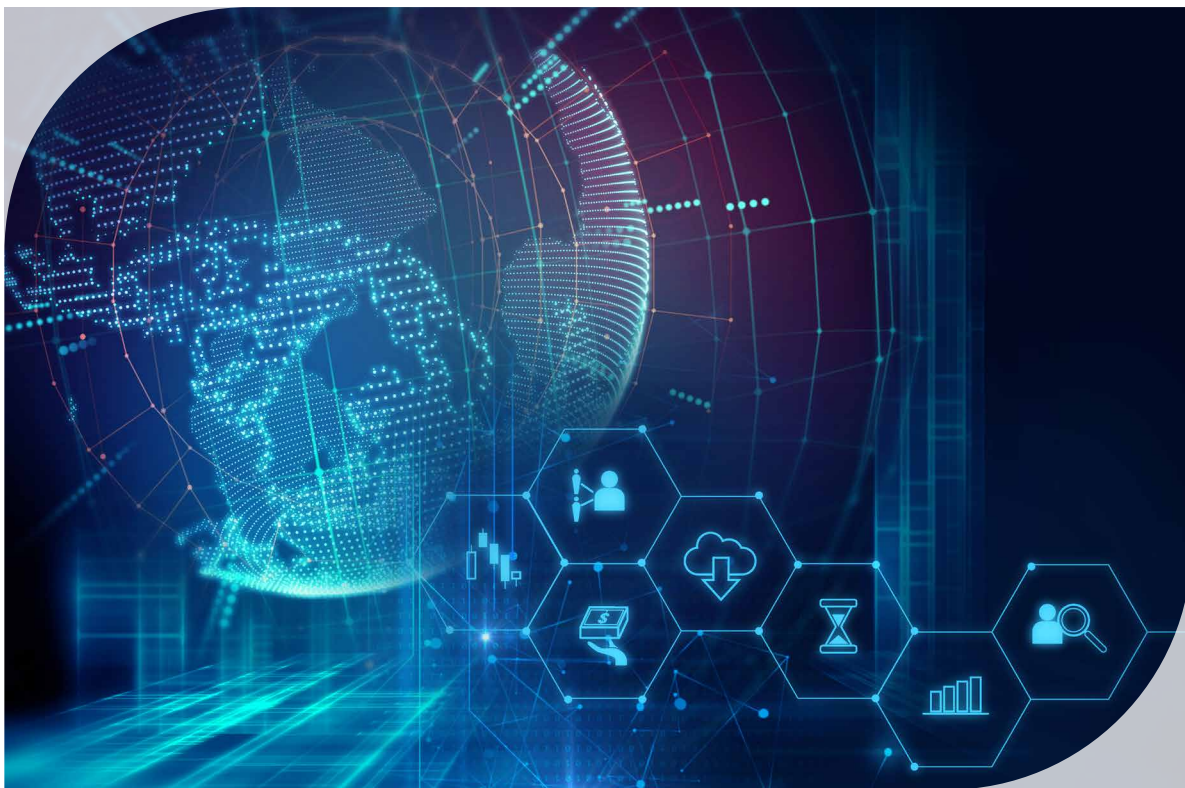
¹² Ibid.

¹³ Osorio-Sanabria, Amaya-Fernández, Brito-Carbajal, Astudillo and González-Zabala, p. 157; Ali Hassan and Twinomurinzi, p. 299.

¹⁴ Bates, p. 398.

¹⁵ Ibid., p. 299.

¹⁶ Ali Hassan and Twinomurinzi, p. 299; cf. *infra* V.



Without exploring new models of citizen legal consent, citizen and government data ownership, designing enabling regulatory frameworks for effective primary and secondary use of data is not possible. And without new rules of operation that both citizens and business can trust, there are few opportunities of interaction between public bodies and civil society in relation to the provision of public services, particularly public services using government open data.

NEW REGULATORY STANDARD OF THE EUROPEAN UNION

Directive (EU) 2019/1024 of the European Parliament and the European Council of 20 June 2019 on open data and the re-use of public-sector information aims to bring open government laws in line with advances in digital technologies. By default, the re-use of documents shall be free of charge and an open data regime enforced via an obligation of public-sector bodies and some public enterprises to make public data available as open data, not only upon request. Open data shall also be data in an open format that can be used freely, re-used and shared by anyone for any purpose.¹⁷

Public-sector bodies shall make dynamic data available for re-use immediately after collection.

via suitable application programming interfaces (APIs) and, where relevant, as a bulk download.¹⁸ Dynamic data means digital documents, subject to frequent or real-time updates, in particular, because of their volatility or rapid obsolescence.¹⁹ Also, high-value datasets shall be made available for re-use in a machine-readable format, via suitable APIs and, where relevant, as a bulk download.²⁰ High-value datasets support society, the environment and the economy by contributing to the creation of value-added services, applications and new, high-quality and decent jobs that can benefit many people.²¹ In relation to exclusive arrangements, the re-use of documents shall be open to all potential actors in the market, even if one or more market actors already exploit value-added products based on contracts or other arrangements between public-sector bodies or public undertakings.

¹⁷ Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public-sector information, 26 June 2019.

¹⁸ Ibid., Article 5(6).

¹⁹ Ibid., Article 2(8).

²⁰ Ibid., Article 5(8).

²¹ Ibid., Article 2(10).

TACKLING LEGAL BARRIERS

In spite of policy development, governments still face challenges due to the lack of international legal standards for:

Government-to-business data sharing – The public sector makes more of the data it generates available for use as open data, especially by small and medium-sized enterprises that use it to develop new data-driven commercial and public services.

Business-to-government data sharing – Not enough private-sector data are available for re-use by the public sector to improve evidence-driven policymaking and public services, and there are too few tools in the public sector to make use of available data without a need for duplicated data collection for public governance purposes. Legal frameworks are needed that offer appropriate incentives to create a data-sharing culture and encourage the re-use of private-sector data for the public interest.

Sharing of data between public authorities – This can make a remarkable contribution to improving policymaking and public services, but also to reduce the administrative burden on companies by implementing “single window” digital public services and the “once only” principle.

Insufficient regulatory frameworks therefore prevent **citizen-sourcing** as well as more modern and collaborative ways of **business-sourcing** that aim to promote innovation in public services.

Citizen-sourcing is participatory- and innovation-oriented. This public-sector governance mechanism enables public organisations, as sectoral regulatory authorities, to engage with citizens via online intermediary platforms and seek innovative ideas and solutions that are better suited for the digital economy than services traditionally performed by public servants or outsourced to commercial operators. In addition to quick wins – such as greater trust in government decisions – these mechanisms encourage public service innovation and cutting programming costs for sectoral initiatives as new ideas are collected and new services piloted with civic activists. These policies focus on “citizen co-production” and are based on the development of new online digital tools for public services – transformative “*civic tech for govtech*”. They promote **innovation**, enhance **democratic participation**, invite **wide public involvement in policy implementation** and improve **law enforcement**.

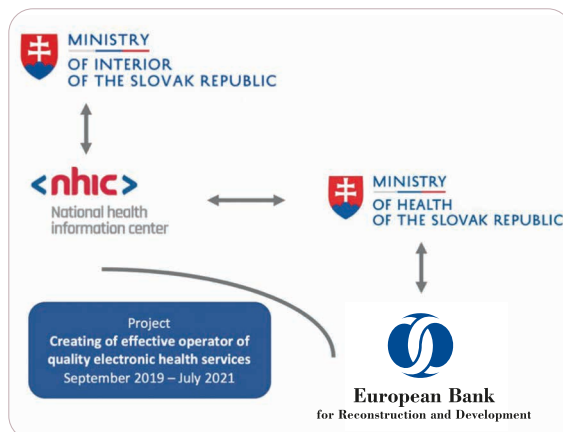
Using a new digital platform to disseminate government information and policies is not a condition for the success of citizen-sourcing. Rather, it happens when informed citizens can use an online digital platform to participate in and contribute to public service delivery, because only citizen co-production enhances public-sector accountability. Without co-production, there is an illusion of government openness without a truly open government to improve public services delivery.



CREATING A REGULATORY FRAMEWORK FOR CITIZEN- AND BUSINESS-SOURCING IN PUBLIC HEALTHCARE SERVICES: EBRD PILOT COLLABORATION WITH THE SLOVAK REPUBLIC

Enabling open government citizen- and business-sourcing is challenging for any public-sector service, but perhaps none is more sensitive than public healthcare. The Slovak Republic aims to create a new type of public body – a national agency operating digital healthcare services (eHealth) for the Ministry of Health. The reform programme focuses on digital transformation of the National Health Information Centre (NHIC), operator of the eHealth system, and introduces data-driven analytics to centralise public procurement in the country's national healthcare system. The objective is to transform the NHIC into a modern public-sector organisation providing proactive digital services to healthcare sector stakeholders, including mobile health (mHealth) services. Similarly, public procurement improvements aim to better control procurement processes of medical supply and devices.

Figure 1: Knowledge sharing among technical cooperation partners. Source: EBRD



As Figure 1 shows, the EBRD teamed up with the Ministry of Health of the Slovak Republic in 2019 for a pilot project, bringing in international expertise and peer organisations to introduce the latest concepts from global digitalisation leaders for healthcare procurement and digital healthcare services. The EBRD helped to identify open government policies for public healthcare and highlight key values and principles for citizen-centred design of public healthcare services (see Figure 2).

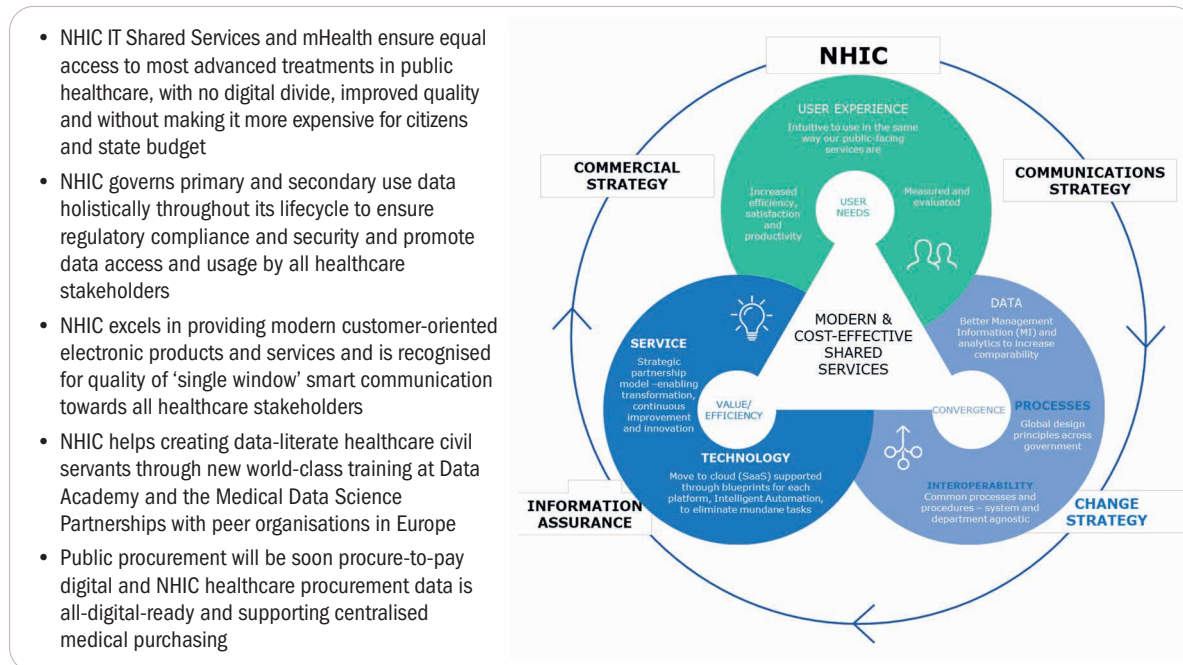
Figure 2: Citizen-centred design of eHealth and mHealth public healthcare services. Source: EBRD



Policy workshops with peer organisations from Portugal facilitated verification of policy concepts in the context of the EU acquis and specified business models and regulatory approaches to develop the vision of digital eHealth and mHealth services. Key business concepts were formulated for the NHIC as a provider of information technology (IT) shared services for public healthcare. In particular, two areas were found to be critical for NHIC's mission. One was a policy framework for open data and digital data-driven e-services, to lead digital transformation of public healthcare services. The second was a digital public procurement data to enable the creation of a modern, centralised medical purchasing agency for the Ministry of Health and to introduce better cost control and more efficient, data-driven medical supply chain management. Questions remain about the licencing terms for secondary use of health and healthcare data, as there are models of open data licences and no identifiable global best practice for secondary use of health and healthcare data.

“ WITHOUT CO-PRODUCTION, THERE IS AN ILLUSION OF GOVERNMENT OPENNESS WITHOUT A TRULY OPEN GOVERNMENT TO IMPROVE PUBLIC SERVICES DELIVERY. ”

Figure 3: Key elements of modern, cost-effective IT shared services in public healthcare. Source: EBRD



Note: The National Health Information Centre is called Národné centrum zdravotníckych informácií in Slovakian.

To deliver innovation and new business concepts, new policies and regulatory frameworks are needed to support and regulate eHealth and mHealth services, in particular:

1. Secure access and health data sharing:

Citizen access to personal health data at both national and EU levels.

2. Cross-border access to anonymised data for research and personalised medicine (secondary use of data): Promotion of a European data infrastructure to support information sharing among healthcare professionals in the EU.

3. Empowering citizens to use digital healthcare instruments to their advantage:

Teach people how to use digital instruments proactively to care for their health, nurture prevention and interact with healthcare providers.

Following identification of the most innovative practices for regulation of primary and secondary use of data (in addition to Portugal, the latest policy developments in Chile, Finland, Germany, the Netherlands and the United States were reviewed), a proposal was designed for a regulatory framework to answer important legal questions about governance models for citizen- and business-sourcing. It covers secondary use of healthcare data and data on medical public procurement to create models for collaboration

with civic tech organisations, academic research centres and business start-ups on eHealth and mHealth digital services. To reach the market quickly, a new regulatory process for three parallel streams is proposed: (a) validation of external solutions developed by the market, (b) mHealth applications and devices created jointly by public and private entities and (c) internal development, involving data sharing between different government entities.

MODEL OF A REGULATORY FRAMEWORK FOR OPEN DATA AND SECONDARY USE OF HEALTHCARE DATA

To promote new eHealth and mHealth digital services to citizens and medical professionals, NHIC needs a new regulation to change the way patients' health data, other healthcare data and medical public procurement data are handled. This is a major change, as it involves citizens' legal consent regarding sensitive health data, government-to-business data sharing, sharing of data between public authorities and public healthcare organisations, and business-to-government data sharing between healthcare regulators and commercial healthcare insurers in the Slovak Republic. New rules must specify the conditions for re-use or secondary use of

health data and data on medical public procurement and recommend formats for open data sharing, rules to charge for health and healthcare datasets, and standard terms of use and licences for eHealth and mHealth services.

Regulatory change is also needed to enable NHIC to introduce new business processes (see Figure 4) for collaborative development and delivery of new eHealth and mHealth services (see Figure 5). mHealth applications for smartphones exist and show promising results but are not in clinical use

due to the missing regulation. In particular, creating partnerships in prototyping and developing new IT solutions and devices for mHealth services (identified as potentially the most cost-effective approach to mHealth) and shared delivery of mHealth services by NHIC in collaboration with commercial IT vendors go beyond contracting options available in current public procurement and concession laws and existing regulation of government IT shared services in the Slovak Republic.

Figure 4: New governance process to enable mHealth solutions based on secondary use of healthcare data in the public healthcare system. Source: EBRD

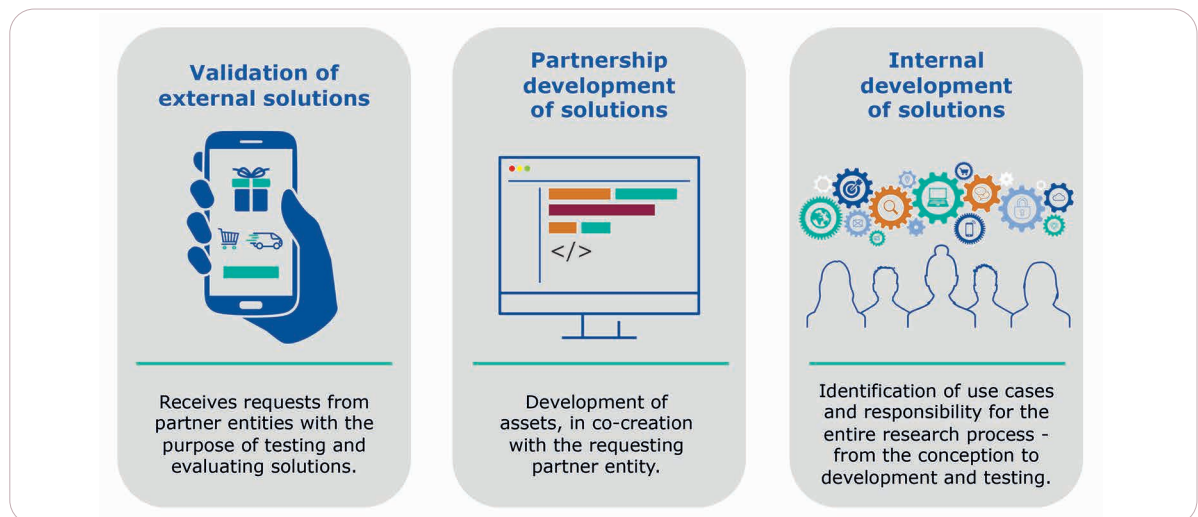
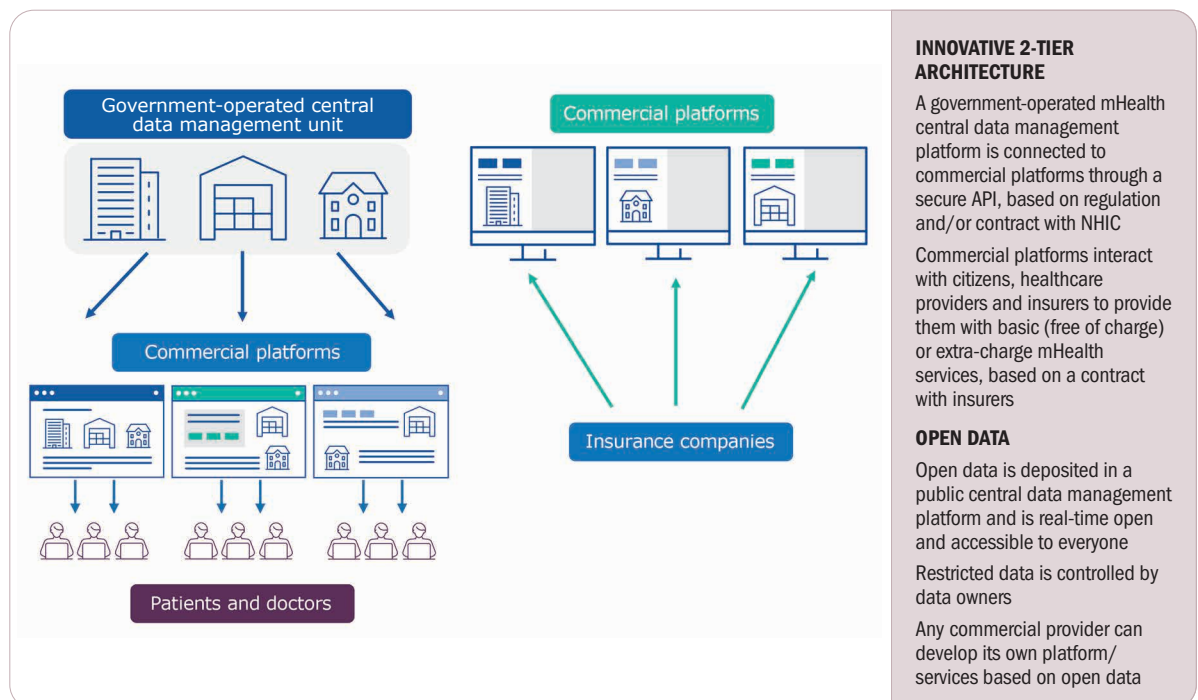


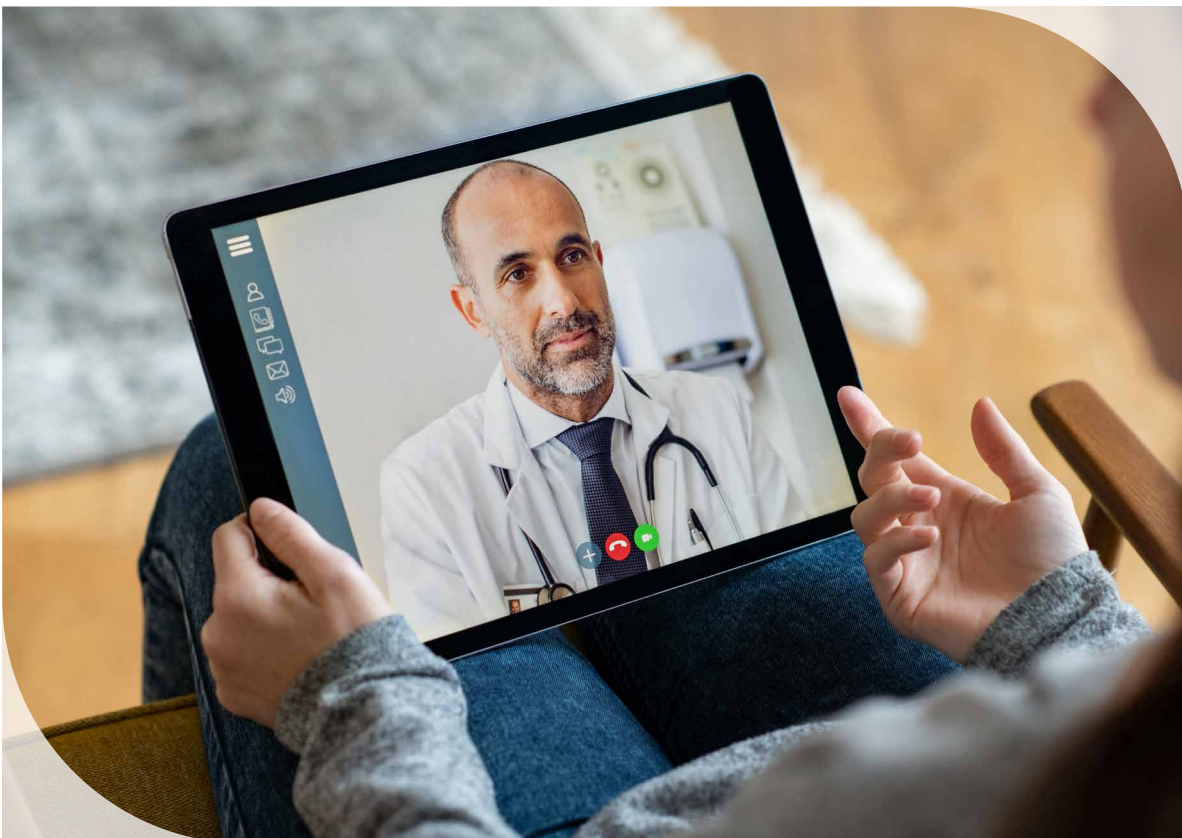
Figure 5: User-pays sustainable financing models for mHealth applications and devices in the public healthcare system. Source: EBRD

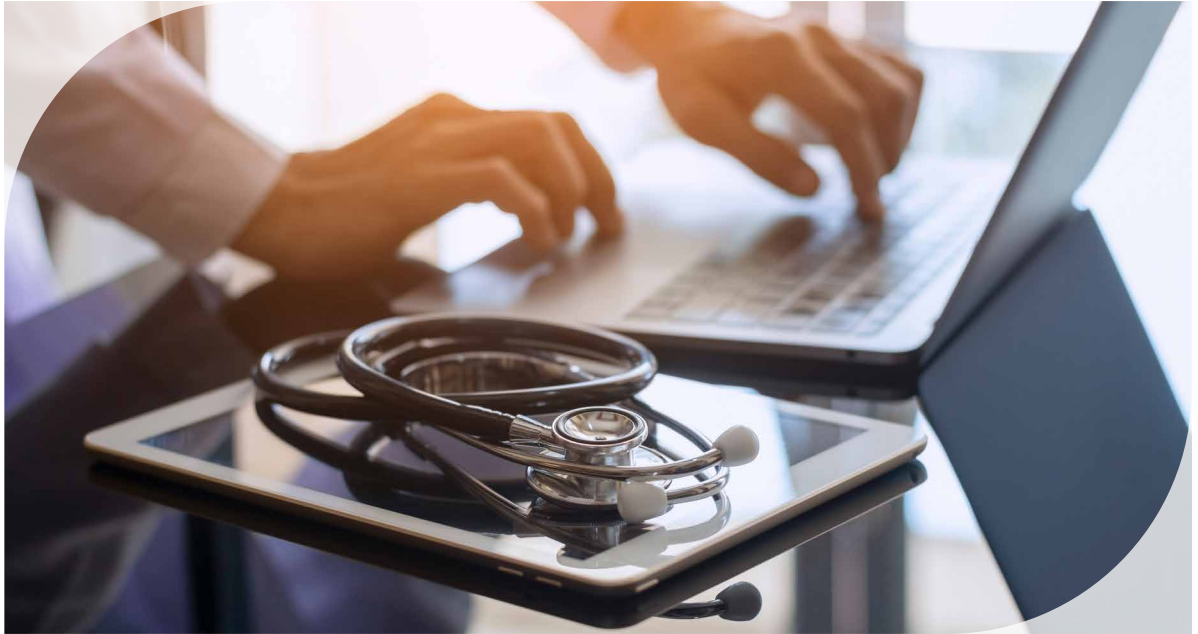


“ TO PROMOTE NEW eHEALTH AND mHEALTH DIGITAL SERVICES TO CITIZENS AND MEDICAL PROFESSIONALS, THE NATIONAL HEALTH INFORMATION CENTRE NEEDS A NEW REGULATION TO CHANGE THE WAY PATIENTS’ HEALTH DATA, OTHER HEALTHCARE DATA AND MEDICAL PUBLIC PROCUREMENT DATA ARE HANDLED. ”

The NHIC eHealth system shall further automate data collection by government, commercial entities and patients. New data governance processes shall separate health data and healthcare data into restricted, closed and open datasets that are published online in relevant repositories and available for appropriate re-use. Data governance mechanisms and the anonymisation of data for secondary use must lead to data that are available online, machine-readable, accessible, findable and re-usable together with their metadata and, where possible, in open data formats of JavaScript Object Notation formats, which are popular with the IT industry. Datasets qualified for secondary use shall be made available for open re-use in machine-readable format, via suitable APIs and/or as bulk download.

To avoid creating barriers in data re-use that may limit development of new mHealth digital services, NHIC should consider making secondary data available for free or exceptionally charged at the marginal cost of dissemination, when NHIC needs to generate revenue to cover part of the costs of data collection and governance. In addition to defining certification procedures for





mHealth services and devices, to make mHealth services sustainable, the Ministry of Health must decide and adopt user-pay tariffs/charges for mHealth services and specify any applicable conditions for including mHealth services and devices in doctors' prescriptions and reimbursing the cost of eHealth and mHealth services from public health insurance. Based on this, NHIC would be able to develop online charging systems for eHealth and mHealth services, both available by medical prescription and refundable from public health insurance as well as certified but non-refundable and only for private purchase.

The institutional transformation of NHIC progresses. However, challenges the Ministry of Health faces in managing healthcare during the Covid-19 pandemic have delayed legislative initiatives and implementation of the new regulatory concepts in practice. If implemented, the Slovak Republic would introduce a very advanced open government regulatory and business concept for secondary use of healthcare and medical procurement data and sustainable "mHealth on prescription" models for mHealth applications/devices in Europe's public healthcare system.

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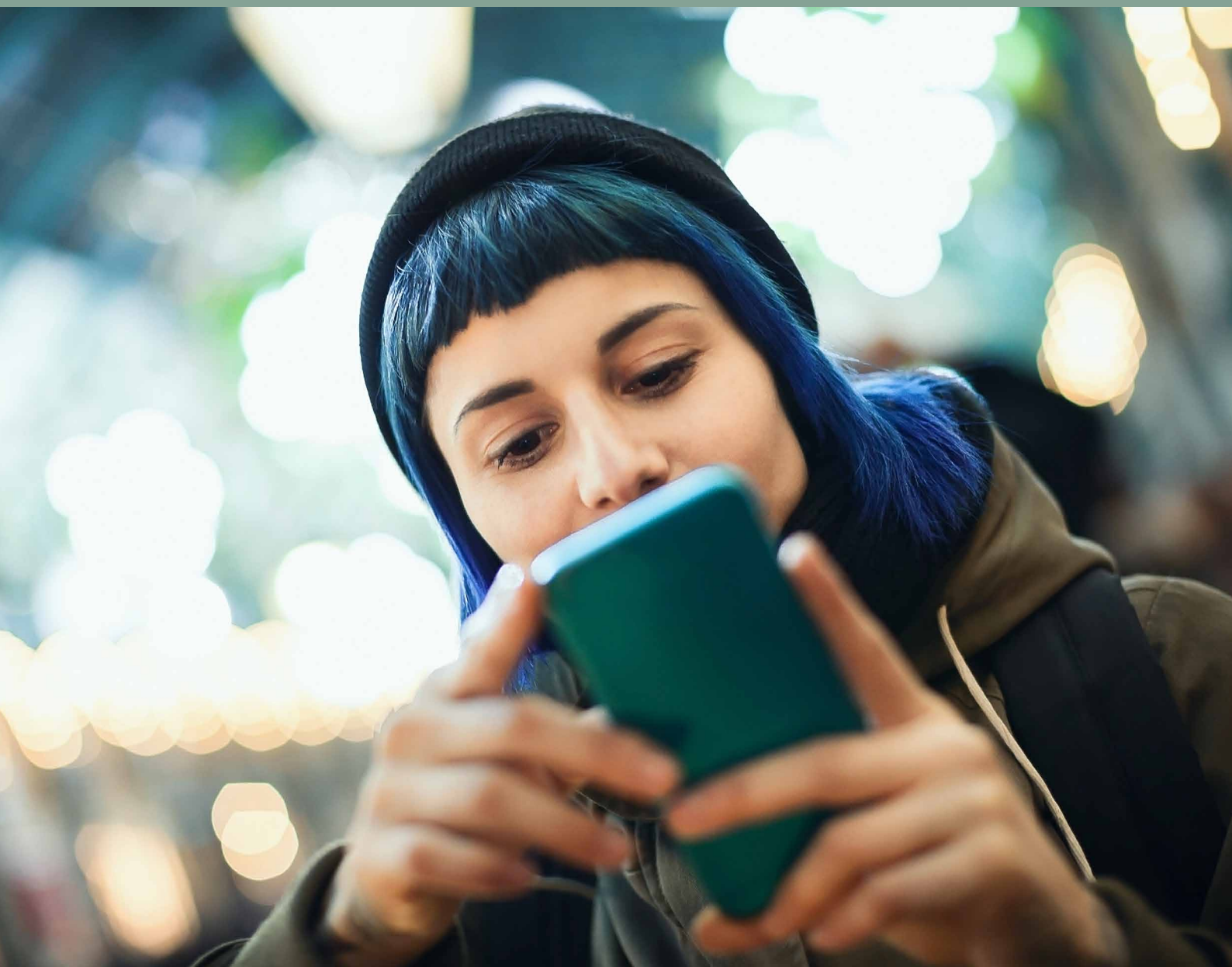
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ACCELERATING THE POLISH DIGITAL TRANSFORMATION AGENDA BY FACILITATING THE USE OF CLOUD AND BLOCKCHAIN IN THE PUBLIC SECTOR





The isolation and social-distancing rules imposed to tackle the Covid-19 pandemic have brought about many (temporary and permanent) changes in the way we lead our lives. While everyone is scrambling and catching up to the new reality, one thing is clear: the “new normal” is more digital. And going digital in today’s world is not just a precondition to thrive and succeed – it is more fundamental than that. It is a precondition to survive and remain relevant.

“GOING DIGITAL IN TODAY’S WORLD IS NOT JUST A PRECONDITION TO THRIVE AND SUCCEED – IT IS MORE FUNDAMENTAL THAN THAT. IT IS A PRECONDITION TO SURVIVE AND REMAIN RELEVANT.”

The recent economic crunch, coupled with inflation and the ever-increasing cost of living, have forced the hands of many governments to intervene and provide financial subsidies to alleviate the negative impact on citizens’ lives. Such unanticipated costs have pushed governments to rethink and re-jig their public spending priorities and accentuated the need for more efficient, digital and transparent delivery of public services.

While this new reality has compelled many governments to prioritise the design and delivery of digital transformation strategies, some countries were working on their digital transformation strategies well before the crisis. Such is the case of Poland.

With a dedicated ministry dealing with digitalisation between 2011-21, the digital angle has been at the forefront of the Polish state strategic vision for a long time. Among the many strategic documents, *Digital Poland for 2014-2020* identified “effective and user-friendly public e-services” as a key area of focus.¹ Yet, despite its long-time focus, work and efforts on digitalisation, Poland has continued to lag behind its European Union (EU) peers. The Digital



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¹ See https://www.polskacyfrowa.gov.pl/media/10410/POPC_eng_1632015.pdf

Economy and Society Index 2018 ranked Poland as 24th of 28 EU member states in the field of the digitisation of the economy.^{2, 3}

EBRD'S WORK WITH THE CHANCELLERY OF THE PRIME MINISTER OF POLAND

To achieve greater digitisation of government services, Poland's Ministry of Digital Affairs⁴ approached the EBRD in 2018 with a request for assistance to:

1. increase the uptake of cloud computing across government administrations and local public authorities throughout Poland (Cloud Workstream) and
2. explore the possible uses of the distributed ledger technology (DLT) in the Polish public sector (DLT Workstream).

With funding from the European Commission's Structural Reform Support Programme in 2019-21, the EBRD's Legal Transition Team – with the assistance of external consultants from Ashurst, R3 and Maruta Wachta – successfully delivered on this request.

THE CLOUD WORKSTREAM

Since the early 2010s, governments around the world have introduced so-called cloud-first policies to prioritise the acquisition (where appropriate) of cloud-based information technology (IT) solutions by public-sector organisations. In practical terms, this means that public-sector organisations should consider and fully evaluate cloud solutions when procuring IT services before considering any other option. The ultimate aim of this policy is to ensure that the IT infrastructure retained offers the best value for money.

In the United Kingdom, for example, IT procurement is effected through the digital marketplace – a portal for ordering services, including cloud services – with cloud services purchased under prescribed framework agreements with pre-approved service providers within the so-called G-Cloud model.

This G-Cloud model was a reference point for the Polish Common State IT Infrastructure Program (WIIP), adopted through a resolution by the Council of Ministers of Poland on 24 September 2019. The WIIP promotes Poland's own cloud-first policy and recognises the benefits that cloud solutions offer when developing new IT solutions in public administration.

“CLOUD COMPUTING IS A METHOD OF STORING, RETRIEVING AND PROCESSING DATA, AND ACCESSING SOFTWARE PROGRAMMES, OVER THE INTERNET (OR OTHER NETWORKS).”

Cloud computing at a glance

The National Institute of Standards and Technology defines cloud computing as a model to enable ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (for example, networks, servers, storage, applications and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. In other words, cloud computing is a method of storing, retrieving and processing data, and accessing software programmes, over the internet (or other networks). Instead of buying, owning and maintaining the physical assets (such as servers) at on-premises data centres, one can access technology services, including computing power, storage, network, security services and software applications, on an as-needed basis from the relevant cloud provider. This can enable faster innovation, flexible resourcing and considerable economies of scale.

² See Digital Economy and Society Index (2018), available at: http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=52233

³ Despite progress in many areas, the ranking remained the same in the DESI 2021, where Poland scored better than only three other EU countries (Greece, Romania and Bulgaria). See: <https://ec.europa.eu/newsroom/dae/redirection/document/80495>

⁴ The Ministry of Digital Affairs was liquidated in 2020 as part of a government reshuffling and (part of) its responsibilities were passed on to the Chancellery of the Prime Minister of Poland.

Figure 1: Key features of cloud solutions. Source: EBRD, Ashurst, Maruta Wachta and R3 (2021)

The key features of cloud computing can be summed up as follows:



Cost: Cloud computing reduces the capital expense of investing in hardware and software, as well as the cost of setting up and maintaining on-site data centres.



Scale: Cloud computing is an elastic delivery model, meaning that a cloud resource can be dynamically scaled (upwards and downwards) according to the user's requirements.



Speed: Most cloud computing products are offered as self-service and on-demand services. This means resources can be provisioned flexibly and rapidly.



Transparency: Cloud services are typically metred, so there is constant visibility over the amount of the service being consumed. This helps in the management of IT budgets.



Performance: Cloud services are regularly upgraded to ensure fast and efficient performance. Achieving equivalent performance on-premises can be prohibitively expensive.



Productivity: On-premises data centres require considerable set-up and ongoing maintenance. Cloud computing devolves this to the provider, so in-house IT teams can focus on more strategic goals.

With respect to the cloud component of the technical assistance request, the Chancellery of the Prime Minister was mainly interested in:

1. raising awareness among the public authority bodies in Poland about the benefits of cloud solutions (in relation to the “on-site” alternatives) and
2. guiding the public authorities in Poland on how to procure cloud-based IT solutions.

To this end, we produced the cloud guidelines aimed at government administration and local public authorities in Poland.⁵ This guide, part of the WIIP, is supposed to help government administration and local public authorities in Poland determine the potential application of cloud computing solutions as part of their decision-making process when procuring new, or refreshing existing, IT resources. To this end, the guide explains what cloud computing offers and the benefits of adopting a cloud-based solution, and sets a framework to help evaluate what data are suitable for the cloud. The use of the cloud also raises important considerations around security, privacy and resilience and the guide outlines these key considerations in separate, specific sections.

In addition, to help government officials negotiate service levels with cloud service providers, we prepared template service level agreements, accompanied with annotations to indicate the rationale and importance of the key provisions typically found in such agreements.

What does this mean in practice?

IT infrastructure is essential for the functioning of every public administration body. When the infrastructure becomes outdated, new resources must be procured. Nowadays, IT infrastructure can be hosted on-premises or on the cloud, and deciding between these two options depends on many variables. However, due to its numerous advantages (see Figure 1 above), there should be a clear preference to go for the cloud alternative, when possible. A simple example is data storage. Instead of stocking physical server machines, which have high initial costs and maintenance costs and take up a huge amount of space, public administration bodies in Poland can procure the services of a cloud service provider and have all their data stored in this provider's data centres.

⁵ Cloud in Government Services: Guide to Public Authorities. Available at: [https://chmura.gov.pl/zuch/static/media/Cloud%20in%20Government%20Services_Final%20\[ENG\].pdf](https://chmura.gov.pl/zuch/static/media/Cloud%20in%20Government%20Services_Final%20[ENG].pdf)

THE DISTRIBUTED LEDGER TECHNOLOGY WORKSTREAM

A subset of distributed ledger technologies, blockchain enables the creation of records of shared facts secured using cryptography to create an audit trail that is maintained and validated by those using the network (without requiring a third-party intermediary). These data are cryptographically assured and can be synchronised and distributed across multiple institutions. This enables anyone with access to the network to view the same information as other network users and creates the capacity to record shared facts across independent participants.

“ WE DRAFTED A STUDY TO IMPROVE AWARENESS AMONG GOVERNMENT STAKEHOLDERS ON THE TYPES, BENEFITS AND POTENTIAL OF BLOCKCHAIN IN FOSTERING TRANSPARENCY OF GOVERNMENT SERVICES. ”

As the Covid-19 crisis has demonstrated worldwide, governments cannot rely on the old ways of administering to meet the challenges of the present or future. Identifying which services could be led or supplemented by digital solutions must become a major driver of public-sector reform.

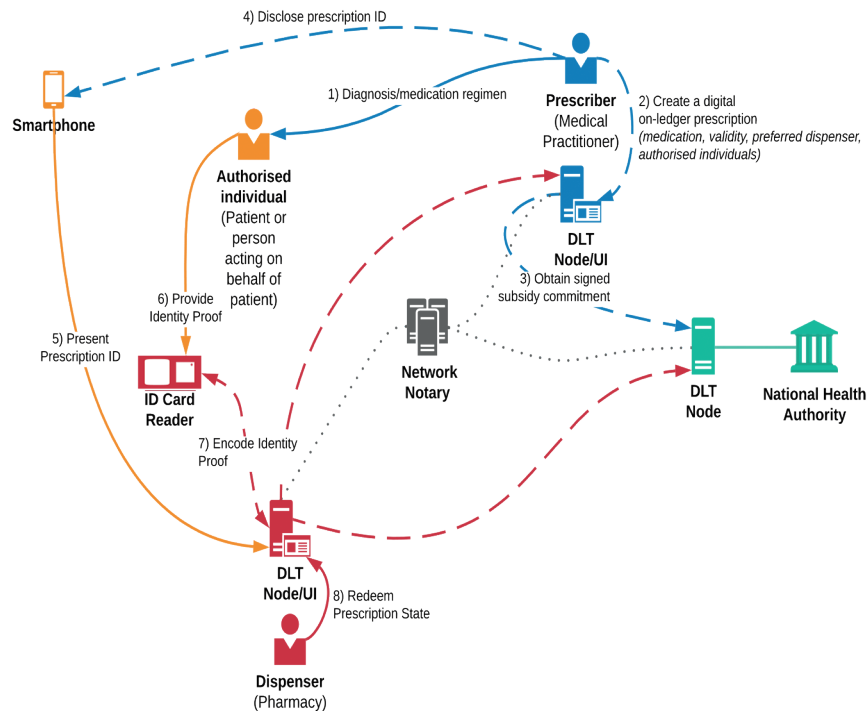
As part of this technical assistance project with the Chancellery of the Prime Minister, we drafted a study to improve awareness among government stakeholders on the types, benefits and potential of blockchain in fostering transparency of government services. Drafted in conjunction with colleagues at the Chancellery of the Prime Minister, the study outlines the fundamental technical elements of the technology in a simple way, so it can be understood by a lay audience. To encourage its use, the study highlights the current landscape with regard to public- and

private-sector use-cases to illustrate where the technology is being applied and where it would be well-suited to public-sector deployment in the future. Furthermore, the study outlines the legal considerations of blockchain solutions. It concludes that there are no clear minimum requirements to implement blockchain and/or specific provisions of Polish law that would explicitly exclude the possibility of using blockchain for governmental purposes. However, any legal framework under which blockchain can be successfully deployed should provide a level of clarity around three key but complex topics: (1) the legal status of crypto-assets, (2) the legal status of smart contracts and (3) compatibility with the existing regulation (such as data privacy, digital identification and authentication).

To illustrate the potential of the technology, the study outlines and discusses three use-cases: one in the financial sector, one in healthcare and the other in education. In each case, a high-level technical architecture and a walk-through of operations is provided along with guidance on how such solutions could operate in Poland. These use-cases are designed to emphasise the flexibility of the technology and its capacity to work within existing frameworks, making blockchain solutions an attractive prospect.

“ GOVERNMENTS CANNOT RELY ON THE OLD WAYS OF ADMINISTERING TO MEET THE CHALLENGES OF THE PRESENT OR FUTURE. IDENTIFYING WHICH SERVICES COULD BE LED OR SUPPLEMENTED BY DIGITAL SOLUTIONS MUST BECOME A MAJOR DRIVER OF PUBLIC-SECTOR REFORM. ”

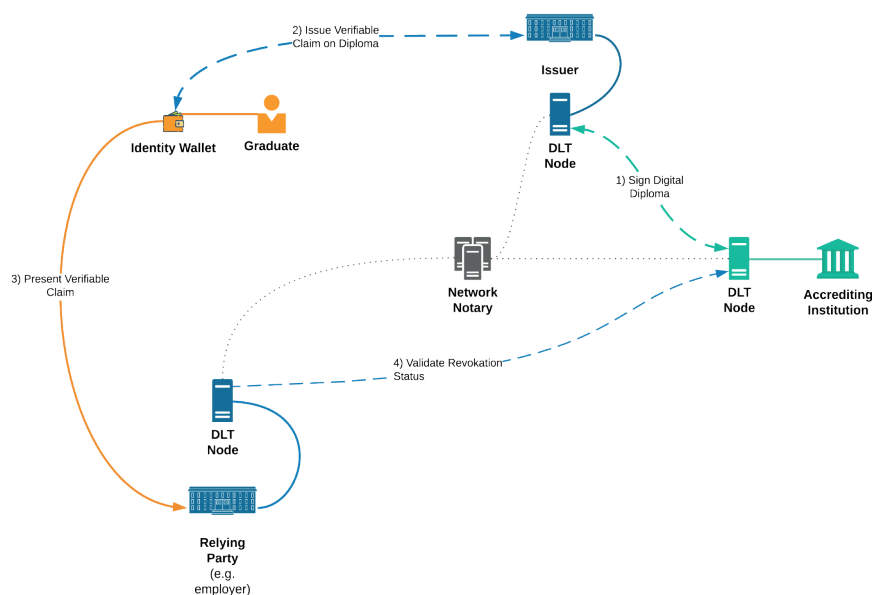
Figure 2: Blockchain's (potential) use in healthcare: E-prescriptions. Source: study by EBRD in cooperation with R3/Ashurst/Maruta



Benefits:

- Capacity to verify collection of prescriptions by patient (or known substitute)
- Traceability in the prescription services from prescriber to distributor and then to patient
- Capacity for prescriber to correct prescription errors
- Efficiency and reduction of time lost to error correction
- Peace of mind for patient in knowing that the prescription is correct
- Creation of digital audit trail for authorities in tracking and monitoring prescription services and potential for the created data set to inform future policy decisions. Such data could include geographic activity, type, origin and manufacture of medicines dispensed

Figure 3: Blockchain's (potential) use in education: University diplomas. Source: study by EBRD in cooperation with R3/Ashurst/Maruta



Benefits:

- Streamlining of application processes for candidate and employer
- Reduction of fraud through the verifiable proof of original qualification
- Capacity for awards to be more effectively revoked
- Capacity for awarding institutions to have status revoked
- Could lead and inspire the development of increased use of digital solutions in identity

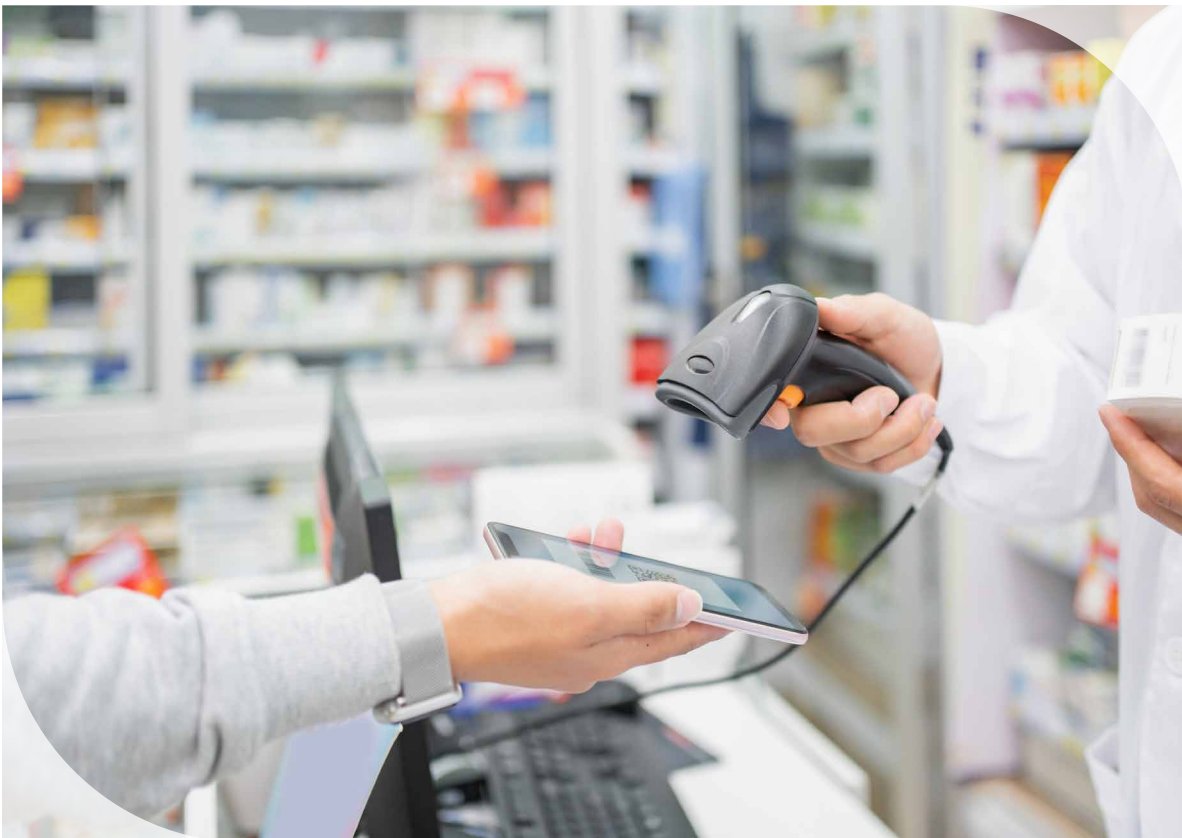
The study was presented in January 2021 to a wide audience including local and international representatives from the public and private sectors.

“THE CENTRAL AIM OF THIS STRATEGIC THEME IS TO UNLEASH THE POWER OF TECHNOLOGY TO BRING ABOUT CHANGE FOR THE BETTER IN OUR ECONOMIES OF OPERATION.”

What does this mean in practice?

In the e-prescriptions case study (see Figure 2) the use of blockchain would add traceability to the prescription chain. Every party (the general practitioner, the patient and the pharmacist) would have a view of the situation at all times. This blockchain-enabled, digital audit trail would also help national health authorities to track and monitor prescription services to inform future policy decisions.

In the education case study (see Figure 3), credentials (that is, certifications) stored on a blockchain database, would create a more trustworthy system where the reliant party (that is, an employer) would have full certainty that the certification presented by a certain candidate is genuine.





CONCLUSION: DRIVING DEVELOPMENT WITH TECHNOLOGY

The limitations in the day-to-day interactions brought about by the pandemic, including mandatory isolation and social-distancing rules, have spurred many governments around the world to think about introducing or revamping their digital transformation agendas. It is clear that the “new normal” will be far more tech-driven and, as such, will present new challenges. Both cloud-based solutions and blockchain have important roles to play in this digital transformation, but deploying real-life use-cases based on such technologies triggers important legal, technical and operational considerations that need careful assessment to ensure a smooth transition with lasting benefits.

The EBRD is here to lend a helping hand to overcome such challenges. Digital transition is at the heart of the EBRD’s mandate and is one of the three key strategic themes in our 2021-2025 Strategic Capital Framework. The central aim of this strategic theme is to unleash the power of technology to bring about change for the better in our economies of operation. And when it comes to realising this strategic ambition, in addition to actual investments, we will also engage in policy dialogue, capacity building and advisory activities, develop knowledge products and create strategic partnerships.





HOW CAN ePROCUREMENT SERVE PUBLIC-PRIVATE PARTNERSHIP PROJECTS, INCLUDING CONCESSIONS?





EXECUTIVE SUMMARY

This article examines the feasibility of using electronic public procurement (eProcurement) tools to select a private party in public-private partnership (PPP) projects, including concessions. For the purpose of this article, PPP projects are discussed together with concessions (PPP projects/concessions). The challenges for governments mainly relate to (a) the relevance of international standards on procurement for PPP/concession procurement, (b) identifying international standards for eProcurement applicable to PPP/concession projects and (c) applying international (and regional) standards on electronic commerce (electronic signatures, platforms and emerging technologies in and for trade, such as artificial intelligence, Internet of Things, big data analytics and distributed ledger technology) to PPP/concession projects.

“ FEW OPERATIONAL DETAILS ARE KNOWN ABOUT USING ePROCUREMENT TO SELECT PRIVATE PARTIES IN PRACTICE. ”

Practical experience with eProcurement tools for PPPs, including concessions, is limited. As a result, few operational details are known about using eProcurement to select private parties in practice. Public procurement policy, concession governance and public-sector digitalisation standards, including the use of platforms, functional equivalence, technology neutrality or smart contracts, need to be revisited to explore the opportunities for eProcurement in PPP/concession projects. For this reason, the Bank collaborates with the Sustainable Infrastructure Foundation, its SOURCE platform and interested governments in the EBRD regions to define a recipe for eProcurement for PPP/concession projects and inspire governments designing their PPP programmes to invest in digital governance tools for their PPP/concession projects.



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CHARACTERISTICS OF PPP TRANSACTIONS THAT AFFECT THE PROCUREMENT PROCESS

PPPs/concessions play a key role in government programmes designed to promote private-sector investment in infrastructure and delivery of public services. PPPs/concessions permit the mobilisation of private capital, expertise and know-how to complement state budgets and other public resources and attract direct private investment in public infrastructure and public services.

The United Nations Commission on International Trade Law (UNCITRAL) Model Legislative Provisions on Public-Private Partnerships defines PPP (Art. 2.a) as *an agreement between a contracting authority and a private entity for the implementation of a project, against payments by the contracting authority or the users of the facility, including both those projects that entail a transfer of the demand risk to the private partner ("concession PPPs") and those other types of PPPs that do not entail such risk transfer ("non-concession PPPs")*. At the same time, the 2011 UNCITRAL Model Law on Public Procurement defines procurement as the acquisition of goods, construction or services by a procuring entity, and a procurement contract as a contract concluded between the procuring entity and a supplier (or suppliers) or a contractor (or contractors) at the end of the procurement proceedings.

Therefore, the main features of PPP/concession projects that distinguish them from regular public procurement contracts to purchase goods, services or works are their complexity; focus on delivery of workable public infrastructure or public services over a long-term contract; development (or significant upgrade or renovation) and management of a public asset (including potentially the management of a related public service) as well as the structure of the transaction. Furthermore, the private party bears substantial management responsibility and risks through the life of the contract and typically provides finance, which is at risk. Remuneration by definition is largely linked to performance and/or the demand for or use of the asset or service.

The question remains how this contractual complexity, performance-based remuneration and longevity of PPP/concession public contracts affect the procurement process, which otherwise has all the features of standard procurement.

“GIVEN THE LARGE SCALE OF MOST INFRASTRUCTURE PROJECTS, IT IS COMMON FOR MULTIPLE OPERATORS ORGANISED IN CONSORTIA TO TAKE PART IN CONCESSION PROCUREMENT PROCESSES.”

First, the pre-selection criteria must identify and describe the necessary professional, technical and environmental qualifications, professional and technical competence, personnel, experience and managerial capability to carry out all phases of the project. Second, the period to submit, prepare and revise proposals should be commensurate with the complexity of the project. Third, subsequent variations in the specifications or other requirements of the project cannot be excluded. Finally, awarding procedures must be appropriate. Unlike small-scale projects, complex infrastructure projects may require the use of consultation or dialogue mechanisms with potential bidders to help formulate specifications and evaluation criteria.

Given the large scale of most infrastructure projects, it is common for multiple operators organised in consortia to take part in concession procurement processes. Selection criteria, review and contract award rules should be adapted accordingly.

Several studies identify similarities in standard public procurement practices, but also important differences. In essence, a selection process of the private party in concessions/PPPs relies on similar legal instruments: qualification requirements (legal qualification, financial-economic capacity criteria, technical capacity or experience) and evaluation criteria (price only or price and quality) as standard public procurement contracts.

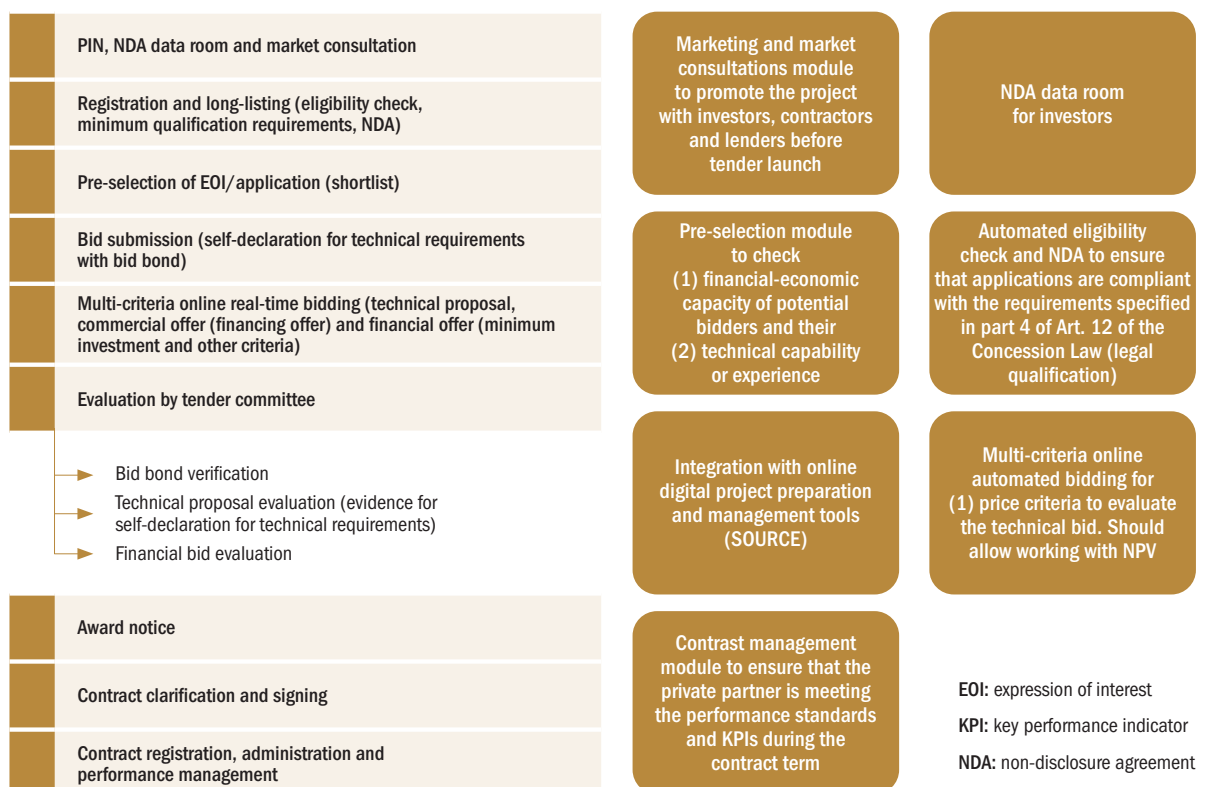
Multi-criteria evaluation is strongly recommended, as the characteristics of concession projects – developing, maintaining or operating public infrastructure or a facility and providing public services – require various criteria for a proper evaluation and comparison of proposals. Price is not the primary evaluation criterion, insofar as environmental sustainability, technical soundness, continuity requirements or social and economic development potential can be crucial policy goals in the procurement process. International standards as provided for by UNCITRAL instruments on public procurement differentiate evaluation criteria for the selection under PPP/concession projects from standard state budget-funded procurement.

Model Provision 19 of the UNCITRAL Model Legislative Provisions on PPP classifies evaluation criteria in those related to the technical elements of the proposals and those related to the financial and commercial ones. For the evaluation of the technical elements of the proposals, the following criteria shall at least be included: (a) technical soundness, (b) compliance with environmental standards, (c) operational feasibility and (d) quality

of services and continuity-ensuring measures. For the evaluation of financial and commercial elements, relevant criteria should be considered, such as the value of the proposed tolls, unit prices and other charges or of the proposed direct payment by the contracting authority; the cost of the procured works; any financial support; proposed financial arrangements; social and economic development potential and even the extent of acceptance of the negotiable contractual terms recommended by the contracting authority in the request for proposals.

Also, user-pays PPP/concession projects require different procurement methods than government-pays PPP/concession projects. In the case of user-pays PPP/concession projects, the procurement process gives more weight to the qualification and selection of interested participants (Figure 1 below shows key features of the tender for user-pays concessions) and open tendering with pre-qualification or selective tendering/restricted tender with pre-selection are recommended. For government-pays PPP/concession projects, procurement focuses more on bid evaluation criteria, to facilitate better value for

Figure 1: Key features of procurement process for user-pays concession. Source: EBRD

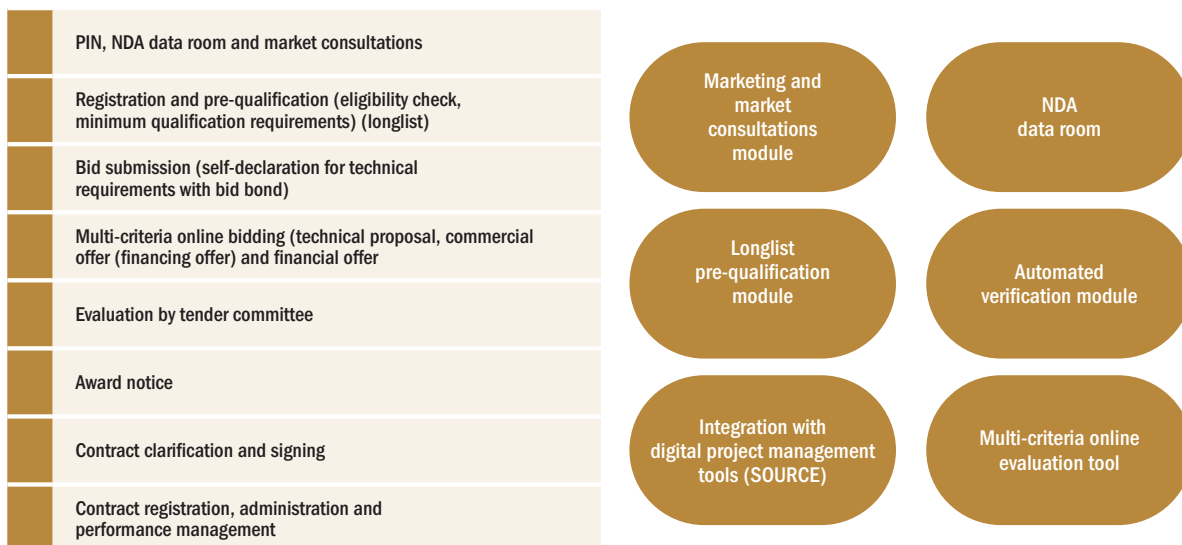


money and price-quality ratio of bids (Figure 2 shows key features of the tendering process for government-pays PPPs). As a result, open tendering with pre-qualification is more frequently used.

In addition to the fairly standard public procurement policy considerations listed above, a procurement process for PPP/concession projects emphasises (a) defining qualification requirements and evaluation criteria in extensive communication with the market, (b) testing, marketing and communicating the project to the market well before the project launch and (c) allowing only qualified participants of the selection process invited to submit a bid to access certain financially sensitive project information.

These are instruments known and described in international legal instruments for public procurement, but not widely used for typical public procurement contracts. However, another feature of PPP/concession projects – final negotiation of the technical, legal and financial aspects of the bid and so-called financial closure of the deal – is heavily restricted or expressly forbidden under public procurement rules for standard state-funded procurement.

Figure 2: Key features of procurement process for government-pays PPP. Source: EBRD



NDA: non-disclosure agreement

PIN: prior information notice

WHY ePROCUREMENT?

eProcurement systems/platforms are designed to perform functions of the public procurement process with the assistance of digital technologies. eProcurement solutions vary from simple information-providing electronic websites to last-generation digital platforms supporting sophisticated procurement processes and using automation, robotics, artificial intelligence and other emerging technologies. Simple eProcurement systems supplement the manual public procurement process with online communication or online workflows for selected stages or tasks of process stakeholders to reduce some transaction costs without substantially altering the procedure. The latest generation of digital eProcurement tools represents a reshaping of the national procurement system and its transition to the digital economy. Digital eProcurement systems are designed, deployed and implemented as an end-to-end electronic process entrusted with the performance of all steps of the procurement process online.

On the global level, eProcurement is promoted by the regulatory standards of the 2011 UNCITRAL Model Law on Public Procurement and the 2012 text of the World Trade Organization's Agreement on Government Procurement, while the Organisation for Economic Co-operation and Development recommended eProcurement to its members in 2015. The European Union (EU) mandated a certain level of eProcurement for member states in the 2014 directives on public procurement and promotes these policies externally by incorporating eProcurement requirements in relevant EU bilateral trade and association agreements. Although global rules on eProcurement are incorporated in regulatory frameworks for public procurement, eProcurement tools are not advanced enough everywhere to support all types of procurement methods. The Covid-19 pandemic accelerated development and implementation of eProcurement tools imposing remote working, less printing and paperwork in general and generalisation of online signature of contracts.

“ePROCUREMENT IS ALSO A RESULT OF GROWING DEMAND FOR MORE TRANSPARENCY IN PUBLIC PROCUREMENT, NECESSARY TO FIGHT CORRUPTION.”

eProcurement is also a result of growing demand for more transparency in public procurement, necessary to fight corruption. Concerns about corruption, arbitrariness in awarding public contracts and/or lack of professional procurement capacities among public-sector officials guide the policy decision on accelerating the digital transformation of public procurement. Digital eProcurement tools, automation in the evaluation process and accessibility of public procurement open data throughout the entire procurement process are effective corruption-mitigating tools.

ePROCUREMENT FOR PPPs, INCLUDING CONCESSIONS: SUITABILITY, BENEFITS AND CHALLENGES

Despite some potential advantages of eProcurement for PPP/concession projects, namely in terms of lower transaction costs, process efficiency and fighting corruption, progress has been slow.

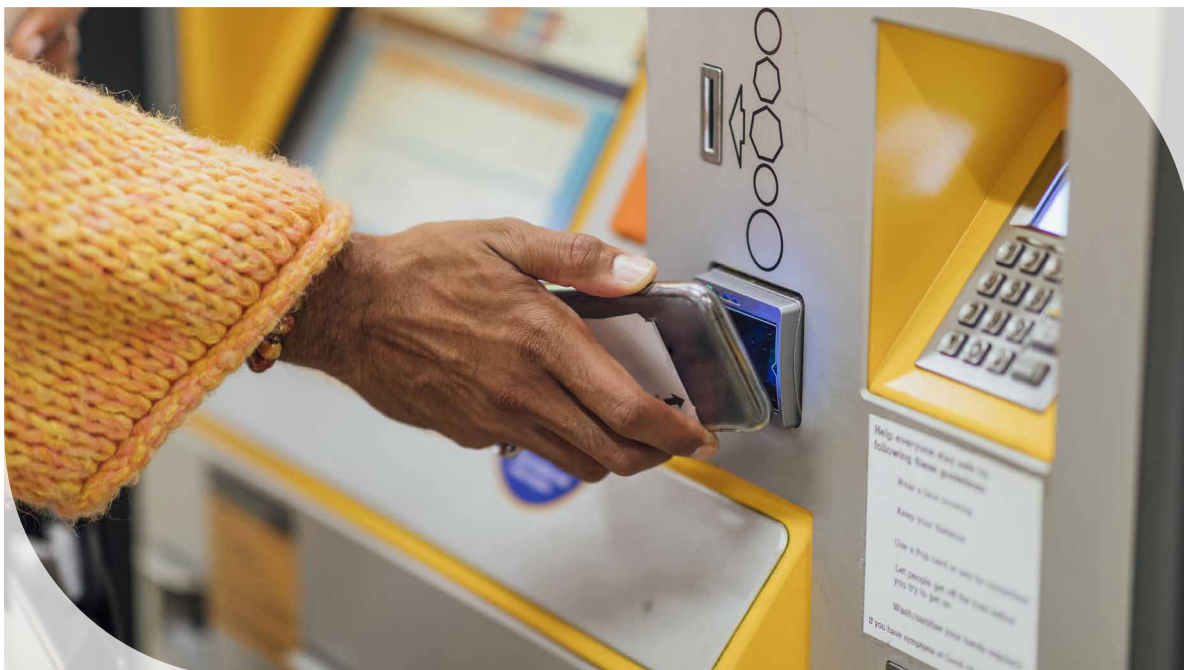
The use of electronic communication in the procurement process for PPP/concession projects does not cause any specific difficulty and can be delivered under very simple eProcurement solutions. The problem starts with pre-qualification and qualification, where more comprehensive and advanced eProcurement digital tools are required for PPP/concession projects. In practice, the use of eProcurement (including automatic selection of the private partner/concessionaire) has been very limited worldwide.

However, the recent rapid development of digital eProcurement tools incorporating emerging technologies has enabled eProcurement to reach PPP/concession projects. This is because modern digital eProcurement systems can deliver online sophisticated, multi-stage procurement processes and effectively support online pre-qualification and pre-selection as well as multi-criteria evaluation methodologies. Key features of the procurement process for user-pays and government-pays PPP/concession projects, as described in Figures 1 and 2, are becoming available as default offerings of last-generation digital eProcurement systems.

New-generation eProcurement tools enable multi-attribute qualification and selection as well as evaluation with multiple non-price values required by public infrastructure projects. The selection stage is based on an assessment of the performance of the competing providers against a predetermined list of evaluation criteria, on the basis of a predefined framework of the weight, relevance and priority of such criteria. Such a selection process in public procurement may greatly benefit from data-driven electronic decision-making. Digital technologies, particularly robotics and automation, accelerate the processing of large amounts of data and information provided by selection participants. Multi-attribute auctions and multi/bilateral negotiations are possible models for

concessions/PPPs. New technology means multi-criteria auction engines perform well with complex projects and it can handle high numbers of bidders. At the same time, the synchronous multi-criteria online bidding characteristic for auction models is driving economic value (cost savings and profit gains) and makes it possible to include non-financial and social aspects in the evaluation methodologies.

Finally, EU policies on digitalisation of public procurement have a significant impact on the procurement of PPP/concession projects, especially for the procurement process of non-concession PPP projects. EU policy does not distinguish between non-concession PPPs and standard public procurement of works and services, and except for concessions as precisely defined in the 23/2014/EU Concession Directive, all types of work or service contracts are to be considered as public procurement as far as the procurement process and contract award are concerned. Non-concession PPPs in EU member states (and associated countries) are therefore subject to national public procurement laws and have to follow the digitisation trend of the public procurement markets as prescribed by the 2014 EU directives on public procurement. Also, some EU member states and candidate countries (Estonia, North Macedonia, Slovakia) decided to directly apply the standard public procurement rules to all PPP/concession projects.





A RECIPE FOR ePROCUREMENT FOR CONCESSIONS/PPPs

eProcurement for PPP/concession projects explores, leverages and selectively applies the widespread, entrenched and market-tested solutions for electronic procurement in the platform economy: electronic marketplaces, electronic trading systems, aggregators and comparators, smart contracts, recommender systems, ranking, rating and scoring.

Specific international legal standards on communications, attribution of legal effects, authentication, transfer of rights, negotiations or liability are available in UNCITRAL MLEC, MLES, MLETR and CEC² and guide most practical steps in the design and operation of eProcurement for PPP/concession projects.

In addition, in-force and ongoing regional proposals on digital service providers, hosting services, online platforms and specific rating or recommender systems enable the future of eProcurement systems for PPPs as well as concessions as sophisticated digital ecosystems fed by data, driven by algorithm and artificial intelligence solutions and that are adaptive, reliable, dynamic and properly monitored.

In essence, developments in policy and emerging technologies teach us that the complete digitisation of procurement process for the PPP/concession projects is possible and it can be facilitated.

The Sustainable Infrastructure Foundation and its SOURCE platform promote one of the recently explored approaches. The SOURCE system is a multilateral platform for sustainable infrastructure led and funded by multilateral development banks. The SOURCE system supports the development of well-prepared projects to bridge the infrastructure gap and government digitalisation agendas. It provides a comprehensive map of all aspects of the preparation of sustainable infrastructure, for both standard procurement and PPPs, covering governance, technical, economic, legal, financial, environmental and social issues. It uses sector-specific templates covering the stages of the project cycle, spanning from project definition to

² UNCITRAL Model Law on Electronic Commerce 1996 with Guide to Enactment (MLEC), UNCITRAL Model Law on Electronic Signatures 2001 (MLES), UNCITRAL Model Law on Electronic Transferable Records (MLETR), United Nations Convention on the Use of Electronic Communications in International Commerce (CEC) approved by General Assembly Resolution 60/21, of 23 November 2005 (<https://uncitral.un.org/en/texts/ecommerce>).

operation and maintenance as well as allowing the definition of specific targets to fulfil the Sustainable Development Goals and the Paris Agreement.

Why may the SOURCE system facilitate the use of eProcurement in PPP/concession projects? Because the platform provides tools for procurement process instruments that are typically non-standard for eProcurement platforms designed to support public procurement procedures, but essential for procurement of PPP/concession projects.

In particular, the SOURCE system provides data repositories and tools for defining qualification requirements and evaluation criteria in communication with the market, guides testing, marketing and communicating the project to the market before the project launch and, when required, provides virtual non-disclosure

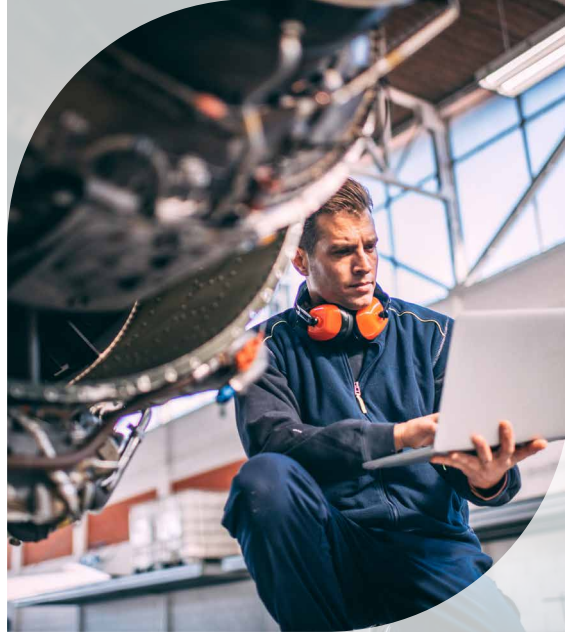
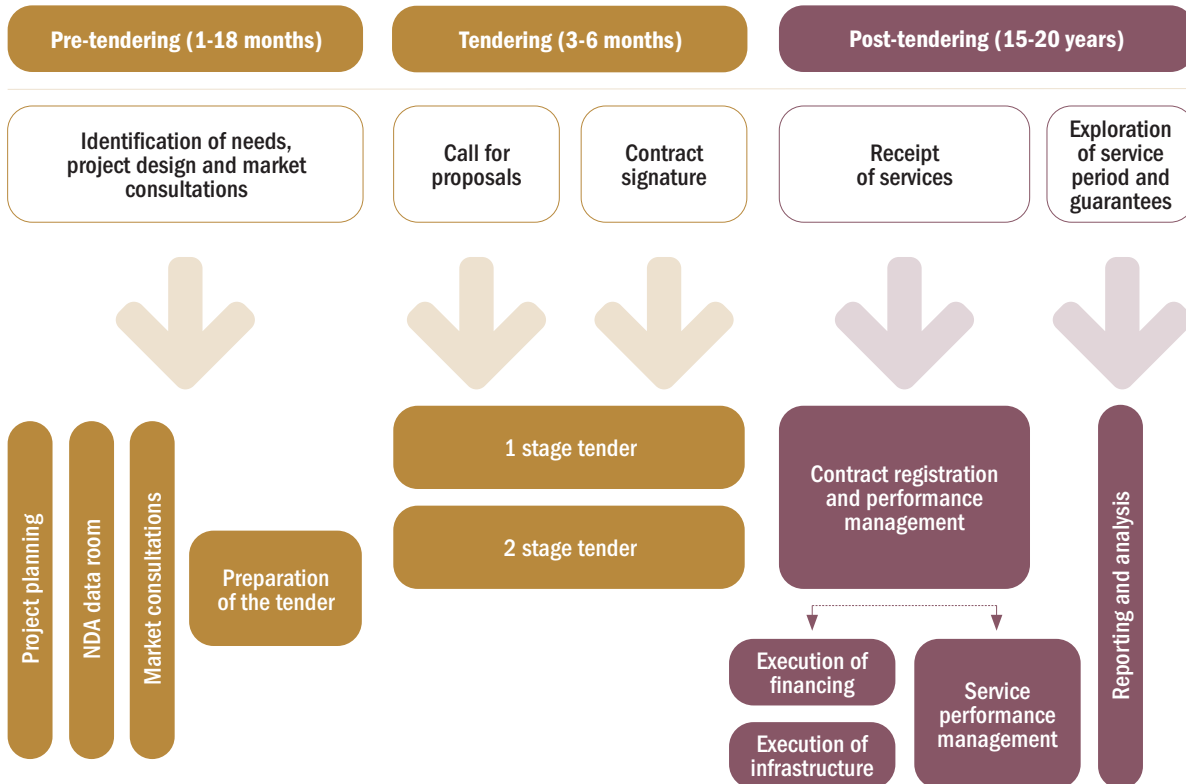


Figure 3: End-to-end digital project cycle, from project definition, through eProcurement to digitised contract management for operation and maintenance of assets. Source: EBRD



agreement data rooms to control access to sensitive project information. Therefore, a simple and far-reaching solution to introduce eProcurement to PPP/concession projects is to integrate a national-level eProcurement platform (or platforms) with the SOURCE system.

With this integration, as described in Figure 3, the SOURCE system serves non-standard parts of the procurement process for PPP/concession projects (project appraisal, non-disclosure agreement data room, market consultations, preparation of the tender), while a national eProcurement platform (or platforms) supports standard procurement processes of single-stage or two-stage tenders. Courtesy of cloud-based applications, the entire process is seamlessly integrated into a single window for all end-users/process stakeholders.

This is possible in practice when a national eProcurement system (or systems) belongs to the latest generation of digital eProcurement tools, is cloud-based and uses the same data standard as the SOURCE system – an open data standard for public procurement – Open Contracting Data Standard or OCDS.

The second condition for this rapid implementation of eProcurement in the procurement processes for PPP/concession

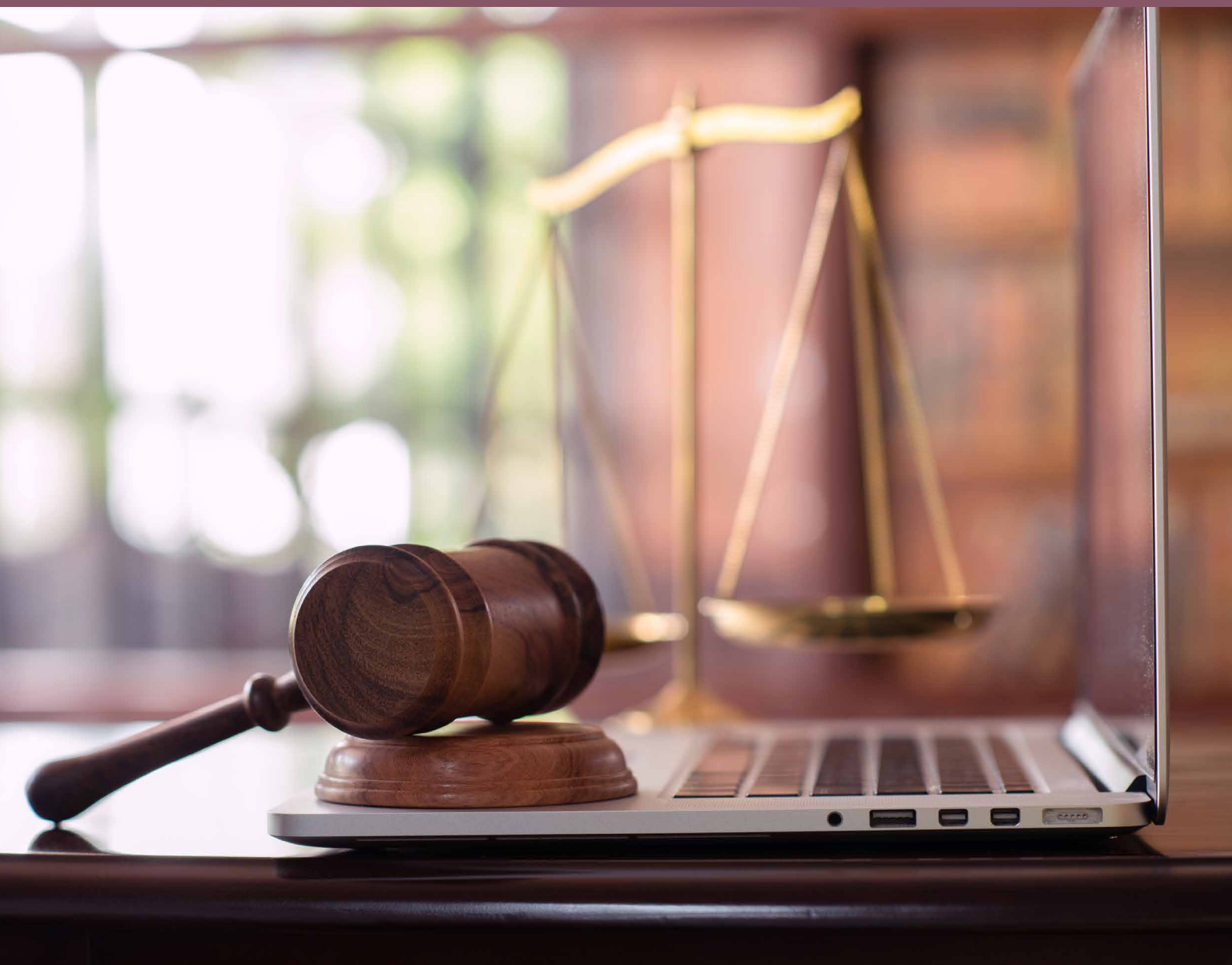
projects is the availability of multi-attribute qualification, selection and evaluation among the functionalities of the national eProcurement platform(s). This too is facilitated by governance guidance embedded in the SOURCE system and it helps the project team access relevant standards for tender preparation and formulation of well-prepared qualification and evaluation methodologies. In the future, the SOURCE system may consider development of more eProcurement add-ins to provide not only support to project definition, tender preparation and contract management, but also a specialised standardised qualification and evaluation tools for the procurement process for concessions/PPP projects. This way, it enables integration with literally any national eProcurement platform.

The integration idea based on the interoperability data standard has great practical potential, and several governments in the EBRD region have expressed interest in collaborating with the Bank and the Sustainable Infrastructure Foundation to try the approach. The Legal Transition Programme, together with the EBRD Sustainable Infrastructure, is working on a conceptual design of eProcurement policies enabling a pilot of eProcurement for the concession/PPP procurement process by integrating a national-level eProcurement system with the SOURCE platform.





ENFORCEMENT OF COURT DECISIONS AND THE WAY FORWARD TO DIGITAL ENFORCEMENT





INTRODUCTION

A healthy and attractive investment climate gives businesses trust that the judicial system will protect their legitimate interests and successfully enforce court decisions. The lack of effective enforcement mechanisms has a devastating effect on the investment climate and the rule of law, deterring local and foreign investment. One of the main problems in commercial disputes in the countries where the EBRD operates arises when a party tries to enforce a court's decision.² Previous EBRD research on judicial decisions found poor implementation of judicial rulings to be the biggest challenge, outranking even corruption. Another EBRD study of enforcement agents' systems³ identified the following elements as most problematic in terms of enforcement and proposed measures to address them:

Most problematic dimensions of enforcement

- Searching for assets
- Sale of assets
- Speed of enforcement
- Supervision
- Seizure of assets
- Cost of enforcement

Measures to promote efficient enforcement

- Initial and ongoing training for enforcement agents
- Adequate pay and incentives
- Easy and efficient access to information in property registries and databases, including bank information
- Efficient sale and auction arrangements, including online procedures
- Robust financial deterrents for debtors who hinder enforcement
- Consistency of legislation on enforcement, property registries, privacy and banking
- Clear, consistent and publicly available statistical data on past and current cases
- Robust oversight of agents' conduct



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² EBRD's Judicial Decisions Assessment 2011-2012. See <https://www.ebrd.com/sites/Satellite?c=Content&cid=1395238675306&pagename=EBRD%2FContent%2FContentLayout>

³ EBRD Enforcement Agents Assessments in the Commonwealth of Independent States, Georgia and Mongolia (2014) and (in 2015) Enforcing court decisions in the Commonwealth of Independent States, Georgia and Mongolia: a comparative review in Law in transition 2014. See <https://www.ebrd.com/downloads/research/law/lit14e.pdf>; <https://www.ebrd.com/sites/Satellite?c=Content&cid=1395238675306&pagename=EBRD%2FContent%2FContentLayout>

- Public debate of reports into allegations of corruption by enforcement officers⁴

In response, the EBRD, through its Legal Transition Programme (LTP), has focused its attention on reforms to improve the effectiveness of enforcement of judgments and the role of enforcement officers.

Despite the level of development of digital technologies around the world, the Covid-19 pandemic has revealed significant shortcomings in the activities of state bodies and the judiciary, including the enforcement system – namely, the absence or insufficient level of digitalisation of activities that would make it possible to work effectively when personal contact is impossible. This situation underscores the need to introduce digital technologies in the judicial system to guarantee access to justice and in enforcement procedures as an effective means of carrying out judgments.

It is worth noting that digitalisation is one of the strategic directions of the EBRD until 2025. The LTP will pay close attention to digital aspects to improve the enforcement systems in countries where the EBRD operates.

INTERNATIONAL ENFORCEMENT STANDARDS AND INSTRUMENTS AND RECENT DEVELOPMENTS

The effective enforcement of court decisions is recognised as an integral part of the fundamental human right to a fair trial established by **Article 8 of the Universal Declaration of Human Rights**,⁵ **Article 14 of the International Covenant on Civil and Political Rights**⁶ and **Article 6 of the European Convention on Human Rights**.⁷ The European Court of Human Rights (ECHR) has linked the enforcement of judgments to the requirements of the right to a fair trial under Article 6.⁸

Until recently, the enforcement of judgments was not the subject of extensive regulation in international law or standard setting among international organisations. However, interest is growing at the global and regional levels in undertaking work in the area of enforcement.

As the table below shows, there are now several good guiding standards and studies at the European and international levels.

1.	Council of Europe's Recommendation (2003) 17 of the Committee of Ministers to member states on enforcement (CE Recommendation), 9 September 2003 ^{9,10}
2.	European Commission on the Efficiency of Justice (CEPEJ) Guidelines for a better implementation of the existing Council of Europe's recommendation on enforcement (CEPEJ Guidelines), December 2009 ¹¹
3.	CEPEJ Good practice guide on enforcement of judicial decisions, December 2015 ¹²
4.	CEPEJ Specific Study on the Legal Professions: Enforcement Agents, 2021 ¹³
5.	Global Code of Enforcement, May 2015, ¹⁴ International Union of Judicial Officers (UIHJ) ¹⁵
6.	Global Code of Digital Enforcement, November 2021, UIHJ ¹⁶

⁴ Ibid.

⁵ See <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

⁶ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁷ See https://www.echr.coe.int/Documents/Convention_ENG.pdf

⁸ ECHR, 19 March 1997, *Hornsby v Greece*, req. n ° 18357/91, § 40 See https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_18357-91_001-58020 and https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf#_ftn4

⁹ See https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805df135

¹⁰ These are enforcement standards with regard to civil and commercial proceedings, comprising rules to enhance the efficiency of the enforcement process and relating to the status and the functions of enforcement agents. Para 3 in <https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf>

¹¹ See <https://rm.coe.int/16807473cd>

¹² See <https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf>

¹³ The study examines the enforcement of court decisions in civil, commercial, administrative and criminal matters and presents the trends and the main conclusions. Since 2004, the CEPEJ has regularly evaluated the judicial systems, including enforcement, of the Council of Europe member states and some observer states. See <https://rm.coe.int/cepej-specific-study-on-enforcement-agents-uihj-2018-data-en-version-2/1680a2a2d4>

¹⁴ The code provides guiding principles on enforcement, provisional and enforcement measures, and enforcement agents. See <https://www.uihj.com/downloads/global-code-of-enforcement/>

¹⁵ See <https://www.uihj.com/about-us-2/introduction/>

¹⁶ Global Code of Enforcement, *op. cit.*



UNIDROIT'S STANDARD-SETTING INITIATIVE ON ENFORCEMENT

The International Institute for the Unification of Private Law (UNIDROIT)¹⁷ refined the undertaking of a project on “Principles of Effective Enforcement” in 2018.¹⁸ A working group was established in 2020 and this project is given high priority on the UNIDROIT Work Programme 2020-2022. The working group is tasked with developing a set of global standards and best practices to improve the domestic law framework for enforcement in the form of a guidance document.

Several global and regional organisations with expertise in this field – including the EBRD – were invited to participate as observers in the working group. The work is divided into three areas, one of which is the impact of technology on enforcement. Preparation of a first draft of the proposed instrument is expected to be concluded in 2022.¹⁹ The Bank contributed to this initiative by providing experience and lessons learned from implementing projects in the EBRD regions over the last decade.

DIGITALISATION OF ENFORCEMENT PROCEDURES

As already mentioned, past EBRD assessments have highlighted the importance of digital technologies in enforcement procedures. Emerging digitalisation – including in the justice sector – has had a major impact on the enforcement system in recent years. Until recently, however, there were no instruments to summarise best practice and define all the necessary aspects of digitalisation to enforce judgments effectively.

As noted above, the **UIHJ Global Code of Digital Enforcement** defines universal principles that apply to all facets of digital enforcement in civil matters. It encourages states to incorporate these principles in their national legislation when regulating the use of digital technologies in

¹⁷ See <https://www.unidroit.org/about-unidroit/>

¹⁸ See <https://www.unidroit.org/work-in-progress/enforcement-best-practices/>

¹⁹ See <https://www.unidroit.org/english/documents/2021/study76b/wg02/s-76b-wg02-02-e.pdf>

enforcement procedures. While the Code also refers to substantive matters, such as issues of enforcement of digital assets, the key aspects outlined below focus on the procedural aspects (electronic enforcement):

- Ensure that **digital enforcement measures are proportional to the enforcement claim**.
- Provide for the **use of digital tools in enforcement agents' activities**, including the use of digital identity, in **compliance with data protection and confidentiality rules**.
- Enable the employment of **secured online dispute resolution** systems by enforcement agents, particularly **online mediation, in the enforcement process**.
- Ensure the necessary level of **digital literacy of enforcement agents through training**.
- Put in place **infrastructure** enabling enforcement agents **to exchange information electronically** regarding the debtor with other relevant institutions (for example, courts) and **to access data** from relevant electronic registers (for example, registers held by banks or asset registers).
- Ensure **flexibility** and allow **the switch from digital to non-digital enforcement and vice versa**, where necessary.
- Develop regulatory frameworks that **permit the use of artificial intelligence** with **minimum risks, compliance with fundamental rights and ethical principles**, and that **allow enforcement agents to control and override the decisions made by artificial intelligence**.
- Maintain a **debtor's access to offline (physical) contact with enforcement agents**.
- Ensure **reasonable, transparent and well-defined costs of digital enforcement**, which in any event should not exceed the costs of non-digital enforcement.

As discussed above, UNIDROIT intends to develop a set of global standards and best practices for the enforcement of judgments, including digital



aspects. These instruments will guide further reforms in the field of enforcement of judgments aimed at the introduction of e-enforcement procedures.

EBRD LTP SUPPORT TO IMPROVE ENFORCEMENT OF JUDGMENTS

Since 2014, the LTP has implemented several enforcement reform projects – including in Mongolia, Tajikistan, Ukraine and the Kyrgyz Republic – that mainly targeted policy, legal and institutional development and capacity building. The focus since 2018 has also encompassed the digitisation of enforcement procedures. New projects were recently initiated in Moldova, Ukraine and Azerbaijan, and another is scheduled to launch in Mongolia in 2022. Some recent initiatives are highlighted below.

The Kyrgyz Republic

The Kyrgyz judicial system has suffered from a low level of enforcement of judgments for many years.²⁰ One of the greatest challenges is the human resource capacity of the bailiff service, which lacks continuous training and has a workload that exceeds the bailiffs' ability to handle it. There is a very low ratio of enforcement agents to residents in the country by regional standards. To help the Kyrgyz authorities enhance the capacity of Kyrgyz bailiffs to enforce judgments in commercial matters, the EBRD launched **the Bailiff Service Capacity Building Project in Kyrgyz Republic** in 2015. The project was implemented in three phases, from 2015-21.

²⁰ See http://president.kg/ru/sobytiya/12774_utverghdena_nacionalnaya_strategiya_razvitiya_kirgizskoy_respubliki_na_2018_2040_godi p. 123.

Under the **initial phase (2015-16)**, the *Functional Analysis of the System of Court Enforcement in the Kyrgyz Republic* was prepared in June 2016 to identify the areas for reform and offer recommendations. The new Law on Enforcement Process and the Status of Enforcement Agents (Enforcement Law or Law No. 15) was adopted on 29 January 2017.²¹ This law introduced useful reforms, though there is room for further improvements.

The Kyrgyz Republic has a state system of court enforcement. To enforce court decisions more efficiently, the government is considering introducing a mixed system of court enforcement that would include private bailiffs, as envisaged in the **National Development Strategy of Kyrgyz Republic for 2018-2040**.²²

Under **Phase 2 (2017-21)**, the project helped the Kyrgyz authorities implement the recommendations by providing legislative and institutional development advice, training of trainers and apprenticeship. As a result, the Court Department under the Supreme Court, responsible for enforcement of court decisions, adopted a comprehensive **Strategy for the Institutional Development of the Court Enforcement Department**, accompanied by the Action Plan for 2019-2021, in 2018.

In line with the Strategy, the project helped to develop legislative amendments to strengthen the enforcement function by creating a new State Court Enforcement Service under the Supreme Court (CDES) with a doubled staff²³ and amending the Budget Code of the Kyrgyz Republic, with a focus on facilitating the financial sustainability and autonomy of the enforcement body and providing adequate incentives for bailiffs. The project further assisted by developing several drafts of secondary legislation concerning the functioning of the CDES and its staffing. The approval process of these documents was postponed because of drastic changes in the political landscape in the Kyrgyz Republic in 2020-21.

At the end of 2021, as a result of political changes and the Covid-19 pandemic, which led to a reduction in the state budget and state structures, the enforcement function was returned to the Court Department under the Supreme Court.²⁴

In view of the Kyrgyz government considering a mixed bailiff system (state and private), the project offered an opportunity to 15 Kyrgyz bailiffs to participate in an apprenticeship programme and a study visit to Ukraine.²⁵ Also under Phase 2, the project prepared the terms of reference for the development of an electronic database of debtors in 2019, in support of an EU initiative to digitise enforcement procedures and exchange of data about debtors and develop electronic auctions for the sale of debtors' assets.

Phase 3 (2018-21) provided extensive training for newly appointed bailiffs and organised a regional conference to exchange best practice. In 2019, secondary legislation on mentoring procedures of newly appointed bailiffs and guidance for formal and regular evaluation of training needs for bailiffs were drafted. Seven training e-handbooks on the key aspects of enforcement proceedings were published on the website of the Court Department and the High Justice Training Centre (HJTC). In 2020, 112 newly appointed bailiffs were trained. In addition to live training, an e-learning module on public speaking and the art of conflict management was developed and is expected to be launched on the HJTC e-learning training platform in 2022.

Overall, the project helped raise the profile of enforcement officers, highlighted the importance of their work, optimised internal processes and created a sustainable and continuous system to train bailiffs. By promoting better working conditions for bailiffs, the project helped boost their salaries and generated increased funding for enforcement agencies. It should be noted, however, that the recent return of the enforcement function to the Court Department means the number of bailiffs may be reduced, making enforcement of court decisions less effective. While the government's

²¹ See <http://cbd.minjust.gov.kg/act/view/ru-ru/111522>

²² Ibid.

²³ See the "Law on Supreme Court and Local Courts of the Kyrgyz Republic", adopted on 11 April 2020 № 39.

²⁴ By the new Law "On Supreme Court and Local Courts of the Kyrgyz Republic", adopted on 15 November 2021 № 39, see at: <http://cbd.minjust.gov.kg/act/view/ru-ru/112315>

²⁵ The visit was organised in cooperation with the Ministry of Justice of Ukraine and affiliated institutions: the Ministry's State Enforcement Service Department and the Private Bailiffs Association in Ukraine.

initiative to introduce private bailiffs may offset the bailiff shortage, it has yet to be implemented. Going forward, recent legislative changes and new internal processes must be implemented effectively. Another analysis to understand the needs of the enforcement system may be appropriate.

Moldova

The enforcement system in Moldova is fully private. Evaluations by the CEPEJ show that excessive cost, length of proceedings and lack of transparency are the top three complaints made by users about the enforcement procedure in Moldova.²⁶ To address these issues, Moldova has taken steps to digitise the enforcement processes. To this end, the National Union of Enforcement Officers developed the Information System for Evidence and Management of Enforcement Procedures (ISEMEP). The system allows bailiffs to keep electronic records of enforcement documents, debtors and creditors, terms of enforcement and costs associated with enforcement, as well as generate statistical data about the enforcement procedure. Nevertheless, the ISEMEP does not allow the exchange of data between bailiffs and other third parties (for example, public registries and banks) possessing vital information for the enforcement procedure. Such communication is currently paper-based, using postal services.

Enforcement practice shows that the overwhelming majority of document exchange is conducted between bailiffs and banking institutions to collect and monitor information about debtors' bank accounts (some 500,000 paper-based requests a year). Exchanging such data using postal services is vulnerable to delays and has become even more difficult during the Covid-19 pandemic.

While increasing the efficiency of judgment enforcement procedures is one of the priorities of the Moldovan government under the **Strategy for Ensuring Independence and Integrity of Justice**

Sector 2022-2025,²⁷ state-led actions do not cover the exchange of information between bailiffs and banks. A recently launched EBRD project called **Streamlining Enforcement Procedures in Moldova/Covid-19 Response: Digitisation of debt enforcement by bailiffs from debtor bank accounts** aims to address this issue by developing and piloting the interoperability capability of the ISEMEP. This will allow the exchange of data and electronic documents between bailiffs and Moldovan banks to request and receive information in real time about debtors' accounts, to request that owed funds in such accounts be frozen and to submit payment orders to retrieve the debt from debtors' accounts. As a result, creditors will benefit from faster enforcement while bailiffs will take part in a more transparent enforcement process.

Ukraine

In recent decades, Ukraine has faced a serious structural problem of non-enforcement or delayed enforcement of domestic judicial decisions and the lack of effective remedy, as confirmed by the ECHR in its judgment in the *Burmych* case in October 2017.²⁸ Statistics show that the unenforced debt based on court judgments amounted to more than **UAH 800 billion** (€25.7 billion), which is 30 per cent of the country's annual gross domestic product. However, only UAH 25 billion-UAH 30 billion (€805 million-€967 million) is being enforced each year, which represents **less than 4 per cent** of the total amount of debt based on court judgments in Ukraine.²⁹ In 2016, Ukraine introduced a mixed

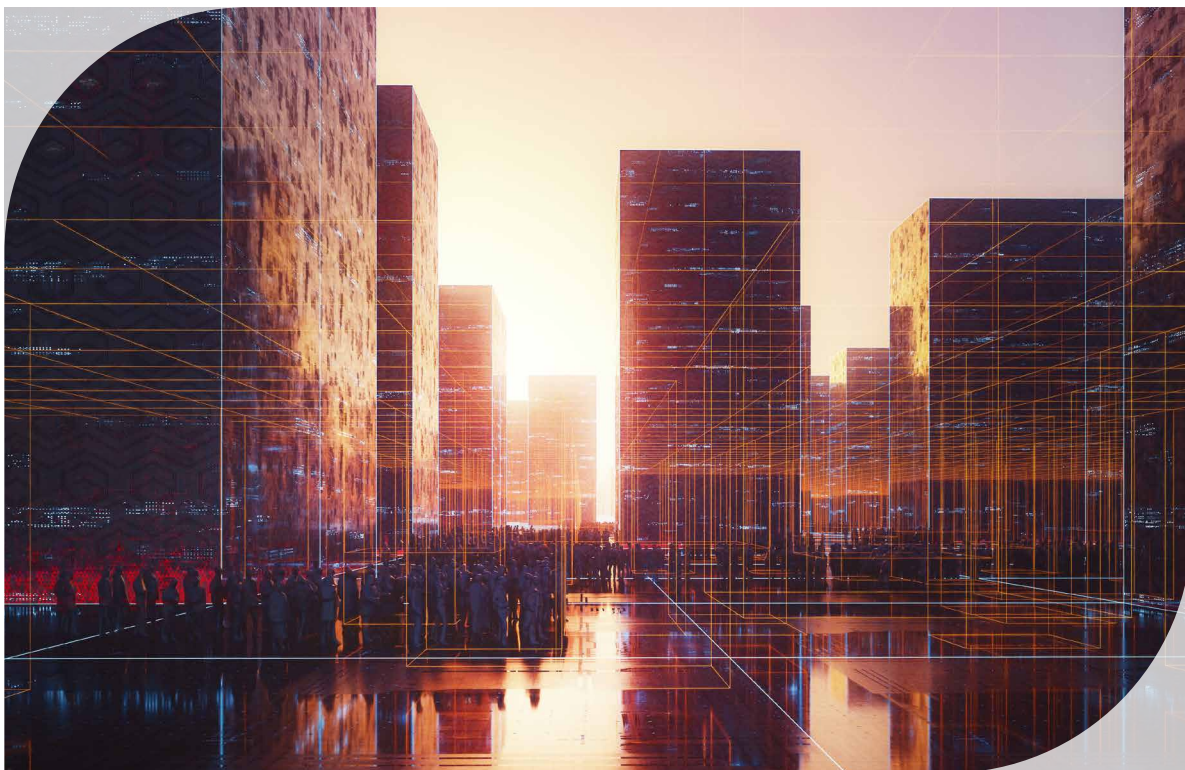
“IT IS WORTH NOTING THAT DIGITALISATION IS ONE OF THE STRATEGIC DIRECTIONS OF THE EBRD UNTIL 2025. THE LEGAL TRANSITION PROGRAMME WILL PAY CLOSE ATTENTION TO DIGITAL ASPECTS TO IMPROVE THE ENFORCEMENT SYSTEMS IN COUNTRIES WHERE THE EBRD OPERATES.”

²⁶ See <https://rm.coe.int/en-republic-of-moldova-2018/16809fe2f2>

²⁷ See https://www.legis.md/cautare/getResults?doc_id=129241&lang=ro

²⁸ See https://www.menschenrechte.ac.at/orig/17_5/Burmych.pdf

²⁹ See <https://apvu.com.ua/europacket>



system to enforce court decisions, namely, in addition to state bailiffs, private bailiffs were allowed to practice.

The LTP launched a project in 2016 called **Bailiff Service Capacity Building - Strengthening the Enforcement of Court Decisions** to help the Ministry of Justice improve the capacity of Ukrainian bailiffs. In Phase 1 (December 2016-18), the project conducted a functional assessment of the enforcement system, identified regulatory, institutional and training problems and needs, and developed recommendations to address them. As a result, the Ministry of Justice used the functional assessment to form a policy vision and plan on further development of the enforcement of court decisions.

In September 2020, the government of Ukraine adopted the **National Strategy³⁰ and its Action Plan on Addressing the Problem of Non-Execution of Judgments until 2022 (National Strategy)³¹** to address this issue of low enforcement.

During Phase 2 (2019-20), the project produced a concept note on further development of the e-platform for bailiffs in Ukraine and developed the scope for the training programme for the Ukrainian State Enforcement Service Department. In turn, the EBRD will seek to provide further

support to the Government of Ukraine in terms of strengthening of the enforcement system.

CONCLUSION

Although the enforcement of court decisions remains a major problem in many countries, some progress has been made. Reform efforts must continue, however. The Bank will continue to support the efforts of the economies where we operate to improve enforcement mechanisms, based on lessons learned and new developments in standard setting on enforcement. Among other necessary improvements, attention will be given to the digitalisation of enforcement procedures and e-learning to ensure the sustainability of continuous education for enforcement officers.



³⁰ See <https://zakon.rada.gov.ua/laws/show/1218-2020-p#Text>

³¹ See <https://zakon.rada.gov.ua/laws/show/210-2021-p>



MAPPING THE DIGITAL TRANSITION IN MONGOLIA'S MINING SECTOR: SUPPORTING THE ESTABLISHMENT OF A DIGITAL GEOLOGICAL DATABASE





The mining sector's sizeable contribution to economic growth and social development in a number of the resource-rich economies where the EBRD operates is well known. Perhaps less well known is the support the EBRD offers these countries to create and maintain some of the critical building blocks necessary to attract and sustain investment and ensure that the sector remains an engine of broader economic development.

“THE PROJECT, RECENTLY CONCLUDED BY THE BANK'S LEGAL TRANSITION PROGRAMME, GIVES MONGOLIA A CUTTING-EDGE DIGITAL PLATFORM TO CAPTURE, STORE, PROCESS, ANALYSE AND DISSEMINATE CRITICAL GEOLOGICAL INFORMATION ON THE COUNTRY'S EXISTING MINERAL RESOURCES AND POTENTIAL.”

This article examines an example of the Bank's support, provided through a technical cooperation project, to help design and establish a national geoscience database for Mongolia's National Geological Service. This project, recently concluded by the Bank's Legal Transition Programme, gives Mongolia a cutting-edge digital platform to capture, store, process, analyse and disseminate critical geological information on the country's existing mineral resources and potential. Mongolia also gains a critical tool to improve transparency, enhance governance and sustain broader economic development.

GEOLOGICAL DATA

Geological data or “geodata” are pieces of information, samples and records of the Earth's surface and subsurface, both onshore and offshore, obtained by *observation, measurement, sampling and description*. They are associated with a location relative to the Earth, including geographical and geological information.¹



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¹ British Geological Survey.

In the mining sector geodata may be used to publicise a country's mineral wealth and, in some cases, to generate revenues for government. The typical perception of geodata is that they are reserved for technical experts. However, geodata are essential to ensure that the development of minerals is properly governed and for the strategic development of natural resources, infrastructure and communities. For example, land and water degradation are inevitable when mining takes place in or near water, by dredging or other techniques. Illicit mining has already affected protected areas and national parks. Ecosystem destruction and deforestation of mining areas reduces quality of life, food and water and is highly problematic.

INTERNATIONAL EXPERIENCE

Global experience over several decades has shown that one of the most important precursors of a successful mining sector is the availability of good-quality information on its mining potential. That mining potential is measured in terms of geological potential of the territory, which will inform the level of investment and contribution to exports, national revenue, employment and industry.

Clear and accurate information about the location, potential quality and estimated quantity of deposits and resources is essential to support strategic development that includes levels of investment, potential markets, placement of infrastructure, environmental protection, social impacts, monitoring requirements and skills development.

Therefore, the availability of high-quality geodata is fundamental to building a comprehensive understanding of the wider potential of a country's mineral sector. Without such geodata it is pretty much impossible to attract the levels of investment necessary to explore or develop the sector proportionally to its geological potential. Geodata are the basis for every mineral resource discovery and essential for efficient resource exploitation.

The more accurate and developed geodata are, the greater likelihood that committed investors will readily enter the mining market. Countries that have non-digital, poor-quality digital or unreliable access to geoscience data (geological maps, reports and their associated information) and lack suitable capacity (both financial and skills-related) for the maintenance and ongoing development of these data will not be attractive to investors.

GENERATING GEODATA

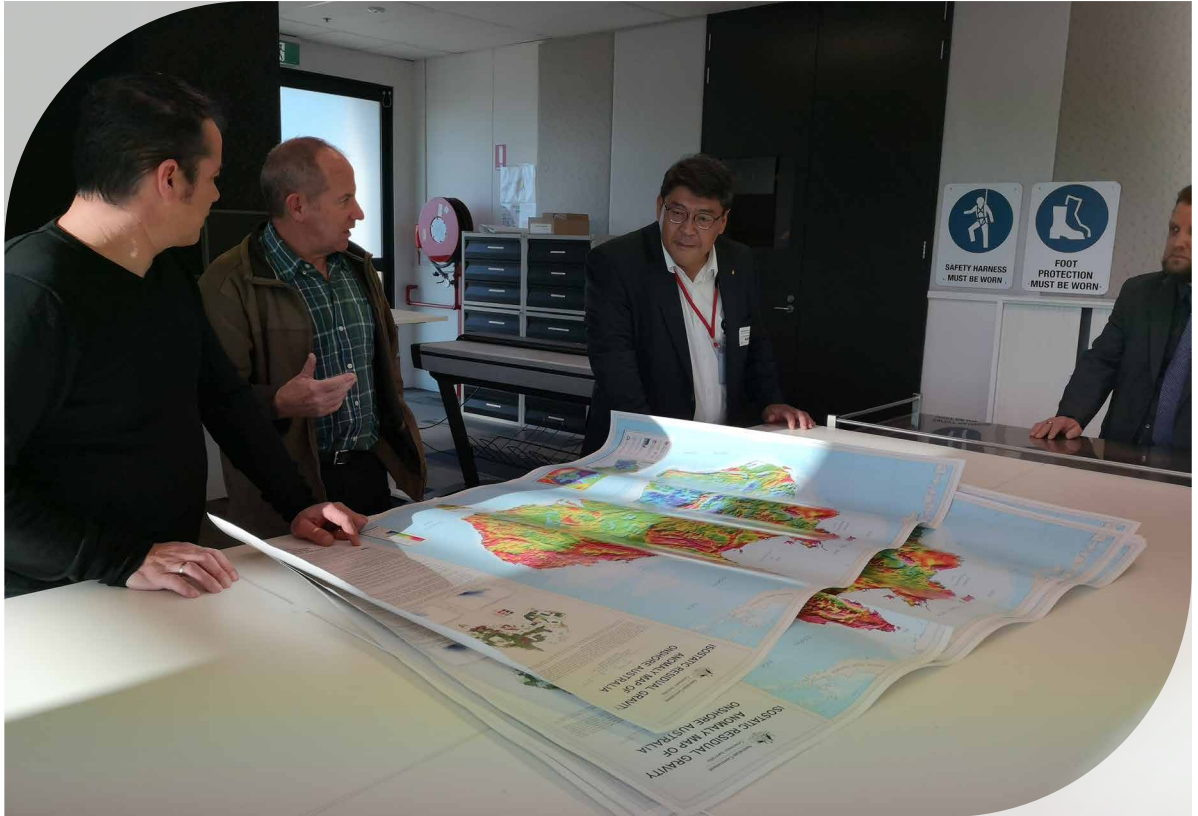
Generating geodata through state-sponsored surveys or as a requirement of exploration and mining licences is generally an expensive task. An investment in generating geodata (for example, through exploration activities) may not be returned because there is no guarantee that profitable resources are discovered. Thus, having access to data gathered during previous exploration campaigns can reduce investment risks significantly and lead and focus activities in the right direction, making the environment for investors more appealing.

DIRECT BENEFITS OF ACCESSIBLE GEODATA

Quality accessible geodata encourage mining companies to invest by reducing exploration risk, particularly private exploration companies that, with proper access to such information, are better able to identify and determine the viability of exploration targets. It also helps governments to understand their mining potential, allowing them to regulate activities properly and plan economic development in a sustainable manner. Simply put, making geodata easily and readily available to government and industry enables effective decision-making.

It is clear that geodata represent one of the components driving informed strategic decisions on economic and social development. More broadly, geodata provide a foundation to facilitate economic growth (by stimulating industry and inward investment), social development (through jobs and security, transparency and reduction in corruption) and improved environmental management.

“ THE POTENTIAL INVESTMENT THAT PUBLICLY AVAILABLE PRE-COMPETITIVE DATA CAN MOBILISE CAN FAR EXCEED THE REVENUE THAT ANY COUNTRY RECEIVES IN DEVELOPMENT ASSISTANCE. ”



Where to start? Geoscience Australia exchanging experience with the National Geological Survey.

USING GEODATA TO MOBILISE INVESTMENT

The potential investment that publicly available pre-competitive data can mobilise can far exceed the revenue that any country receives in development assistance. This position is supported by the Australian Department of Finance's *Strategic Review of Geoscience Australia*,² which found that government-owned pre-competitive data:

- play a key role in reducing risk for the resources industry, especially for private-sector exploration companies that are better able to determine exploration targets
- generate positive externalities in terms of new deposits providing information about regional prospectivity and comparable geological formations and
- help the government maximise the future value of resources that it owns on behalf of society (there are strong analogies to the due diligence and other costs in developing an investment prospectus for a major, complex asset).

GEODATA IN MONGOLIA

Given the importance of Mongolia's mineral activities to the country's development, it is unsurprising that quality accessible geodata have long been seen as a key pillar of an enabling modern, well-governed, competitive and investor-oriented mineral sector.

Unfortunately, access to such valuable geological information is restricted in some economies where the EBRD invests, as governments are reluctant to allow wider accessibility to geodata, believing sector development and national security would be better served by limiting access.

This was the case in Mongolia before the launch of the Bank's national geoscience database technical cooperation. The country's trove of geodata was scattered across millions of pages of paper maps and outdated digital (that is, PDF) collections. In addition, several agencies held,

² <https://www.finance.gov.au/archive-link/2011-strategic-review-geoscience-australia>

managed and delivered geodata in Mongolia, resulting in duplication of data collection, limited sharing of data between the agencies and no understanding of the country's total current geoscience data inventory. At the outset, there were also restrictions on the types of geodata that were publicly accessible.

With the limited digital data held by separate and independent agencies, it was extremely difficult for both domestic and foreign investors to evaluate Mongolia's resource potential when fundamental geoscientific datasets could not be provided in digital formats or accessed online. This also applied to Mongolian geoscientists, who were unable to use and integrate data in non-digital formats or to share data and collaborate to build expertise collectively. Prior to the technical cooperation on the national geoscience database, the absence of digital data reflected several factors:

- Restrictive policies and regulations related to national and regional digital data, with mineral sector regulations failing to require companies to submit digital data (both geoscientific data and administrative reporting) to the regulator; reports were only provided in hard-copy format. For geoscience datasets (for example, data from drill holes, geophysical surveys such as gravity or magnetic surveys), providing data as a picture in a hard-copy report effectively renders them unusable and does not support future value-adding activities using these data.
- Historical reports stored in hard-copy format in the regulator's library were not available in digital format and required digitisation (and translation from Russian/Mongolian to English and other languages).
- Information and communication technology infrastructure was insufficient to store and manage digital data appropriately (that is, databases and digital catalogues).

“GOVERNMENT-OWNED PRE-COMPETITIVE DATA PLAY A KEY ROLE IN REDUCING RISK FOR THE RESOURCES INDUSTRY.”

This restricted availability, inadequate access and the use of obsolete – especially non-digital – methods to record, manage, store and make available geological information in Mongolia were repeatedly cited as major obstacles to investment and, as a result, a significant barrier to more and better development of the mining sector.

Mapping and digitising existing structures and integrating them in one coherent online database system ensures that all information is accessible and consistent. This is a key step to attract increased investment, particularly into critical exploration activities.

EBRD/MONGOLIA DIALOGUE

It was against this background that the Bank engaged with the government, highlighting the benefits of permitting wider access as a means of influencing policy and the legal changes that would allow such availability and accessibility. The Bank's advocacy and dialogue paid off when the government agreed to important changes in policy and law allowing greater geodata availability and online accessibility.

POLICY AND LAW REFORM

The Mongolian State Minerals Policy (2014-25) was adopted in January 2014. It included guidelines to support the sustainable economic development of Mongolia's mining sector. The policy explicitly enabled the creation of a national geo-information database. The subsequent amendment to the Minerals Law included a provision to establish a national geological database, to be managed by the National Geological Survey.

Figure 1: How the National Geological Database works. Source: National Geological Survey, Mongolia



LAUNCH OF THE NATIONAL GEOSCIENCE DATABASE PROJECT

This change in policy and law enabled the launch of the Bank's National Geoscience Database project, with implementation beginning in January 2019 and concluding in December 2021. The Bank (through its Shareholder Special Fund) and the governments of Australia and Mongolia jointly funded the project.

The project initially worked with the Ministry for Mining and Heavy Industries and the Mineral Resources Regulatory Authority of Mongolia, which collaborated with the country's recently established National Geological Survey. The project designed and operationalised the database; established the process to acquire, digitise, store and manage geodata; trained and built capacity among policymakers and regulatory authorities; and fostered cooperation between Mongolian geological authorities and their peers abroad.

Specifically, the project designed and developed digital geochemical, geophysical and other datasets and created and implemented an information system to provide easy and efficient access to these data. The system handles geographic information data contained in reports kept in the regulator's library of technical reports and maps. Additionally, the system includes the facility to scan and archive technical reports.

OUTCOME

The outcome of the project provides Mongolia with a national geological database³ that represents a cutting-edge digital platform to capture, store, process, analyse and disseminate critical geological information on the country's existing mineral resources and potential.

³ The National Geological Database can be found here: <https://mrns.mn/#/>

BENEFITS OF THE DIGITAL GEOLOGICAL DATABASE

The key benefits of this database for the sector and the economy are twofold. First, it contributes substantially to improving the transparency and wider accessibility of a vital resource for the development of the mining sector. The greater the transparency, the lower the risk for responsible investors in entering the market. The lower the risk, the lower the cost of market entry, which should in turn translate into greater investor interest.

“MAKING GEODATA EASILY AND READILY AVAILABLE TO THE GOVERNMENT AND INDUSTRY ENABLES EFFECTIVE DECISION-MAKING.”

Second, the national geological database bolsters sector governance considerably by helping the government to better understand the country's resource potential and more accurately evaluate the risks and benefits of stages of mineral investment and mine development. This should enable the government to regulate activities properly and better plan economic development. The database also provides critical input to sector revenue management activities, ensuring that the government captures financial return and conserves and protects the country's limited resources. Simply put, making geodata easily and readily available to the government and industry enables effective decision-making.

VALUABLE EXPERIENCE

Given the extent of Mongolia's mining sector reforms, the country possesses rich experience on the effectiveness and impact of these reforms, good and bad. As exposure of Mongolia's successes (such as the national geological

Vast mineral riches lie beneath Mongolia's land surface.





database) increases, the clearer the example becomes – an example other countries can and should look to in their search for workable solutions for sector challenges.

The national geological database is a project that is very important for the EBRD, not only in terms of its contributions to transparency and improving the investment environment, but also in terms of what the Bank has learned from the time spent helping to make the database a reality.

Drawing on this rich experience, the EBRD has begun working with governments and geology services in the region on how best to leverage the vast trove of geological data that they possess to drive investment, more sustainable development of the sector and, more broadly, the economy.

“IT IS CLEAR THAT GEODATA PROVIDE A FOUNDATION TO FACILITATE ECONOMIC GROWTH, SOCIAL DEVELOPMENT, AND IMPROVED ENVIRONMENTAL MANAGEMENT.”





INFORMATION MATTERS - A NEW DIGITAL RESOURCE FOR SMEs ACROSS THE EBRD REGIONS





This article presents a recent EBRD digital initiative to provide small and medium-sized enterprises (SMEs) in the EBRD regions with core legal and business advice on how to remain resilient in a challenging economic environment. Launched in September 2021 in response to the coronavirus pandemic, we have created a freely accessible general website (businessguide.ebrd.com) for SMEs in all EBRD economies of operations, with content in both English and Russian.

Local language websites in Georgia (<https://businessguide.ebrd.ge/>), Moldova (<https://ghidulafacerii.ebrd.md/>) and Ukraine (<https://businessguide.ebrd.com.ua/>) complement this website and contain tailored advice for the local market.¹

“MORE THAN 99 PER CENT OF ALL BUSINESSES ACROSS THE ECONOMIES WHERE THE EBRD WORKS ARE SMEs, WHICH ARE AN ESSENTIAL SOURCE OF EMPLOYMENT AND ECONOMIC GROWTH.”

SMEs play a vital role in economic development. These businesses are at the heart of the EBRD's twin mandates of supporting transition to open-market economies and promoting private and entrepreneurial initiative. More than 99 per cent of all businesses across the economies where the EBRD works are SMEs, which are an essential source of employment and economic growth.

For this reason, the EBRD has long championed SMEs in its economies of operations. It runs a successful Small Business Initiative across its regions that offers financing directly and through local financial intermediaries, as well as consultancy services through its Advice for Small Businesses programme to help improve SME performance and make them catalysts for economic growth. The programme targets SMEs with a turnover of less than €50 million (or a balance sheet of under €43 million), with



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¹ The United Kingdom's Good Governance Fund supported development of these three country-specific sites and related events from January-December 2021.

between 10 and 250 employees (exceptionally up to 500 employees).² It also offers specialised advisory services to businesses in areas such as strategy and marketing, technology and energy efficiency and environmental aspects. Managed at local level, the programme has strong links with the SME community and helps SMEs to innovate and reach their full potential.

However, significant challenges remain in the SME sector across the EBRD regions. A number of studies indicate that barriers to digitalisation and productivity in particular persist, with SMEs lagging behind larger companies.³ Supporting digitalisation has become a key component of the Bank's strategy of supporting the SME sector.

Digitalisation is a central theme of the EBRD's Strategic and Capital Framework 2021-2025, focused around three central pillars: (1) laying the foundations of a sustainable and inclusive digital economy, (2) adaptation of organisations to support digitalisation of services, assets, business processes and value chains, and (3) supporting innovation and sustainable growth among digital-first clients.⁴ For example, in Ukraine, EBRD supported the development of *Merezha*, an award-winning digital platform launched in 2019 that acts as a market place and knowledge hub for Ukrainian SMEs, matching them with professional advisers and enabling access to online events. The platform has been so successful that there are already plans to replicate it in neighbouring countries in the Caucasus region, including Georgia.

The Bank has also instituted several other digital initiatives as part of its emergency response package to support the EBRD regions following the onset of the Covid-19 pandemic and ensuing economic crisis. These include the launch of both the EBRD Know How Academy in 2020 and the EBRD website businessguide.ebrd.com.⁵

EBRD BUSINESS GUIDE WEBSITE

[Businessguide.ebrd.com](https://businessguide.ebrd.com) is an open information resource website created by the EBRD Legal Transition Programme, in partnership with its Governance and SME Finance and Development initiatives. The website addresses a need identified in many EBRD economies for SMEs to have easy access to free legal and business advice. This need was particularly acute at the start of the pandemic, when businesses were facing requirements to comply with new, emergency legislation and regulations, often introduced with little warning. At the same time, lockdowns and social-distancing measures in many countries presented businesses with major operational challenges. In addition, businesses faced complex contractual issues, including health and safety requirements as well as force majeure.

To help SMEs access free tools and guidance on how to cope with and quickly adapt their businesses to these new requirements and a constantly changing economic climate, we designed and established businessguide.ebrd.com. Structured around six core modules, the website provides information to SMEs on:

1. Developing your business strategy
2. Managing your people
3. Running your business
4. Taking your business online
5. Keeping your business's finances healthy
6. Restructuring your business finances

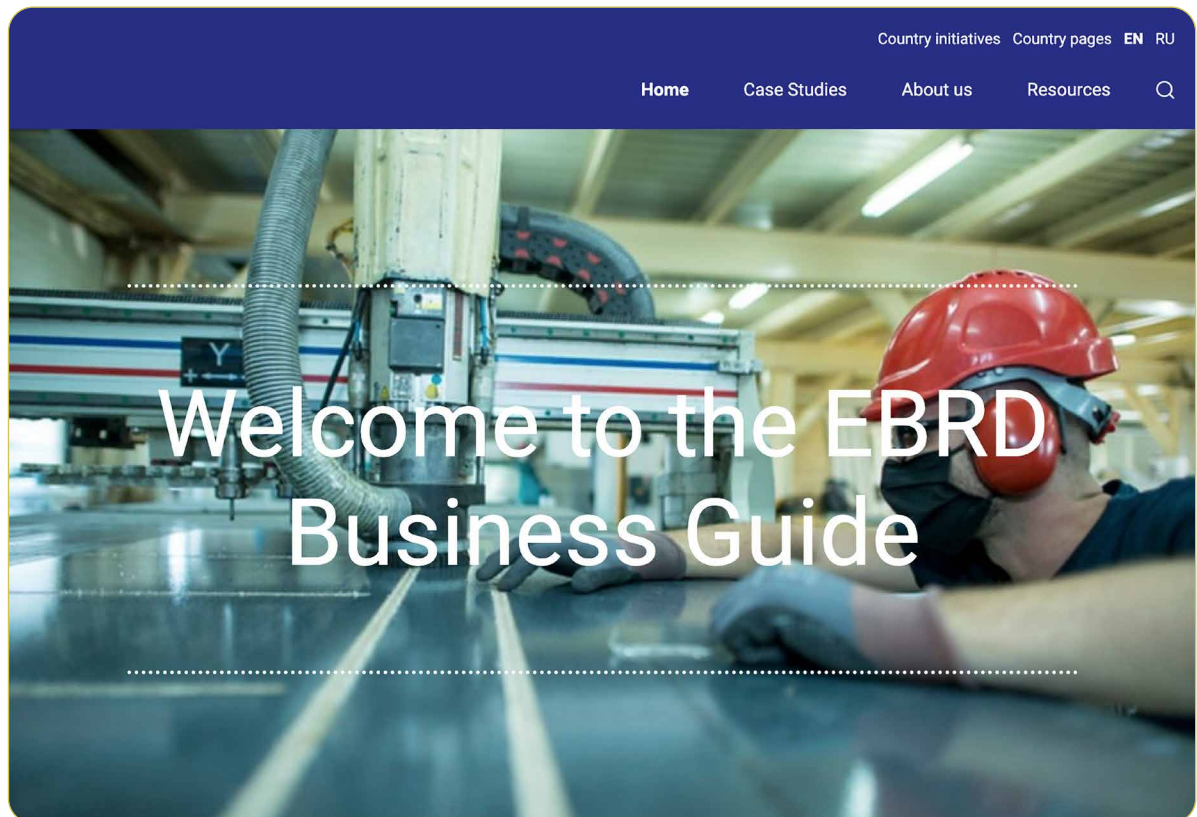
Through this guidance, the website assists owners and managers of SMEs with supplier, customer and employee relationships, and helps them to manage operational and financial challenges and navigate restructuring processes. Significantly, the platform provides businesses with legal guidance in corporate, employment and insolvency law – areas in which small companies have strong demand for expertise and information. The website also offers templates to help SMEs apply business concepts to their day-to-day operations. These range from templates for

² For more information on eligibility criteria, see www.ebrd.com/knowhow.

³ Marchese, M., et al. (2019), *Enhancing SME productivity: Policy highlights on the role of managerial skills, workforce skills and business linkages*, OECD SME and Entrepreneurship Papers, No. 16, OECD Publishing, Paris.

⁴ <https://www.ebrd.com/news/2021/ebrd-adopts-first-digital-approach.html>

⁵ The EBRD Know How Academy – a 30-country digital learning programme for SMEs, micro businesses and entrepreneurs – delivers a range of structured courses in crisis management around relevant topics, such as financing and managing customers, suppliers and staff.



business strategy development to a template of a standstill agreement to help firms in financial difficulty reach an agreement with their trade creditors while they look for a restructuring solution.

The businessguide.ebrd.com website also provides an entry point to dedicated country pages in local language for Georgia, Moldova and Ukraine. These country pages follow the structure of the general website and include a specific section detailing temporary emergency measures and support for businesses introduced by their respective governments in response to the pandemic, to help raise awareness.⁶ For example, the Georgian government provided fiscal support to individuals and businesses equal to GEL 1.86 billion (€521 million or 3.8 per cent of gross domestic product) in 2020 and to an expected GEL 1.25 billion (€349 million or 2.2 per cent of gross domestic product) in 2021. Similarly, in Moldova, the government implemented a comprehensive fiscal package for businesses and individuals, including deferral of tax payments and tax relief for sectors affected by state-imposed restrictions. In Ukraine, measures were even broader and included the cancellation of certain business-related taxes and penalties.

At a broader level, the businessguide.ebrd.com website provides free information and advice that is not otherwise readily available to SMEs across EBRD economies. The website draws inspiration from other government and country initiatives for SMEs. In Ireland, for example, support for SMEs is one of the pillars of the Department of Enterprise, Trade and Employment. On the Department's website, SMEs can find information on matters such as late payments, the new small companies administrative rescue process⁷ and government support – including a network of 30 local enterprise offices and a telephone information centre to support SMEs. In addition, the website www.businessregulation.ie centralises online information and advice about all regulations affecting business.

⁶ <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>

⁷ The Small Company Administrative Rescue Process was introduced pursuant to the Companies (Small Company Administrative Rescue Process and Miscellaneous Provisions) Act 2021 to provide a restructuring option to SMEs. This became officially available on 7 December 2021.

Australia adopts similarly supportive policies for SMEs at a regional level. The Queensland government website contains a number of tools for small businesses, including a “business health check”, and provides information on topics such as health and safety, finance and funding and supply chain support, as well as specific coronavirus-related programmes. Moreover, the government runs a helpline for smaller businesses, produces a monthly *Small Business Connect* newsletter and even organises a Queensland Small Business month. While this level of government support is not yet present in many of the emerging economies where the EBRD operates, the Bank’s businessguide.ebrd.com website seeks to fill part of the communication and information gap for SMEs.

In other countries, trade groups and associations play an active role in representing SME interests and sharing information with the SME community. For example, Canada has a privately operated national publication called *Canadian SME* as well as several organisations – such as membership association Canada SME and Canada Innovative SMEs Association – to support SMEs. The latter specialises in sectoral areas to drive Canada’s prosperity, such as artificial intelligence and information and communications technologies.

While countries such as Ukraine have a private association of entrepreneurs, most EBRD countries do not have the same level of coverage for the SME sector. Nevertheless, there is recognition among most national authorities



that websites and digital platforms should be part of any efficient and forward-looking communication strategy with the SME sector. This recognition is already turning into action in many countries: in Ukraine, there is a new Ministry for Digital Transformation. Among its many spheres of activity, the Ministry is responsible for a new SME advisory platform, the Diia.Business portal. In Moldova, meanwhile, there is a new Deputy Prime Minister for Digitalisation, responsible for overseeing implementation of the country’s digitalisation strategy.

Designed in consultation with the EBRD Small Business Initiative and the EBRD-supported Investment Council Secretariats, the Georgian, Moldovan and Ukrainian country pages of businessguide.ebrd.com seek to provide specific local legal, business and language advice relevant to SMEs, creating an information hub. The webpages also connect users to other online platforms with relevant local information, such as a support programme for agricultural SMEs administered by the Georgian government’s Rural Development Agency, as well as to the EBRD-supported Investment Councils. These councils serve as platforms for high-level public-private dialogue between the government and the private sector to identify and help resolve constraints to the countries’ business environments.⁸



⁸ In Ukraine, the Investment Council does not have an SME focus and therefore was not a partner organisation for the project.

Each Council Secretariat has its own website to promote the council's work, as well as a reciprocal link to the local-language businessguide.ebrd.com webpages. The secretariats' websites receive significant traffic from both government and private-sector visitors, so help raise awareness and direct businesses to the advice provided through businessguide.ebrd.com. In addition, the Secretariat in Moldova is working to launch a Virtual Business Community application (app) so government and private-sector representatives can obtain information and discuss reform initiatives in real time. This app will also be cross-linked to businessguide.ebrd.com. Promoted through these channels as well as social media and a series of EBRD webinars run in parallel to the launch of businessguide.ebrd.com, the dedicated country pages have already proven popular, with some 37,000 visitors to the Georgian site, 27,000 to Moldova and 23,000 to the Ukrainian site in the five months since their launch.⁹

Partnerships with other local organisations have also been established through the development of businessguide.ebrd.com. Logo sharing and cross-referencing of businessguide.ebrd.com with the websites of Enterprise Georgia and the Rural Development Agency in Georgia, the Organisation for the Development of the SME Sector (ODIMM) and the Ministry of Economy in Moldova, and the Ministry of Digital Transformation and Diia. Businesses in Ukraine have helped integrate our offer into the local market. These collaborations have also reaffirmed our understanding at the outset of the project: government authorities need assistance to better support the SME community, and legal advice to SMEs is an important part of this. As a Moldovan Ministry of Economy representative confirmed at our launch event last September, the website helps businesses to keep abreast of the many legal changes affecting the business community.

“THE WEBSITE HELPS BUSINESSES TO KEEP ABREAST OF THE MANY LEGAL CHANGES AFFECTING THE BUSINESS COMMUNITY.”

So what are our next steps for the businessguide.ebrd.com website? At the beginning of 2022, we secured funding to maintain the website and host a legal-focused webinar programme for two more years. In addition, as part of our new strategy for 2022-23, we are planning to produce a quarterly newsletter for distribution through businessguide.ebrd.com and EBRD's Small Business Initiative networks, in partnership with the EBRD-supported Investment Councils and other local organisations.

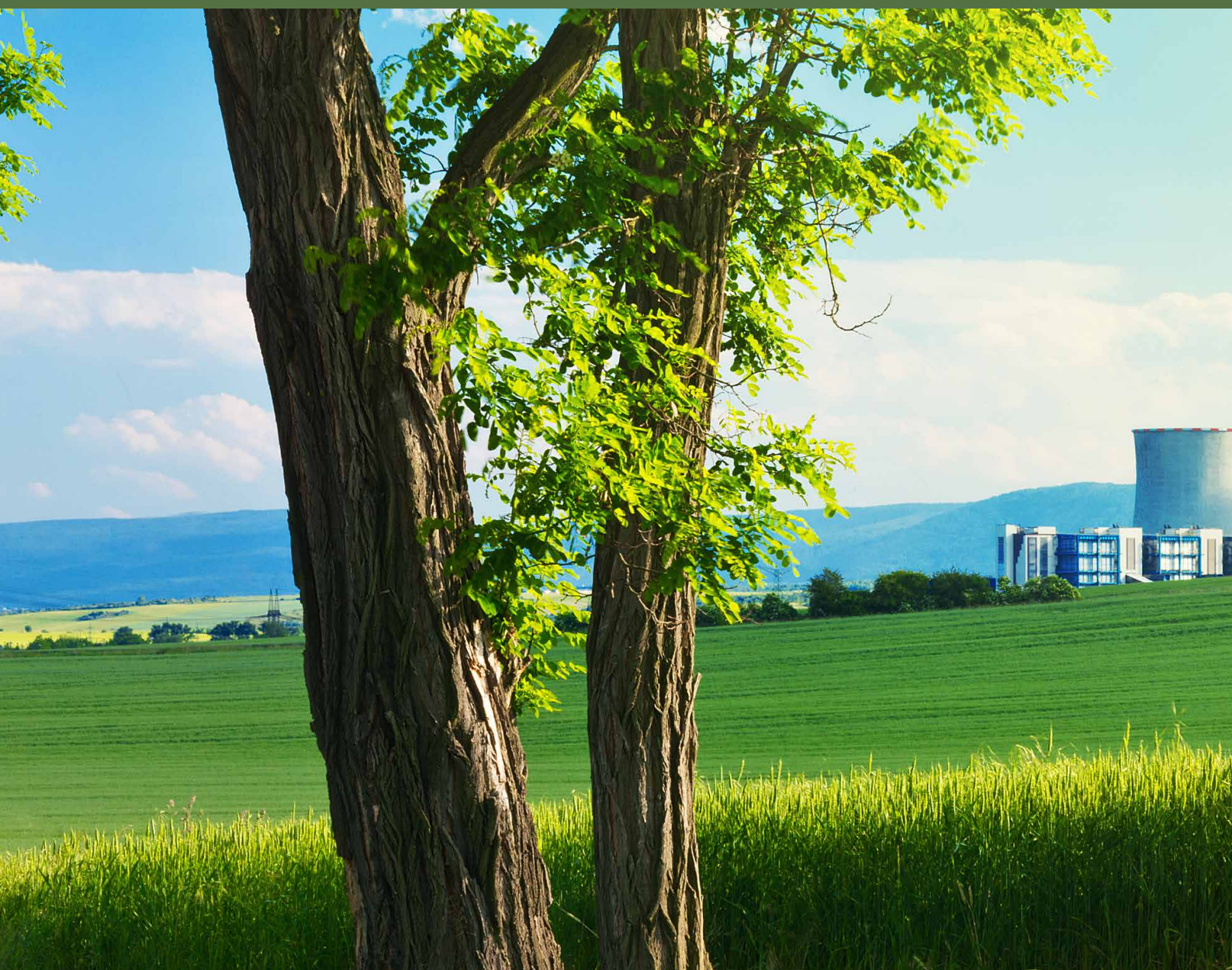
Ultimately, we hope to identify a government or other local private-sector champion to continue our work and to help strengthen communications on important business and legal issues with the SME sector. A successful approach will likely require a combination of public support with private-sector expertise.

⁹ As of February 2022. Since the date of this article we have expanded the website further to provide targeted advice to Ukrainian businesses that have been impacted by the war with Russia.





GREEN TRANSITION



“Facing dramatic global challenges, we need a global capacity to address them that reaffirms the importance of multilateralism and the importance of a rules-based set of international relations, based on the rule of law and in accordance with the UN Charter.”

UN SECRETARY GENERAL ANTÓNIO GUTERRES





THE EBRD'S CLIMATE AND SUSTAINABILITY AGENDA: THE ROLE OF LAW AND LAWYERS IN DELIVERING ON THE PARIS AGENDA





INTRODUCTION: THE INTERNATIONAL CLIMATE CHANGE REGIME

Climate change poses a grave and widespread threat to human health and well-being. The last decade witnessed the devastating impacts of a fast-changing climate. Yet matters are set to get much worse: infrastructure, economic development, food security, migration and trade flows are all further threatened under current projections. The scale and the scope of the crisis demand urgent and appropriate responses across a daunting array of fields and professions, from policymakers and the financial community to top scientists and civil society leaders. This article reviews the key aspects of the EBRD's green and sustainability agenda to address the crisis, then examines what lawyers can and must do to help achieve the Paris goals.

“AVERTING THE WORST POSSIBLE CATASTROPHES CAUSED BY CLIMATE CHANGE WILL REQUIRE NO LESS THAN A LARGE-SCALE TRANSFORMATION OF BOTH ECONOMY AND SOCIETY.”

The landmark 2015 Paris Agreement on climate change – joined by 193 Parties – sets a suitably ambitious goal of keeping the increase in global temperature to “well below 2°C” above preindustrial levels and pursuing efforts to limit the increase to 1.5°C. Six years on, the world is projected to warm by about 2.7°C^o on average based on national policies now in place.² Scientists have warned that crossing the 1.5°C threshold risks unleashing far more severe climate change effects on people, wildlife and ecosystems. The increased country ambition reflected in binding long-term targets, and especially the net-zero targets of large emitters (that is, the United States and China) signed in



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¹ The authors would like to thank Vesselina Haralampieva, Senior Counsel, EBRD, for her invaluable assistance in the drafting of this article.

² See Climate Action Tracker Glasgow's 2030 Credibility Gap: Net Zero's Lip Service to Climate Action (9 November 2021) at <https://climateactiontracker.org/publications/glasgows-2030-credibility-gap-net-zeros-lip-service-to-climate-action/>

2021, have led to more optimistic projections (around 2.1°C global warming) that nonetheless still entail unpredictable and unprecedented disruption to societies across the globe.³

Insufficient progress on mitigation was at the core of negotiations at the meeting of the parties to the Paris Agreement (COP26) in Glasgow last year. COP26 concluded with countries' commitment to increase ambition and, in particular, to review annually their progress towards the interim 2030 targets. Nevertheless, the scale of the challenge and the multiple competing public policy demands, notably the unpredictable imperatives of responding to a war of aggression in Europe, heighten the risk that the Paris agenda will be stalled.

Averting the worst possible catastrophes caused by climate change will require no less than a large-scale transformation of both economy and society. Financial markets and institutional investors are increasingly shifting towards sustainable investments: over US\$ 500 billion flowed into environmental, social and governance (ESG)-integrated funds last year.⁴ With such a transformation under way, policy and regulatory responses are inevitable to prepare markets for better management of climate-related risks and ensure their stability. With this trend sweeping rapidly across every type of economy and every geography on the globe, it still remains to be seen if the climate transition envisaged by the Paris Agreement – and required for the health and safety of the planet – will remain orderly or spin into chaotic disorganisation.

As lawyers and policymakers at the heart of the EBRD's investment and policy engagement in sustainable finance, we take on two challenges in this paper. First, we look carefully at the Bank's green agenda and how it fits in the legal and regulatory landscape that would impose some degree of order and allocate formal responsibility on key parties. Next, we explore the essential and unique contribution of law and lawyers, as key professionals in an "all-hands-on-deck" effort, to achieve the Paris goals within the timeframe necessary to prevent the worst catastrophe.

THE GREEN AND SUSTAINABILITY AGENDA OF THE BANK

Sustainable development and environmentally sound investment are intrinsic to the EBRD's mandate and incorporated in its founding agreement of 1991. This commitment is restated in EBRD sector and country strategies and integrated in all projects that the Bank finances through the environmental and social requirements set out in our Environmental and Social Policy. Most importantly, it is embedded in our transition mandate. The Bank's mandate is to "foster the transition towards open market-oriented economies". Addressing climate change, famously described by a former Chief Economist of the Bank, Lord Nicholas Stern, as "the greatest market failure the world has seen", is fundamental to this agenda.

“ADDRESSING CLIMATE CHANGE IS AT THE CORE OF THE BANK'S STRATEGIC AND CAPITAL FRAMEWORK FOR 2021-2025.”

Emerging economies and developing countries are particularly vulnerable to climate change. We saw the devastating impacts of wildfires in Turkey, Greece and Bulgaria last summer, as well as flooding in Central Europe and droughts in Central Asia and North Africa. The costs of these events can be measured in lost lives and livelihoods, lost homes, lost businesses and billions of euros in emergency services and disaster relief. At the same time, the countries in the EBRD regions are among the most energy-intensive economies in the world and often lack capacity, technical knowledge, policy and legal frameworks to support the transition to net zero.

Addressing climate change is at the core of the Bank's Strategic and Capital Framework for 2021-2025. "Supporting the transition to a green, low carbon economy" is one of its three strategic

³ Ibid.

⁴ See ESG Outlook 2022: The Future of ESG Investing (1 February 2022) at <https://am.jpmorgan.com/gb/en/asset-management/liq/investment-themes/sustainable-investing/future-of-esg-investing/>



themes, alongside inclusion and digital. This orientation builds on a long tradition in the Bank that began with the adoption of the Sustainable Energy Initiative in 2006. The EBRD's efforts in this area have two pillars:

- A target of ensuring that green finance represents at least 50 per cent of the Bank's annual investments by 2025.
- A commitment, adopted formally by the Bank's shareholders in summer 2021, to align all EBRD operations with the goals of the Paris Agreement by 1 January 2023.

The Bank, in fact, reached the first target four years early, with green finance representing 51 per cent of commitments in 2021. This reflects the comprehensive mainstreaming of green thinking throughout the business cycle. However, the commitment to Paris alignment represents an even more fundamental reshaping of the Bank's operations to align every aspect with the long-term goal of fostering a low-carbon transition. This, of course, begins with a close assessment of every Bank investment. To this end the EBRD has developed and published detailed methodologies to underpin this assessment. But it extends to cover the Bank's own operations and its funding

approach. Perhaps most importantly, Paris alignment includes broad-ranging support for the Bank's regions and clients in designing their own pathways to a net-zero endpoint.

The EBRD's green financing approach is anchored to its client-driven and private-sector business model and in line with its operating principles of transition impact, sound banking and additionality. Addressing market failures in this area, rooted most fundamentally in the lack of pricing greenhouse gas externalities, our policy work will have an important role alongside the Bank's financing activity.

SUPPORTING THE GREEN AGENDA THROUGH INVESTMENT AND POLICY DIALOGUE: IMPLICATIONS OF COP26 FOR THE EBRD

COP26 catalysed a significant increase in climate ambition across governments and businesses. Beyond the commitments made before and during COP26, the Glasgow Climate Pact codified the conclusions of the meeting, including a crucial commitment from countries to update the nationally determined contributions (NDCs) and prepare long-term strategies in 2022. These

documents form the vital architecture of a low-carbon transition, setting the direction and speed of travel. They must be clear, detailed and credible enough that investors can respond, and they have to capture the level of ambition needed to meet the Paris Agreement temperature goals. Collectively, however, the updated NDCs and the new pledges leave a 15 per cent to 20 per cent gap between the current emissions trajectory and the trajectory required to meet the Paris goal of limiting the global temperature increase to 1.5°C.

Responding to this, the EBRD has sharpened its focus on policy instruments supporting the climate transition, including by enhancing cooperation on countries' updated NDCs, helping develop long-term strategies and other low-carbon and climate-resilient pathways at sector and subnational levels. For example, the Bank is supporting the development of a low-carbon pathway for the power sector in Uzbekistan, a low-carbon pathway for the steel sector in Turkey and the development of a green hydrogen strategy in Egypt. This work is not obviously connected to the investments and loans that are the "bread and butter" of a development bank's work, but in fact they are inextricably linked. The policy dialogue creates the enabling environment for green investments; the understanding of investor needs informs the policy dialogue.

This work to help countries recalibrate their economies to incentivise low-carbon investments is vital because it addresses the critical constraint holding back those investments. There is sufficient capital and financing available for the net-zero transition, especially for clean energy and carbon-reducing projects. One of the highlights of COP26 was the announcement by the Global Financial Alliance for Net Zero (GFANZ) of more than US\$ 130 trillion of capital committed to adopting high-ambition, science-based targets, including achieving net-zero emissions by 2050.⁵ A growing number of low-carbon technologies have reached the level of maturity where they are capable of being rapidly scaled, making them increasingly cost-competitive. However, there are insufficient commercially robust projects coming to market

at the speed needed for those funds to be used and, importantly, at the speed required to reduce emissions. This challenge motivates the broad range of policy engagement that the EBRD carries out in this area.

“THE EBRD AIMS TO SCALE UP INVESTMENT IN RENEWABLES AND FINANCE SMART, INTEGRATED AND RESILIENT NETWORKS AND REGIONALLY INTEGRATED MARKETS.”

In addition to the United Nations Framework Convention on Climate Change (UNFCCC) negotiations and the outcomes captured in the Glasgow Climate Pact, COP26 also prompted the adoption of various initiatives that won wide support, but not the consensus required of a formal UNFCCC conclusion. These spanned a very wide range of issues, from protecting Congo Basin forests to phasing out internal combustion engine vehicles. One of the major commitments by the parties was a move away from coal and a redirection of funds to cleaner energy, also reflected in the carefully crafted wording in the Glasgow Climate Pact, committing to a “phase down” of coal consumption. This aligns well with the EBRD's longstanding work to accelerate the development of alternative energy solutions in its regions by supporting energy sector reform, investing in new technologies and mobilising private-sector capital. Decarbonisation and integration of energy systems are at the heart of the EBRD's 2019-2023 energy strategy. Back in 2018 the Bank decisively shifted away from the most polluting fuels by closing the door on thermal coal mining or coal-fired electricity generation. In 2021 the Bank also concluded that it would not invest in upstream oil and gas exploration or production. Instead, the EBRD aims to scale up investment in renewables and finance smart, integrated and resilient networks and regionally integrated markets. It is also increasingly

⁵ Its 450 members represent an astonishing 40 per cent of the world's financial assets under management. They will all now work to meet global net zero by 2050.

focused on the newer technologies that will be fundamental to deep energy decarbonisation, in particular energy storage, e-mobility and green hydrogen.

The energy transition is not only about investment in zero-carbon infrastructure; the world relies on hydrocarbons for 80 per cent of its energy needs. That is reflected in the existing infrastructure, and a critical challenge in the coming years is to engage with that infrastructure, to reduce its emissions and to transform it to a low-carbon mode. The EBRD accordingly remains engaged with the high-emitting sectors. It was the first multilateral development bank (MDB) at COP26 to sign the Global Methane Pledge, a commitment now made by more than 100 countries to reduce their collective methane emissions by 30 per cent by 2030.⁶ Methane abatement is a key focus area for the coming years because it is typically low cost and can generate revenue by avoiding losses. Furthermore, methane emissions are high impact, with a global warming potential 27 to 80 times that of carbon dioxide, depending on the timeframe assessed.

“THE EBRD ALSO ANNOUNCED AT COP26 A GOAL OF DOUBLING ITS PRIVATE-SECTOR CLIMATE MOBILISATION BY 2025.”

COP26 also placed considerable scrutiny on climate finance as one of the main pillars of the international climate change regime. A central plank in that regime is the commitment made in the 2009 Copenhagen Accord to mobilise US\$ 100 billion of climate finance by 2020 for developing nations. The Glasgow Climate Pact acknowledged “with deep regret” that developed countries had not met that goal and would be unlikely to do so before 2023. It reaffirmed the commitment of developed countries to this goal, however.

MDBs play an important role in delivering this goal, but clearly their own resources are insufficient. While MDBs’ climate finance from their own resources exceeded US\$ 63 billion in 2020,⁷ little of that finance is provided in developing countries.

Accordingly, to reach the investment needs required and to contribute to the US\$ 100 billion goal, all MDBs strongly emphasise mobilising other sources of climate finance. These efforts focus especially on the private sector, which has, as the GFANZ declaration highlighted, huge volumes of capital available for this agenda, at least in principle. Beyond just the money, the private sector also brings innovation, diversity and operational resources; the dramatic fall in renewable costs over the last decade demonstrates vividly how effective those characteristics can be.

This mobilisation is a priority for the EBRD, given its primarily private sector-oriented mandate. In 2020 the Bank mobilised US\$ 1.80 of private climate co-financing for every dollar of its own climate finance committed, compared to US\$ 0.50 among MDBs as a whole.⁸ Consistent with that priority, the EBRD also announced at COP26 a goal of doubling its private-sector climate mobilisation by 2025.

The importance of the private sector and the business community in transition towards a low-carbon, climate-resilient economy was highlighted repeatedly at COP26, making it by all accounts the conference of the parties with the strongest business participation ever. There is now broad recognition that climate change is a systemic source of both risks and opportunities for businesses, and that companies must strengthen their corporate climate governance to adjust to this shifting market context. Yet most companies in emerging markets have little visibility on what their climate risk exposure might be. We see this in the gulf between levels of governance and disclosure of climate-related risks and opportunities in developed and emerging markets.⁹

⁶ Global Methane Pledge at <https://www.globalmethanepledge.org/>

⁷ Joint Report on Multilateral Development Banks’ Climate Finance 2020 at <https://www.ebrd.com/2020-joint-report-on-mdb-climate-finance>

⁸ Ibid.

⁹ The gap is visible in a recent EBRD study of banks where only 43 per cent of chief risk officers of companies in the region consider the climate impacts of their portfolios as a potential source of risk compared to 91 per cent of respondents from leading global banks. See <https://www.ebrd.com/news/2021/support-is-key-to-helping-ebrd-partner-financial-institutions-deal-with-climate-risk-survey-shows-.html>

The EBRD has accordingly extended support to its clients to develop and enhance their corporate climate governance consistent with the recommendations of the Task Force for Climate-related Financial Disclosures. As a mainly private-sector bank, our strength is to engage with businesses and help them adopt better corporate practices by assessing, managing and disclosing information about climate-related risks and opportunities. As companies integrate these actions into their risk management and business strategies, they become part of the market shift towards low-carbon and resilient economies.

The final piece of the framework refocusing private capital on the climate challenge relates to standards. Institutional investors are increasingly looking to finance green and sustainable products.¹⁰ Climate-related reporting of large financial institutions and companies is gradually being mandated in law and regulations at a national level,¹¹ with some jurisdictions requiring the integration of climate and ESG reporting and financial reporting.¹² Therefore, there is growing demand for a more quantifiable and comparable measure of emissions and environmental impact, especially for greater simplicity and credibility in the fast-growing plethora of green standards, initiatives, institutions and principles. The new standard-setting institution established by the International Financial Reporting Standards Foundation and announced at COP26 – the International Sustainability Standards Board – will contribute to the long-awaited harmonisation of standards with direct impact on companies and investors.

“LAW IS FUNDAMENTAL FOR TACKLING CLIMATE CHANGE EFFECTIVELY.”

THE ROLE OF LAW IN DELIVERING ON THE CLIMATE AGENDA

Tackling climate change is in many ways a matter of justice. The impacts of climate change are pervasive and raise many scientific, political, economic and financial questions as well as questions about equity and responsibility; and, of course, each of these areas has a direct nexus with the law. Climate change threatens the effective enjoyment of a range of human rights, including those to life, water and sanitation, food, health, housing, self-determination, culture and development. As one of the largest investors in the EBRD regions, the Bank has committed to ensure that no one is left behind while we transition away from fossil fuels into a more sustainable and cleaner world. Such a “just transition” is one where the benefits of a green economy are shared, while support is also provided to those that stand to lose economically from the transition – be they countries, regions, industries, communities, workers or consumers. To unlock opportunities for climate finance and to ensure a “just transition”, we need enabling, sound and transparent legal frameworks and policy development.

Law is fundamental for tackling climate change effectively. Legal acts underpin policy commitments and targets, turning them into binding obligations and setting out the institutional framework to support the policy objectives. Climate laws also produce an enabling environment for private-sector investments, creating legal certainty and business opportunities. A national climate framework law, for example, mandates a country to cut its carbon emissions to net zero by a certain date (ideally no later than 2050) and ensures oversight and accountability. A strong and enforceable climate law also has interim targets to ensure this mark is reached and obliges the government to develop a roadmap to achieve the targets.

To drive action on the crisis, laws need to change at many levels, and they must be clear, participatory and inclusive. We need to strengthen and update laws relevant to all sectors (for instance, energy, land use and planning, transport) to take account of urgent climate objectives and obligations. Sectorial laws, in particular, set clear targets for specific industries, create a level playing field for investors and

¹⁰ See article “Beyond the hype: Delivering impact through sustainability reporting” in this journal.

¹¹ For example, the United Kingdom will require all financial services firms to publish their net-zero plans by 2023.

¹² The European Union sustainable finance package will likely require the integration of financial and non-financial reporting.



regulate new relationships in areas pushed forward by the pace of the energy and climate transition (for example, offshore wind laws). At the EBRD, we support national authorities and policymakers as they develop and implement innovative legal instruments and institutional capacities to attract and absorb financial flows while ensuring an equitable sharing of the benefits for the community.

For example, we have supported national authorities in Eastern Europe, the Caucasus, Central Asia and North Africa to introduce modern legal and regulatory practices in the energy sector. This includes reviewing and updating energy sector legislation, strengthening the institutional capacity of regulators, building market interconnections and opening up transparent and competitive markets for renewable energy. The new national legal and regulatory frameworks that the EBRD has supported have been instrumental to unlocking opportunities for major private-sector solar developments in North Africa, the Western Balkans and Central Asia, among other regions.

Finally, but importantly, countries need to invest in environmental rule of law to reduce and prevent pollution, establish dispute resolution mechanisms

in case of violation and ensure the enforcement of sanctions. Many countries also recognise the mutually reinforcing relationship between human rights law and the environment,¹³ which provides a more robust and enforceable legal protection regime for disadvantaged communities. And as this last point implies, the judiciary has an essential role in tackling climate change; the tidal wave of climate-related litigation is swelling.¹⁴ The Bank has a long-standing tradition of supporting lawyers, the legal profession and the judiciary in the economies where we invest, so it is only natural for the EBRD to help lawyers navigate the increased complexities caused by the impacts of climate change.

¹³ Many countries have established the right to a healthy environment in their domestic legal frameworks. Internationally, the UN Human Rights Council recognised the human right to a clean, healthy and sustainable environment, see <https://www.unep.org/news-and-stories/story/landmark-un-resolution-confirms-healthy-environment-human-right>

¹⁴ Interest in climate litigation is increasing, reflecting a growing perception that courts can be a forum for progressing climate justice and can offer a focal point for bringing concerned citizens together. A growing body of constitutional law and human rights cases now seeks to achieve climate justice for all claimants.

HOW LAWYERS CAN PAVE THE WAY TO NET ZERO

It is tempting to feel helpless in the face of the immensity of the climate change challenge, but as lawyers, we have both the capacity – some even argue a duty – to act and contribute.

At the EBRD, our in-house lawyers ensure that sustainability is embedded within our strategic documents and integrated into our broader business operations and our policy dialogue. Our legal support ranges from advising on financing agreements with donors and climate funds to project structuring, institutional support and policy and regulatory advice. We prepare the legal structures and agreements supporting mitigation and adaptation investments and advise when the Bank subscribes to green bonds or sustainability-linked bonds issued by clients in the region.¹⁵

In addition, we advise our Treasury department on the issuance of new products aimed at supporting the low-carbon and resilient agenda of the Bank, such as the EBRD's Green Bonds,¹⁶ which are aligned with the International Capital Market Association's Green Bond Principles. The Bank has issued sustainability bonds and the world's first dedicated climate resilience bond¹⁷ as part of efforts to green our portfolio.

Lawyers also provide critical input to the Bank's policy framework on sustainability, which includes three key policies that ensure the EBRD meets the highest standards: the Environmental and Social Policy, the Access to Information Policy and the Project Accountability Policy. In addition, EBRD lawyers provide support and guidance to economies where we operate in implementing policy, law and governance reforms to build climate resilience and reduce carbon emissions.

The legal profession more broadly will play a leading role in maintaining and strengthening the rule of law and supporting transparency and responsible governance for delivering on the

sustainability goals. As companies seek to attract new capital by publishing their ESG or climate reports, in particular, separating the wheat from the chaff can be complex. Understandable concerns about greenwashing¹⁸ are growing and scrutiny of companies' green claims on a whole range of products is intensifying. And as climate liability is on the rise, lawyers must consider climate-related risks in advising their clients.¹⁹ Finally, in company law, the changing nature of directors' duties pressures executives and their legal advisers to consider the impact of a firm's business on the community and the environment, in addition to the material climate and ESG risks the company faces.

As we engage with our clients, we have seen the expanding role of in-house lawyers as drivers of change in organisations by advising on innovative project structures and demanding climate-conscious provisions in legal agreements and standard contracts (for suppliers or service providers, for example). The general counsel in particular should be a trusted adviser to the board on matters related to good governance, reputation and integrity in the context of ESG and climate-related reporting. As climate and sustainability regulation become more stringent, lawyers will expect to play a more important role in aligning the sustainability strategy with the regulatory environment, highlighting potential current and future risks. Aligning and balancing business and sustainability strategies must become part of the in-house lawyers' repertoire to manage and enhance the ESG portfolio.

¹⁵ See <https://www.ebrd.com/news/2021/ebrd-invests-in-ppcs-followup-sustainabilitylinked-bond-issue-in-greece.html>

¹⁶ See <https://www.ebrd.com/work-with-us/sri/green-bond-issuance.html>

¹⁷ See <https://www.ebrd.com/sites/Satellite?c=Content&cid=1395285042643&d=Touch&pagename=EBRD%2FContent%2FContentLayout>

¹⁸ A new High-level Expert Group was established on 31 March 2022 to police the net-zero commitments of non-state entities and weed out so-called greenwashing; it will report directly to the UN Secretary-General. See <https://www.un.org/en/climatechange/high-level-expert-group>

¹⁹ Many professional bodies believe that consideration of climate-related risks is increasingly necessary as part of the legal due diligence process, especially in high-risk sectors (energy, mining, transport) and areas of law (conveyancing).



CONCLUSION

Responding to the climate crisis is one of, if not the, greatest geopolitical challenges of the coming decades. We already observe the impacts across all countries of a 1°C temperature increase. We have emitted enough greenhouse gases that a further increase, and thus further impact, is inevitable. A failure to hold that increase to the goals set out in the Paris Agreement risks impacts of ever-worsening scale and nature.

We know what needs to be done to reach the Paris Agreement goals, to avoid those impacts, to preserve the benefits of modern developed economies and to spread those benefits globally: a global economy that relies overwhelmingly on hydrocarbons must be rebuilt with infrastructure and systems that run on clean energy. More than ever before, we know not just what has to be done, but how it can be done. The pathways to reduce emissions to zero by 2050 are uncertain, but the pathway to halve emissions by 2030 is clear, feasible and affordable: reduce energy intensity,

electrify road transport, progressively electrify heating and industry, shift electricity generation to wind, solar and other renewables, conveyed on a smart network with growing quantities of storage, and start the process of decarbonising aviation, shipping and heavy industry.

The climate crisis is at heart a human crisis. The impacts of climate change are not book entries, but lost opportunities, displaced communities, degraded biomes, drought, hunger, poverty and all the ills that flow from these. Addressing such a complex, pervasive challenge requires a set of rules and a belief in the value and credibility of a rules-based system. Lawyers believe in the rule of law as an essential prerequisite for a just and fair society delivering better outcomes for all. That same aspiration sits at the core of a development bank's mandate. In addressing a challenge that is multifaceted, global and multigenerational, lawyers from all paths of the profession have an essential role to play.





BEYOND THE HYPE: DELIVERING IMPACT THROUGH SUSTAINABILITY REPORTING





INTRODUCTION

Sustainability is on the agenda of most corporate boards today. Many companies take steps to embed sustainability in their strategy, operational systems and decision-making process. Globally, public demand for business transparency in respect of environmental, social and governance (ESG) issues has driven the rise of ESG reporting among companies across all sectors. In many instances, ESG reports are prepared in response to impending market regulation, investors' requirements and peer pressure.

“GLOBALLY, PUBLIC DEMAND FOR BUSINESS TRANSPARENCY IN RESPECT OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG) ISSUES HAS DRIVEN THE RISE OF ESG REPORTING AMONG COMPANIES ACROSS ALL SECTORS.”

In a changing world, a company's ability to assess and mitigate risks related to climate change, human rights, biodiversity loss and supply chains will become a core part of an investor's decision-making process, thus informing capital allocation. At the same time, ESG reporting faces problems associated with inconsistent metrics, unreliable ESG ratings and lack of independent verification. This article discusses the importance of bringing together corporate and market action, government and regulatory pressure, and the vigil of the public's eye to ensure the delivery of the sustainability goals at a company and at national and global levels.

ESG AT A CROSSROADS

ESG, a concept prevalent in the investment community, can be defined as a broad set of environmental, social and corporate governance considerations “that may impact a company's ability to execute its business strategy and create



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value over the long term”.² In practice, ESG reflects the view that managing environmental and social topics is a governance issue for companies, a “proxy for the quality of their management teams”.³

The process of identifying, assessing, managing and reporting on ESG matters shifts the focus from short-term gains to long-term successful performance. Over the past few years, companies have experienced growing demand from investors, governments and civil society to disclose how they assess and tackle climate- and sustainability-related business risks. As a result of this call for disclosure, companies are providing more information about their ESG practices than ever before.

As an illustration, the proportion of S&P 500 companies that published a sustainability report rose to 92 per cent in 2020 from 20 per cent in 2011.⁴ This trend demonstrates that the business community is responding to the demand for transparency around ESG factors. The growing sophistication of such reports underpins the understanding that effective ESG integration is vital for risk management and identification of new business opportunities as countries move towards net-zero economies.

While investors increasingly rely on such disclosures to measure the sustainability of their portfolio, the growing number of disparate ESG reporting standards and frameworks continues to stir uncertainty about the accuracy and comparability of ESG data. Companies are often confused by how best to report on ESG progress in a credible way and avoid being accused of “greenwashing” or “greenwishing”.⁵ This ambiguity has defied the key pillars of reporting, which aim to provide coherent, comparable and useful non-financial information to investors and other stakeholders. With at least 34 regulatory bodies and standard setters in 12 markets undertaking official consultations on ESG in 2021 alone,⁶ there is no globally accepted set of standards.

Due to this lack of uniformity, many companies choose ESG metrics that are easily measured and consistent with their own aspirations and short-term growth trajectory. Accordingly, even though a growing number of businesses publish ESG reports, the contribution of their sustainability activities in averting the global climate crisis remains unclear. Some sustainability leaders and academics have lamented that reporting alone does not ensure environmental and social improvement and has become a means on its own.⁷ Effectively, studies show that individual corporate action alone, although important, is not sufficient to deliver on the global Sustainable Development Goals (SDGs) or allow business to grow within the boundaries of our finite planetary ecosystems.⁸

It is therefore important to distinguish between the concepts of ESG reporting and sustainability. ESG reporting is based on quantifiable metrics that aim to provide data to investors on how companies address non-financial issues in their operations (such as regard of human rights and carbon emissions) and how they manage ESG risks. A company’s ESG report is important to inform investors’ decision-making and redirect the flow of capital towards more sustainable business models.

Sustainability builds on this, but goes further by balancing a company’s ESG performance and its impact measured against internationally recognised standards, frameworks and best practices. This effectively goes deeper to the core of double-materiality, which is embedded in the

² See NASDAQ (2019), *ESG Reporting Guide*, New York (available at: <https://www.nasdaq.com/ESG-Guide>).

³ See World Travel and Tourism Council (2017), *Background on Sustainability Reporting*, London.

⁴ See Governance & Accountability Institute (2021), *2021 Sustainability in Focus*, New York (available at: <https://www.gai-institute.com/2021-sustainability-reporting-in-focus.html>).

⁵ D. Austin (2019), “Greenwish: The Wishful Thinking Undermining the Ambition of Sustainable Business” (available at: <https://preventablesurprises.com/wp-content/uploads/2019/07/2019-07-19-Greenwish-Essay.pdf>).

⁶ For example, such initiatives have been undertaken by Canada, Chile, China, the European Union, Hong Kong, India, Malaysia, New Zealand, Singapore, Thailand, the United Kingdom and the United States of America. Global ESG standard-setters include the Bank for International Settlements, the International Financial Reporting Standards Foundation, the International Organization of Securities Commissions, the Sustainability Accounting Standards Board and the Task Force on Climate-related Financial Disclosures, among others.

⁷ There is no clear correlation proving that a company with high ESG ratings delivers on the SDGs or has a measurable impact on tackling global problems. See K.P. Pucker (2021), “Overselling Sustainability Reporting”, *Harvard Business Review*, May-June 2021 (available at: <https://hbr.org/2021/05/overselling-sustainability-reporting>).

⁸ See D.H. Meadows, D.L. Meadows, J. Randers and W.W. Behrens (1972), *The Limits to Growth: A Report to the Club of Rome*, Washington, DC: Potomac Associates (available at: <https://www.clubofrome.org/publication/the-limits-to-growth/>).



European Union's (EU) sustainable finance package. The double-materiality principle recognises that a company should report on sustainability matters that are both material to its *business* and to the *market, the environment and society*. Sustainability has to be specific to individual sectors and companies and should be closely embedded in the company's strategy.

Sustainability frameworks are intrinsically linked to the concept of sustainable development.⁹ To translate sustainability into practical solutions on the business level, we have mainstreamed it through ESG criteria. At the same time, ESG information on a company can prove abstract unless there is a robust policy framework, meaningful targets and a direction of travel. ESG reporting should rely on consistent, comparable and systematic standards and show progress towards clear corporate commitments. To ensure impact beyond individual companies, we need to draw on concepts such as science-based targets, nature-based solutions and net-zero pathways and secure broader engagement. The mobilisation of actors and solutions will provide the much-needed data, tools, independent verification, pressure and sanctions.

“IT IS IMPORTANT TO BRING TOGETHER CORPORATE AND MARKET ACTION, GOVERNMENT AND REGULATORY PRESSURE, AND THE VIGIL OF THE PUBLIC'S EYE TO ENSURE THE DELIVERY OF THE SUSTAINABILITY GOALS AT A COMPANY AND AT NATIONAL AND GLOBAL LEVELS.”

⁹ The 1987 Brundtland Commission, the 1992 Rio Earth Summit, the Rio Summit of 2012, the SDGs, the 2015 Paris Agreement, UNFCCC COP26 and other initiatives, fora and frameworks have driven the sustainable development agenda.

TOWARDS GREATER HARMONISATION AND REGULATION

The 2018 International Panel on Climate Change (IPCC) report warned that the carbon budget on our planet is running out. We are living in a critical decade when we can witness the devastation to communities and economies that climate change brings, while we still have limited time to avert the worst possible impacts. The February 2022 IPCC report has laid bare the urgent need to reduce global emissions and invest in adaptation measures to the physical impacts of a warming planet. Climate change, pollution and unsustainable business practices are taking a toll on the natural capital, contributing to a biodiversity loss that further accelerates climate change.

Since the Paris Agreement was signed, public support for an ambitious climate agenda has soared. The commitment to deliver on the climate goals has catalysed significant efforts among central and local governments, financial and business communities, and in civil society and professional organisations. This has driven the whole sustainability agenda as demand for measurable results has grown.

The role of governments and regulators in addressing market failures, pricing carbon and natural resources adequately, and requiring

corporate transparency is essential to provide the necessary steer to corporate behaviour. Transparency rules and strict greenwashing regulations will help channel finance into sustainable activities.

Leading the way, the European Commission (EC) adopted an Action Plan on Sustainable Finance in March 2018, followed by a strategy in April 2021.¹⁰ This strategy laid out an ambitious and comprehensive package of measures to help improve the flow of money towards sustainable activities across the EU. This set of measures, which will be instrumental in making Europe climate neutral by 2050, consists of:

1) a disclosure framework for sustainability-related information, 2) investment tools, including benchmarks, standards and labels and 3) a classification system or “taxonomy” of sustainable activities.

The EU package therefore comprises several acts. These include a new Sustainable Finance Disclosure Regulation¹¹ that defines the rules and principles for sustainable finance for financial market participants and financial advisers. This framework will be supported by the taxonomy, a green bonds regulation and sustainability risk requirements by financial regulators.

Furthermore, the EC has proposed a new Corporate Sustainability Reporting Directive (CSRD)¹² that amends the Non-Financial Reporting Directive¹³ currently in force. The CSRD is built on the premise that ESG issues may have material impacts on an organisation, cements the double-materiality principle, changes reporting from voluntary to mandatory and subjects reporting to verification.

Under the proposal, the EC plans to extend the scope of reporting obligations to all large companies with more than 250 employees and all firms – including non-EU businesses – with securities listed on EU-regulated markets (except listed micro companies). This significantly increases the number of entities that will need to report in the EU from 11,000 under the Non-Financial Reporting Directive to almost 50,000 under the CSRD. In addition, the EC proposal for a directive on corporate sustainability due diligence¹⁴ would require businesses to audit their supply chains for adverse human rights and environmental impacts by implementing risk-based, robust and effective supply chain due diligence practices. The package of regulations

¹⁰ See European Commission (2021), *Strategy for financing the transition to a sustainable economy*, Brussels (available at: https://ec.europa.eu/info/publications/210706-sustainable-finance-strategy_en).

¹¹ See European Union (2019), *Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector*, Brussels (available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019R2088>).

¹² See European Commission (2021), *Proposal for a directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting*, Brussels (available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0189>).

¹³ See European Union (2014), *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups*, Brussels (available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095>).

¹⁴ See European Commission (2022), *Proposal for a Directive on corporate sustainability due diligence and annex*, Brussels (available at: https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en).

would require consistent sustainability reporting and responsible corporate behaviour of large companies and throughout their value chains.

The European Financial Reporting Advisory Group (EFRAG) is developing detailed sustainability reporting standards that will be issued as delegated acts.¹⁵ EU sustainability standards will closely follow Global Reporting Initiative requirements and will make mandatory reporting a very powerful benchmark to be used by investors and analysts.¹⁶

Overall, these measures form part of a broader suite of ESG initiatives to channel investments to environmentally and socially beneficial activities, far beyond the geographical boundary of the EU. Such initiatives aim at facilitating businesses' alignment with both Paris Agreement climate targets and the United Nations 2030 Agenda for Sustainable Development.

Further convergence of existing standards and frameworks for ESG reporting is expected under the International Sustainability Standards Board (ISSB) set up by the International Financial Reporting Standard Foundation.¹⁷ For the first time, there is consensus among the G7¹⁸ and, to some extent, G20¹⁹ groups of nations on the need for consistent climate reporting in line with the recommendations of the Task Force on Climate-related Financial Disclosure and harmonisation of ESG reporting standards.²⁰

WHAT IS SUSTAINABLE INVESTMENT?

As part of the reporting requirements, the EU and several other international players have been developing taxonomies to define what qualifies as a sustainable investment. This is important to reduce greenwashing and ensure that sustainability reporting is consistent, transparent and verifiable. The EU is developing a common language and a clear definition of what is sustainable by creating a classification system for sustainable economic activities, that is, the “EU taxonomy”.

The EU Taxonomy Regulation,²¹ which establishes the basis for the EU taxonomy, will require major financial actors and businesses in the European Union to report on their alignment with the criteria of the Taxonomy Delegated Act under the new disclosure regime (see above). An economic activity must meet four overarching conditions and six environmental objectives to qualify as environmentally sustainable. Work is ongoing on

social taxonomy, which incorporates “Significant Contributions” and ensures “Do No Significant Harm” principles.

ENSURING BROADER ENGAGEMENT FOR IMPACT CREATION

The impact of the EU legislation on the financial sector will lead to increased availability and mainstreaming of ESG data. This will come with initial hurdles from preparing ESG reports to data collection. While most of S&P 500 and FTSE 100 companies have published comprehensive sustainability reports in recent years, many businesses in emerging markets are not yet ready to report in line with the evolving standards and frameworks. This has resulted in delays and confusion in ESG reporting.

Demand has been growing in the countries where the EBRD operates for guidance and technical support to develop frameworks, practices and regulations that would help unlock opportunities for sustainable finance. Accordingly, we work with private- and public-sector clients to invest in

¹⁵ See EFRAG (2022), Draft European Sustainability Reporting Standards for consultation, Brussels (available at: <https://www.efrag.org/lab3>).

¹⁶ The standards address a wide variety of ESG issues ranging from pollution prevention, diversity and corporate governance, and labour issues to climate and impact on local communities, supply chains as well as risk management.

¹⁷ The IFRS Foundation is the international body that governs the setting of global accounting standards that have been adopted by hundreds of jurisdictions around the world. Five leading standard and framework setters – the Global Reporting Initiative, the Sustainability Accounting Standards Board, the International Integrated Reporting Council, the Climate Disclosure Standards Board and the Carbon Disclosure Project – announced a shared vision in November 2020 for a comprehensive corporate reporting system that considers both financial and sustainability disclosure connected via integrated reporting, which is what ISSB is tasked with developing.

¹⁸ See Reuters (2021), “G7 backs making climate risk disclosure mandatory”, 5 June (available at: <https://www.reuters.com/business/environment/g7-backs-making-climate-risk-disclosure-mandatory-2021-06-05/>).

¹⁹ See G20 Sustainable Finance Working Group (2021), 2021 *Synthesis Report*, Rome (available at: https://g20sfwg.org/wp-content/uploads/2021/11/Synth_G20_Final.pdf).

²⁰ This approach is also consistent with the work of EFRAG on developing sustainability standards under CSRD.

²¹ See European Commission (2021), Commission-delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council, Brussels (available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R2139&qid=1639037016630>).

green and sustainable products, provide training and capacity building, and help develop new laws, regulations and best practices.

The EBRD has committed to align all of its activities with the goals of the Paris Agreement by the end of 2022²² and become a majority green bank by 2025. In line with its Green Economy Transition approach,²³ the Bank has honed its unique business model (which combines investment, policy dialogue and advisory) to promote a green transition. We support policy initiatives that help our partners assess and integrate material ESG factors into the investment decision-making process.

For illustration, below we discuss how we work with stock exchanges in the EBRD region to raise capacity and help direct capital towards sustainable products and activities.

THE EBRD'S POLICY ENGAGEMENT WITH STOCK EXCHANGES²⁴

Stock exchanges play a strategic role in the shift towards more comprehensive ESG disclosure. They enable economic development by facilitating the mobilisation of financial resources and bringing together those who need capital to innovate and grow with those who have resources to invest. Many exchanges worldwide recognise such opportunities, as well as the related risks, and are stepping up their efforts to engage market participants and integrate ESG into mainstream financial practices.²⁵ Stock exchanges continue to be the primary drivers of ESG disclosures in markets where reporting is encouraged or required, with more than 80 per cent of exchanges fulfilling this function.²⁶

As one of the largest investors in its region of operations, the EBRD launched a policy initiative in 2020 to help stock exchanges in the economies where we operate to navigate the various ESG reporting frameworks and requirements that have emerged over the past few years. Business communities in emerging markets have little awareness of this topic and there is a large gap in terms of tools, guidance and training for stakeholders. This initiative aims to close that gap by collaborating with stock exchanges and giving them the necessary materials to be able to educate issuers and investors on ESG.

In May 2021, the Warsaw Stock Exchange – a regional leader in terms of number of listed companies and market capitalisation – published the first ESG guidelines for listed firms developed with EBRD's technical assistance.²⁷ The guidelines are the first in Poland and Central and Eastern Europe to take into account the latest developments of the EU sustainable finance framework and good industry practices while also remaining reflective of the national context. Local companies and companies from the region, including Bank clients, have started incorporating the guide's recommendations in their ESG reporting.

Similarly, on 31 January 2022, the Macedonian Stock Exchange (MSE) published its ESG guidelines, developed with the EBRD's technical support.²⁸ The first in North Macedonia and the Western Balkans region, these guidelines provide practical information for issuers on how to prepare their ESG reports.

²² See EBRD (2021), "EBRD announces full Paris alignment by end-2022", London (available at: <https://www.ebrd.com/news/2021/ebd-announces-full-paris-alignment-by-end2022-.html>).

²³ See EBRD (2020), *Green Economy Transition Approach 2021-25*, London (available at: <https://www.ebrd.com/what-we-do/get.html>).

²⁴ The authors would like to recognise the EBRD specialists who have worked together with them on this initiative from three different teams across the Bank (Legal Transition, Capital and Financial Markets Development, and the Environment and Sustainability Department): Lucija Baumann, Razvan Dumitrescu, Jacek Kubas, Florian Lalanne, Daniel Man and Viktoriya Protsenko.

²⁵ In 2009, the United Nations-backed Sustainable Stock Exchanges Initiative was launched to engage exchanges in the dialogue about how to promote better markets through sustainable business practices. Today, the initiative has 110 Partner Exchanges, 63 of which have published ESG reporting guides for their listed companies. See Sustainable Stock Exchanges Initiative (n.d.), "Stock Exchange Sustainability Activities" (available at: <https://sseinitiative.org/>).

²⁶ See World Federation of Exchanges (2021), *7th Annual Sustainability Survey 2021*, London (available at: <https://www.world-exchanges.org/storage/app/media/WFE%20Annual%20Sustainability%20Survey%202021%20Final%20v2.pdf>).

²⁷ See Warsaw Stock Exchange (2021), *ESG Reporting Guidelines: Guide for issuers*, Warsaw (available at: https://www.gpw.pl/pub/GPW/ESG/ESG_Reporting_Guidelines.pdf).

²⁸ See EBRD (2022), "EBRD helps North Macedonia exchange to develop ESG guidelines", London (available at: <https://www.ebrd.com/news/2022/ebd-helps-north-macedonia-exchange-to-develop-esg-guidelines-.html>).

ESG GUIDELINES OF THE MACEDONIAN STOCK EXCHANGE

The guidelines are based on the MSE's Corporate Governance Code of December 2021, which was also developed with EBRD assistance and in coordination with the Securities and Exchange Commission (SEC) of North Macedonia. Reliable disclosure is an essential element of good corporate governance. The new Code, which reinforces the argument that good governance is a necessary element of corporate sustainability, is among the first in the region to introduce specific principles around corporate sustainability and management of the environmental and social impact of business.

Examples of relevant provisions include those on integration of environmental and social considerations in risk management systems and boards' decision-making, setting a target of at least 30 per cent of women on supervisory and management boards, engagement with stakeholders and environmental and social reporting. Guided by the "comply or explain" principle, companies in North Macedonia will shift their focus towards long-term value creation and sustainable value chains. The new reporting framework will allow the MSE and the SEC to monitor and raise instances of substandard practices or poor disclosure. The Corporate Governance Code, jointly with the ESG Reporting Guidelines, will steer companies to go beyond a "box-ticking" exercise, embed sustainability in their decision-making and provide real value to investors and other stakeholders.²⁹

In the same vein, in 2022 the Bucharest Stock Exchange³⁰ published its first guide providing step-by-step guidance for ESG reporting prepared with EBRD support. The guide acts as a "bridge" between current practice in the local market and the ESG reporting expected to enter into force in the coming years under the proposed EU sustainable finance legislation and its accompanying standards.

MARKET SHIFT TOWARDS A GREEN AND SUSTAINABLE FUTURE

In light of the growing pressure for decarbonisation, investors are demanding a radical transformation of business models to manage ESG risks. Better company ESG performance is important for greening financial flows, creating long-term value and connecting with customers and employees. Thus, integration of ESG considerations in decision-making processes is quickly becoming good business practice.

The EBRD is committed to aligning all activities with the Paris Agreement on climate change, promoting the SDGs and supporting its clients and economies of operations in their green and climate transition. As we hurtle through the coming decade, businesses will see the Paris Agreement and the EU sustainable finance package transform from a guiding beacon to a mile-marker in the race to net zero. Limiting climate change and ensuring sustainability was always going to need more than a portfolio tilt, but the new reporting frameworks will create opportunities for companies and investors to change business models, develop effective transition pathways and consider their broader impact.

²⁹ The authors wish to thank Pavle Djuric, Principal Counsel, EBRD for his contribution to this box.

³⁰ See EBRD (2022), "Bucharest Stock Exchange launches its first ESG guidelines with EBRD support", London (available at: <https://www.ebrd.com/news/2022/bucharest-stock-exchange-launches-its-first-esg-guidelines-with-the-support-of-european-bank-for-reconstruction-and-development-.html>).





BIODIVERSITY AND NATURAL CAPITAL





EXECUTIVE SUMMARY

Nature and the services it provides are the basis of our societies and economic activities. They also play a vital role in helping regulate our climate and adapt to climate change. Since the EBRD's inception in 1991, the environment has been central to the Bank's work, from the Agreement Establishing the Bank to our Environmental and Social Policy.

“FINANCIAL INSTITUTIONS IN GENERAL, AND MULTILATERAL DEVELOPMENT BANKS IN PARTICULAR, ARE NOW GOING BEYOND THE TRADITIONAL PRECAUTIONARY *DO NO SIGNIFICANT HARM* PRINCIPLES INTO SUPPORTING SUBSTANTIAL NET BIODIVERSITY GAINS.”

More recently, climate action has provided additional momentum to the work done under the Convention on Biological Diversity since 1992. Nature-based solutions are attracting growing attention as a means to deliver co-benefits for addressing biodiversity loss and climate crises. In that sense, financial institutions in general, and multilateral development banks (MDBs) in particular, are now going beyond the traditional precautionary *do no significant harm* principles into supporting substantial net biodiversity gains. This is being supported, for example, by assessing nature-related financial risks and opportunities, investing in nature-positive programmes, and tracking and reporting nature impacts.

There are still important challenges ahead, from the development of accurate methodologies that value natural capital to the complexity of identifying and tracking biodiversity indicators in multiple ecosystems. Nevertheless, technology, standards and regulations are rapidly evolving and should help tackle the next major issue on the global sustainability agenda.

NATURE, THE GLOBAL BIODIVERSITY AGENDA AND THE EBRD

Nature is essential to all human activity, and much more. Therefore, protecting biodiversity and



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our collective natural capital is vital for the future of our societies and the planet. The EBRD has committed, in a joint statement by the major international development banks at COP26,¹ to increase its focus on nature, ecosystems and biodiversity across all of its work – in our advice to our clients, in our investments and operations, in our work on law and policy and in the way we communicate our impact.²

Historically, we have been working on projects that deliver benefits to nature and biodiversity since our inception as a development bank in 1991. Article 2 of our founding document, the Agreement Establishing the Bank,³ requires us to assist recipient member countries through measures that promote environmentally sound and sustainable development. Meanwhile, across the EBRD's portfolio, all of the projects we finance must comply with our Environmental and Social Policy (ESP),⁴ and in particular with Performance Requirement 6 (PR6), which highlights the importance of protecting biodiversity and the sustainable management of living natural resources in the economies where we operate. Projects must also comply with PR3 on pollution prevention and control, combating the emission of harmful substances for the environment, including greenhouse gases.

In 2015, the EBRD adopted the Green Economy Transition approach. The original objective was to increase the financing of projects that advanced the transition to an environmentally sustainable, low-carbon economy. The Bank has subsequently committed to raise its green financing to more than 50 per cent of its annual business volume by 2025 and align all its activities with the objectives of the Paris Agreement.

“ HISTORICALLY, WE HAVE BEEN WORKING ON PROJECTS THAT DELIVER BENEFITS TO NATURE AND BIODIVERSITY SINCE OUR INCEPTION AS A DEVELOPMENT BANK IN 1991.”

As a signatory to the European Principles for the Environment,⁵ together with the European Investment Bank and three other European development banks, the EBRD is already committed to ensuring that our projects are structured to meet applicable European Union (EU) environmental principles, practices and substantive standards. For example, the EU Habitats Directive⁶ ensures the conservation of a wide range of rare, threatened or endemic animal and plant species. As new EU legislation evolves, the EBRD will apply it in conjunction with our own ESP, regardless of the jurisdiction of the investment.

So a framework for the protection and conservation of nature is already in place. But the recent acceleration of the broader international environmental policy agenda, and the emergence of a growing body of performance standards, laws and regulations in the field of sustainable finance, provide the Bank with a welcome opportunity to re-evaluate and intensify its efforts across the full spectrum of environmental activities. It enables us to look beyond climate change and think more broadly about the impact the Bank's activities have on our natural environment. As an institution we are looking to move beyond a mindset of conservation and protection, towards holistic risk management (financial and non-financial) and ultimately to the development of a new asset class of “nature-positive” investments.

In this article, we will consider the evolution of law and policy in this field, how the EBRD is working to mainstream nature-positive activities to tackle the environmental crisis and what our contribution might be in the future.

¹ The 26th United Nations Climate Change Conference of the Parties (COP26), held in Glasgow from 31 October to 13 November 2021.

² <https://ukcop26.org/mdb-joint-statement/>, 2 November 2021.

³ <https://www.ebrd.com/news/publications/institutional-documents/basic-documents-of-the-ebrd.html>

⁴ <https://www.ebrd.com/news/publications/policies/environmental-and-social-policy-esp.html>, 25 April 2019.

⁵ <https://www.eib.org/attachments/strategies/european-principles-for-the-environment-en.pdf>, 30 May 2006.

⁶ https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm, 21 May 1992.



INTERNATIONAL AND EUROPEAN LAW: CONVENTION ON BIOLOGICAL DIVERSITY, TAXONOMY REGULATION

Shortly before COP26 opened in Glasgow in November 2021, the first half of the “other” COP took place virtually in October. The United Nations Biodiversity Conference, COP15, gathered 154 of the parties to the Convention on Biological Diversity (CBD), an international treaty that entered into force in December 1993.⁷

In broad terms, the CBD focuses on the conservation of biodiversity and the sustainable use of the components of biodiversity, defined as the variability among living organisms from all sources including terrestrial, marine and other aquatic ecosystems, and the ecological complexes of which they are part. According to the World Economic Forum, humanity has already been responsible for the loss of 83 per cent of wild mammals and half of all plants, while one million species are at risk of extinction in the coming decades.⁸

The economies where the EBRD operates are diverse in their geography and habitats and face a range of environmental challenges, from airborne emissions to climate change, soil degradation and water pollution. In the Palearctic region where EBRD economies are located, species population declined by more than 30 per cent between 1970 and 2014.

The EBRD regions also encompass some of the most pressured seas including the Aral, one of the largest human-made environmental catastrophes of the 20th century. The environmental degradation along the Mediterranean, Black Sea and Atlantic coasts due to overfishing, untreated waste and real estate overdevelopment represents a major human and environmental threat at the heart of our region.

⁷ <https://www.cbd.int/doc/legal/cbd-en.pdf>

⁸ <https://www.weforum.org/reports/nature-risk-rising-why-the-crisis-engulfing-nature-matters-for-business-and-the-economy>

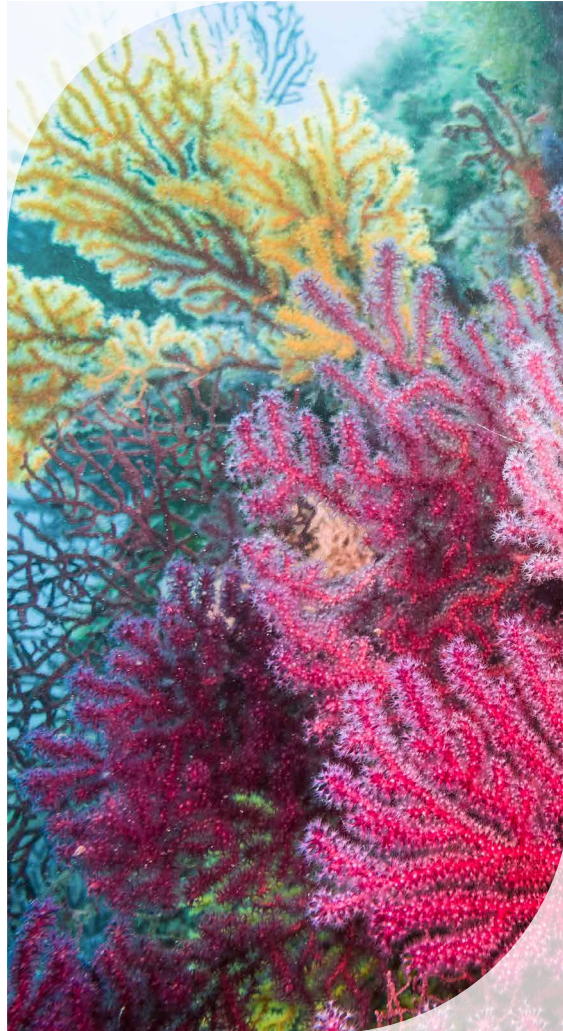
At CBD COP15, all parties committed in the Kunming Declaration⁹ to develop, implement and monitor an effective post-2020 framework that will put biodiversity on the path to recovery by 2030 and achieve the vision of “living in harmony with nature” by 2050. This is consistent with the Leaders’ Pledge for Nature,¹⁰ announced in September 2020 and now endorsed by 93 governments, to reverse biodiversity loss by 2030; and the EU’s biodiversity strategy for 2030.¹¹

Also at the EU level, the Taxonomy Regulation¹² is the central plank of the bloc’s sustainable finance legislation. In force since July 2020, it contains the EU’s attempt to answer the question: what does “green” mean? Or rather, what constitutes an environmentally sustainable economic activity?

Article 9 of the EU Taxonomy Regulation sets out six environmental objectives, one of which is protecting and restoring biodiversity and ecosystems.¹³

To qualify as an environmentally sustainable economic activity, an activity must “contribute substantially” to one of the objectives, “do no significant harm” to any of the objectives, be carried out in compliance with certain minimum safeguards (focusing particularly on human rights) and comply with technical screening criteria published by the European Commission.

This conceptual framework provides a useful mechanism for considering situations where there may be tension between competing environmental objectives. For example, when the construction of a renewable energy facility is proposed in an area of natural beauty, it may be that the potential for “significant harm” to



biodiversity and ecosystems outweighs the “substantial contribution” to climate change mitigation. In other situations, achieving an environmental objective might be counterbalanced by human rights concerns, such as where benefits in the production of certain agricultural products are compromised by forced or child labour issues in their supply chain.

The EBRD follows an equivalent approach for its green finance investments, considering joint MDB climate finance and/or other environmental objectives alongside compliance with its ESP and the 10 performance requirements. The latter set the minimum standards for managing environmental and social impact and the risks caused by projects, and establish the strategic goal of promoting net benefits. The performance requirements cover areas from labour, health and safety, and stakeholder engagement to pollution prevention and biodiversity protection.

⁹ <https://www.cbd.int/doc/c/df35/4b94/5e86e1ee09bc8c7d4b35aaf0/kunmingdeclaration-en.pdf>

¹⁰ <https://www.leaderspledgeformature.org/>

¹¹ https://ec.europa.eu/environment/strategy/biodiversity-strategy-2030_en

¹² <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R0852&from=EN>

¹³ Those six environmental objectives are climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control, and the protection and restoration of biodiversity and ecosystems.

NATURAL CAPITAL AND THE DASGUPTA REVIEW

From a policy perspective, one of the leading texts in this area is the Dasgupta Review, a study commissioned by the UK Treasury entitled *The Economics of Biodiversity*,¹⁴ for which the EBRD provided comments. The study highlights the importance of “natural capital”, defined as the stock of renewable and non-renewable natural assets (for example, ecosystems) that yield a flow of benefits to people (that is, ecosystem services). The term is used to signify that nature is intrinsically valuable because it provides the resources and environmental services upon which peoples’ well-being and economic activity rely, and should therefore be treated as an asset base whose value needs to be preserved and enhanced.

This well-being refers not only to that of the current population, but also of future unborn generations who will need to draw on the stock of natural assets for their own welfare and economic activity. In fact, research by the World Economic Forum suggests that US\$ 44 trillion of economic value generation – representing more than half the world’s total gross domestic product – is moderately or highly dependent on nature and its services.

Introducing the concept of natural capital is important from a banking perspective because it enables institutions like the EBRD to begin to measure and monitor the impact that a project might have on nature. Consider, for example, the development of a coastal or mountain resort to which we attribute an initial natural asset value of x , yielding yearly returns of y . (Those returns could be physical, in the form of “ecosystem services” such as fresh air, clean water and agricultural produce, as well as monetary, in the form of revenue streams for governments and local communities). With sustainable tourism policies in place, it should be possible to maintain returns at y or even increase them, and enhance the value of the natural asset value above x . However, if poorly managed or overexploited from a sustainability perspective, the asset may temporarily provide y returns, but its value would be rapidly depleted below x , eroding returns in future years permanently below y .

The EBRD is leading a combined effort by a number of multilateral development banks to put in place a methodology for assessing the value of biodiversity and natural capital in the ecosystems where we operate. This work tries to ascribe an economic value to the services ecosystems provide to society and then feed that value into the decision-making of key economic actors. Previously, the lack of any natural capital valuation methodology meant that biodiversity was typically treated as an externality and given a null residual value in economic models, thus being ignored in socio-economic decision-making. To avoid this “tragedy of the commons” on climate, MDBs have successfully implemented a similar approach with their shadow carbon pricing methodology. In addition, valuing biodiversity and natural capital is an essential step to assessing and disclosing nature-related risks associated with projects and clients.

DISCLOSURE OBLIGATIONS FOR COMPANIES

Year-on-year, corporates and banks are required to disclose increasing amounts of information about the environmental impact of their operations. In the EU, which includes 12 of the economies where the EBRD operates, the Non-Financial Reporting Directive (NFRD)¹⁵ already imposes obligations on 11,000 of the bloc’s largest companies, which must publish an annual management report containing disclosure on environmental matters (among other things). In its review of EU environmental disclosure in 2020,¹⁶ the Climate Disclosure Standards Board observed that only 46 per cent of companies reporting under the NFRD had included biodiversity disclosure, and subsequently published specific guidance for firms on this issue.¹⁷

¹⁴ <https://www.gov.uk/government/publications/final-report-the-economics-of-biodiversity-the-dasgupta-review>, 2 February 2021.

¹⁵ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN>

¹⁶ <https://www.cdsb.net/nfrd2020>, December 2020.

¹⁷ <https://www.cdsb.net/what-we-do/nature-related-financial-disclosures/biodiversity-related-disclosures>, January 2022.

The European Commission published a proposal for a Corporate Sustainability Reporting Directive (CSRD)¹⁸ in April 2021. Extending the scope of the requirements to all EU listed companies – some 50,000 entities in total – the CSRD is scheduled to apply to large firms from 1 January 2023 and to listed small and medium-sized enterprises from 1 January 2026, and will require much more detail than the NFRD. See the previous chapter for further details on the NFRD, the CSRD and disclosure issues more generally.

The CSRD will introduce mandatory reporting standards. The information disclosed will need to cover the full range of environmental matters, including biodiversity and nature. In November 2021, the IFRS Foundation Trustees announced the formation of a new International Sustainability Standards Board (ISSB)¹⁹ to develop a comprehensive global set of sustainability disclosure standards.

The European Commission has asked the European Financial Reporting Advisory Group (EFRAG)²⁰ to represent European views in the preparation of the ISSB's draft standards, which are scheduled for adoption in October 2022 and are expected to mirror the environmental objectives of the Taxonomy Regulation.²¹ EFRAG's work to date includes developing a draft European Sustainability Reporting Standard on Biodiversity and Ecosystems.

EBRD representatives are closely involved in shaping the future regulatory landscape, contributing to a number of the bodies and initiatives described above. Our contributions have

“EBRD REPRESENTATIVES ARE CLOSELY INVOLVED IN SHAPING THE FUTURE REGULATORY LANDSCAPE, CONTRIBUTING TO A NUMBER OF THE BODIES AND INITIATIVES.”

been focused on aspects that are most relevant to our mandate to promote environmentally sound and sustainable development, particularly in the private sector, across the EBRD regions.

The Bank is part of several working groups helping to develop the EU Taxonomy for Sustainable Finance and the technical screening criteria that define the economic activities that can be considered sustainable, in line with the six environmental objectives. EBRD experts are members of EFRAG and the Bank is represented on two of the expert working groups: environment (excluding climate change) and governance.

We have also contributed to the work of the ISSB in preparing the standards themselves and specifically to its Biodiversity Working Group.

Looking beyond the EU, the Taskforce on Nature-related Financial Disclosures (TNFD)²² was created in September 2020 to develop a risk management and disclosure framework for organisations to report and act on evolving nature-related risks. Even while the TNFD was being conceptualised, the EBRD participated in the informal expert working groups that led to the creation of the taskforce. The project's ultimate goal is to shift global financial flows away from nature-negative outcomes towards nature-positive outcomes. This mirrors the example of the Taskforce on Climate-related Financial Disclosures, created in 2015 by the Financial Stability Board to develop consistent, climate-related financial risk disclosures for use by companies, banks and investors in providing information to stakeholders.

The TNFD produced a work plan in June 2021²³ that envisages the development of a set of standards and their launch in the market from 2023.

¹⁸ Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0189&from=EN>

¹⁹ <https://www.ifrs.org/news-and-events/news/2021/11/ifrs-foundation-announces-issb-consolidation-with-cdsb-vrf-publication-of-prototypes/>

²⁰ <https://efrag.org/>

²¹ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R0852&from=EN>

²² <https://tnfd.global/>

²³ <https://tnfd.global/wp-content/uploads/2021/07/TNFD-Nature-in-Scope-2.pdf>



Meanwhile, the EBRD as an institution participates in the TNFD Forum, alongside other development and commercial banks. The forum has a consultative role and liaises closely with the working group, providing feedback at key stages on the path towards implementation. We are also collaborating with *Agence Française de Développement* and the other multilaterals under the TNFD Development Finance Hub to promote a better understanding of biodiversity-related risks and share risk disclosure, case studies and sectoral experience. The biodiversity and natural capital valuation work fits within those efforts to find a common approach among multilateral institutions for the assessment and disclosure of nature-related risks.

OUTLOOK FOR FUTURE DEVELOPMENTS, “NATURE-POSITIVE” INVESTMENTS

Across these initiatives our work is informed by the experience of developing the EBRD’s own policies and instruments over our 30 years of operations.

So what should the Bank do better, or more of, in the coming months and years?

The MDB joint nature statement at COP26 provides a suitable roadmap for action. We have undertaken i) to show leadership in achieving the objectives set out in the key international treaties in this field, ii) to develop and make “nature-positive” investments, and iii) to foster synergies between the governments of different countries and regions, and between the private and public sectors. We have also undertaken iv) to help our clients value nature and natural assets to deliver development benefits and v) to develop tools and methodologies for tracking nature-positive activities across our portfolio, then report on our efforts publicly.

We expect that developing and identifying nature-positive investments will lead to many innovative and exciting projects. This should involve both specific investments in nature-based solutions, such as the creation of an orbital forest around Tirana, and by changing the parameters of projects to prioritise conservation and mitigation activities, thereby generating net gains in natural capital and biodiversity.

Our bankers are speaking with clients across the EBRD regions in the agribusiness, municipal and property and tourism sectors, to name just a few, about different investment structures. For example, an agriculture business could be incentivised to progressively eliminate its water pollution discharge by entering into a sustainability-linked loan where the coupon payment steps up or down depending on the company's achievement (or otherwise) of a specific key performance indicator. Elsewhere,

a public-sector infrastructure project could involve the “construction” of a mangrove swamp or forest, with benefits from reduced coastal erosion to improved air quality and the introduction of additional species to an ecosystem.

The creation of platforms where different stakeholders find synergies and collaborate to achieve systemic impact will be essential. This was achieved in the Baltic and Barents seas after the Helsinki Convention was established²⁴ and the Northern Dimension Environmental Partnership created. And we now have the opportunity to replicate this environmental remediation work in the Mediterranean, Black and Red seas, strengthening the Barcelona Convention.²⁵

Meanwhile, our environmental specialists are already working with other multilateral development banks on biodiversity accounting and natural capital valuation. This may provide the grounds to develop a shadow nature pricing to internalise nature-related externalities in our decision-making process. The approach would mirror the established shadow carbon pricing and could be integrated in our environmental and social due diligence processes. This joint

²⁴ <https://helcom.fi/about-us/convention/>, most recently updated in July 2014.

²⁵ <https://www.unep.org/uneppmap/who-we-are/barcelona-convention-and-protocols>

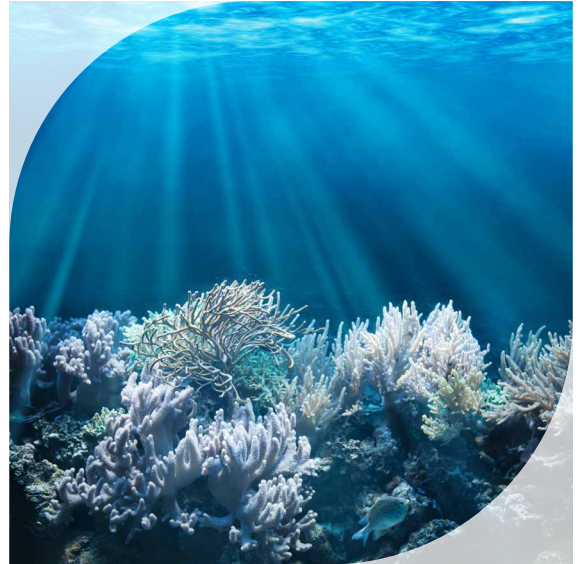


multilateral work should also lead to the use of new technologies, such as the use of technological advances in DNA to improve understanding of ecosystem function and resilience, and satellite images to foster better and broader disclosure of project-related biodiversity data and impacts.

We will continue to contribute to the development of disclosure and risk management frameworks for nature and biodiversity, drawing on our experience in assessing biodiversity and resource impact under PR6.

Of course, there will be challenges along the way. Regulatory fragmentation and the emergence of rival taxonomies and standards at different levels of ambition could lead to uncertainty for our clients and for stakeholders in general. Tensions between competing political agendas and irreconcilable environmental and social objectives could result in important and useful projects being delayed or cancelled. And the sheer pace of regulatory change could lead to an increase in reputational risk and the risk of litigation for participants.

But the direction of travel is clear, and the EBRD will continue to communicate with its clients and contribute to the evolution of the legal and regulatory framework in the coming years. Our aim is not only to protect and conserve nature and biodiversity, but to develop and enhance them in a way that benefits nature, the people across the EBRD regions and the planet.



“OUR AIM IS NOT ONLY TO PROTECT AND CONSERVE NATURE AND BIODIVERSITY, BUT TO DEVELOP AND ENHANCE THEM IN A WAY THAT BENEFITS NATURE, THE PEOPLE ACROSS THE EBRD REGIONS AND THE PLANET.”





GLOSSARY

API	application programming interface
CBD	Convention on Biological Diversity
CDES	State Court Enforcement Service under the Supreme Court
CE	Council of Europe
CEPEJ	European Commission on the Efficiency of Justice
CSRD	Corporate Sustainability Reporting Directive
DLT	distributed ledger technology
EBRD	European Bank for Reconstruction and Development
EC	European Commission
ECHR	European Court of Human Rights
EFrag	European Financial Reporting Advisory Group
eHealth	digital healthcare services
EOI	expression of interest
eProcurement	electronic public procurement
ESG	environmental, social and governance
ESP	Environmental and Social Policy
EU	European Union
GFANZ	Global Financial Alliance for Net Zero
HJTC	High Justice Training Centre
IPCC	International Panel on Climate Change
ISEMEP	Information System for Evidence and Management of Enforcement Procedures
ISSB	International Sustainability Standards Board
IT	information technology
KPI	key performance indicator
LTP	Legal Transition Programme
MDB	multilateral development bank
MSE	Macedonian Stock Exchange
mHealth	mobile health services
NDA	non-disclosure agreement
NDC	nationally determined contribution
NFRD	Non-Financial Reporting Directive
NHIC	National Health Information Centre
NPV	net present value
PIN	prior information notice
PPP	public-private partnership
SDG	Sustainable Development Goal
SME	small and medium-sized enterprise
TNFD	Taskforce on Nature-related Financial Disclosures
UIHJ	International Union of Judicial Officers
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNFCCC	United Nations Framework Convention on Climate Change
UNIDROIT	International Institute for the Unification of Private Law
US	United States
WIIP	Polish Common State IT Infrastructure Program

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