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Contributors

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LEGAL REFORM IN THE TIME OF COVID-19

ABOUT THE EBRD

The EBRD is a multilateral bank that promotes the development of the private sector and entrepreneurial initiative in 37 economies across three continents. The Bank is owned by 69 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, *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.

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LEGAL REFORM IN THE TIME OF COVID-19

In 2020 Covid-19 revolutionised the way we live and work. And accordingly, the crisis changed the way international financial institutions provide their assistance. When the pandemic struck, the EBRD rapidly put in place a €4 billion Solidarity Package of crisis-response investments. But the response was not limited to financing; the EBRD also seized the opportunity to reimagine policy dialogue in a global pandemic. Helping governments improve their legal environments for business had to be adapted to the emergency we faced. This led to some new directions – and new opportunities – in our technical assistance activities.

First, the crisis has highlighted the need to accelerate the digital agenda for legal and judicial reforms. The initial few stories in this issue of the *Law in Transition* journal consequently focus on digitalisation: online courts, online mediation, blockchain at the Georgia Ministry of Justice, and e-learning for Armenian judges, to name a few. This reflects a new and exciting orientation in our programme.

In leading the charge for technical assistance for digitalisation, we are directly aligning with the digital transition theme of the EBRD's newly approved Strategic and Capital Framework for 2021-2025. For the judicial sector in particular, online courts will be the next chapter in digitalisation. Online courts can help by improving access to justice during the pandemic, but also by reducing the chronic backlogs of cases that predate the crisis. The EBRD will take a leading role in the economies where it invests to formulate strategies for developing online courts. In the initial phase, the focus will be on small claims courts, which are seen as a good place to debut reforms.

Second, the EBRD's Legal Transition Programme (LTP) has responded to the Covid-19 crisis with an enhanced focus on insolvency law. In the aftermath of the pandemic, many businesses will struggle economically and may become insolvent. In the medium term, countries must enact measures that support these businesses through the turbulent times ahead. The crisis calls for special rules to offer otherwise sound companies a second chance through financial restructurings. To help achieve this in the economies where we invest, the LTP has launched a new assessment of restructuring regimes, which should allow our specialists to define the most appropriate targets for this technical assistance.

As one additional technical assistance response to the Covid-19 crisis, the LTP has developed projects to advise small and medium-sized enterprises on survival techniques, focused on legal issues arising from the crisis. The team has turned to webinars to deploy this emergency legal advice throughout 2020, and continuing into 2021. It has reached hundreds of small businesses in the Kyrgyz Republic, Moldova, Mongolia and Uzbekistan.

Although the Covid-19 crisis is the main story, it is not the only story in legal reform. The LTP has continued to deliver assistance to governments on a series of commercial and financial law matters, as you will see in the following pieces. In spite of the pandemic – and in some ways because of it – building sound legal systems remains a priority for promoting investment and creating resilient markets.

Excitingly, our work in this year's journal represents a true cross-cutting initiative, covering contributions from specialists across the EBRD. It is especially gratifying to welcome contributions co-authored by EBRD staff outside the Office of the General Counsel, including the Banking Department and the Vice-Presidency for Policy and Partnerships.

We hope this publication will generate debate and encourage policymakers to improve their legislative frameworks and institutions, create more investor-friendly legal regimes and expand their citizens' access to justice. As the United Nations Secretary General, António Guterres, recently said in an address to the General Assembly: "In a global crisis, we must meet the expectations of those we serve with unity, solidarity and coordinated multilateral global action".

MICHAEL STRAUSS
GENERAL COUNSEL, EBRD

EDITOR'S MESSAGE

This has been a peculiar year for the EBRD's Legal Transition Programme. Normally our lawyers would have been travelling extensively to meet country officials, discussing their needs in terms of legal technical cooperation and providing advice to them. But the last 12 months have instead been spent working from home without any country visits. The Covid-19 pandemic has radically changed the way we deliver our assistance.

Perhaps the biggest surprise has been to see how it is possible to provide advice remotely via email and video conferences. The response has varied depending on the country but overall we can say that most counterparts have been extremely receptive and ready to adapt to the "new normal". In this way, the EBRD has been able, through its Legal Transition Programme, to continue playing an active role in helping the economies where we invest to upgrade their legal environment for business. We are happy to share some stories with our readership, showing what we have accomplished in the last year.

As the General Counsel noted in the Foreword, the pandemic has accelerated the digital agenda of the economies in the EBRD regions. Creating online tools for state institutions had been on their to-do lists for a while, but with the pandemic it suddenly became a priority. The first few stories in this journal reflect the new prominence of this digital transformation.

In the first article, Michael Strauss and Veronica Bradautanu reflect on the introduction of online courts. They show how the Covid-19 crisis has emphasised the structural and economic inefficiencies of judiciaries, which will, in turn, create a greater impetus for change.

Milot Ahma and Ammar Al-Saleh then present the potential of blockchain to support the digital transformation of public services in Georgia. Going beyond the use of this technology in the financial sector, they make the case for its extended use in public administration.

In the next article, Yulia Shapovalova and Jyldyz Galieva advocate the use of online mediation as an effective way for small and medium-sized enterprises (SMEs) to resolve disputes during the Covid-19 pandemic. Online tools are a great way to circumvent the inability of traditional mediation techniques to operate during and after the crisis.

Catherine Bridge Zoller and Bob Davies look at insolvency law reform in Armenia. This has included online training for insolvency judges and insolvency practitioners, thus creating a stronger environment for addressing the needs of insolvent businesses.

The next piece is by Paul Moffatt and presents the findings of a survey on investor perception in the broadband connectivity sector. The survey records directly the views of a wide range of existing and potential stakeholders, including finance providers, telecommunications network and service operators, broadband and internet service providers, analysts and other market stakeholders.

In the following article, Gian Piero Cigna, Pavle Djuric, Zsoka Koczan and Yuliya Zemlytska discuss the role of state-owned enterprises (SOEs) in the EBRD regions, with a focus on the governance of SOEs and how they differ from private sector entities.

The next piece looks at how international financial institutions (IFIs) have responded to Covid-19 and the role of their legal experts. Enrico Canzio and Kimberly Guo interviewed lawyers from the International Fund for Agricultural Development, Asian Development Bank, the EBRD and International Finance Corporation. Their testimonials show how IFI lawyers are playing a vital role in setting up new facilities targeted to help countries respond to the crisis.

In the following story, Alexei Zverev looks into the legal regime for public-private partnerships in the three Caucasus states (Armenia, Azerbaijan and Georgia) and considers the potential for boosting this efficient tool to develop much-needed infrastructure projects in the region.

Vesselina Haralampieva, Gabriel de Lastours and Sophie Vermorel report on an EBRD investment in Tunisia, where the Bank has advised a big utility company on developing a corporate climate governance action plan.

Markus Renfert and Arzu Kutadgu then consider the development of the Turkish debt capital market in light of a new legal regime for bondholders' meetings and bondholders' representatives.

Lastly, Ammar Al-Saleh and Svenja Petersen look at the prospects for SME development in Uzbekistan, based on the findings of a technical assistance project focusing on SME-sector policies and on removing obstacles faced by these businesses.

I hope you enjoy this issue of the *Law in Transition* journal. It was written under the extraordinary circumstances of a global pandemic and contains many lessons learned by our programme. We are happy to share these experiences with you and we look forward to your feedback.

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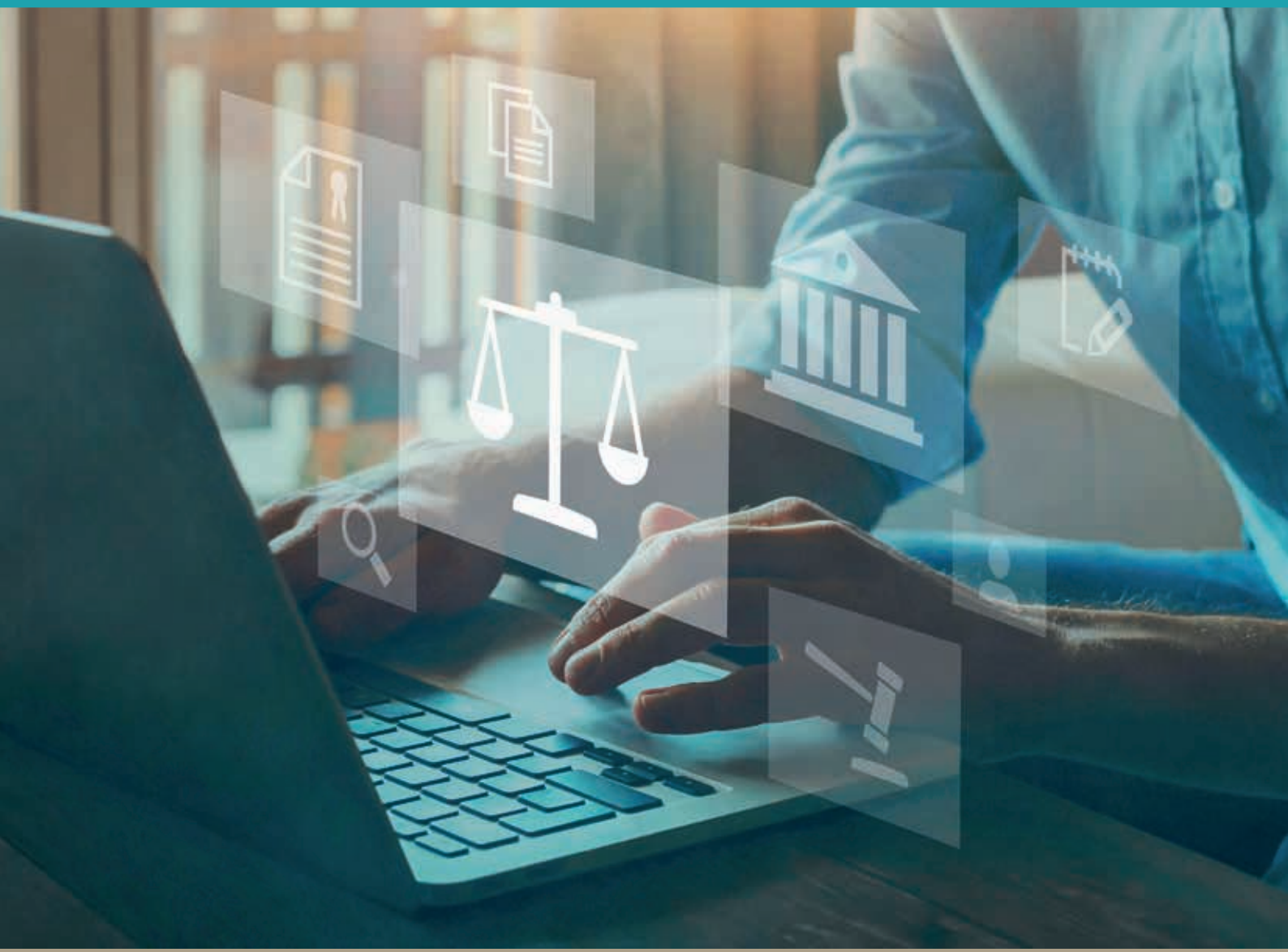
EMERGING MARKETS EMBRACING ONLINE COURTS – COMMERCIAL COURTS FOR SMALL VALUE CLAIMS



"The Covid-19 crisis has highlighted how much we rely on the paper-based, out-of-date and inefficient processes of existing courts."

WHAT DO WE MEAN BY ONLINE COURTS?

What was once the subject of science fiction movies and books – "AI Justices" and "robocops" – is moving a step closer to reality, spurred on, surprisingly, by a pandemic. We now rely on technologies to shop, meet and visit museums, and all we need for that is a computer and internet connection. These changes were slower to come to the courts, which have had a tendency to resist change; however, the pandemic is forcing the judicial sector to go digital as well.

The Covid-19 crisis has highlighted how much we rely on the paper-based, out-of-date and inefficient processes of existing courts. According to an EBRD survey in May 2020,[2] because of the pandemic, courts in many countries had to close and postpone case hearings, limiting consideration to urgent matters (see Chart 1).

1 The authors would like to thank Patricia Zghibarta, Consultant, EBRD, and Christina Heliotis, Consultant, EBRD, for their research and drafting of the EBRD discussion paper on the same subject matter, which the authors used in part for the information and data for this article. Special thank you to Patricia for her help with the data and data sources for this article.

2 In May 2020 the EBRD conducted a survey among 20 of the economies where it invests to obtain information about the most recent developments in their court digitalisation processes. The questions focused on the risk of postponement and backlogs amid Covid-19, the availability of a case management system for courts and an online information system for litigants and attorneys, as well as the use of remote hearings by courts. The information was provided by law firms from the following jurisdictions: Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Jordan, Kazakhstan, Kyrgyz Republic, Moldova, Mongolia, Montenegro, Morocco, Romania, Serbia, Tajikistan, Tunisia, Turkey, Ukraine and Uzbekistan.

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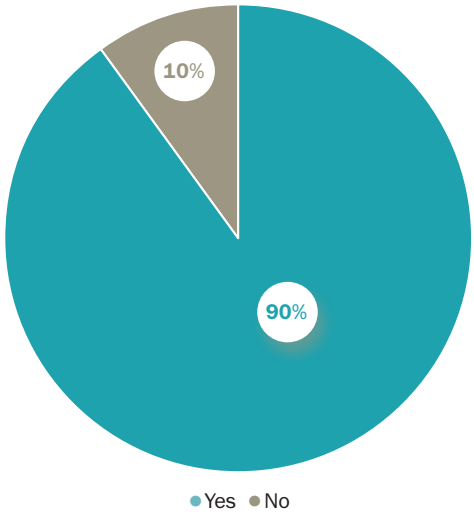
Chart 1: Postponement of commercial cases in 20 EBRD economies

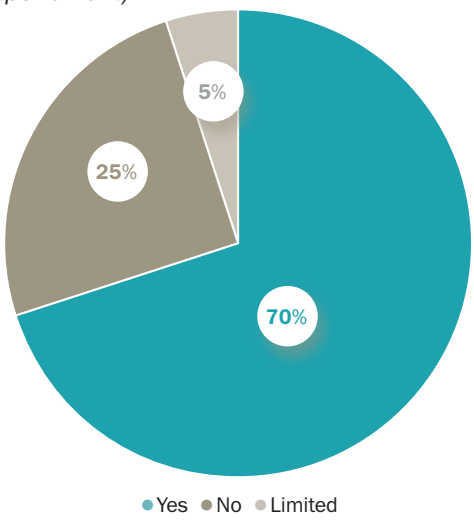
Were courts recommended/directed to postpone commercial case hearings?



Source: EBRD survey of law firms in 20 jurisdictions, May 2020.

Chart 2: Perception of eventual backlog of commercial cases in 20 EBRD economies

Do you believe there will be a significant backlog of commercial cases in courts (due to postponement)?



Source: EBRD survey of law firms in 20 jurisdictions, May 2020.

More concerning was that 70 per cent of the responding jurisdictions, including Armenia, Bulgaria, Georgia, Jordan, Moldova, Montenegro, Tunisia and Ukraine, expected a significant backlog in commercial courts because of these postponements. Interestingly, countries where remote hearings and written procedure could be rapidly employed, such as Estonia, did not envisage a significant backlog.

To counter the effects of the pandemic and continue their work, courts are making efforts to move online. Initially, this has been achieved by using emerging communication platforms, such as Zoom, Skype, Microsoft Teams, as well as pre-existing video equipment, to conduct court hearings. Case management systems, online payments for court fees, online submission of claims and remote access to case files for parties and judges – each plays a role in this transition. However, not many jurisdictions have all the elements of digital operations in place to ensure fully remote proceedings, hence the degree of preparedness to shift online varies.

Given that the transition has been in many ways *ad hoc* and partial, distinguishing remote court proceedings from the traditional ones involving physical presence has led to imprecise terminology. It may well be that in the future "traditional" proceedings will soon refer to both in-person processes and a hybrid of the physical and the virtual. In the meantime, there is often confusion as this new format has been called "online courts".

Before the pandemic, the term **online courts** primarily meant court proceedings conducted based on document submissions (submitted electronically) and usually without court hearings.[3] In this article we will follow that meaning for "online courts". Consistent with the work of experts in this field, we will label the current process – driven by the exigencies of the pandemic – of courts moving existing processes online as **remote courts**.[4]

3 For example, see Supreme Court of New South Wales (2007), "Practice Note No. SC Gen 12. Supreme Court – online court Protocol" (available at: https://bit.ly/3nmJqKz (last accessed 13 January 2021) or see definition by R. Susskind (2019), *Online Courts and the Future of Justice*, Oxford University Press, Oxford.

4 Professor Richard Susskind refers to several forms of "remote courts", such as audio hearings (largely by telephone), video hearings (for example, by Skype and Zoom), and paper hearings (decisions delivered on the basis of paper submissions). For more information, see https://remotecourts.org/ (last accessed 13 January 2021).

WHY TRANSFORM THE COURTS? REMOTE COURTS VERSUS ONLINE COURTS

The innovative idea behind **online courts** is the opportunity to revisit the way court services are delivered and consider new approaches that would ease access to justice. Transferring existing proceedings to online and remote formats, though, is not enough (**remote courts**).

We believe there is a strong public consensus among those accessing justice that courts and court proceedings are complex, expensive (be it for the parties or for the state), slow and, overall, an intimidating endeavour. Data show that, while access to justice (civil and criminal) is a human right, roughly 50 per cent of the population can exercise that right.[5]

This also applies to the business communities, where small companies and individual entrepreneurs tend to avoid the courts at the expense of not being able to enforce their rights. For example, in Ukraine, businesses indicate that breakdown in the rule of law and the lack of law enforcement are major challenges to doing business.[6] In the Western Balkans, foreign-owned firms similarly perceive courts as one of the major obstacles in conducting business.[7]

As a consequence, policymakers should take this opportunity to consider ways to make court proceedings more effective and efficient. In particular, court services need to be made suitable and user-friendly for the litigants, beyond focusing on improving processes for judges, lawyers and court staff.[8]

"The innovative idea behind online courts is the opportunity to revisit the way court services are delivered and consider new approaches that would ease access to justice."

HOW CAN THE COURTS BE TRANSFORMED?

Court reform may take various forms. The EBRD's countries of operations (CoOs) have long sought to reform their courts to minimise corruption, increase court efficiency (that is, make them faster), and improve the quality of decisions.[9]

Perhaps the current crisis offers a rare opportunity to approach court reform from a different perspective. For example, the United Kingdom and Canada[10] took the view that courts should deliver better public service and be more user-friendly and accessible, in particular, to litigants in person (for some categories of cases). The EBRD's Legal Transition Programme (LTP) organised a virtual discussion on 20 October 2020[11] where panellists offered ways to transform court proceedings.

5 See OECD, 'Towards Inclusive Growth - Access to Justice: Supporting people-focused justice services' (available at: http://www.oecd.org/gov/access-to-justice-supporting-people-focused-justice-services.pdf last accessed 13 January 2021).

6 EBRD (2020), *Transition Report 2019-20: Better governance, better economies*, p76 (available at: https://2019.tr-ebrd.com/)

7 See A. Krešić, J. Milatović and P. Sanfey (2017), "Firm performance and obstacles to doing business in the Western Balkans: evidence from the BEEPS," EBRD, London available at: https://www.ebrd.com/documents/oce/firm-performance-and-obstacles-to-doing-business-in-the-western-balkans-evidence-from-the-beeps.pdf (last accessed 13 January 2021).

8 See Richard Susskind's book *Online Courts and the Future of Justice* (OUP) exploring the idea of court as a service and ways in which such a service can be redesigned to enable laypeople a structure and to resolve their disputes.

9 A. Colman, "Court decisions in commercial matters: an EBRD assessment" in *Law in transition 2011: Towards better courts*, EBRD, London, pp 20-37.

10 B. Henderson, "Is access to justice a design problem?", available at https://www.legalevolution.org/2019/06/is-access-to-justice-a-design-problem-099/ (last accessed 13 January 2021).

11 For more information on the EBRD event on 20 October 2020, Developing Online Commercial Courts For Emerging Markets, description, agenda, related documents and recording please visit: https://ebrd.glueup.com/event/developing-online-commercial-courts-for-emerging-markets-27964/ Direct link to the recording of the event can be found here. The EBRD has also developed a draft discussion paper, exploring existing best practices and potential challenges in developing online courts in the economies where the Bank invests.

Panellists suggested that throughout the transformation process, policymakers should also consider several reforms:

- **Simplifying the court proceedings** is one of the first steps to consider, independent of the need for digitalisation. Lawmakers and the courts should consider court processes in detail and identify bottlenecks, redundant rituals and unnecessary parts of proceeding, such as mandatory court hearings for small claims disputes or loopholes allowing delays as a result of suspension of court proceedings. These could be excluded or reformulated for certain categories of cases, creating a separate more streamlined procedure (online court).
- **Unifying court practice** through commentaries and guidance for judges and the legal profession will increase the predictability of outcomes. It will also help guide litigants when deciding to file a claim in court.
- **A preliminary mediation or negotiation step** is obligatory in many jurisdictions before parties may file an action in court. This allows the resolution of many cases without court intervention. Technology also makes this easy to carry out.
- **Including templates, guidance and other tools to assist the litigants** is essential in saving costs and time for the parties, as well as providing parties with the confidence to act on their own and navigate court proceedings.
- **User-friendly and intuitive technical solutions** are another essential ingredient in the transformation of court processes aimed at improving access to justice. For example, in Canada, the reformers modelled the online court with a user-centric approach in mind (that is, the public comes first) to achieve simplicity and familiarity for the users.[12] In Singapore, they offered pre-filling assessments to help litigants structure their disputes,[13] while in China, service of documents was enabled via text messages, emails and WeChat messenger.[14]

During the aforementioned EBRD event in October 2020[15] there was consensus among the experts that to achieve better courts and public service the policymakers need to consult the public and understand their concerns. The best way to do this is to map out litigants' experience by asking parties to provide feedback on each step of the process, including during piloting stages.

It is worth noting that improving access to justice through online, user-friendly processes may have a significant impact on access to justice for the more vulnerable categories of the population and the businesses they run (such as women, people with disabilities), although, so far not much data have been gathered to back this claim. In countries that set up online courts, there is a perception that women users outnumber men, and women access online courts at a proportionally higher rate than traditional courts. The EBRD study on access to justice of women entrepreneurs in Jordan[16] and the discussions during the Regional Forum for Women Judges in SEMED[17] revealed there are cultural barriers to women's appearance in courts in some jurisdictions.

12 S. Salter and D. Thompson (2017), "Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal", *McGill Journal of Dispute Resolution*, Vol. 3, 2016-2017, Osgoode Legal Studies Research Paper No. 44, Available at SSRN: https://ssrn.com/abstract=2955796 (last accessed 13 January 2021).

13 See Supreme Court of Singapore "E-litigation" (available at: https://www.supremecourt.gov.sg/services/services-for-the-legal-profession/elitigation) (last accessed 13 January 2021).

14 G. Du and M. Yu (2019), China Justice Observer, "How to Litigate before the Internet Courts in China: Inside China's Internet Courts Series -02" (available at: https://www.chinajusticeobserver.com/a/how-to-litigate-before-the-internet-courts-in-china) (last accessed 13 January 2021).

15 For more information on the EBRD event on 20 October 2020, Developing Online Commercial Courts For Emerging Markets, description, agenda, related documents and recording visit: https://ebrd.glueup.com/event/developing-online-commercial-courts-for-emerging-markets-27964/ (last accessed 13 January 2021).

16 Visit the EBRD's Economic Inclusion page: https://www.ebrd.com/what-we-do/projects-and-sectors/economic-inclusion.html
The Study 'Women Entrepreneurs' Access to Justice. Study findings: Jordan' (2019) is available at: https://www.ebrd.com/cs/Satellite?c=Content&cid=1395288222273&pagename=EBRD%2FContent%2FDownloadDocument (last accessed 13 January 2021).

17 EBRD (2019), *Law in Transition 2019: Better laws for better economies*, see at: https://www.ebrd.com/publications/law-in-transition-2019-gender-balance.pdf, pp. 58-61.

"As any reform in any jurisdiction, creating online courts will encounter resistance and a series of challenges."

FOCUS ON COMMERCIAL DISPUTES AND SMALL VALUE CLAIMS

Taking on the reform of the entire court system would be a gargantuan task. It may also prove not very efficient, as various parts may need differently tailored approaches, depending on the type of case – criminal, family, commercial, labour, and so on. Most jurisdictions implementing online courts started with limited categories of cases. In Canada, the Civil Resolution Tribunal started with small claims of up to US$ 5,000, motor vehicle accident and injury claims of up to US$ 50,000, as well as societies and cooperative association disputes (Soc/Coop) and strata property (condominium) disputes of any amount.[18] The Singaporean Community Justice and Tribunal System opted for small claims, community disputes and employment claims.[19]

18 Civil Resolution Tribunal Act, [SBC 2012] Chapter 25 (available at: https://bit.ly/33zC12H) (last accessed 13 January 2021). According to its 2019-20 Annual Report, out of 5,880 new CRT applications for dispute resolution in 2020, 4,926 were small claims applications. For more information, see "2019-2020 Annual report" (available at: https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2019-2020.pdf https://civilresolutionbc.ca/about-the-crt/presentations/ (last accessed 20 January 2021).

19 See State Courts Singapore, Community Justice and Tribunal Systems, https://www.statecourts.gov.sg/CJTS/#!/index1 (last accessed 13 January 2021).

Commercial disputes, and disputes based on small claims in particular (€5,000 to €10,000), seem a good target for transformation and transitioning online. There are a number of reasons for this, including the need to ease access to justice for small and medium-sized enterprises. In small claims, the costs and time delays are often disproportionate compared with the value of the claim. According to World Bank data, the cost of resolving a commercial dispute through a local first-instance court in Serbia amounts to 39.6 per cent of the claim value, in Ukraine – 46.3 per cent, and in the Kyrgyz Republic – 47 per cent.[20] In addition, many jurisdictions often already have a separate court procedure for small value claims.

This may mean that reform will require fewer changes to the law. Moreover, in many jurisdictions cases involving small value claims are generally examined without court hearings, based on documents submitted by the parties, making them particularly suitable for shifting online.

WHAT ARE THE CHALLENGES IN ESTABLISHING ONLINE COURTS IN EMERGING MARKETS?

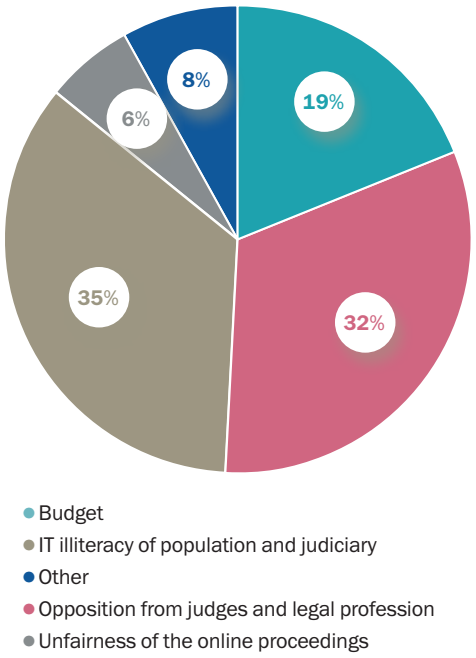
As any reform in any jurisdiction, creating online courts will encounter resistance and a series of challenges. Many challenges, though, will be more prominent in the emerging markets.

Political instability and government turnover are a particular challenge in the EBRD's CoOs. Reform of courts typically requires investments of financial resources and time. Hence political commitment, as well as leadership, is essential. In Ukraine, the new president came to power with the slogan: "A state in a smartphone". But momentum must be maintained even as governments change: it is also important that the champions of reform have sufficient time to progress these reforms, or at least make them difficult to reverse through approved strategy commitments – or better still, by advancing them far enough for the people to realise and fight to keep the benefits of these reforms.

Insufficient information technology (IT) literacy of the judiciary and the public is another major concern in any jurisdiction. When polled during the LTP's 20 October event, and a similar event during the World Bank Group's Law, Justice and Development Week (LJDW) in November 2020 participants and experts in the field clearly indicated this as a major challenge to setting up online courts.[21]

Chart 3: Example of poll results on challenges to establishing online courts (LJDW)

What do you think is the biggest challenge for establishing online courts in your jurisdictions?



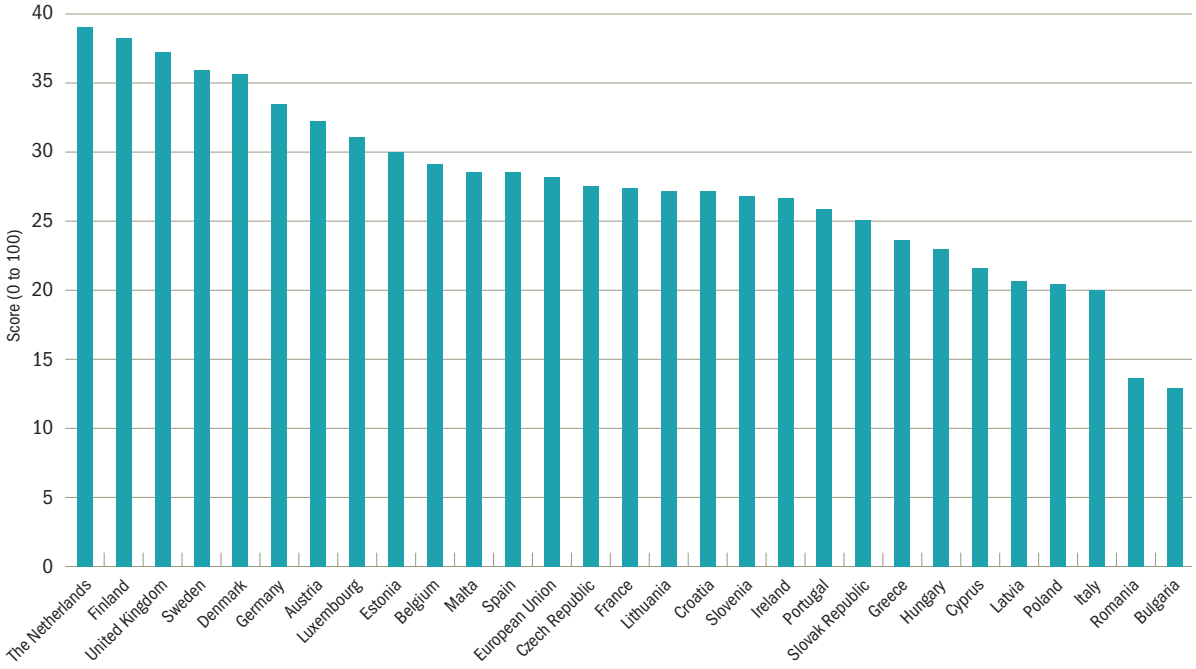
Source: Online poll conducted during LJDW 2020: Urgency of Online Courts for Commercial Disputes.

Insufficient IT skills should not be regarded as a deterrent, but should nevertheless be considered when planning and designing such courts. In particular, a hybrid approach may be a solution, giving the public access to physical courts and/or guidance by court clerks as needed. Below is a snapshot of digital skills in the EU countries.

20 The World Bank (2020), "Doing Business. Enforcing Contracts" (available at: https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts) (last accessed 13 January 2021).

21 During the *Law, Justice and Development Week 2020 - Legal Responses to the COVID-19 Pandemic* event organised by the World Bank in November 2020, 59 out of 167 respondents mentioned IT illiteracy as the biggest challenge for establishing online courts in their jurisdiction. For more information about the LJDW, visit https://www.worldbank.org/en/events/2020/05/29/law-justice-and-development-week-2020 (last accessed 13 January 2021).

Chart 4: Internet User Skills Score (DESI, European Commission)



Note: The Internet User Skills Score indicates a combination of the number of individuals residing in EU member states with the skills they possess to use digital devices and/or the internet. The highest score indicates the higher number of individuals with basic internet and other digital user skills. The score is part of the European Commission's Digital Economy and Society Index (DESI). To learn more about DESI, please visit https://ec.europa.eu/digital-single-market/en/digital-economy-and-society-index-desi.

Source: European Commission, 2020.[22]

The significant financial resources necessary to put in place online courts pose another major challenge. While some jurisdictions that have developed online courts have deployed impressive resources to this end, the advice is to learn from their experience, as well as consider finding more affordable IT solutions. In particular, many EBRD jurisdictions have access to highly sophisticated IT resources, which may be used at a fraction of the cost of counterparts in developed markets. One of the most relatable experiences in digitising court systems for EBRD countries is the example of Estonia, which since early 2005, fully digitised its court system, offering online submission of claims. According to its experts in digital transformation, the investments in IT solutions may be recovered within two months f implementation.[23]

To put such savings into perspective and ascertain the potential investment required, one need only review the European Commission for the Efficiency of Justice (CEPEJ) reports on the Evaluation of the judicial systems. According to the latest report (2016-18 cycle), the annual public budgets implemented by some EBRD CoOs for court computerisation (equipment, investments, maintenance) are as follows: Armenia: €69,466; Bosnia and Herzegovina: €1,452,946; Bulgaria: €1,031,772; Croatia: €9,963,093; Estonia: €118,352; Georgia: €154,407; Moldova: €379,144; Montenegro: €382,646; Romania: €2,557,371; and Ukraine: €4,816,308.[24] Note Estonia's extremely reasonable court maintenance budget, which clearly indicates a reduced financial burden after the initial development investment.

22 European Union (2020), "Digital Agenda" (available at: https://digital-agenda-data.eu/ and https://digital-agenda-data.eu/datasets/desi/visualizations (last accessed 20 January 2021).

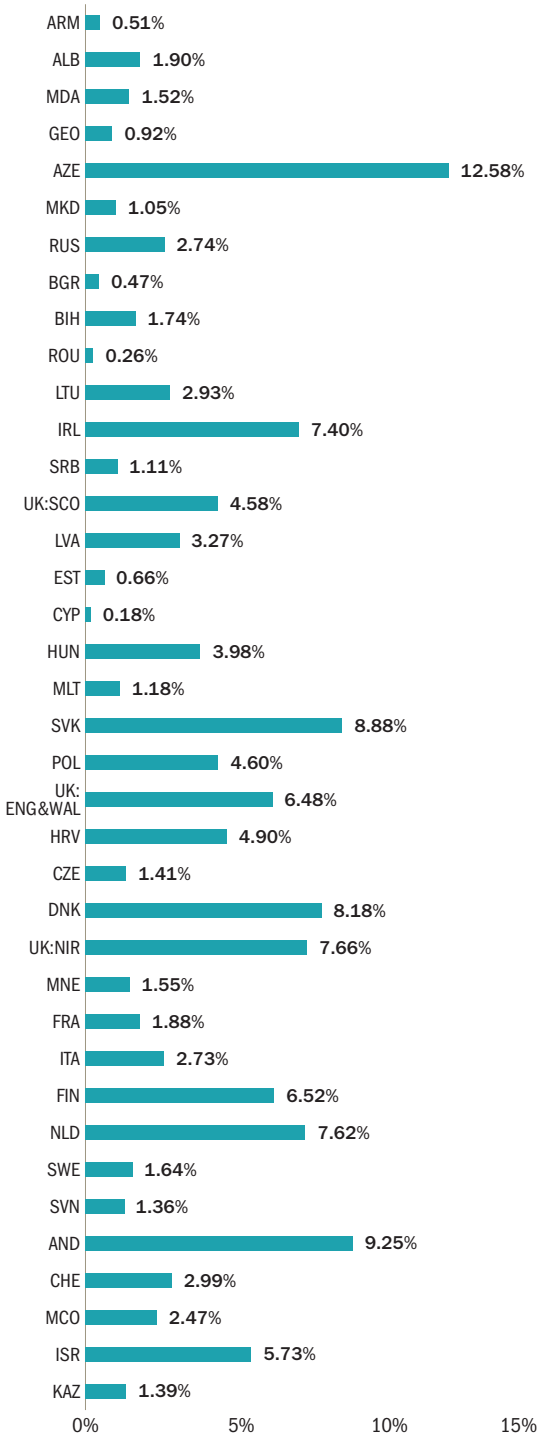
23 Annet Numa, Digital Transformation Adviser at e-Estonia Briefing Centre, EBRD webinar "Developing online courts for emerging markets", 2020.

24 European Commission for the Efficiency of Justice (CEPEJ) (2018), "Evaluation for the judicial systems. Ukraine" (available at: https://rm.coe.int/ukraine/16808d02b1) (last accessed 13 January 2021).

Opposition from the judiciary and lawyers is another oft-cited challenge to online courts. The legal profession may perceive online courts as taking away their livelihoods by providing direct, easy access for litigants. In exploring this critique, Richard Susskind refers to "lawyerless courts".[25] However, depending on the type of cases deferred to online resolution, this concern may be overplayed. It is well recognised that small-value cases rarely reach the courts or, if they do, rarely require formal legal representation, due to their simplicity. Increasing access to courts may in fact raise the demand for legal services, for a smaller fee and simpler advice. As for the opposition from the judiciary, a constant dialogue and adequate training must be in place to help the transition.

"The Covid-19 crisis has only emphasised the structural and economic inefficiencies of the judiciary and will thus create a greater impetus for change."

Chart 5: Average participation of the implemented ICT budget in the budget of courts, annually, 2014-2018



Source: European judicial systems CEPEJ Evaluation Report 2020 Evaluation cycle (2018 data), available at https://rm.coe.int/evaluation-report-part-1-english/16809fc058. The three digit codes are ISO 3166 country codes.

25 R. Susskind (2019), *Online Courts and the Future of Justice*, Oxford University Press, Oxford, p. 235.

CONCLUSION

Technology will continue to disrupt and enhance the work of various sectors, including more conservative areas such as the justice sector and the judiciary. The Covid-19 crisis has only emphasised the structural and economic inefficiencies of the judiciary and will thus create a greater impetus for change.

Online courts are a viable solution for the highlighted issues. Advocates suggest that they increase access to justice for those who are otherwise deterred from resorting to court services because of the cost, duration and difficulty in navigating legal proceedings. This can be successfully addressed by adopting a user-centred approach.

With the onset of the Covid-19 pandemic, the time finally arrived to gradually reform our courts, but reform must be carried out while being mindful of the purpose of transformation and goals pursued– be it access to justice, efficiency of justice or simply modernising the justice system. We advocate for first embracing expanded and online access to justice as a goal, then designing the solutions appropriately.

HARNESSING BLOCKCHAIN TO FACILITATE DIGITAL TRANSFORMATION: THE FUTURE OF PUBLIC SERVICES IN GEORGIA

"The need to speed up the flow of information and deliver automated and – to the extent possible – remote public services has never been more pressing."

Over the last few years, blockchain, an obscure technology once associated only with the cryptocurrency, Bitcoin, has become one of the most important technologies to develop. Since its emergence, blockchain has been predominantly applied to innovation within the financial services sector (fintech). However, lately, several new applications have been explored in areas including supply chain, data management, identity and – significantly – public administration.

WHAT IS BLOCKCHAIN?

As has become globally apparent in light of the Covid-19 crisis, governments must change the way they administer and deliver their services in order to be equal to current and future challenges. The need to speed up the flow of information and deliver automated and – to the extent possible – remote public services has never been more pressing. Having said that, initiatives for the digitalisation of public administration significantly predate the Covid-19 crisis. A declining trust in government institutions as well as growing expectations of citizens in terms of transparency, integrity and accountability have catalysed digital transformation in the public sector for decades.

A subset of distributed ledger technologies (DLT), blockchain enables the creation of records of shared facts secured using cryptography to create an audit trail which is maintained and validated by those that use the network (without requiring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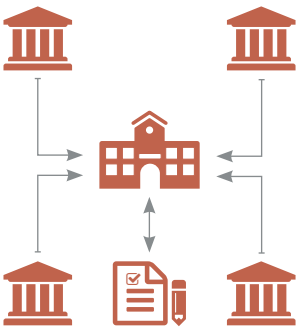
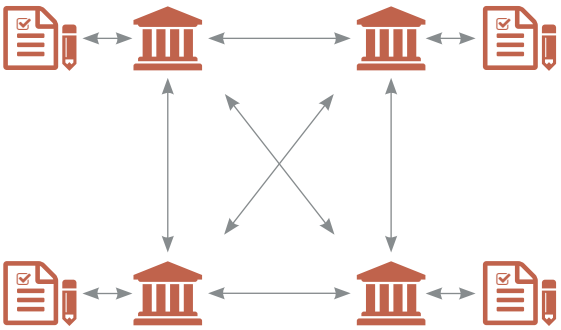
a third-party intermediary). This data is cryptographically assured and can be synchronised and distributed across multiple institutions. This allows anyone with access to the network the ability to view the same information as other network users and creates the capacity for a recording of shared facts across independent participants.[1]

Chart 1: Distributed ledger technologies



Centralised ledger



Distributed ledger

Source: EBRD, based on a TradeIX diagram.

With decentralisation, transparency and immutability at its heart, blockchain technology is primed to revolutionise the delivery of public services and promote openness, transparency and inclusiveness, which is one of the key pillars of a digital government,[2] and fits perfectly with the EBRD's mandate as outlined in its 2021-2025 Strategic and Capital Framework.[3]

PUBLIC ADMINISTRATION SERVICES AND BLOCKCHAIN

Apart from the efficiency and trustworthiness of blockchain, the technology can also considerably reduce transaction and administrative costs. Blockchain can also help public administration to digitise, automate and securely manage its records.[4] This all has the potential to benefit user (be that the citizen or business) experience which in turn contributes to an increased trust in public institutions.[5]

It is therefore no surprise that several governments are exploring the potential of blockchain application in public sector administration, land registries, data maintenance, contract management, identity proof and even blockchain-based elections.

EXPLORING BLOCKCHAIN IN GEORGIA

The EBRD has always prided itself on promoting entrepreneurship and innovation, and helping advance the transition to market economies, while fostering sustainable and inclusive growth. Digitalisation fits this mandate perfectly and supports several of the transition qualities.

In late 2019 we responded to a specific request from the Ministry of Justice of Georgia to assist with identifying the possible uses of blockchain in government services delivered by the ministry. As explained below, at the time of the request, Georgia had already piloted the use of blockchain in its land registry, and the aim now was to expand its use.

1 UK Government Chief Scientific Adviser (2016), 'Distributed Ledger Technology: beyond block chain', p. 5, Government Office for Science. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/492972/gs-16-1-distributed-ledger-technology.pdf (last accessed 10 December 2020).

2 http://www.oecd.org/governance/digital-government/toolkit/12principles/ (last accessed 10 December 2020).

3 https://www.ebrd.com/documents/corporate-strategy/strategic-and-capital-framework-2021-2025.pdf (last accessed 10 December 2020).

4 https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/using-blockchain-to-improve-data-management-in-the-public-sector (last accessed 10 December 2020).

5 https://core.ac.uk/download/pdf/196263616.pdf (last accessed 10 December 2020).

In recent years, the Ministry of Justice's efforts to innovate and improve efficiency have been lauded globally. In 2019 the Global Innovations Index ranked Georgia in its top 50 countries.[6] In the same year, the World Bank's economy rankings placed Georgia seventh for overall "ease of doing business". Specific category rankings included: fifth place for ease of registering property, and second place for ease of starting a business. Georgia has retained its Doing Business rankings in 2020.[7] These top accolades relate directly to the services offered by the Ministry of Justice.

To ensure that the public service offering remains highly efficient and accessible, the Ministry of Justice sought the EBRD's help in exploring the use of blockchain to further improve the quality of the essential public services it provides, using the country's well-established innovative approach.

The purpose of our assistance was to outline the specific opportunities for using blockchain in public service delivery by detailing a comprehensive and agency-specific set of use cases. The project has been led by the EBRD's Legal Transition Programme and the Ministry of Justice of Georgia and supported by distinguished blockchain industry experts at Verum Capital AG.

Key use cases identified

The Ministry of Justice is the national government body in Georgia responsible for ensuring efficient and accessible public services to citizens through its 12 agencies. The services carried out by such agencies include: the notaries profession, registries (including land registry, real estate registry, movable property rights registry, entrepreneur and non-profit entities registry), enforcement of court decisions, national archives and legislative herald.

Through close cooperation with the Ministry of Justice and each of its agencies, in carrying out the assignment we studied the activities of, and services delivered by, each agency and devised potential use cases where blockchain can be

6 https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2019/ge.pdf (last accessed 10 December 2020).

7 https://www.doingbusiness.org/content/dam/doingBusiness/country/g/georgia/GEO.pdf (last accessed 10 December 2020).

deployed and add value to public services. For each use case, we tried to identify the specific technical requirements necessary to deploy it, as well as flag any potential legal and regulatory obstacles.

Lastly, each use case was evaluated against a measured scorecard, the metrics of which were defined in working with the Ministry of Justice. The criteria used to evaluate each use case stress the creation of value for all stakeholders, simplicity of solutions, increased impact and reach of services, valid use of the technology and potential for further innovation (see table below). These metrics have served as overall guiding principles to uphold the interests of the citizens that the Ministry of Justice serves every day.

Due to its innate features, blockchain technology lends itself particularly well to ledger-like solutions such as databases and registries by ensuring the integrity and authenticity of data stored therein.

Example:
Blockchain land registry, Sweden

Piloted in 2016, the blockchain land registry ensures that land titles are stored securely in a trusted environment. It ensures, among other things: complete trust in government data; prevention of internal parties from manipulating data; verification of the integrity of government data independent of its central database and in real time to enable data interoperability between systems and across borders.

Source: Kairos Future (2017), 'The Land Registry in the blockchain – testbed'.

Table 1: Use case evaluation scorecard

Criteria	Vectors	Thresholds
1. Value **Prioritises low initial investments and high operational outcome**	• ongoing improvements • immediate benefits to staff	Low/medium/high
2. Simplicity **Prioritises ease of integration and low ongoing operational requirements**	• ongoing requirements • ease of integration	
3. Impact **% of population that will benefit and the level of service improvement experienced**	• service improvement • reach	
4. Validity **Prioritises the blockchain as a critical feature and its ongoing value**	• blockchain's ongoing value • blockchain's necessity	
5. Potential **Prioritises a stepwise implementation and foundational benefits for further blockchain projects**	• foundational capacity • stepwise implementation	

Land registries and real estate ownership records were identified early on as one of the main public services that could benefit from using blockchain. In countries with unreliable registries, implementing blockchain solutions could form the foundation for more investment in land and development of the mortgage and credit markets.

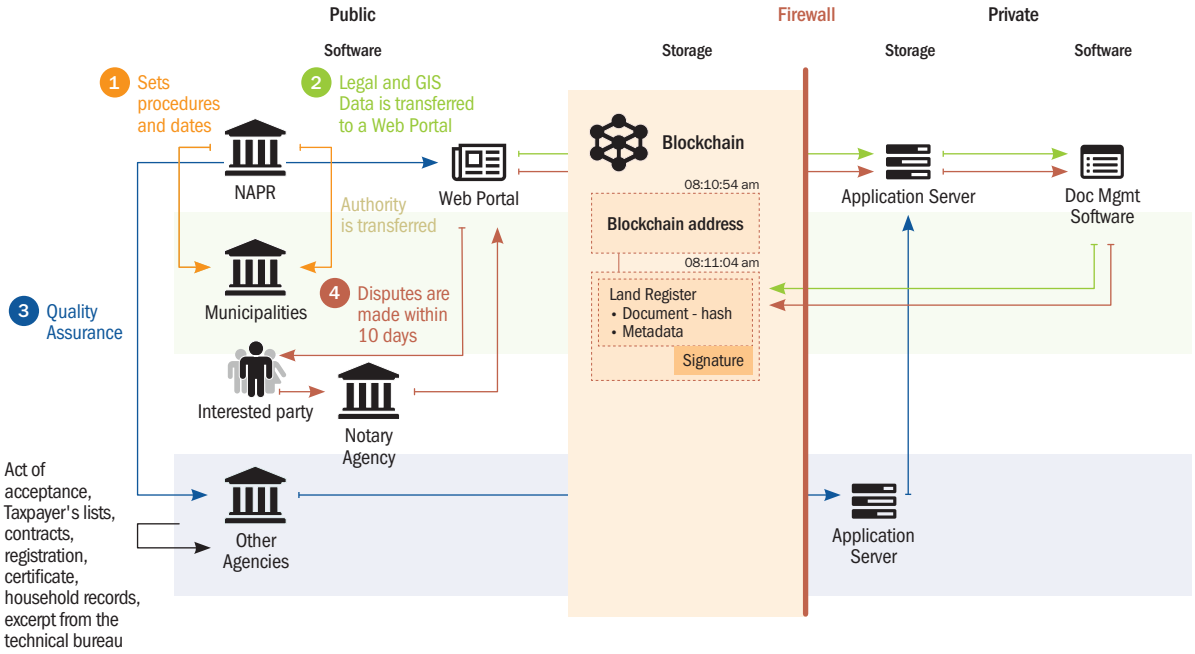
In Georgia, the National Agency for Public Registry (NAPR) currently offers sporadic and systematic forms of land registry to citizens. The NAPR currently stores the data centrally and has written hashed[8] datasets written to the blockchain, ensuring that centrally stored data cannot be manipulated. With early experiments in using a public blockchain well under way, the NAPR is well poised to create an enduring solution for the Land Registry, one that leverages blockchain as an enduring solution for data integrity and creates new opportunities to automate transactions and enables new possibilities for ownership transfer.

Migrating the land registry to blockchain could attract many benefits, including:

1. **Enhanced reliability and trust.** A stand-alone blockchain can improve the security of the existing registry system ensuring that records have not been manipulated by any party who might have access.
2. **Automation and cost savings.** The use of smart contracts can reduce errors related to manual processing, costs-related menial work done by officials, and lower the risk of threats, phishing and otherwise, at the point of data entry, in this case the citizens' portal. For more advanced use cases, a blockchain-based digital identity could reduce recurring procedural costs by approving citizens for registry interaction and allowing them to enter data into the smart contract directly.

Below, in no particular order, we provide a summary of some of the key use cases identified in our report.

Chart 2: Blockchain-based systematic land registry*



Source: EBRD-Verum (2020), "Distributed Ledger Technology Opportunities for the Ministry of Justice of Georgia : An Innovative Approach to Public and Governmental Service Delivery".

*As the EBRD-Verum AG Report envisages it to be implemented in Georgia.

8 A hash is a function that converts an input of letters and numbers into an encrypted output of a fixed length.

Debtor registry

The National Bureau of Enforcement (NBE) manages Georgia's Debtor's Registry, ensuring that it is up to date and publicly accessible. It is a systematised electronic database that lists individuals, legal entities and organisations against which enforcement administration has been exercised. The database is accessible on the NBE website; citizens can submit a request, at a negligible cost, to instantly retrieve relevant records. Individuals and entities are added to the registry at the moment that they become the target of an enforcement proceeding.

Migrating such a registry to blockchain could attract many benefits, including:

1. **Reduced risk for fraud and corruption.** A blockchain-based debtor's registry, similar to other registries, can reduce the risk of manipulation of records from parties that might have access to a centralised database.
2. **Cost reduction for involved parties.** Through the eventual automation of access, the administrative costs associated with managing requests could be eliminated.
3. **Social support.** Opportunities to consolidate records and outstanding debts from multiple parties could allow agency officials to support citizens with debt relief counselling based on complete information.

Example:
Ukrainian Ministry of Justice Auction Portal

Piloted in 2017, this blockchain-based auction portal helps fight corruption by providing a transparent and decentralised system for the sale and lease of state properties and other rights and ensuring legitimate ownership and transfer of ownership.

Source: Reuters (2017), 'Ukrainian ministry carries out first blockchain transactions'.

Example:
Groningen Debt Assistance, The Netherlands

Piloted in 2018, blockchain supports debtors to coordinate their credit information from external parties so that government agents can easily provide debt-relief assistance and help them to be stricken from the debtor's registry. Key benefits include secure consolidation of financial obligations for debtors and reduced administrative and legal costs.

Source: CGI (2018), 'Using blockchain to help Groningen residents control their debts'.

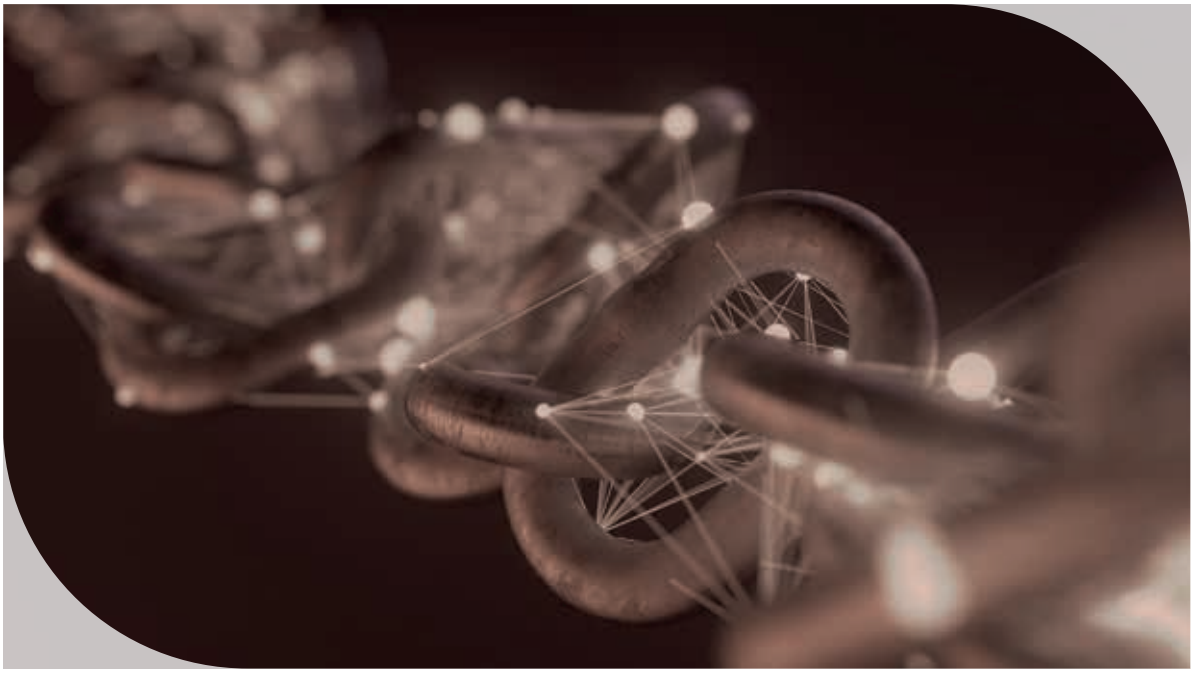
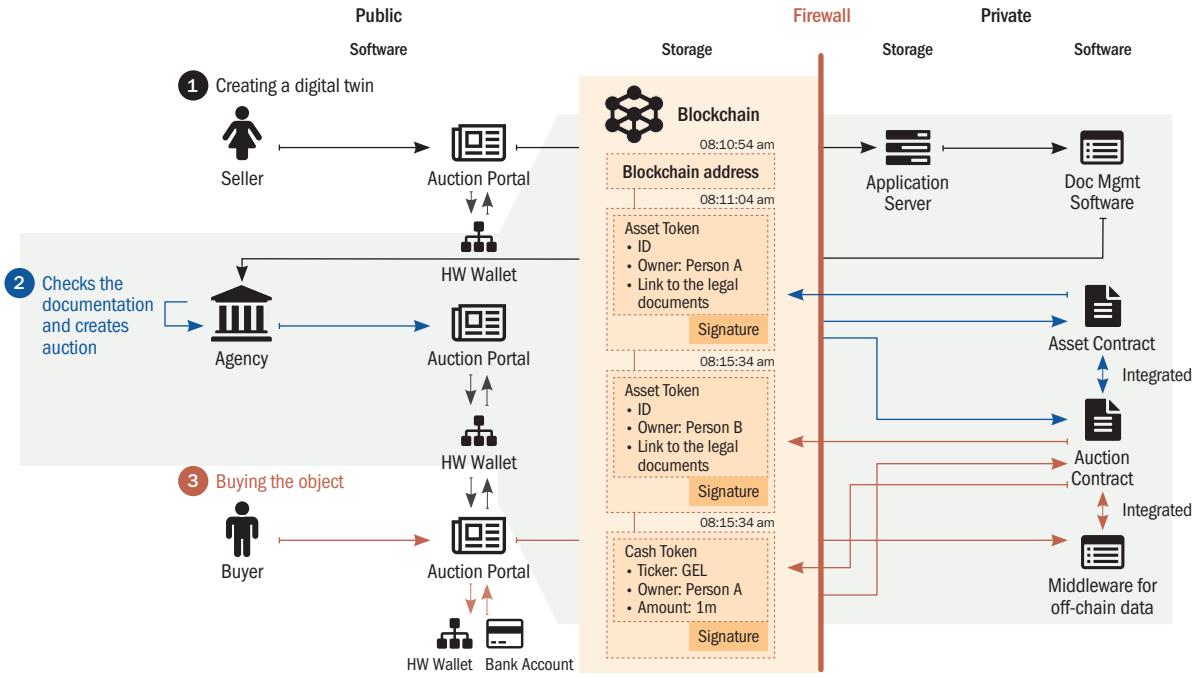


Chart 3: Blockchain-based auction portal



Source: EBRD-Verum (2020), "Distributed Ledger Technology Opportunities for the Ministry of Justice of Georgia : An Innovative Approach to Public and Governmental Service Delivery".

*As the EBRD-Verum AG Report envisages it to be implemented in Georgia.

Auctioning of property

The NBE enables all citizens to trade online and purchase property that is being auctioned. The auction process starts by NBE publishing a statement online, announcing an auction that will last from seven to 10 days. Participants in the auction proceed to agree to terms, pay a guarantee, register via the relevant website and ultimately submit their bid online. The winning bidders are required to pay in full for purchases within 10 days or they lose their guarantee. Certified ownership documents are then issued and the buyer must collect their property within 15 days.

Migrating such registry to blockchain could come with many benefits, including:

1. **Secure payments**. Guarantees can be submitted and returned instantly. This allows people to make more bids and feel more secure with how their funds are being handled.
2. **Secure transfer of ownership**. Transfer of ownership can be completed instantly on auction close or after payment in full has been received with minimal administrative efforts. Citizens can prove ownership rights to avoid collection issues.
3. **Automated and secure processes**. A smart contract programmed to uphold the terms of the auction can reduce opportunities for error by agency officials and prevent any internal manipulation of bids or pricing.

"The National Bureau of Enforcement (NBE) enables all citizens to trade online and purchase property that is being auctioned."

GENERAL LEGAL REQUIREMENTS TO ENSURE ENFORCEABILITY OF BLOCKCHAIN TRANSACTIONS AND COMPLIANCE WITH LOCAL LAWS AND REGULATIONS

Lastly, when considering the adoption of blockchain in the delivery of a public service, a key consideration should be the extent to which the platform and the services delivered through it are compliant and enforceable under the local law. In a sense, there needs to be a recognition of specific actions/events as having the force of law. Such actions can be summarised as recognition of :(i) digital signatures and stamps attributed to an individual (that are able to indicate intention in a binding and timely manner); (ii) timestamps (that indicate when and by whom the action has been conducted placing it in time); and (iii) other sorts of validation relevant to a specific use case (for example, uploading of documents and agreements; approval of actions by third parties).

Enforceability of blockchain-based smart contracts is predicated on being able to ascertain parties' identities (which may also be helpful if a dispute is presented before a court of law) and intention. Mechanisms introduced on the basis of recognised international standards and regulations (that is, European Union eIDAS regulation) such as electronic signatures and time stamps would need to be recognised and given equivalence to their written/analogue counterparts.

"Careful analysis of local laws and regulations is required in order to ensure conformity of blockchain solutions with the local regulation in this respect."

"Digitalisation has found a new spotlight, so this is the perfect time to focus on digital transformation."

In addition, whether smart contracts (the computer code utilised to automatically execute certain functions on blockchain) are legally enforceable contracts themselves or form part of legally enforceable contracts, remains a fundamental question for blockchain adoption. In general, analysis of this question relies on the application of basic contract law principles with modern-day facts and circumstances.

Importantly, the inherent features of blockchain technologies (especially immutability and security) may place it at odds with data privacy laws and regulations which call for the possibility to amend, correct and delete personal data. As a result, careful analysis of local laws and regulations is required in order to ensure conformity of blockchain solutions with the local regulation in this respect.

The EBRD's Legal Transition Programme's Report "Smart contracts: Legal Framework and Proposed Guidelines for Lawmakers",[9] published in 2018, provides further detailed and useful guidance for state authorities considering all these issues.

9 http://www.ebrd.com/documents/pdf-smart-contracts-legal-framework-and-proposed-guidelines-for-lawmakers.pdf (last accessed 10 December 2020).

CONCLUSION

The cryptography that underlies blockchain technology helps increase the security of the transaction in any sort of application. Blockchain offers government bodies the ability to provide a secure, trustworthy and transparent service while improving communication with its citizens. Furthermore, blockchain is able to provide secure access to public sector data, which in the long term will help ensure all information is kept safe.

The saying “necessity is the mother of invention” rings especially true now. Digitalisation has found a new spotlight, so this is the perfect time to focus on digital transformation. Industries across the board are evolving at lightning speed and keeping up with the change is challenging. It is no surprise that blockchain has caught the eye of the government, notwithstanding that widespread implementation of it may be some time ahead.

Shepherding the government through such a digital journey needs to be a steady process. With technology changing at breakneck speed, infrastructures must be put in place to help navigate the platforms of the future. Governments must focus on the value of technology and acquiring the necessary skills.

Our work, as evidenced by our activity in Georgia, is significant progress, where it can be seen that a priority for the government is to recruit more digital and technology specialists in order to improve the government’s technical capability. We look forward to seeing this evolve and adapt through the years.

ONLINE MEDIATION:
AN EFFECTIVE SOLUTION FOR DISPUTE RESOLUTION FOR SMALL AND MEDIUM-SIZED ENTERPRISES DURING THE COVID-19 PANDEMIC

"Mediation is one of the most common and effective alternative dispute resolution (ADR) mechanisms for resolving commercial disputes."

INTRODUCTION

Mediation is one of the most common and effective alternative dispute resolution (ADR) mechanisms for resolving commercial disputes. This mechanism is especially useful for small and medium-sized enterprises (SMEs) who need an alternative method for resolving disputes faster and more cost effectively than is possible in the courts. This has become especially relevant during the recent Covid-19 pandemic which has led to disruptions to the normal functioning of business activity and the judicial system. This has resulted in an increase in the number of commercial disputes and delays in court. Due to the impossibility of conducting mediation in the traditional way during the pandemic, mediation is increasingly shifting online. In the economies where the EBRD invests, mediators were often not ready to move to online mediation due to a lack of relevant skills and knowledge of resolving disputes online. The EBRD, through its Covid-19 response projects, is focused on promoting online mediation to help businesses resolve commercial disputes quickly and efficiently during and beyond the pandemic.

WHAT IS MEDIATION AND WHY IS IT USED?

Mediation is regarded as one of the ADR mechanisms and is considered to be non-adversarial. It is a confidential process by which a neutral third party, the mediator, assists the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parties in reaching a negotiated settlement. The mediation settlement is not binding until the parties sign an agreement which then becomes enforceable. Mediation can be a quick and cost-effective solution with most mediations only lasting one to two days.

Mediation has proved to be an effective tool in resolving commercial disputes. It preserves business relationships between parties and ensures a higher level of voluntary enforcement of the mediation agreement. This leads to greater predictability for commercial partners in addition to an increased number of transactions. The mechanism is especially useful for SMEs, who need an alternative method to resolve their disputes more urgently and cost effectively than what is possible in the courts.

MEDIATION IN LIGHT OF THE COVID-19 PANDEMIC

The importance of ADR mechanisms, including mediation, has become ever more pronounced in 2020 because of the global Covid-19 pandemic.

First, this unprecedented situation has put tremendous pressure on the national economies and had a major impact on economic activity around the world. According to the OECD's latest estimations, many economies will fall into recession.[1] SMEs have been particularly vulnerable to the Covid-19 crisis which has severely disrupted businesses across the EBRD regions. As stated in the EBRD Covid-19 Solidarity Package: Full Mobilisation Paper: "SMEs are likely to feel the brunt of an economic downturn and will be a focus of EBRD intervention."[2]

Second, due to the introduction of strict restrictive measures during the pandemic, the normal functioning of all state bodies, including the judicial system, was suspended, which in turn led to a delay in the resolution of commercial disputes in the courts.

Third, an additional effect of the Covid-19 pandemic is the significant impact on the business community which threatens commercial relationships and can often lead to disputes. Examples include: the impossibility of fulfilling contracts for the supply of goods, lack of income to pay rent for retail and industrial premises due to the forced suspension of business activity, and so on. It is expected that this situation will generate a higher number of commercial disputes that will need to be resolved more urgently and cost-effectively. However, the pandemic has brought dramatic new challenges to parties seeking to resolve their disputes in national courts.

Businesses benefit if they can address their disputes with a commercial, efficient and future-oriented focus. This helps overcome a number of the challenges presented by the pandemic, not least the expected backlog in the courts. With accelerated mediation, businesses can concentrate their resources on resolving other challenges, rather than conducting prolonged and expensive legal proceedings.

Traditionally, mediation is conducted in person. However, due to the emergency caused by the spread of Covid-19, traditional mediation is increasingly being shifted to online mediation.

Mediators should be taught to adjust to the new ways of doing their business remotely – as many mediators in the economies in which the EBRD invests where mediation is very new may struggle with new ways of communicating with clients and resolving disputes online.

"Due to the emergency caused by the spread of Covid-19, traditional mediation is increasingly being shifted to online mediation."

1 http://www.oecd.org/coronavirus/en/ (last accessed 16 December 2020).

2 https://www.ebrd.com/what-we-do/coronavirus-solidarity (last accessed 16 December 2020).

ONLINE MEDIATION AS A RESPONSE TO COVID-19

Online mediation is a dispute resolution process that uses online video conferencing platforms to allow parties and a neutral mediator to "meet" remotely for sessions. In online mediation, the entire process is conducted remotely using a digital platform (a video conferencing service provider such as Zoom, Skype, Teams, and so on). Unlike a traditional mediation, the parties and the mediator will not meet face-to-face and all interactions are digital.

ADVANTAGES OF ONLINE MEDIATION

- It makes traditional mediation services more accessible.
- Parties can mediate from anywhere, so long as the parties have access to a computer and a secure and reliable internet connection.
- Scheduling can be more convenient, saving time and cost: parties need only consider the scheduled mediation time (no travel/logistics issues).
- The physical distance can be an advantage for the parties in cases of high level of contentiousness: when parties are physically in the same room, their old patterns and dynamics may emerge more readily, which can negatively affect communication and negotiation.
- Similar to traditional mediation, online mediation allows for caucusing by utilising virtual meeting or breakout rooms so parties are able to meet separately with the mediator if needed.
- Parties, legal counsel and experts can participate easily: when the parties are legal entities (companies and so on), online mediation facilitates the participation of legal representatives, managers directly involved in the dispute and their legal counsel because they can remain in their respective offices and devote limited time to the mediation session.
- Documents can be shared and edited instantaneously.
- Respect of social distancing rules owing to Covid-19.
- Mediation fills the gap for solving disputes when access to courts is limited.

DISADVANTAGES OF ONLINE MEDIATION

- Risks to confidentiality when using third-party applications and the possibility of third-party presence near the parties' devices.
- Difficulty for the mediator in building rapport with parties: absence of human insight and empathy.
- The ability to read body language, hand gestures, eye contact and so on are all likely to be reduced over video conferencing.
- Difficulties for those who are not used to technology.

ONLINE MEDIATION PRE-COVID-19

Online mediation existed before the Covid-19 pandemic but it was not used intensively as a traditional in-person method. For example, in Italy, the Italian General Law on Mediation (legislative decree n. 28/2010) provides that mediation can also be conducted online. Based on the law, Italian mediation centres adopted the rules on online mediation. The Mediation Rules adopted by the Special Agency of the Chamber of Commerce of Rome for Arbitration and Conciliation, include an appendix on rules for online mediation. Its official website says that: "This system (*online mediation*) is very quick and easy to use but it is advisable to use it when it is not possible to meet personally because mediation, to work at its best, requires the physical meeting of the parties..."[3] Due to the Covid-19 pandemic, however, the use of online mediation has gained in popularity.

ONLINE MEDIATION DURING COVID-19

Since the onset of the pandemic, a number of mediation centres, where mediation has been successfully used for a long time, have promptly introduced online mediation and trained their mediators in new skills.

For example, the Singapore International Mediation Centre (SIMS) Mediation Rules provides an online mediation service. The parties requesting mediation should indicate the mode of mediation: in-person or online mediation (full or hybrid).[4] SIMS has also designed a Covid-19 Protocol which provides a swift and inexpensive route to resolve commercial disputes online during the Covid-19 period. This protocol applies whether a dispute was to a material extent caused by the pandemic or legislation relating to the pandemic.[5]

In the United Kingdom, in response to Covid-19, while the normal procedure is disrupted, the Centre for Effective Dispute Resolution (CEDR) offers online and telephone mediations to resolve disputes and help businesses find a sustainable way forward. CEDR has designed the Mediator's Guide to Online Mediation and the Model Mediation Agreement for Online and Telephone Mediation.[6] The mediators and businesses can find the CEDR's guidance to conducting online mediations and can book online mediation on its mediation webpage.[7]

"Since the onset of the pandemic, a number of mediation centres have promptly introduced online mediation and trained their mediators in new skills."

3 https://www.arbitracamera.it/pagina32_mediazione-secondo-modalit-telematiche.html (last accessed 16 December 2020).

4 SIMC Mediation Rules EN https://simc.com.sg/mediation-rules/ (last accessed 16 December 2020).

5 https://simc.com.sg/simc-covid-19-protocol/ (last accessed 16 December 2020).

6 https://www.cedr.com/wp-content/uploads/2020/03/Mediator-Guide-to-Online-Mediation-1.pdf (last accessed 16 December 2020).

7 https://www.cedr.com/commercial/telephone-and-online-mediations/ (last accessed 16 December 2020).

TECHNICAL REQUIREMENTS FOR ONLINE MEDIATION

Online mediations can provide a more cost-effective and environmentally friendly mechanism for dispute resolution. In order to create an environment which is conducive to settlement it is important that the mediator thinks carefully about the process from the outset and that he or she is familiar with all the relevant equipment and functions.[8]

There are certain requirements that are essential to any online mediation:

- strong, reliable internet connection with up-to-date security software
- computer/laptop with a microphone and high-quality camera
- secure video conference service provider, such as Zoom, Webex, GoToMeeting, Teams, Skype or others, which has the following functions:
  - waiting room which allows the holding of all participants on their own separate lines until the mediator opens the call
  - multiple room (a "conference room" for all parties)
  - breakout rooms for the individual parties which allow each party to have their own separate virtual room where they may discuss matters with the mediator or among themselves confidentially.
- sharing documents online
- utilisation, if possible, of electronic signing services.

In addition to the normal rules of mediation, there are online-specific issues which need to be considered, as the mediator will not have full visibility and control of the environment where the mediation is taking place. This includes:

- confidentiality
- privacy (ensuring that the parties agree that only individuals listed on the participant form may attend or be present in the rooms where each party member is joining)

8 https://www.cedr.com/wp-content/uploads/2020/03/Mediator-Guide-to-Online-Mediation-1.pdf (last accessed 16 December 2020).

- recording (agreeing in writing that recording is not permitted)
- planned or possible interruptions
- active management of communication
- explanation of how the mediation will run
- use of phones/checking emails (agree ahead of time if participants should have email and messenger functions closed and off during the mediation)
- having a Plan B, if there is a technical issue that arises.[9]

EBRD SUPPORT OF ONLINE MEDIATION

The EBRD has been continuously supporting the promotion of commercial mediation in a number of economies where the EBRD invests, including the Kyrgyz Republic, Moldova, Serbia and Tajikistan, and as a means of improving the investment climate.

As a response to the Covid-19 crisis, in order to support SMEs to resolve their disputes more efficiently through mediation during and post the Covid-19 pandemic period, the EBRD launched a technical cooperation project in Montenegro in September 2020. In the Kyrgyz Republic and the Republic of Tajikistan similar projects have been approved in October/November 2020 and will be launched at the beginning of 2021.

The situation in these countries varies in terms of the level of development of commercial mediation, but none of these countries currently has online mediation.

9 https://www.cedr.com/wp-content/uploads/2020/03/Mediator-Guide-to-Online-Mediation-1.pdf (last accessed 16 December 2020).

For instance, in the Kyrgyz Republic, the Law on Mediation was adopted in 2017, and with the support of the EBRD a self-regulated organisation for mediators entitled Republican Community of Mediators of the Kyrgyz Republic was established. There are currently two mediation centres in the country with a pool of mediators trained with EBRD support. Although Kyrgyz legislation has introduced the right of judges to refer disputing parties to the first informative mediation session and judges have received training on mediation, the number of cases of mediation is still small.

In Tajikistan, the Law on Mediation has not yet been adopted. The EBRD, through its project on commercial mediation launched in 2017, contributed to the promotion of commercial mediation and drafting the law on mediation. To promote mediation in the country, the Chamber of Commerce and Industry in the Republic of Tajikistan (CCI) established the Commercial Mediation Centre (CMC) as its structural subdivision which became operational in 2020. The EBRD project helped to develop the package of statutory documents for the CMC and organised the training of mediators. All certified mediators have been registered in the CCI mediators' registry and are ready to start practising mediation. The EBRD, during the next phase of the project, will provide support with adoption of the law on mediation in the country and, on its adoption, will assist with promoting and facilitating the use of commercial mediation, including online mediation to SMEs.

In Montenegro, the new Law on Alternative Dispute Resolution was adopted by the parliament on 16 July 2020 and came into effect on 6 August 2020.[10] The law simplifies the procedure for enforceability of mediation settlements and provides for an obligatory referral of parties to a first meeting with a mediator in some types of disputes, including commercial ones. While the recent improvements of the legal and institutional framework establish an important milestone towards increasing the use of commercial mediation, the overall use of mediation in the country remains low. There is still a high number of commercial cases causing an overload in the courts, especially because of Covid-19, which remains of concern. In 2020 the Mediation Centre, recently renamed as the Centre of Alternative Dispute Resolution of Montenegro, received 3,535 cases (2,885 cases were referred by the courts) of which 2,085 cases were settled (other cases are still pending). Of these 46 were commercial disputes from which 27 were settled and 19 are in progress. [11]

To achieve the aforementioned objectives, these Covid-19 response projects will assist in providing guidance on how to conduct mediations online and organising capacity-building training for online mediators. In cooperation with EBRD Advice for Small Businesses, it is planned to promote the use of commercial mediation, including online mediation, among SMEs.

CONCLUSION

Online mediation is predicted to become the "new normal". Its simplicity ensures it is an attractive option for anyone involved in commercial disputes. The Legal Transition Programme at the EBRD will continue to support the promotion of online commercial mediation in our regions to help SMEs resolve their disputes more effectively during and post Covid-19. In addition, the EBRD aims to enhance the necessary skills of the mediators and ensure the use of mediation, including online mediation, becomes normal business practice.

10 https://me.propisi.net/zakon-o-alternativnom-rjesavanju-sporova/ (last accessed 16 December 2020).

11 Provided by the Centre of Alternative Dispute Resolution of Montenegro as of 7 December 2020.

WORKING WITH INSOLVENCY STAKEHOLDERS IN ARMENIA

"The Legal Transition Programme has built strong relationships with the Armenian authorities and local stakeholders through an extensive programme of cooperation on insolvency law matters."

Armenia has been hit hard economically by the coronavirus pandemic and so supporting the development of an investor-friendly, transparent and predictable legal environment has never been needed more. Part of this is making sure that the country has an efficient, well-designed insolvency framework that can act as a safety valve for business failure and offer businesses a "second chance". The EBRD's Legal Transition Programme has been working with the Armenian authorities and Insolvency Court on ways to improve the court's operations and effectiveness, as well as providing training for judges and insolvency practitioners.

Armenia is one of the smaller economies in which the EBRD invests, yet it is strategically important; a mountainous landlocked country of approximately three million people, Armenia borders Azerbaijan, Georgia, Iran and Turkey.

The EBRD began investing in Armenia in the early 1990s, and its investments span a broad portfolio of financial institution, energy, industry, commerce, agribusiness and sustainable infrastructure projects.

The EBRD's current portfolio in Armenia is approximately €400 million, spread across some 60 projects. The private sector share of this portfolio is close to 90 per cent. In 2020 the EBRD committed in Armenia close to €160 million, of which almost 93 per cent was in the


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private sector. Of the €160 million, more than €50 million was earmarked for the banking and energy sectors in the context of the EBRD's Resilience Framework, which was set up to counter the impact of Covid-19 on the EBRD's regions.

Like many countries, Armenia was seriously hit by the pandemic. However, the economic and political situation was complicated further by military hostilities involving the Nagorno-Karabakh region. The IMF forecast 7.25 per cent negative growth for the economy in 2020. Lockdown measures have had a significant impact on business, including tourism, which plays an important role in generating revenues and attracts many of the Armenian diaspora. The Armenian government announced an assistance package valued at approximately US$ 300 million (about 2 per cent of GDP) to mitigate the socio-economic issues related to the pandemic.[1] The country has also benefited from support from the International Monetary Fund.

"The EBRD's new assessment on business reorganisation, launched in September 2019, aims to present specific recommendations to the economies where the EBRD operates, including Armenia, on how to improve their legislation to use insolvency as a positive force for business rescue."

Against this backdrop, the work that the Legal Transition Programme has been doing in Armenia to support the development of an investor-friendly, transparent and predictable legal environment has never been more relevant. The severity and unprecedented nature of the 2020 economic crisis has highlighted the importance of an efficient, well-designed insolvency framework that can act as a safety valve for business failure and offer businesses a "second chance".

Fortunately, the Legal Transition Programme has built strong relationships with the Armenian authorities and local stakeholders through an extensive programme of cooperation on insolvency law matters. Our work in this area began in 2017, following an agreement between the EBRD and the Armenian Ministry of Justice (MOJ), which was determined to invest time and effort in improving the country's insolvency framework and its ranking in the World Bank *Doing Business* report. We were supported by the Armenian Business Support Office, a body established to promote public-private dialogue and improve Armenia's business environment and investment climate.[2]

MAJOR REFORMS TO ARMENIA'S INSOLVENCY SYSTEM

In 2018, after extensive consultations with public and private stakeholders and the World Bank Group, we delivered a report to the MOJ containing recommendations on how to reform the insolvency framework. The report focused on two areas where reforms were most pressing: insolvency practitioners and court practice.

First, the report advised creating a more robust regulatory and supervisory regime for insolvency practitioners to address issues of malpractice. Often referred to as "trustees", "administrators" or "liquidators", insolvency practitioners play a critical role in insolvency systems around the world and help to administer the debtor's estate for the benefit of creditors.

Second, the report made recommendations on how to improve court rules and practice to tackle court overload and the widespread practice of

1 https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19 (last accessed 15 January 2021).

2 http://www.bso.am/ (last accessed 15 January 2021).

open-ended appeals and challenges to court decisions. One such recommendation was to create a specialist court to manage insolvency cases and deliver a consistent approach to the interpretation of insolvency laws and rules.

The MOJ accepted many of our recommendations, and the Centre for Legislative Development, a body affiliated with the MOJ, drafted a series of widespread amendments to the country's Law on Bankruptcy.[3]

The government moved quickly on judicial reform. On 6 August 2018 the Supreme Judicial Council, an independent constitutional state body established in April 2018 and responsible for guaranteeing the independence of courts and judges, approved the composition of a new Insolvency Court and selected 12 acting judges. This was given effect on 10 August 2018 by a decree from the president of Armenia, which provided that the Insolvency Court would start operating from 1 January 2019 in accordance with the Judicial Code of Armenia. The authorities had a number of practical tasks to administer, including locating a building for the court, furnishing it and engaging administrative staff.

Reform to insolvency legislation moved at a slower pace but on 26 December 2019 the Law on Bankruptcy was amended.

The amendments introduced major changes and improvements to the regulatory system for insolvency practitioners. For example, there are 97 active insolvency practitioners in Armenia, 12 of whom have passed retirement age and are only allowed to continue working on ongoing cases. The amendments liberalised the regulatory structure for these practitioners by allowing more self-regulatory associations of 20 or more insolvency practitioners to be created, beyond the existing self-regulatory organisation (SRO), which effectively has a monopoly on the profession. The changes also prevented the SRO from raising membership fees above a certain threshold, calculated on the country's minimum salary, without the MOJ's consent, to reduce the risk of the SRO fixing a high entry fee that would keep out new professionals.

3 Law of the Republic of Armenia HO-51-N of 25 December 2006 "On bankruptcy".

Significantly, the amendments gave the MOJ a central role in regulating the profession and provided that the MOJ would have the authority to supervise insolvency practitioners' observance of legal requirements, backed up with relevant disciplinary powers.[4] At the same time, the amendments clarified and limited the SRO's responsibility regarding supervision of professional conduct.

Another important shift in the balance of powers between the MOJ and the SRO relates to the automatic appointment system for insolvency practitioners. This system, which applies to cases where the parties fail to reach agreement on the individual to be appointed, had been run by the SRO but had lacked transparency. Following the amendments, the automatic appointment system is now under the control of the MOJ, a more neutral body.[5]

The legislation also addressed insolvency practitioner training. Armenia now requires insolvency practitioners to cover a minimum of 24 academic units or 18 hours of training per year and makes the SRO responsible for providing training to its members and recording their participation in such training.[6]

On the procedural side, the reforms helped to make insolvency proceedings more efficient. Apart from confirming the role of the Insolvency Court, they provided for an electronic exchange of documents between the court, state and local authorities and the insolvency practitioners.[7]

Furthermore, they introduced the rule that all civil cases connected with the debtor in insolvency proceedings are heard by the Insolvency Court, reducing the previous lack of coordination within the judicial system. Other improvements relate to the appeals process.

The amendments also clarified the process for appeal of decisions made by the court during examination of the insolvency case before the Court of Appeal and stipulated that appeals do not suspend the performance of any actions arising from such decision, unless the Court of Appeal determines that this would "inevitably give rise to grave consequences for the debtor or creditor".

Since the main legislative amendments came into effect, the Centre for Legislative Development and the MOJ have been busy developing secondary legislation and templates to standardise certain aspects of the insolvency process. There are now five pieces of secondary legislation covering mandatory training of insolvency practitioners, annual reporting on activities by the SRO and practitioners, the register of insolvency claims, financial analysis of the debtor and guidance on lists of property owned and co-owned by the debtor.[8] The Insolvency Act allows for further secondary legislation in a number of key areas, including applications for a qualifying test and enrolment by insolvency practitioners before the MOJ.

> "With a new online training platform for insolvency judges, Armenia has become a benchmark for future projects of this kind."

4 Article 27.1. Supervision over administrators and self-regulatory organisation of administrators.

5 Article 22. Selection and appointment of the administrator.

6 Article 26.1. Training of administrators. More detail is contained in Order N 104-N dated 12 March 2020, on Determining the Procedure of Yearly Mandatory Trainings of IOHs.

7 For example in relation to the court's acceptance of the bankruptcy application (see Article 13 of the Law on Bankruptcy as amended).

8 In order of reference: Decree No. N-104-N (12 March 2020); Decree No. N-103-N (12 March 2020); Decree No. N-107-N (12 March 2020); Decree No. N-101-N (12 March 2020) and Decree No. N-102-N (12 March 2020).

PERCEPTIONS OF ARMENIA'S INSOLVENCY SYSTEM

While the range of insolvency amendments is significant, the timing of the reform means that organisations such as the OECD and the World Bank have not yet interpreted them in their reports on Armenia's insolvency framework.

A recent comparison of Eastern Partnership countries (Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine) in March 2020 by the OECD found that insolvency frameworks remain one of the weakest areas for Eastern Partnership countries, and for Armenia in particular.[9] Moreover, the World Bank's *Doing Business* 2020 report ranks Armenia 95th out of 190 economies for resolving insolvency, including indicators such as the time, cost, outcome and recovery rate for a commercial insolvency and the strength of the legal framework.[10]

These results do not reflect the efforts that the Armenian authorities have made in recent years to reform and improve the Armenian insolvency framework. Nevertheless, one major area where insolvency reform is still needed relates to the reorganisation and continuation of struggling businesses, as well as the liquidation of failed businesses.

This is deeply engrained in the OECD SME Policy Index, which is based on the principles of the European Union's Small Business Act for Europe.[11] It is also a principle upheld by the EBRD's Core Principles of an Effective Insolvency System, which advocate for the importance of insolvency procedures that support the reorganisation of debtor businesses.[12]

Indeed, there is a major trend within European Union national insolvency systems to support early attempts by the debtor at "preventive restructuring" following the publication in 2019 of the EU directive 2019/1023 on preventive restructuring frameworks. This trend conflicts with the existing ability of creditors in Armenia to enforce their security in insolvency proceedings aimed at financial rehabilitation of the debtor.

The EBRD's new assessment on business reorganisation, launched in September 2019, aims to present specific recommendations to the economies where the EBRD operates, including Armenia, on how to improve their legislation to use insolvency as a positive force for business rescue.[13] This is vital for many businesses whose operations have been disrupted and whose profitability has been eroded because of the coronavirus pandemic.

Table 1: Progress in the bankruptcy and second chance dimension

Bankruptcy and second chance	Armenia	Azerbaijan	Belarus	Georgia	Moldova	Ukraine	EaP average
2020 scores	2.40	2.97	3.34	3.03	2.79	2.56	2.85
2016 scores	3.76	2.87	2.57	2.94	2.68	2.05	2.71
2020 scores*	2.73	3.23	3.21	3.20	2.69	2.38	2.91

*2016 methodology

Scores are initially derived as percentages (0-100) and then converted into a 1-5 scale with 5 being the highest-performing score. The methodology changed in 2020 hence the chart also reports 2020 scores based on the old 2016 methodology, as well as the new methodology, which includes an assessment of bankruptcy prevention measures. Source: OECD SME Policy Index: Eastern Partner Countries 2020: Assessing the Implementation of the Small Business Act for Europe.

9 https://www.oecd-ilibrary.org/docserver/8b45614b-en.pdf (last accessed 15 January 2021).

10 https://www.doingbusiness.org/content/dam/doingBusiness/country/a/armenia/ARM.pdf (last accessed 15 January 2021).

11 See https://ec.europa.eu/growth/smes/business-friendly-environment/small-business-act_en (last accessed 15 January 2021).

12 http://pubdocs.worldbank.org/en/538701606927038819/ICRStandard-Jan2011-withC1617.pdf (last accessed 15 January 2021).

13 www.ebrd-restructuring.com (last accessed 15 January 2021).

OPERATION OF THE NEW INSOLVENCY COURT

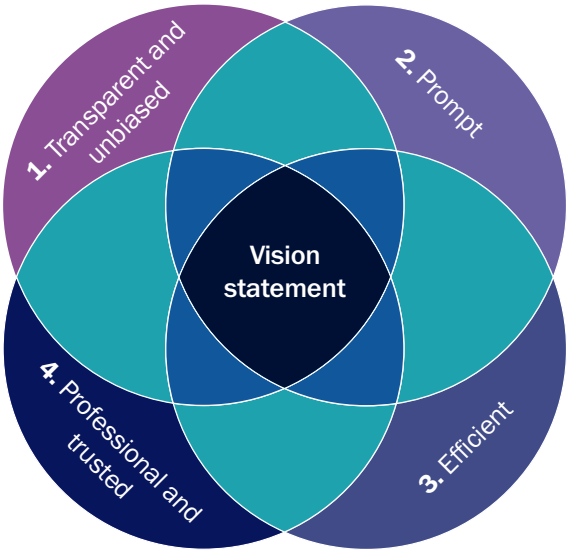
Apart from legislative changes, our work with the Armenian authorities has encompassed a number of capacity-building initiatives and outreach.

Soon after the Insolvency Court was established, we launched a project in partnership with the International Law Development Organization (IDLO) to help the court analyse and improve its operations and to deliver training to the court's insolvency judges, as well as judges in the higher instance courts.

Working closely with the Supreme Judicial Council and the Insolvency Court, we conducted a full operational analysis of the court and proposed an action plan to improve court processes. This was officially presented to interested parties and stakeholders in a webinar in June 2020.

Specifically, the team analysed the court's organisational structure, the institutional structure of the insolvency judicial system and reviewed the main operational processes. Benchmarking was conducted against court systems in Estonia, Germany, Russia, Slovenia, the United Kingdom and the United States of America to understand potential solutions and improvements.

"On the policy side, the EBRD's Legal Transition Programme worked closely with the authorities and national experts to create a vision for the Insolvency Court."



Source: Armenian Insolvency Court Action Plan, 2020.

The key areas identified for improvement included:

- standardising insolvency documents, including a recommendation for the creation of an insolvency application template
- establishing an internal database for sharing decisions and information, together with tools for monitoring and managing any old or long-running cases
- upgrading court software to extract statistical information for reporting, coupled with other IT tools to improve IT security management.

An insolvency court, similar to an insolvency law, should strive to achieve certain key objectives. On the policy side, the EBRD's Legal Transition Programme therefore worked closely with the authorities and national experts to create a vision for the Insolvency Court.

The vision statement, illustrated above, was "To ensure Transparent and Unbiased judgments by providing Prompt, Efficient, Professional, and Trusted resolutions to insolvency cases".

In summary, these qualities reflect the following:

1. Transparent and unbiased: all processes and decision-making in insolvency proceedings should be transparent and understood by all stakeholders in order to promote stability in commercial relations, enable creditors to assess risks and prevent disputes between parties.
2. Prompt: timely management of the insolvency process is essential to avoid undue disruption to a debtor business or distress in the case of a consumer and generally to preserve and maximise value for all stakeholders concerned.
3. Efficient: imposition of extensive costs on the insolvency estate should be minimised and procedures should be performed with minimal cost and maximum result.
4. Professional and trusted: all judicial proceedings should be conducted with high professional standards that are trusted by the community. The Insolvency Court should be perceived as an institution that ensures that the interests of all stakeholders are considered in accordance with the law.

While there is clearly significant work to be done by the Insolvency Court to improve its operations, there is also a sense of opportunity. If managed effectively, the court should help to reduce general instance court overload and the timeframe for insolvency case hearings. Having insolvency cases heard by a small group of specialist judges who are dedicated to overseeing insolvency proceedings can also have great benefits. Apart from ensuring more consistent court judgments, expertise and knowledge can deliver greater efficiency and timely conduct of insolvency proceedings.

CAPACITY BUILDING FOR JUDGES AND INSOLVENCY PRACTITIONERS

Our ongoing work with the Armenian authorities is now primarily in the area of capacity building and training. As a result of the coronavirus pandemic, we have had to be agile and adapt our plans from in-person training to an e-learning format. We have been fortunate that Armenia is quite a highly digitalised society, with 64.7 individuals out of 100 recorded as using the internet according to UN data for 2020.[14]

Moving the training online has led to some delays but – in cooperation with IDLO – we have now finalised the judicial training modules, which will enable insolvency court judges and higher instances judges to hone their knowledge and skills. The modules will be launched in the coming months.

This project is the first comprehensive training programme by the EBRD for insolvency judges and the programme is highly innovative in both the content and breadth of training, covering not only legal aspects but also financial skills and knowledge, which are critical for assessing the financial standing of the debtor business and the feasibility of any restructuring plan. It focuses on international best practices as well as on domestic legislation and practice. We have built a strong team of leading national and international experts and trainers.

We are developing a similar programme now for insolvency practitioners, which will contain additional elements specific to the profession, including professional status, supervision and discipline, case management and reporting obligations.

All of these initiatives support ongoing investments in Armenia. With a new online training platform for insolvency judges that systematically incorporates national and international trainers and expertise, Armenia has become a benchmark for future projects of this kind. We hope to have the opportunity to continue our work with the Armenian authorities in the area of insolvency and address new, innovative approaches, including in the field of restructuring and reorganisation.

14 http://data.un.org/en/iso/am.html (last accessed 15 January 2021).

MORE BYTE FOR YOUR BUCK
HELPING DELIVER DIGITAL INFRASTRUCTURE – A SURVEY OF INVESTOR PERCEPTIONS

"The methodology relied on building an accurate picture from the outputs of the sector itself alongside the policy, legal and regulatory environment for investors, service providers and consumers."

BACKGROUND

The EBRD's Legal Transition Programme (LTP) has focused part of its work on assessing the state of legal, policy and regulatory transition in a number of sectors in the economies where the EBRD invests.[1] These assessments benchmark the sector developments in each country against recognised international best practices, providing analysis of the existing legislative framework, a comparison of that framework with best practice and the identification of gaps and legal and regulatory reform needs.

As part of that work, the Bank, through the LTP, has carried out regular assessments (in 2008, 2012 and 2016) of the information communications technology (ICT) sector in the economies where it invests. The LTP's approach was to study key characteristics of the market, in terms of output metrics (for example broadband penetration, eGovernment and eCommerce world rankings) alongside a comparison of the legal and regulatory framework and best practice in the sector. That methodology relied on building an accurate picture from the outputs of the sector itself alongside the policy, legal and regulatory environment for investors, service providers and consumers.

1 See http://www.ebrd.com/where-we-are.html

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A NEW APPROACH

For 2020-21, the LTP's survey takes a different approach, one based on investors' immediate concerns regarding which factors in each country contribute most to decisions on whether to invest or not. The results therefore identify the countries that have the most attractive markets and policies for encouraging investment, particularly for digital infrastructure and broadband connectivity. The survey outputs, in the form of a ranking of investment attractiveness and a listing of the key investment risk factors, are intended not only to inform investors about relative investment climates, but also to prompt policymakers to consider reforms that would improve investment conditions in their countries.

THE SURVEY'S OBJECTIVE

The overall objective of the survey is to inform investors, policymakers, regulatory and other influencers of investment so that they can make decisions that will increase the impact and effectiveness of sector investments and thereby improve digital infrastructure and broadband connectivity coverage, quality and capacity.

COUNTRIES INCLUDED IN THE SURVEY

The countries intended to be included in the 2020-21 survey are:

- from the southern and eastern Mediterranean (SEMED) region: Egypt, Jordan, Lebanon, Morocco and Tunisia
- from the south-eastern European countries (SEE) region: Albania, Bosnia and Herzegovina, Croatia, Kosovo, Montenegro, North Macedonia and Serbia
- from the eastern Europe and the Caucasus (EEC) region: Armenia, Belarus, Georgia, Moldova and Ukraine
- from the Central Asia (CA) region: Kazakhstan, the Kyrgyz Republic, Mongolia and Tajikistan.

The SEMED and SEE country reports were published during the course of 2020[2] and the remaining country reports, from EEC and CA, will be published during 2021.

METHODOLOGY

The survey records directly the views of a wide range of existing and potential stakeholders in investment in broadband connectivity, including finance providers, telecommunications network and service operators, broadband and internet service providers, analysts and other market stakeholders. "Broadband investment" embraces digital infrastructure and connectivity (fixed and mobile networks) and the digital services (both retail and wholesale) that are delivered over these networks (voice, internet, data or media). This definition is used within the context of the key purpose of this survey – to promote digital infrastructure investments.

Respondents were asked to make a separate response for each country with which they are familiar. Their knowledge of the country could be either from their existing presence, or by their having studied the market for possible investment in the sector in that country. The survey sought opinions on the market for broadband investment from several overall viewpoints:

- market attractiveness – what is perceived about the market size, potential and attractiveness for investments?
- investment risk factors – including sector policies, the general and specific legal and regulatory frameworks, public and private sector cooperation, availability and quality of input resources including spectrum, labour and rights of way, taxation, trade policies and political stability
- best practice potential – what level of confidence do investors have in the country moving towards best practices for the sector?

1 See www.ebrd.com/cs/Satellite?c=Content&pagename=EBRD%2FContent%2FContentLayout&cid=1395292756036 for country reports, individually and regionally grouped.

COUNTRY OUTCOMES

Applying the above approach and methodology to individual countries and regional groupings, detailed conclusions were drawn and recommendations offered to overcome any identified impediments. These conclusions and recommendations are reported in detail in the full survey reports, 12 of which have been published on an individual country basis and as two regional groupings.[3]

Herewith a summary of the conclusions and recommendations for the two regional groupings.

Table 1 shows that Egypt is the largest market by population and is also forecast to be the fastest-growing market for broadband services, from the lowest current base. Morocco is the second-largest market by population, with the second-best forecast broadband growth rate, also from a low base. All five countries have relatively low positions in the overall world rankings for ICT development, although Jordan and Lebanon appear to have made some progress in improving their position.

Survey analysis and conclusions – the southern and eastern Mediterranean region

Table 1: Main market benchmark indicators in the SEMED countries

Market indicator	Egypt	Jordan	Lebanon	Morocco	Tunisia
Population (million)	100	10.1	6.9	36.5	11.7
Penetration of fixed broadband per 100 population	5.4	4.7	21	3.9	8.8
Penetration of mobile broadband per 100 population	50	104	57	58	81
% of population using the internet	45	67	78	65	64
ICT Development Index (world ranking)	103rd	70th	64th	100th	99th
Average download speed per fixed broadband user (Mbps)	26.52	50.53	8.10	18.52	9.12
Average download speed per mobile broadband user (Mbps)	16.89	17.74	46.69	33.57	25.32
Forecast overall broadband market growth up to 2023 (% compound growth per annum)	17	3.4	5.8	13	6.0

Source: United Nations, ITU, Speedtest Global Index, Fitch Solutions.

Table 2: Market attractiveness - the SEMED countries

Market attractiveness factors	Egypt	Jordan	Lebanon	Morocco	Tunisia
Overall size of the market, in population terms and relative spending power					
Growth potential of the market, in terms of demand for broadband services					
Efficiency of the markets in terms of fair competitive conditions					
A clear national ICT market strategy for the country with stated ambitions and goals, for example targets for broadband coverage and take-up					

Source: United Nations, ITU, Speedtest Global Index, Fitch Solutions.

● Good ● Medium ● Poor

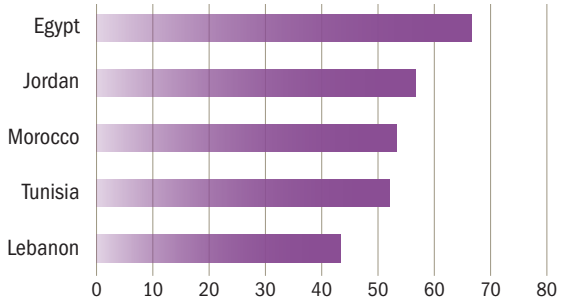
2 http://www.bso.am/ (last accessed 15 January 2021).

3 *Ibid*

Jordan and Lebanon are relatively small markets, but with relatively high standing in internet usage. Jordan already has high mobile broadband penetration, while its relatively expensive fixed broadband prices contribute to relatively low fixed broadband penetration. Jordan's forecast for broadband growth remains the lowest of the five countries. The average broadband speed test results show that the highest users are Jordanian fixed broadband subscribers, followed by Lebanese mobile broadband users. Relatively low speed usage is recorded by fixed broadband subscribers in Tunisia and Lebanon. The countries with the highest average download speeds also have the lowest fixed broadband penetration, showing that in these markets, the big users are purchasing fixed broadband.

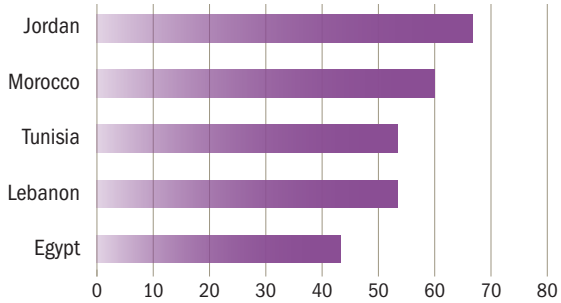
Based on the respondents' views (see Chart 1), Egypt is the most attractive of the SEMED broadband markets and Lebanon the least attractive. For this component, the survey participants were asked to rate only the pure market potential, disregarding any investment risk factors, which are only taken into account in the next component. Both the market attractiveness and the risk factors are combined to calculate the Overall Broadband Investment Index.

Chart 1: SEMED Broadband Market Attractiveness Index



On the comparative scale, zero would indicate a perception that the broadband market had no attraction. A score of 100 would indicate a perception that the market potential was perfect. Source: EBRD

Chart 2: Best Practice Index - SEMED countries

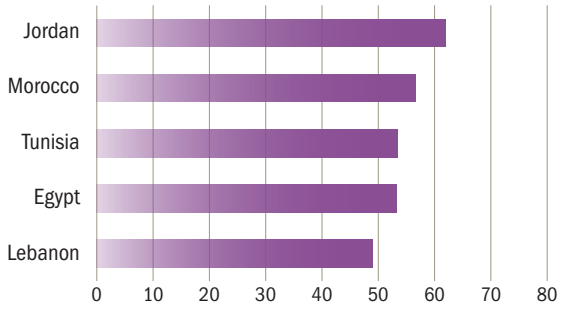


A value of zero would indicate that the country had no best practices relating to broadband investment conditions. A score of 100 would indicate that the country had already adopted all relevant best practices. Source: EBRD

Jordan appears to be the fastest at adopting best practices for lowering investment barriers (Chart 2). Its legal and regulatory framework has followed the main liberalising steps already adopted by the European Union (EU). Jordan's current policy is to continue to harmonise with the EU's more investor-friendly laws and regulations.

Morocco and Tunisia have the same overall harmonisation aims but are slower to implement the required steps.

Chart 3: Overall Broadband Investment Index – SEMED countries



On the comparative scale, zero would indicate a perception that the investment climate was very poor. A score of 100 would indicate a perception that the overall conditions were perfect for investment. Source: EBRD

Lebanon is currently deadlocked by policy and regulatory inaction.

Respondents have the lowest confidence in Egypt's adoption of best practice adoption by the sector.

The Overall Broadband Investment Index is a composite index and has been compiled from the scoring in the components set out in the preceding sections, namely:

- market attractiveness
- investment risk
- confidence towards adopting best practices.

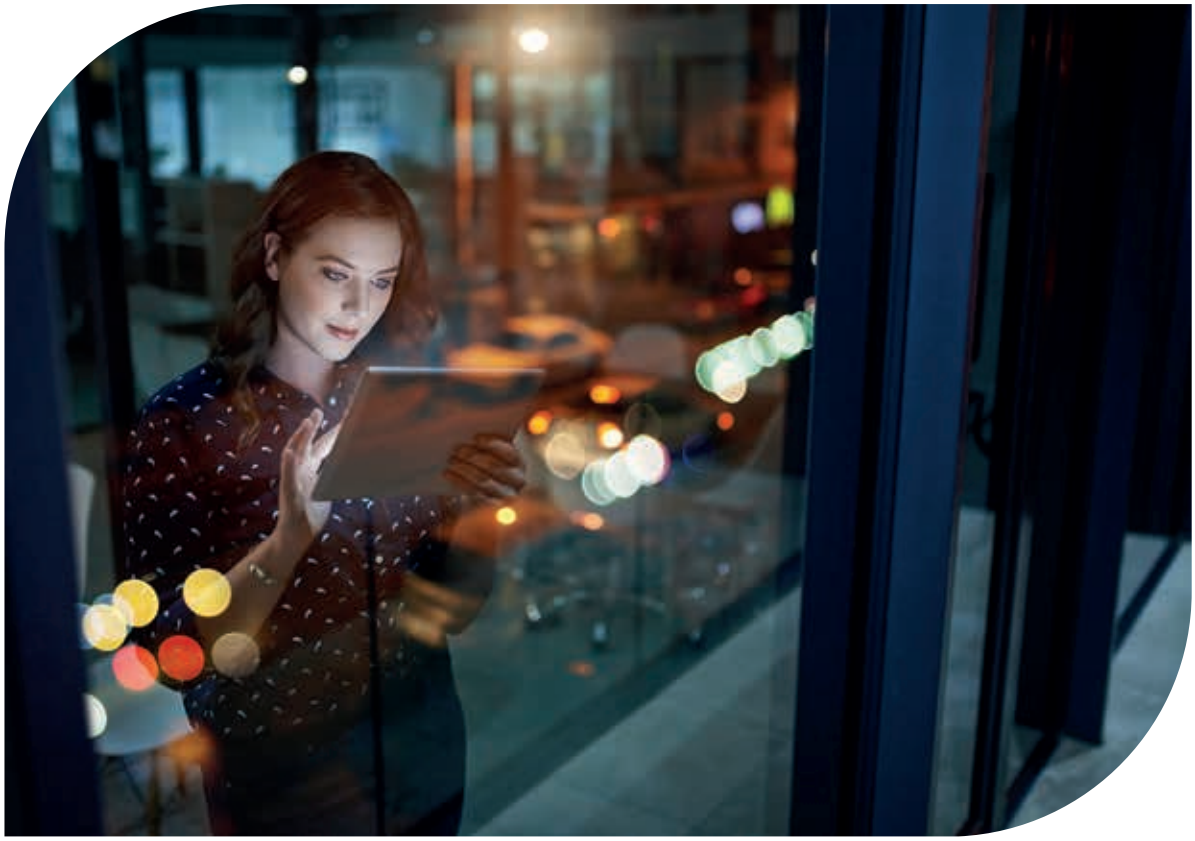
Chart 3 shows that in all SEMED countries, conditions are a long way short of what respondents would ideally wish for.

Table 3: SEMED countries - recommended priorities for action

Investment risk factors	Egypt	Jordan	Lebanon	Morocco	Tunisia
Taxation generally or targeted at the sector	●	▲	●	▲	▲
Access to spectrum resources	▲	▲	●	●	●
The legal and regulatory framework specific to electronic communications and broadband investments	▲	●	▲	●	●
The country's overall legal system, predictability and process	●	●	▲	●	●
State participation in the sector	▲	●	▲	●	●
State assistance and funding schemes	▲	●	▲	●	●
Certainty in construction permits or wayleaves	▲	●	●	▲	●
Trade barriers	●	●	●	●	▲

Source: United Nations, ITU, Speedtest Global Index, Fitch Solutions.

● Low priority ● Medium priority ● High priority



Survey analysis and conclusions – the south-eastern Europe region

Table 4: Main market benchmark indicators in the SEE countries

	Albania	Bosnia and Herzegovina	Croatia	Kosovo	Montenegro	North Macedonia	Serbia
Population (million)	2.9	3.3	4.1	1.8	0.7	2.1	7.0
Penetration of fixed broadband per 100 population	16	22	34	38	25	22	26
Penetration of mobile broadband per 100 population	45	51	90	72	55	63	91
% of population using the internet	72	70	73	77	72	79	73
ICT Development Index (world ranking)	89th	83rd	38th	Not available	61st	69th	55th
Average download speed per fixed broadband user (Mbps)	33.2	32.1	35.7	46.2	30.3	46.4	50.0
Average download speed per mobile broadband user (Mbps)	49.6	33.6	61.5	28.8	49.3	41.3	43.4
Forecast overall broadband market growth up to 2023 (% annual compound growth)	6.2	1.6	0.9	6.8	2.6	1.1	0.8

Table 5: Market attractiveness factors

Market attractiveness factors	Albania	Bosnia and Herzegovina	Croatia	Kosovo	Montenegro	North Macedonia	Serbia
Overall size of the market, in population terms and relative spending power	👍	👍	👍	👎	👎	👎	👍
Growth potential of the market, in terms of demand for broadband services	👍	👍	👎	👍	👍	👎	👎
Efficiency of the markets in terms of fair competitive conditions	👍	👍	👍	👍	👍	👍	👎
A clear national ICT market strategy for the country with stated ambitions and goals, for example targets for broadband coverage and take-up	👍	👎	👍	👍	👍	👍	👍

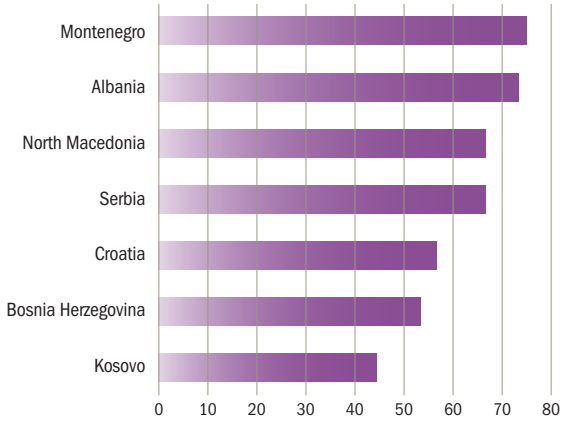
● Good ● Medium ● Poor

Serbia (see Table 4) is the largest market in population terms but is also forecast to be the slowest-growing market for broadband services. Croatia is the second-largest market by population and also has a low forecast broadband growth rate. The highest forecast growth rates are in Albania and Kosovo. Croatia has the highest global ranking for ICT development, benefiting from its EU membership.

Kosovo, Montenegro and North Macedonia are relatively small markets, but with relatively high standing in internet usage together with some potential to grow their broadband markets.

Based on the respondents' views, Montenegro is the most attractive of the SEE broadband markets and Kosovo is the least attractive (Chart 4). For this component, the survey participants were asked to rate only the pure market potential, disregarding any investment risk factors (which are only taken into account in the next component). Both the market attractiveness and the risk factors are combined to calculate the Overall Broadband Investment Index.

Chart 4: SEE - Broadband Market Attractiveness Index



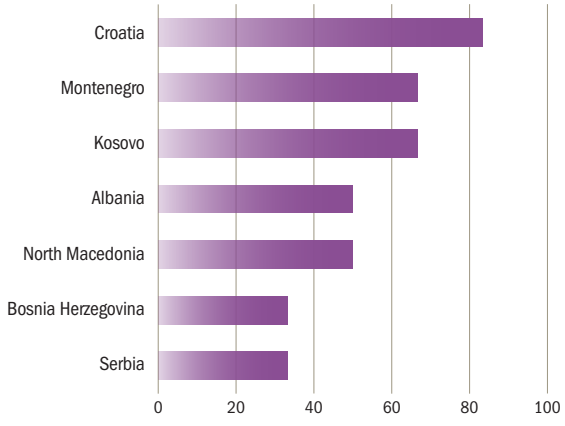
On the comparative scale, zero would indicate a perception that the broadband market had no attraction. A score of 100 would indicate a perception that the market potential was perfect. Source: EBRD

All the SEE markets surveyed have problems in the adoption of best practices, creating significant barriers to investments including time delays and inconsistently applied procedures. The most common example across the region is the problem experienced by investors in obtaining permissions for constructing civil infrastructures. This includes building mobile transmission towers, laying cables and ducts, getting access to public and private properties and for installing specialist equipment. In many of the markets there are bureaucratic delays, multiple levels of decision-making and inconsistently applied rules.

Best practice would be in place if the necessary applications could be made online via a one-stop-shop procedure, with all the layers of permission granting following the same effective procedures and timescales. Even in Albania, Croatia, North Macedonia and Serbia, where the introduction of new procedures for permission-granting has begun, there are still significant problems experienced by network operators.

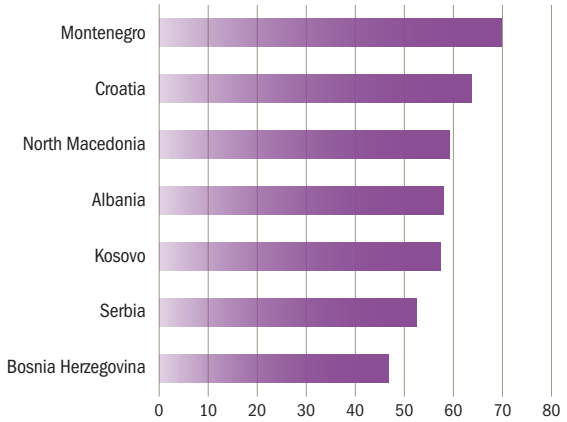
Croatia is the market where there is most confidence that best practice policies, legislation and regulatory practices will be applied to the sector (Chart 5). This arises from its membership of the EU. In the other markets, confidence varies, especially in the way that geographical municipalities apply the various legally defined procedures. The lowest confidence is in Serbia, where private investors feel particularly disadvantaged in competing against the state-owned incumbent operator.

Chart 5: Best Practice Index - the SEE countries



A value of zero would indicate that the country had no best practices relating to broadband investment conditions. A score of 100 would indicate that the country had already adopted all relevant best practices. Source: EBRD

Chart 6: Overall Broadband Investment Index – SEE countries



The Overall Broadband Investment Index is a composite index and has been drawn from the scoring in the components set out in the preceding sections, namely:

- market attractiveness
- investment risk
- confidence towards adopting best practices.

The chart shows that in all the markets, the investment conditions are less than what respondents would ideally wish for.

On the comparative scale, zero would indicate a perception that the investment climate was very poor. A score of 100 would indicate a perception that the overall conditions were perfect for investment. Source: EBRD

Table 6: SEE markets - Recommended priorities for action

Investment risk factors	Albania	Bosnia and Herzegovina	Croatia	Kosovo	Montenegro	North Macedonia	Serbia
Certainty in construction permits or wayleaves	▲	▲	▲	●	▲	▲	▲
Availability of labour especially with digital skills	▲	▲	▲	●	●	▲	●
State participation in the sector	▲	●	●	▲	●	●	▲
Taxation generally or targeted at the sector	▲	●	●	●	▲	▲	●
Political stability, security, criminality, terrorism	▲	▲	●	▲	●	●	●
Corruption generally or applied to the sector	●	▲	●	●	●	●	▲
State assistance and funding schemes	●	●	▲	●	●	▲	●
The country's overall legal system, predictability and process	●	●	▲	▲	●	●	●
Access to spectrum resources	●	●	●	▲	●	▲	●
Legal and regulatory framework for broadband	●	▲	●	●	●	●	▲
Quality of databases and access to information	●	●	●	●	●	●	▲
Labour regulations, militancy, disruptions	●	●	●	●	●	●	▲

Source: United Nations, ITU, Speedtest Global Index, Fitch Solutions.

● Low priority ● Medium priority ● High priority

Recommendations for each country are given in more detail in the full survey reports which can be found here.

COVID-19 CONSIDERATIONS

Some of the analysis for the survey took place before the advent of the Covid-19 virus, so no account has been taken of the subsequent impact of the pandemic. The forecasts of fixed and mobile broadband growth are based on 2019 data and cover the period up to 2023. These forecasts are likely to be affected by the pandemic, typically arising from a greater demand from personal and business users for social and work-related networking.

Although the impact of Covid-19 is likely to vary from market to market, the overall relative growth rates should remain consistent. For example, the relatively high growth rates for broadband services in Egypt and Morocco (17 per cent and 12 per cent per year, respectively) are likely to be maintained as broadband coverage improves. The relatively lower growth rates in Lebanon, Jordan and Tunisia (from 3 per cent to 6 per cent per year, respectively) will continue to reflect the greater relative level of saturation already achieved in those markets. Similarly, the relatively high growth rates for broadband services in Albania, Kosovo and Montenegro (around 3 per cent to 7 per cent per year) are likely to be maintained because the fundamentals of their competitive market growth remain unchanged. The relatively low growth rates in Croatia and Serbia (around 1 per cent per year) will continue to reflect the greater level of saturation already achieved in those markets.

Broadband speeds appear to be affected[4] for example in Albania, where average mobile broadband download speeds have decreased by 9 per cent while fixed broadband speeds have increased by 1 per cent. In Montenegro, fixed and mobile broadband speeds have increased by 3 per cent and 13 per cent, respectively while in North Macedonia these have both decreased slightly. Similarly, fixed broadband speeds in Jordan have increased by 44 per cent and Tunisia by 30 per cent. Mobile broadband speeds have reduced in Morocco and Tunisia while in Jordan mobile broadband speeds have risen by 7 per cent and in Lebanon by over 100 per cent. The inconsistency of these changes will add further uncertainty to investment conditions.

Several SEMED countries adopted measures to cope with the increasing demand for communications services during the Covid-19 outbreak. For example, governments in Egypt and Tunisia requested operators to provide free internet packages and to offer free access to e-learning and healthcare platforms. In Egypt, the cost of the additional data packages and free browsing was financed by the state. The regulator in Jordan temporarily granted telecommunications operators additional spectrum to increase network capacity.

This report makes both general and detailed recommendations based on the analysis of respondent views given before the coronavirus outbreak. These recommendations will still apply and in many instances their relevance will be brought more into focus by the new situation. The case for further investment in broadband infrastructure has increased, now with even more attention on more reliable and universal broadband services.

At a policy and regulatory level there will also be greater focus on the collaboration between government investments and private sector investments. This is particularly relevant in areas such as policy consultation, the use of public funds, achieving universal broadband coverage and the need for greater investment efficiencies to achieve cost reductions and greater network resilience.

4 https://www.speedtest.net/insights/blog/tracking-covid-19-impact-global-internet-performance/#/ (last accessed 22 January 2021).

CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES: CAN THEY RISE TO THE CHALLENGE?

"The focus of the research was to understand how our jurisdictions express, structure and exercise their ownership function, what corporate governance requirements are in place, and how they differ from the rules applicable to privately owned companies."

In most EBRD economies, the state has traditionally been the owner of the country's most important companies. While the state's role has somewhat diminished over the past three decades, the Covid-19 pandemic and the ensuing economic crisis are likely to take the concept of "state as owner" to a new level, amid a time of unprecedented state spending. This is likely to put pressure on state-owned enterprises (SOEs) to perform more efficiently and at the same time pose less of a fiscal risk, which is why the corporate governance of SOEs is more important than ever.

In order to gauge whether SOEs are equipped with the correct governance rules and structures to help them rise to these expectations, the EBRD's Legal Transition Programme, in cooperation with the Office of the Chief Economist, carried out a dedicated study that aims to capture the SOE corporate governance frameworks across 37 economies of the EBRD regions.[1] The focus of the research was to understand how our jurisdictions express, structure and exercise their ownership function, what corporate governance requirements are in place, and how they differ from the rules applicable to privately owned companies.

1 Key findings of the study have also been mentioned in Chapter 2 of the following: EBRD (2020), *Transition Report 2020-21 – The State Strikes Back*, London. Also available at: https://2020.tr-ebrd.com/ (last accessed 21 December 2020).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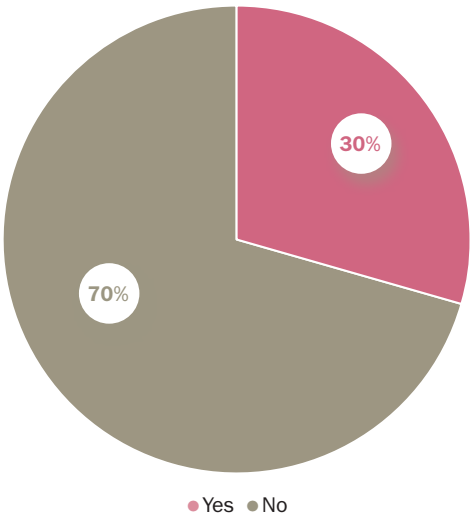
THE STATE AS OWNER – THE IMPORTANCE OF CLEAR OBJECTIVES

Just like private companies, SOEs need to have long-term objectives which define the measure of their success over time. However, unlike private investors, the state engages in ownership of SOEs to achieve wider benefits for its citizens. In so doing, it typically aims for more than just financial success: such as uninterrupted provision of vital services or universal availability of a product or service, which may even contradict the aim of being profitable. While it is almost self-explanatory as to why the state would want to own a company in the defence industry or an electricity producer, why does the state need to own car manufacturers, chemical plants or mines?

The answers to these questions should stem from clear and explicit rationales for state ownership. The OECD Guidelines on Corporate Governance of State-Owned Enterprises (OECD Guidelines) – which are an internationally accepted, albeit aspirational benchmark in the area of corporate governance of SOEs – call on states to adopt state ownership policies that set out rationales for ownership as well as the overall goals that the state wants to achieve as owner. This serves to inform the purpose of individual SOEs but also helps establish boundaries of the state's intervention in the SOEs' business, which according to the OECD Guidelines should be limited to setting high-level objectives of an SOE in a way that allows their clear prioritisation, as well as setting key performance expectations.

When it comes to OECD member and partner countries, there is a clear trend towards establishing or strengthening state ownership policies and objectives, as around two-thirds of the 28 jurisdictions surveyed in a recent OECD study[2] reported establishing or updating their ownership policies and key objectives in the period from the OECD Guidelines' adoption in 2015 until 2020.

Chart 1: Is there a government document, policy (for example, State Ownership Policy), or law that defines the overall objectives of state ownership?



Source: EBRD, corporate governance legislation and practices of state-owned enterprises, 2020 .

The aforementioned share is much lower in the EBRD regions as it appears that fewer than one-third of jurisdictions (11 out of 37) have a law, government strategy, policy or other document in place defining the overall objectives for state ownership. This suggests that in many economies neither the state nor the SOEs themselves have a well-developed framework of objectives and expectations, which may impede SOEs developing long-term strategies, creating room for inefficiencies and mismanagement as well as undue interference from the state.

When it comes to the state's ownership function, the preferred approach taken by many developed economies is the "centralised" model, where all or most SOEs are overseen by one ownership entity – separate from the regulatory authority – which has the requisite capacity and legal powers of the shareholder. This approach helps to streamline oversight efforts and to separate SOE ownership from the policymaking and regulatory functions of the state, which is vital for ensuring sound competition and a level playing field in individual sectors of the economy.

2 OECD (2020), *Implementing the OECD Guidelines on Corporate Governance of State-Owned Enterprises: Review of Recent Developments*, Paris. Also available at: https://doi.org/10.1787/4caa0c3b-en (last accessed 21 December 2020).

When looking at the economies where the EBRD invests, the approaches taken are quite diverse, with SOEs being owned by multiple entities within the state in a vast majority of jurisdictions. In 18 jurisdictions (48 per cent) we recorded ownership function organised according to the "decentralised" model (where multiple authorities – mainly line ministries – supervise SOEs in their own areas of competence). In 14 economies there seems to be a "dual system", where responsibilities are shared between two authorities, mostly between line ministries and the government, or line ministries and a ministry of finance. Only fewer than one-third of jurisdictions (10 out of 37) appear to have a system of state ownership broadly fitting the centralised model. Overall, this suggests that line ministries – which usually also exercise the regulatory function - continue to play a prominent role when it comes to exercising ownership in SOEs alongside their role in setting sectoral policies and/or regulatory framework. In fact, in nearly 45 per cent of jurisdictions (16 out of 37) at least some ownership entities also take regulatory/industrial policy decisions that affect the SOEs they oversee.

AUTONOMY OF SOEs: ARE SOEs ABLE TO ORGANISE AND RUN THEIR BUSINESS INDEPENDENTLY?

Once the vision of the state as owner has been set for an SOE, it should have autonomy to set the course of its business. This includes legal autonomy – that is, being legally empowered to adopt key decisions such as strategy and business plans and to own the assets necessary for carrying out its activities – as well as operational autonomy to make and implement day-to-day business decisions without interference by the owner.

The scope of legal autonomy can be determined by comparing the regulations applicable to SOEs to the rules that apply to privately owned companies. In this respect, our analysis found that in only a fraction of economies were SOEs operating exclusively under general corporate forms available to the private sector. This complexity creates further disparities between SOEs and private companies (and sometimes between SOEs themselves) with regards to their governance structures, labour and bankruptcy regimes and access to capital markets. One such

example involves restrictions associated with non-corporatised SOEs on owning and disposal of some key assets (for example, gas pipelines or assets forming the electrical grid that in some countries legally belong to the state rather than the SOE), which can have direct implications for the ability to use and maintain these assets in the best interests of the SOE.

When it comes to operational autonomy, this is driven partly by the governance structures at SOEs and partly by the formal and informal relations between various state actors and the SOE. As indicated above, line ministries feature heavily in these relations. On the other hand, autonomy should not mean lack of oversight. After all, the OECD Guidelines recommend the state act as an "informed and active owner", which means that the state needs to establish a regular monitoring of SOEs and hold their governing bodies accountable in instances of poor performance. Surprisingly, almost half of EBRD economies do not seem to have a clear monitoring framework by the owner. In just over half of examined jurisdictions, the regulation prescribes the main financial and (sometimes) non-financial indicators for SOEs to be monitored and we found the process and mandate for performance evaluation of SOEs to be comprehensively regulated in similar percentages. Still this means that almost half of the EBRD economies do not have a clear and comprehensive monitoring of SOEs' performance. The minimal annual frequency of monitoring is specified in 19 countries (at least for certain categories of SOEs), which may not be enough to ensure active engagement with SOEs.

"Unfortunately, our analysis has shown only a limited share of SOEs across EBRD economies have a governance structure which envisages a body tasked with strategic oversight over the company."

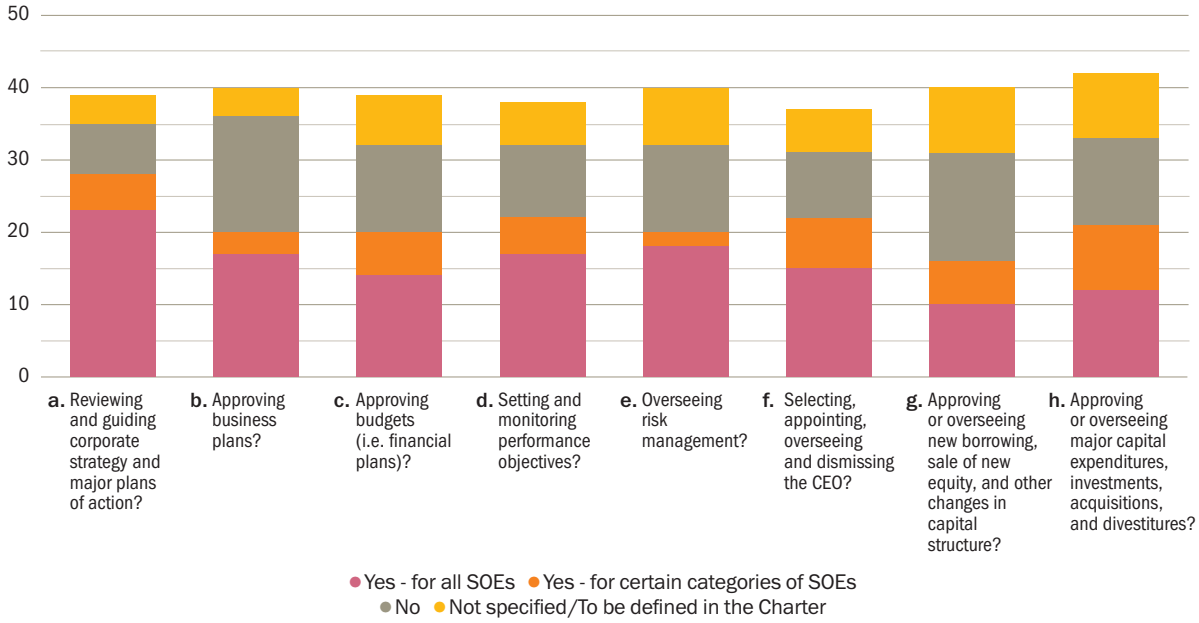
SOE BOARDS: NEED FOR LEGAL IMPROVEMENTS AND PROFESSIONALISATION

Most corporate governance standards devote much of their attention to the board[3] as a company's governing body in charge of driving its key decisions. OECD Guidelines are no exception in this respect as a whole chapter deals with the boards' responsibilities and functioning. In order to be effective in this crucial role, it is traditionally understood that boards need to be entrusted at least with the responsibilities for setting strategy and budget and monitoring their implementation, overseeing the system of internal controls, supervising management, appointing and removing the CEO and setting executive remuneration.

Unfortunately, our analysis has shown only a limited share of SOEs (mostly those organised as companies) across EBRD economies have a governance structure which envisages a body tasked with strategic oversight over the company. Moreover, in most of the jurisdictions analysed, boards lack comprehensive strategic authority and have limited autonomy to make decisions. Our analysis did not reveal a single jurisdiction where SOE corporate legislation would equip the boards with all the responsibilities necessary to duly exercise their roles (for example, approval of strategy, budget and risk appetite, appointment and removal of executives, approval of capital expenditures and oversight of management performance). Fewer than 20 per cent of economies seemed to empower all their SOE boards with a range of essential duties, still subject to various limitations, such as for example – managerial appointments, approval of capital expenditures (and risk management) which are missing in several jurisdictions.

3 For the purposes of the analysis, the term "board" refers to an SOE's governing body entrusted with strategic and oversight functions as opposed to day-to-day management of the company.

Chart 2: Which of the following are defined in the law, regulations and code as the explicit responsibilities of SOE Boards?



Source: EBRD, corporate governance legislation and practices of state-owned enterprises, 2020.

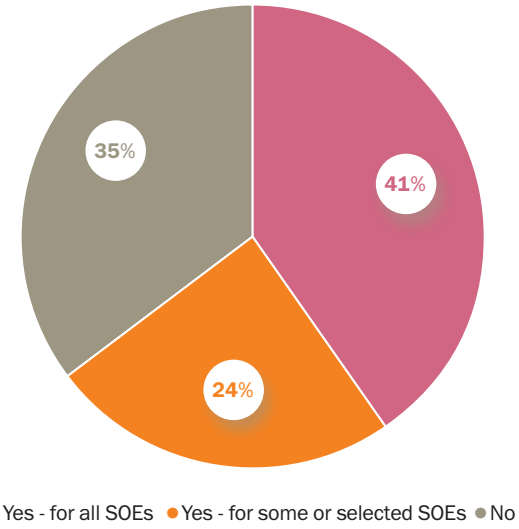
Note: Although the number of reviewed jurisdictions was 37 for all topics covered in the chart, in some bars a higher number was exhibited because of the complexity of the framework applicable to different categories of SOEs. For example, the same responsibility could be assigned as a default under the corporate legislation, whereas for non-corporatised SOEs it would have to be explicitly envisaged in the SOE's charter.

Strikingly, in almost half of jurisdictions SOE boards do not approve strategies or budgets and the two often seem to be developed separately and without connection to each other. In addition to lack of clarity on the strategy, authorities for approving the business plan and/or budget and for overseeing the risk management and internal control framework are the ones most frequently missing. It seems that in most jurisdictions risk is not seen as integral to the strategic planning and implementation monitoring processes, as overseeing risk management is an explicit responsibility of the boards for all SOEs in only 45 per cent of them (18 countries). In only six countries does the framework have a reference to board responsibilities related to managing the environmental and social risks and factors in the company's operations. This suggests that the environmental, social and governance and climate change-related risks do not play a major part in the decision-making on strategy and its monitoring activities.

In addition, it seems little attention is paid to how boards are composed and how they function. The board nomination process is frequently inconsistent and lacks transparency: only 16 per cent of countries in the EBRD region have a requirement for a nomination policy that would set out the desired profile of an SOE's board. In 81 per cent of countries there are no existing pools of potential directors in place to be drawn on for future appointments. SOE boards often lack independence and the board composition is often not appropriate to ensure effective and independent supervision over SOEs. A requirement for independent directors on SOE boards is in place for all SOEs only in 40 per cent of EBRD economies (15), and for some or selected SOEs (mostly for SOEs operating in the form of companies or listed SOEs) in nine other countries. However, over one-third of jurisdictions (13 of them) still do not reflect such a requirement in their legal frameworks. In any event the definition of independence and the test over the "independence of mind" has room for improvement in the vast majority of jurisdictions.

When discussing committees, it seems some (mostly audit committees) are required in at least some categories of SOEs in almost 60 per cent of EBRD jurisdictions. However, composition of SOE board committees is not strictly limited to board members in over 60 per cent of jurisdictions, which makes us wonder if these committees can be considered board committees and whether they contribute to the work of the board in any way.

Chart 3: Is there a requirement for independent directors on SOE Boards?



Source: EBRD, corporate governance legislation and practices of state-owned enterprises, 2020.

> "In 80 per cent of EBRD economies, SOEs are not required to have a unit dealing with compliance issues."

DO SOEs HAVE APPROPRIATE INTERNAL CONTROLS?

Proper internal controls are essential in SOEs, not least because of their susceptibility to corruption[4] and the potential fiscal risks which seem to be exacerbated in cases of SOEs that are used to provide subsidies to the wider population and are therefore more dependent on further state support.[5]

While internal controls in private sector companies tend to be organised according to the so-called "three lines of defence" model, it seems that in SOEs these controls are much more scattered and do not allow the identification of SOEs' risks from a holistic perspective.

The most frequently seen internal control function is the internal audit as in 17 (46 per cent) countries all SOEs are required to have such a function. In 27 per cent of countries this requirement only applies to some SOEs.

4 OECD (2019), *Guidelines on Anti-Corruption and Integrity for State-Owned Enterprises*, Paris. Also available at: https://www.oecd.org/fr/gouvernementdentreprise/anti-corruption-integrity-guidelines-for-soes.htm (last accessed 21 December 2020).

5 Chapter 2 of the following: *EBRD (2020), Transition Report 2020-21 – The State Strikes Back*, London. Also available at: https://2020.tr-ebrd.com/ (last accessed 21 December 2020).

In the majority of jurisdictions (54 per cent, 20 countries), SOEs are not required to have codes of ethics or compliance programmes. Compliance with codes of ethics is monitored and enforced in all SOEs only in 12 countries (32 per cent) while in three countries (8 per cent) it applies only to selected SOEs. However, this is not specified in over half of the jurisdictions (51 per cent). In 80 per cent of EBRD economies, SOEs are not required to have a unit dealing with compliance issues.

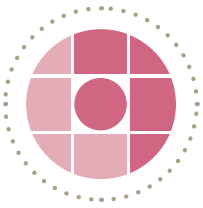
SOEs also seem to conduct very little risk analysis. SOE strategies are rarely assessed from the risk perspective, while specific risks are unlikely to be addressed in strategies and mitigating measures in budgets. Most have no risk department, thus no organisational framework to act on (external) risk analysis.

CONCLUSION

There is little doubt that the economic needs on the one hand and the decreasing room for state spending on the other will require SOEs to run successfully without relying (as) much on the state budget for years to come. This will require adjustments from both the state and the SOEs themselves. Starting with the state, this current situation will provide an excellent opportunity for many governments to re-assess their ownership rationales and define more clearly (preferably within the framework of state ownership policies) in which cases state ownership is necessary.

Hopefully this will mean that they will also be more incentivised to set clearer expectations, not just in terms of public service obligations and financial performance, but also with respect to environmental, social and governance issues that are relevant for particular SOEs. This will mean that many jurisdictions will need to strengthen their own capacity in order to follow up as to how objectives that have been set for SOEs are being implemented and hold boards and management to account in cases of poor performance.

On the SOEs level, the greater clarity to be provided by the state should be reciprocated with an improved intelligibility on what an SOE can realistically achieve and the risks (and opportunities) it may face on this journey. This requires improved strategic planning, risk analysis and budgeting processes as well as diligent oversight and controls in implementation, which – as is usually the case in corporate governance – can be built with the help of a professional and empowered board and a management team that is capable, motivated and accountable.



INTERVIEW: THE RESPONSE OF INTERNATIONAL FINANCIAL INSTITUTIONS TO COVID-19 AND THE ROLE OF THEIR LAWYERS

"IFI lawyers are playing a vital role in setting-up new facilities targeted to help countries respond to the crisis, introducing changes to their policies and streamlining their internal processes."

Interview with lawyers from International Fund for Agricultural Development, Asian Development Bank, the EBRD and International Finance Corporation

As countries and people across the globe are working hard to contain the spread and impact of Covid-19, international financial institutions (IFIs) are also taking unprecedented measures and mobilising resources to help contain the global pandemic and its economic fallout. IFI lawyers are playing a vital role in setting-up new facilities targeted to help countries respond to the crisis, introducing changes to their policies and streamlining their internal processes.

We invited four lawyers from various IFIs to share their experiences during these unusual and challenging times. They talk about the new programmes and policies that each institution initiated in response to the pandemic, the legal challenges that the offices of the general counsel have encountered, and their own experiences of working from home. We intend to provide you with some insights on IFI lawyers' professional contribution to their institutions' Covid-19 responses as well as their personal efforts in coping with the impact of this pandemic.

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1. Please briefly introduce yourself and your work at the institution:

Cynthia Colaiacovo (International Fund for Agricultural Development, IFAD): I am the Deputy General Counsel at IFAD, an IFI and a UN Specialized Agency. In this capacity, I oversee the Office of the General Counsel's four units (that is, corporate, institutional, operations, as well as finance and impact investment). Before joining IFAD, I practised law in the United States of America and Brazil and worked for over a decade at the Inter-American Development Bank in sovereign-guaranteed operations and corporate legal affairs.

Douglas Perkins (Asian Development Bank, ADB): I am a Principal Counsel in ADB's Office of the General Counsel. I joined ADB in early 2011, before which I worked for many years as a corporate transactional lawyer for a large international law firm with a significant presence in Asia. My current primary focus at ADB is supporting sovereign operations in South Asia and the Pacific.

Remy Cottage-Stone (EBRD): I have been working in the Banking Group of the Office of the General Counsel (OGC) of the EBRD for almost 20 years. This part of OGC focuses on the legal work required in connection with the EBRD's lending and investment operations and provides legal support to the banking team, from the inception of each project until final repayment/exit. My work consists of supporting and supervising the team, assisting senior management on projects, policies, processes and various other administrative matters, as well as working on my own deals, which cut across sectors, geographies and instruments.

Turgut Cankorel (International Finance Corporation, IFC): I am Senior Counsel at IFC. My work consists mainly of advising on IFC investment and advisory projects in the Europe and Central Asia and Middle East and North Africa regions, across a broad spectrum of sectors and products. I also hold the global role of knowledge management lead within IFC's legal department, which is a volunteer role that rotates every couple of years. In that capacity, I am in charge of designing and implementing the department's knowledge management, which includes delivering onboarding and trainings, managing knowledge databases and using technology to improve business systems.

2. **What is your institution doing specifically to help the international effort of managing the ongoing Covid-19 crisis?**

Cynthia (IFAD): The Covid-19 crisis is having a severe negative impact on the progress achieved in the Sustainable Development Goal (SDG) 1, no poverty, while threatening to aggravate the already deteriorating SDG 2, zero hunger. IFAD's response strategy includes:

- repurposing ongoing investments
- establishing a Rural Poor Stimulus Facility (RPSF). IFAD launched a rapid-response intervention to mitigate the effects of Covid-19 on vulnerable communities. The RPSF aims to improve the resilience of rural poor communities by ensuring timely access to inputs, information, markets and liquidity. We launched the facility by providing an initial US$ 40 million seed donation envisioned to be scaled up to at least US$ 200 million through contributions by countries and partners. To accelerate the recovery of poor and vulnerable people from Covid-19, the RPSF will focus on four main areas: (i) inputs and basic assets, (ii) access to markets, (iii) targeted funding to small-scale producers and agricultural enterprises, and (iv) digital services
- supporting policy responses through advice and analysis
- working with financial institutions to improve financial flexibility in affected countries.

Douglas (ADB): In mid-April this year, ADB announced that it would be providing an overall Covid-19 response package of US$ 20 billion, which included approval of several special policy variations and other measures that allow ADB to respond more rapidly and flexibly to the crisis. In terms of financing support, the most significant step ADB has taken is the establishment of a COVID-19 Pandemic Response Option (CPRO) under its existing Countercyclical Support Facility. Up to US$ 13 billion of the ADB response package has been allocated for CPRO operations to help the governments of ADB's developing member countries implement effective countercyclical expenditure programmes to mitigate the impacts of the pandemic, with a particular focus on the poor and vulnerable. In addition, approximately US$ 2 billion of the response package is being made available for the private sector, and a number of policy variations were approved to facilitate such support. ADB has also quickly deployed grant resources for providing expert technical support and medical and personal protective equipment and supplies from expanded procurement sources.

"From what I have seen, the legal profession's characteristic ability to manage uncertainty and time pressure is helping lawyers shine through in this environment."

Remy (EBRD): In March 2020 the EBRD's shareholders approved the Covid-19 Solidarity Package (further expanded in April 2020), which consists of a series of response and recovery measures with a view to helping the 38 economies where the EBRD invests to combat the economic impact of the coronavirus pandemic. A central pillar of the Solidarity Package is the Resilience Framework, a €4 billion envelope focused on providing finance to the EBRD's existing clients to meet their short-term liquidity and working capital needs. Other elements of the Solidarity Package include an expansion of the EBRD's Trade Facilitation Programme, the use of existing finance frameworks to expeditiously channel financing in particular to small and medium-sized enterprises (SMEs) and corporates and a new Vital Infrastructure Support Programme to provide financing for the continuity of essential infrastructure services or infrastructure investment programmes. Moreover, the EBRD can help the economies where it invests survive the pandemic not only with investments but also by providing governments and other state institutions with high-quality, straightforward and usable policy advice. Covid-19-related areas of policy dialogue where the Bank is active include:

- supporting digitalisation efforts in various government sectors
- facilitating SME access to finance
- promoting financial restructurings and insolvency policy initiatives.

Turgut (IFC): IFC is providing US$ 8 billion in fast-track financial support to existing clients to help sustain economies and preserve jobs during this global crisis, which will likely hit the poorest and most vulnerable countries the hardest. IFC's response consists of four financing facilities.

- *Supporting critical industries* – the Real Sector Crisis Response Facility will provide US$ 2 billion to support existing clients in the infrastructure, manufacturing, agriculture and services industries vulnerable to the pandemic.
- *Keeping trade flowing* – the Global Trade Finance Program will provide US$ 2 billion to cover the payment risks of financial institutions so they can provide trade financing to companies that import and export goods.
- *Helping clients pay their bills* – the Working Capital Solutions Program will provide US$ 2 billion funding to emerging-market banks to extend credit to help businesses shore up their working capital, the pool of funds that firms use to pay their bills and employees' salaries.
- *Shoring up local banks* – the Global Trade Liquidity Program, and the Critical Commodities Finance Program, will together provide US$ 2 billion in funding and risk-sharing support to local banks so they can continue to finance companies in emerging markets.

3. In such Covid-19 crisis projects, what are the new challenges or opportunities that lawyers of your institution are facing? How are the lawyers contributing to the objectives of your institution?

Cynthia (IFAD): Before the onset of the Covid-19 crisis, IFAD had already been working on a timely paradigm shift to expand its development toolkit to include financing the private sector as well as sponsoring (and now itself investing in) an agri-impact investment fund. Throughout this shift and expansion, the legal team has been adapting in an agile, creative way to help IFAD solve the complex 21st century problems facing the rural poor. Our lawyers' assistance in developing the RPSF is no exception. The legal team was able to ensure that the RPSF was established quickly and with integrity—minimising risk while enabling innovation in a time of global crisis. More specifically, the legal team has been instrumental in expediting approvals of new projects under the RPSF. The legal team has also helped redesign ongoing projects and amended the respective loan and grant agreements to incorporate such changes. Furthermore, we have supported project teams with internal approvals and changes to internal policies and procedures.

"Above and beyond the institution's support toward its staff, for me the most motivational factor has been to see the institution's quick and extensive response to the Covid-19 crisis."

Douglas (ADB): The attorneys and other legal staff of ADB's OGC have been right in the middle of virtually all aspects of ADB's pandemic response efforts. Numerous OGC attorneys took a front-line role in the working group that identified and crafted the special policy variations needed to facilitate ADB's Covid-19 response efforts. Similarly, ADB attorneys have been key members of the teams put together to prepare individual financing operations both for governments and the private sector, helping ensure that the compliance and quality of ADB's operations remain high, notwithstanding the speed at which new Covid-19-related operations are being processed and approved.

Remy (EBRD): The EBRD's staff have been working remotely since mid-March. Remote working combined with the increase in EBRD's workload has been challenging: (i) working remotely on a full-time basis is to a certain extent more difficult and less efficient than working in an office environment with easy access to printing facilities and secretarial support; and (ii) there were initially IT issues. We also had to adapt, anticipate and address issues linked to a world where remote working was the new way forward, such as ensuring that enough bank executives across the Bank's regions had the required authorities to execute agreements, that originals of the signed documentation were being kept track of, and so on. Of course, the current conditions are not only challenging on the transactional side, but across all groups in OGC. I think generally lawyers at the EBRD are very involved and our contribution has been critical to the adaptation of EBRD's processes and modus operandi to the new Covid-19 situation and the EBRD's operations.

Turgut (IFC): I think the obvious new challenge for lawyers is the increased demand for our services. Clients look to us to fulfil these functions, which we do on top of our pre-existing day jobs, and often under great time pressures and unknown variables given the uncertainty around how the Covid-19 crisis will unfold. But from what I have seen, the legal profession's characteristic ability to manage uncertainty and time pressure is helping lawyers shine through in this environment. In my mind, the main opportunity is to use our experience to facilitate these fast-track Covid-19 financings and help our clients. They also raise a number of novel legal issues and thus

provide a new platform for creating and sharing new knowledge across our institutions. For example, within weeks of the announcement of the pandemic, IFC's legal department had launched an internal website dedicated to Covid-19 related legal issues, raising awareness among our clients of how the main legal issues (*force majeure*, and so on) are addressed at our institution and in the market, as well as how to think about practical challenges (how to deal with remote signings, and so on). Another opportunity is to re-think how technology can help us do our jobs, and to seize the moment to create positive momentum in our institutional culture in that direction (for example, facilitating remote work and signings).

4. With the increasing amount of new challenges coming with these projects as well as the inconvenience necessitated by working from home, how are you and your colleagues coping with this new norm? How is your institution helping its employees during this adjustment?

Cynthia (IFAD): As the situation changed rapidly, our team handled uncertainty and changes with optimism. Our headquartered location in Rome, Italy, placed us at the epicentre of the outbreak at the beginning of the pandemic. Without having many others to consult with, we were among the first IFIs to develop and implement a work continuity plan and Covid-19-related policies. As part of these efforts, we have successfully handled the virtual onboarding of various new staff members based all over the world. Later, IFAD became an adviser to other IFIs regarding Covid-19 adjustments. More specifically, a key coping strategy from the onset has been frequent and honest communication. This has resulted in tailored solutions to specific challenges – from providing the appropriate equipment in order to work from home, supporting authorisations to telework from a different country, adjusting

portfolio priorities, among others. We have continued with this strategy as we recently started a gradual return to the office. Our flexibility and optimism has paid off.

Douglas (ADB): ADB's headquarters are located in Manila, the Philippines, which has been subject to government-mandated quarantine starting from mid-March of this year. Since that time, virtually all of ADB's headquarters staff has been on work-from-home arrangements, with many international staff returning to their home countries. The technology solutions and resources made available to ADB staff even before the pandemic started have enabled us to largely perform our jobs without significant disruption. What's more, not having to commute to the office each day (Manila traffic is notoriously bad!) means more productive use of the available time. Of course, one of the huge perks of working at a multilateral development bank is the chance to meet and work with colleagues and clients from around the world, which has been unfortunately lost under the current circumstances. While I imagine that the old way of working will not be entirely restored once the crisis is over (some degree of working from home will likely continue), I do look forward to the day that I get to catch up with my colleagues in the hallways and over lunch again!

Remy (EBRD): I think some of those who were sceptical about working from home have learned to adapt, organise their workstation to be efficient and are now seeing the positive aspects of it; when this is for a couple of days per week and not full time. I think most of us are struggling with an increased workload while being overall less productive because of the working conditions, leading to longer days. Also, whilst you can (most of the time) leave work behind when leaving the office, there are no boundaries when working from home and work seems to invade your private life without a set timeframe. Lastly, after a few months of remote working and with the absence of face-to-face contact, staff are missing the human interaction with colleagues and this has become difficult for morale. The EBRD has been supportive of its staff, by giving allowances to buy equipment and facilitate the set-up of functional and comfortable workstations, doing surveys and giving regular advice on how to improve our work conditions or mental health as well as giving regular updates on the Covid-19 situation and on the EBRD's plans.

"I think some of those who were sceptical about working from home have learned to adapt, organise their workstation to be efficient and are now seeing the positive aspects of it."

Turgut (IFC): From my perspective, it took around a month to adjust but overall it seems to me that colleagues are coping rather well with the new norm (though many of us admit that some days are better than others). In my mind, this is largely because our baseline is an institutional culture of mobility, personal accountability, and genuine dedication to the development mission. The institution is very good about keeping us informed on a real-time basis, creating a lot of personal touch-points that could have otherwise disappeared in remote work settings, providing excellent technology platforms and support, and providing administrative flexibilities where needed. But above and beyond the institution's support toward its staff, for me the most motivational factor has been to see the institution's quick and extensive response to the Covid-19 crisis – which further reinforces my personal sense of belonging to the development mandate and justifies all the extra work that we are doing during this period.

PPP REGIME DEVELOPMENT IN ARMENIA, AZERBAIJAN AND GEORGIA: FURTHER REGULATORY EFFORTS COULD STIMULATE PRIVATE SECTOR PARTICIPATION

"PPP schemes are at a relatively early stage of development in the Caucasus region. PPPs can be a tool for investor outreach and growth promotion in the three countries."

Each of the three countries in focus has turned to the mechanism of public-private partnerships (PPPs) at different times and with varying appetites for implementation and records. Thus each country is at different stage of its experience with PPP regulation and projects implementation.

PPP schemes are at a relatively early stage of development in the Caucasus region. PPPs can be a tool for investor outreach and growth promotion in the three countries.

ARMENIA

In 2017 the government of Armenia approached the EBRD with a request for assistance in developing a modern PPP regime. The EBRD initiated a technical cooperation project by retaining a group of international and local advisers to assist in preparing a PPP policy and a PPP law, drafting secondary legislation and building capacity in the context of the new PPP law. The documents were drafted based on analysis of the local legal system, socio-economic situation, public needs and priorities and internationally accepted standards and best practices. They were discussed with government officials in 2017. Feedback from relevant institutions led to an adjustment of certain concepts and provisions of the draft law.

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The Law of the Republic of Armenia on PPPs which was signed on 16 July 2019 and entered into force on 1 January 2020 broadened the foundation for PPP development. Further thinking may be required in the context of private partners' selection procedures, the institutional framework set-up, and other aspects influencing PPP project structures. The bankability, effectiveness and efficiency of PPP projects should be at the core of such thinking.

This can unlock new PPP opportunities, which the EBRD would continue supporting with funding and advice. Successful and well-structured flagship projects create a positive momentum for a broader rollout of PPP schemes. The EBRD works with the authorities to explore PPP opportunities. Structured properly and with due regard to management of long-term contingent liabilities and risks, these might alleviate pressure on the budget and help to crowd in international investor interest, thus providing positive multipliers.

"All three countries are making efforts in the development of their public infrastructure by way of attracting private investors' finance, efficiency, management skills and know how. "

AZERBAIJAN

In 2016 Azerbaijan adopted the Law "On the implementation of special financing for investment projects related to construction and infrastructure facilities" and the Presidential Decree on its basis "On the establishment of conditional for the realisation of investment projects within the build-operate-transfer model". Despite the adoption of these acts, no new infrastructure projects with private sector participation have been initiated in the country.

Therefore, Azerbaijan's regime for PPP projects requires a substantial upgrade to comply with internationally recognised standards and best practices. The Ministry of Economy, initially through the PPP Centre within its Small and Medium Business Development Agency, requested that the EBRD provide them with technical assistance to support the design and development of a modern investor-friendly PPP regime in the country.

In 2019 the EBRD engaged international and local consultants for their assistance in drafting PPP strategy and law. Both the draft PPP strategy and draft law have been developed and presented to the government and are under consideration pending various comments before their submission for official endorsement. The EBRD has agreed to further assist the Ministry of Economy with the development of regulatory and in particular the PPP-enabling framework and practical documentation such as guiding methodologies and templates.

There are a number of projects in the country that could benefit from the new legal and institutional framework. Azerbaijan plans an improvement of its transport infrastructure and a number of projects are at the planning stage. Some of the projects are expected to be capital intensive and support in structuring and subsequently financing from the EBRD and/or other international financial institutions (IFIs) is likely to be needed.

Pilot PPPs could be considered in the road and port sectors as well as in intermodal projects involving roads, logistics, rail and shipping, and underwater cable connections. It would also allow the creation of a digital infrastructure such as data-processing centres and the installation of fibre optic cables.

GEORGIA

In 2015 the government of Georgia requested the EBRD's assistance with the development of legal instruments to attract private sector participation and investment in public infrastructure. Although the laws of Georgia allowed PPP structuring without a specific PPP law, the government of Georgia, similar to many other countries, decided it would be beneficial to promote PPP. The EBRD's Legal Transition Programme, together with international and local consultants have helped draft a PPP policy in accordance with internationally recognised standards and best practices that the government approved in June 2016. In addition the EBRD assisted the government in developing a modern, investor-friendly and transparent PPP law. On 4 May 2018 the Parliament of Georgia approved the Law "On Public-Private Partnerships" and the relevant amendments to primary legislation. In August 2018 Georgia adopted secondary legislation developed by the Asian Development Bank (ADB) with extensive comments from the EBRD team.

The PPP Agency has been established following the PPP law enactment. It is looking at international experience and is active in discussing possibilities for future projects with private investors and IFIs. The EBRD plans to provide assistance to the PPP Agency with capacity enhancement and drafting practical documentation to facilitate project preparation and implementation.

The prospects of implementing PPP projects in quite a number of sectors could be considered.

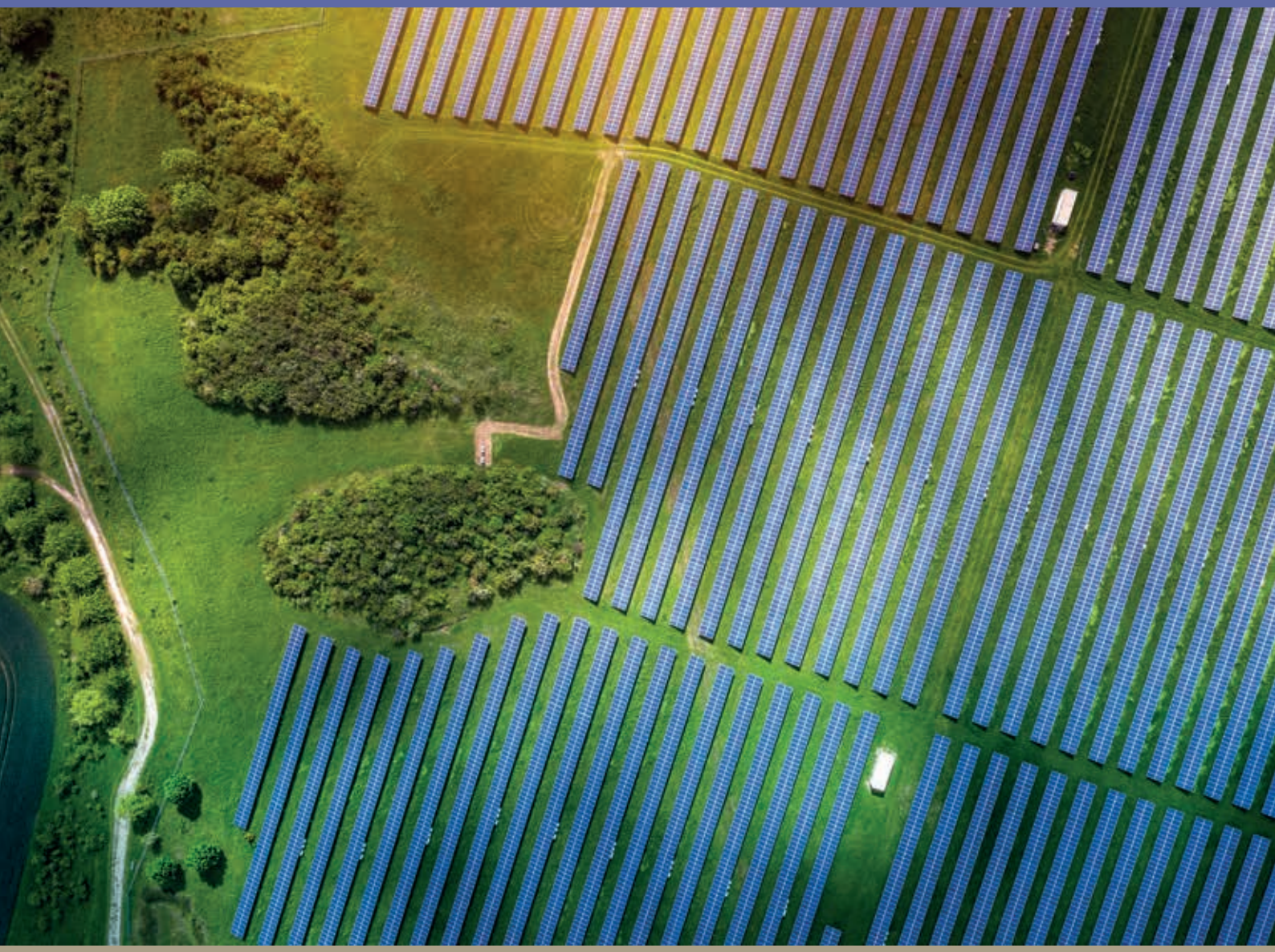
Georgia's PPP market has good experience in the energy sector (whether one refers to PPP or quasi-PPP when talking about the energy sector this is a matter of definition and project particulars), with further projects under discussion.

There is a fair potential for the development of the country's infrastructure both in the merchant and social sectors and PPP mechanisms would surely be useful. A few healthcare projects are being discussed. Road rolling may be a potential and the EBRD and the ADB have each examined it in their respective studies. Municipal transport may also become attractive.

CONCLUSION

All three countries are making efforts in the development of their public infrastructure by way of attracting private investors' finance, efficiency, management skills and know how. Authorities are generally open to international cooperation with investors and financial institutions and welcome advice as well as technical and financial assistance. It is particularly important for any initial pilot PPP project to be a success in order to ensure a broader take-up of the whole PPP programme in a respective country, thus paving the way for further PPP projects.

DISCLOSURES IN A TIME OF ENERGY TRANSITION: SUPPORTING STEG'S CORPORATE CLIMATE GOVERNANCE REFORM



"In these uneasy times, the EBRD has scaled up support to the economies where it operates through investment, policy advice and technical assistance."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The article[1] provides an overview of the climate-related financial disclosures in the energy sector as a key driver for market-wide climate action. The authors argue that there is a key role for the EBRD and other multilateral development banks to play in supporting energy transition by helping their clients implement the Task Force on Climate-related Financial Disclosures. The article highlights a pilot project in Tunisia, an emerging economy, where the EBRD steps in both as an investor providing financial stability to a client in times of Covid-19, and as a policy adviser to help develop the client's corporate climate governance and climate action.

A YEAR OF MILESTONES FOR THE EBRD

The urgency of the climate crisis and the fundamental risk it poses to humanity has risen to the forefront of business, economic and political discussions during the Covid-19 pandemic.

In these uneasy times, the EBRD has scaled up support to the economies where it operates through investment, policy advice and technical assistance. To name a few milestones in 2020, the EBRD approved its Covid-19 Solidarity Package,

1 The authors would like to thank Zeynep Boba, Consultant, EBRD, for her research and assistance in the drafting of this article.

issued the new Green Economy Transition 2021-25 (GET) approach, and developed its first Task Force on Climate-related Financial Disclosures (TCFD) status report.[2]

As envisaged in the EBRD's founding document, the Agreement Establishing the Bank, the EBRD is committed to "promoting environmentally sound and sustainable development in the full range of its investment and technical cooperation activities". As part of its new GET approach the EBRD has committed to: (i) achieving a green finance ratio of over 50 per cent of the total annual investments by 2025; (ii) aligning its financial flows with the Paris Agreement on climate change; and (iii) enhancing its policy work to achieve a systemic impact in its regions.[3]

"In accordance with its focus on sustainability, climate action and energy sector policy, the EBRD has pledged to help its clients develop effective corporate climate governance and climate disclosure mechanisms and policies."

CLIMATE-RELATED FINANCIAL DISCLOSURES

In today's environment, organisations can no longer ignore the impact that climate change has on their assets, portfolio and supply chains. There is a global trend for companies to respond to the risks and opportunities related to these impacts, as well as an expectation of transparency through financial and non-financial reporting.

Company executives are increasingly aware of the need to develop governance and risk management tools to integrate assessment and management of climate change-related impacts into financial and business decision-making. This is needed in order to optimise business performance, economic output and financial stability in the face of the physical impacts of climate change and the necessary decarbonisation of the global and local economy.

This shift is being reinforced by recommendations and emerging regulatory frameworks from the industry-driven TCFD, the European Commission's Sustainable Finance Action Plan and a number of national regulatory and supervisory bodies. The importance of informing market participants of how organisations manage their climate risks is recognised in the GET.

Set up by the Financial Stability Board in 2016, the TCFD examines climate change in a financial stability context and provides guidance for organisations on how to reduce their impact on the environment and to address the adverse effects of climate change on their business.

The TCFD recommendations ask for a better understanding of climate risk and climate-related financial disclosures, and are structured around four major areas – governance, strategy, risk management, and metrics and targets – adoptable across sectors and jurisdictions.

2 The EBRD became a Task Force on Climate-related Financial Disclosures (TCFD) supporter in March 2018, requiring the EBRD to begin disclosing its exposure to climate-related risks and opportunities like any other company. In 2020 the EBRD took its climate-related disclosure a step further by publishing a standalone report on the steps it is taking to follow the recommendations of the TCFD. The published report is an important milestone for the EBRD process of aligning its metrics and disclosure relating to climate risks and opportunities to those of other organisations, while formulating plans to become a majority green bank by 2025.

3 The EBRD would screen all investments for alignment with the Paris Agreement and national climate-related action plans, taking into consideration the priorities set in country and sector strategies. It would also increase its capacity to support economies, regions and sectors to develop low carbon and climate resilience strategies and scale up its efforts to mobilise climate finance.

TCFD IMPLEMENTATION BY THE ENERGY INDUSTRY

The TCFD 2020 status report includes a review of the disclosures of 274 energy companies. The energy industry remains one of the best-performing industries in terms of quality and coverage of TCFD recommendations and had the highest percentage of disclosures for 2019 (which reaches an average of 40 per cent).[4] The assessed companies include major oil and gas organisations and energy utilities, which have been under increasing scrutiny by investors and society on their exposure to climate risk.

The top-performing companies with regard to climate-related financial disclosures are predominantly from Europe (that is, France, Italy and the United Kingdom) and Australia. This is driven by a number of factors, including statements by financial regulators signalling their expectations regarding climate-risk disclosures, the increased focus among banks and investors to direct capital allocation to green projects, and shareholder and consumer pressure.

INTEGRATING CLIMATE-RELATED GOVERNANCE AND DISCLOSURE INTO INVESTMENT PROJECTS

There is a shortage of companies from emerging economies committing to disclose their policies on identifying and managing climate-related financial risks and opportunities. Developing countries and emerging economies may be more vulnerable to climate change due to low-income levels, poor infrastructure, weak corporate governance culture, dependency on fossil fuels, deficient legal and institutional frameworks resulting in a scarcity of climate-related data, and low market action on building climate resilience.[5] Adding unquantifiable climate-related risks to the existing, at times, commercial, legal and geopolitical risks, turns away potential investment, especially as investors are looking for green finance market opportunities.

In accordance with its focus on sustainability, climate action and energy sector policy, the EBRD has pledged to help its clients develop effective corporate climate governance and climate disclosure mechanisms and policies.

> "In today's environment, organisations can no longer ignore the impact that climate change has on their assets, portfolio and supply chains."

One of the EBRD's first investment projects integrating corporate climate governance is with Société Tunisienne de l'Electricité et du Gaz (STEG). STEG is Tunisia's wholly state-owned, vertically integrated national electricity and gas utility, and is under the administration of the Ministry of Energy, Mines and Energy Transition (the Ministry).

STEG was founded in 1962, when the Tunisian government decided to nationalise the generation, transmission, distribution, import and export of electricity and gas, entrusting these activities to STEG. STEG has the monopoly on distribution and transmission of electricity and gas, and acts as the single buyer for all the electricity generated. It controls electricity generation thanks to its ownership of 90.2 per cent (4,582 MW as of 2018) of domestically installed capacity.

Overview of Tunisia's energy sector and key challenges

For more than two decades, Tunisia has focused on the rational use of energy and a gradual development of renewable energies. Due to its ambitious energy demand management programmes, the country has reduced the growth

4 See https://www.fsb.org/wp-content/uploads/P291020-1.pdf (accessed 22 December 2020).

5 V. Haralampieva (2019), *Law in transition*, Enhancing companies' governance framework for ramping-up climate action.

rate of energy consumption and substantially improved energy intensity.[6]

Despite these efforts, the Tunisian energy mix remains heavily dependent on fossil fuels with demand for electricity still growing. The international context, characterised by a sustainable rise in energy prices, clean energy policies and investors' expectations for energy decarbonisations will significantly influence the energy situation in Tunisia.

The Tunisian government has targeted two priority actions for its energy strategy for 2030, namely strengthening energy efficiency (through, among other things, improving energy independence by reducing consumption of fossil fuels and reducing greenhouse gas [GHG] emissions) and the use of renewable energies. Tunisia's mitigation efforts under the country's Nationally Determined Contributions (NDCs) are mainly focused on the energy sector, as it is the biggest contributor to direct gross GHG emissions (it accounts for 75 per cent of the proposed emission reductions).[7]

STEG is the central and critical player in the Tunisian electricity and gas sector. Given its responsibilities as transmission system operator, single buyer of electricity, and electricity distributor and producer, its long-term sustainability is critical for Tunisian social and economic stability and green energy transition. STEG is heavily dependent on gas imports. The absence of substantial tariff reform and, more recently, the Covid-19 crisis have exacerbated liquidity issues.

STEG's stability and efficiency is essential both for the success of Tunisia's renewable programme (since STEG is the long-term purchaser of all renewable power) and for the stability of energy supply in Tunisia. In this context, the EBRD has been approached to support STEG's ambitious long-term reform objectives in the electricity sector while providing STEG with an immediate response to the Covid-19 crisis.

STEG INVESTMENT AND POLICY ROADMAP INTEGRATING CORPORATE CLIMATE GOVERNANCE AND DISCLOSURE MEASURES

On 30 December 2020 the EBRD signed a loan agreement with STEG, which combines long-term reform objectives with an immediate response to the Covid-19 crisis. The proceeds of the EBRD's loan will be used to: (i) stabilise STEG in light of the Covid-19 crisis; and (ii) refinance its short- and medium-term debt to provide terms more consistent with STEG's operations, with the purpose of contributing to the financial stability of STEG.

To respond to the country's energy priorities and in accordance with its transition mandate, the EBRD, in cooperation with the Ministry and STEG, has put together a comprehensive roadmap to reform and restructure STEG, which is integrated into the investment project. Most of the envisaged ambitious measures will be developed with the EBRD's technical assistance, which would aim to achieve the long-term sustainability of STEG and the Tunisian energy sector.

Disbursements of the EBRD's loan are linked to STEG's implementation of the reform and energy sustainability roadmap. The roadmap aims to: (i) improve the company's corporate and climate governance and disclosures; (ii) enhance financial management of the company; and (iii) promote a series of inclusive initiatives both at the company and industry levels to support equal opportunities and career development for women and young professionals in the energy sector.

As part of this roadmap, the EBRD developed a Corporate Climate Governance Action Plan (CCGAP), aimed at enhancing the company's governance and management of climate-related risks and opportunities and drawn on TCFD recommendations.[8]

6 Thanks to these programmes, to produce the same level of wealth (GDP-wise), Tunisia today consumes 20 per cent less energy than in 2000.

7 The country is committed to reducing carbon intensity by 41 per cent (13 per cent unconditionally and another 28 per cent conditionally) between 2010 and 2030. In accordance with the country's national strategies and energy transition agenda, the country plans to increase to 30 per cent the penetration rate for renewable energy in electricity production. See https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Tunisia%20First/INDC-Tunisia-English%20Version.pdf (last accessed 22 December 2020).

8 The project also promotes the EBRD's inclusion agenda – for example, by helping young people to improve their skills and supporting gender equality in terms of access to economic opportunities.

The main objectives of the CCGAP are to ensure that:

- the company's board is tasked with environmental and climate matters, including the approval of the corporate strategy (which features climate-related key performance indicators [KPIs])
- the management has the adequate tools to assess climate risks and prevent them from materialising as well as to identify and assess climate-related opportunities
- the policies adopted by the company, in particular those related to climate matters, are complied with by the operational divisions and the management
- STEG makes adequate disclosures to the public, in particular on matters related to identification and management of climate-related risks and opportunities in line with international voluntary climate-related disclosure standards (for example, TCFD, CDP, or others).

Taking into account the four pillars of the TCFD, some critical actions under the CCGAP can be identified as follows.

1. **Governance.** Under the CCGAP, STEG is required to ensure clear reporting and accountability lines in the company and to map all key functions, including environmental and climate-related matters. Another action refers to strengthening the responsibilities of STEG's board so that it is clearly tasked with approving the company's strategy and budget and determining its risk appetite, including in relation to climate-related risks and opportunities. Considering the challenges that state-owned enterprises (SOEs) face in making any governance changes, STEG committed, on a best efforts basis, to adopt a new charter and, once enabled by the relevant new legislation, to approve the new board's bylaws. The EBRD is working closely with the relevant policymakers to ensure timely adoption of this legislation.
2. **Strategy.** Once the board is equipped with the responsibilities regarding strategy approval, STEG will adopt a corporate strategy aligned to a defined budget and risk appetite with clear and defined KPIs that shall include climate-related issues.

3. **Risk management.** The company's due diligence showed that it needed to strengthen its risk management function by adopting a risk register, developing an internal risk management framework with a methodology and tools to establish climate-related risks and opportunities. A stronger risk function is required for better identification, assessment and management of climate-related risks and opportunities.
4. **Metrics and targets.** The company will have to develop specific metrics and targets for mitigating its impact on climate change (for example, developing renewable energy sources and adopting energy efficiency measures) and preventing physical climate risks from negatively affecting the company's assets and investments. In order for STEG to be able to disclose the metrics and targets used to assess and manage relevant climate-related risks, it is essential that the company improve its corporate governance disclosure in its annual report and website, including introducing climate-related reporting in line with international frameworks and standards.

While it contains improvements to "traditional" corporate governance elements (that is, the role and composition of the board and audit committee, a stronger internal control function and so on), the CCGAP focuses on specific climate actions that reflect international standards and that are innovative for the Tunisian market.

When implemented, the climate actions will lead to strategic and organisational changes in the company. Such changes will ensure that climate-related risks and opportunities are effectively identified, assessed and managed so as to inform STEG's decision-making process. Further, it will lead to the development of a corporate strategy with a progressive and clear climate-related strategic direction with multiple time horizons, which will have an impact on future investment plans and a natural shift towards renewables.

STEG has also committed to publishing climate-related data, including the company's enhanced climate governance, climate metrics and targets, which, once publicly available, are expected to have a positive impact on the country's energy sector.

> "The EBRD and other multilateral development banks have a vital role to play in helping their clients address climate-related risks and identify business opportunities."

STEG's implementation of these ambitious climate actions is expected to act as a model for other SOEs and the energy market in Tunisia, given that STEG is one of the most important SOEs in Tunisia (in terms of the number of employees). As noted above, climate-related governance and disclosure are still uncommon for energy companies in emerging markets; in fact, there is not yet a Tunisian company listed as a TCFD supporter (as of January 2021). In addition, this is one of the first CCGAPs developed by the EBRD with a public utility company and it is expected that it will have a wide impact on the Tunisian and regional energy markets.

Due to their market position, electric utilities in particular have a central role to play in leading a transition to the low-carbon economy, driven by electrification and decarbonisation. The transition and development of generation and non-generation fossil-free activities while ensuring security of supply present great challenges.[9] At the same time, the companies that assess and manage their climate risks will be among the first to identify and implement opportunities revealed by the new technology, green finance and consumer preference.

9 See https://www.wbcsd.org/Programs/Redefining-Value/External-Disclosure/TCFD/Resources/Disclosure-in-a-time-of-transition-Climate-related-financial-disclosure-and-the-opportunity-for-the-electric-utilities-sector (last accessed 22 December 2020).

CONCLUSION

There are significant gaps between climate disclosure standards and evolving regulation in Europe and other leading jurisdictions on the one hand, and the levels of disclosure in emerging markets on the other. Given these challenges, and in line with their climate commitments, the EBRD and other multilateral development banks have a vital role to play in helping their clients address climate-related risks and identify business opportunities.

Energy utilities are key players in advancing the green energy transition and building climate resilience. The ones that are able to realise and implement climate-related opportunities offered by new technologies, infrastructure and customer solutions would create a substantial value for their businesses and for the wider society. Through the investment in STEG and its technical assistance programme, the EBRD will help ensure financial stability in times of crisis and contribute to the long-term sustainability of the company. As the company develops its corporate climate governance and climate strategy, it will identify the most effective pathways for reducing emissions and introducing energy efficiency measures.

As it implements the reform roadmap, STEG will transition towards a profitable, more efficiently run and modern SOE, and be in a better position to mitigate risks and promote the development of green energy in the country over the medium and long term.

FURTHERING THE DEVELOPMENT OF THE TURKISH DEBT CAPITAL MARKET: A NEW LEGAL REGIME FOR BONDHOLDERS' MEETINGS AND BONDHOLDERS' REPRESENTATIVES

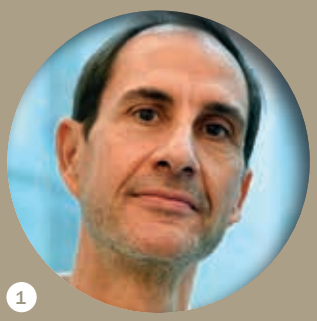
"One of the strategic objectives of the EBRD is to contribute to the development and resilience of the local capital markets of its countries of operations."

In 2020 following a study commissioned by the EBRD in Turkey, provisions about bondholders' meetings and bondholders' representatives have been enacted into Turkish law. The Capital Markets Law[1] has been modified and, after public consultation, a communiqué has been issued by the Capital Markets Board.[2] This new set of provisions will certainly be seen positively by investors and contribute to the development of the local currency corporate bond market. In this article, we highlight some of the notable features of the new legal regime applicable to bondholders' meetings and bondholders' representatives.

One of the strategic objectives of the EBRD is to contribute to the development and resilience of the local capital markets of the economies where it invests. In Turkey, the Bank established in December 2015 a TRY 700 million framework to facilitate the development of the local currency non-financial corporate bond market and is now an active investor therein. This instrument was later supplemented by a second framework of TRY 1.2 billion.

1 Art 31A Capital Markets Law, introduced by amendment law, Official Gazette No 31050 dated 25 February 2020.

2 Capital Markets Board Communiqué on Noteholders Meeting, Official Gazette No 31241, dated 11 September 2020 (the "communiqué").



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Five years after the establishment of the framework, the EBRD has participated in eight bond issuances, investing TRY 658 million in aggregate. In structuring and participating in bonds with maturities between 2.5 and 5.0 years, the EBRD has been able to raise the average maturity at which investors were prepared to invest. By improving disclosure standards and supporting issuances with hedgeable benchmarks (TRLIBOR rather than the government bond benchmark), the EBRD has made issuances more attractive and contributed to widening the investor base.

True to its strategy of combining investments with policy dialogue, the EBRD has also engaged with the Turkish Capital Markets Board to help improve the applicable legal regime – particularly provisions concerning bondholders' meetings and bondholders' representatives.

INTRODUCTION OF BONDHOLDERS' MEETINGS AND BONDHOLDERS' REPRESENTATIVES INTO TURKISH LAW

The absence of provisions about bondholders' meetings and bondholders' representatives was a previous disadvantage of the Turkish law regime. The lack of collective decision-making rules for bondholders was a severe impediment for the amendment of terms and conditions of bonds. Particularly in restructuring scenarios, the coordination of bondholders' interests proved difficult, leaving relevant actors designing *ad hoc* solutions on a case-by-case basis. In the absence of clear rules about rights, obligations and liability, few actors were willing to take an agency role. Due to the lack of any rule allowing a majority of bondholders to take binding decisions for all bondholders, the issuer had to engage with every bondholder to agree to new terms. It was not clear whether bilateral deals with only some bondholders were legally robust, considering the principle of equal treatment of bondholders. The introduction of new rules on these matters is an important improvement of the Turkish law regime applicable to corporate bonds.

The new regime applies to bonds issued in Turkey only. It covers bonds, convertible bonds, exchangeable bonds, bills, precious metal bills, and can be extended by the Turkish Capital Markets Board to other types of bonds.

BONDHOLDERS' REPRESENTATIVE

Appointment

Article 31A of the Capital Markets Law provides that a bondholders' representative may be appointed to represent the bondholders. While the designation of a bondholders' representative is optional, it can be expected that bondholders will make it a requirement for their investment.

The bondholders' representative can be appointed by the issuer in the offering document or in the issuance certificate, or by a vote of bondholders representing a simple majority of the bonds' nominal value. The same majority of bondholders can dismiss a bondholders' representative.

a. Eligibility criteria

The new provisions include certain eligibility criteria for the role of bondholders' representative: (i) absence of any sentence for any of the crimes listed in the communiqué; (ii) the professional education, knowledge and experience, honesty and prestige necessary to protect the rights of bondholders.

It will be up to the bondholders to set further eligibility criteria (in the offering document or in the issuance certificate) to ensure that a bondholders' representative has no links to the issuer or bondholders, which could raise a conflict of interest. For instance it would not be appropriate for any representative or employee of the issuer or of any majority bondholder to act as bondholders' representative.

b. Bondholders' representative's rights and obligations

The new regime is quite succinct regarding the bondholders' representative's rights and obligations. Under section 5 of the communiqué, the representative will protect the rights of bondholders in accordance with the equal treatment principle if there is a conflict of interest between the issuer and the bondholders. In order to protect the bondholders' rights efficiently, the bondholders' representative will need to have certain information rights against the issuer. It would also be advisable that the bondholders' representative is entitled to take action against

the issuer, any guarantor or security provider, under the guidance of the bondholders' meeting. The bondholders' representative will also have a fundamental role in the proper conduct of the bondholders' meetings.

One can expect that bondholders' representatives will seek to include liability limitations, which will need to be carefully reviewed by investors.

Issuers, bondholders, the regulator and other market participants will have to translate the general principles into more detailed provisions in the issuance documentation. They will need to provide the bondholders' representative with such rights as are necessary to make the individual an efficient agent of the bondholders.

c. Remuneration

The new provisions indicate that the bondholders' representative's remuneration will be determined in the offering document or in the issuance certificate. Usually the issuer would fix the level of the remuneration and bear the costs.

BONDHOLDERS' MEETINGS

The holders of bonds of a certain tranche can regroup in a bondholders' meeting and take collective decisions. Decisions taken by the relevant majority are binding for all bondholders.

a. Types of decisions and majority requirements

Changes to the interest, maturity, principal and other main terms and conditions of the bonds require a vote of the majority of bondholders holding two-thirds of the nominal value of the bonds. But the communiqué also allows the issuer to provide for a different voting majority for changes to the financial or operational commitments made by the issuer in the offering document or the issuance certificate. The qualification of a matter within one of the two categories of decisions with their potentially different majority requirements will be important. The issuance can provide for higher majority requirements. Bonds held by the issuer or related parties do not give a right to vote.

No distinction between attendance quorum and voting quorum is made. There are no provisions about second meetings with reduced attendance quorum or voting majority requirements. This means that for issuances with a large number of bondholders, an issuer wanting to modify the terms and conditions of the bonds will need to make significant efforts to mobilise and engage the bondholders to reach the required majority.

b. Tranche bondholders' meeting and general bondholders' meeting

Alongside the bondholders' meeting regrouping the bondholders of a particular tranche, Turkish law has introduced the concept of a general bondholders' meeting. Such general bondholders' meeting regroups the bondholders of all other tranches of a particular issuance. The role of this general bondholders' meeting is to entitle such bondholders to block the decision of a particular tranche bondholders' meeting, if such a decision adversely affects the rights of the holders of other tranches.

"The legislator has taken an important positive step in providing the framework. The next bond issuances will certainly be followed with much attention and one can expect an interesting period of experimentation before a settled standard emerges."

Bondholders holding at least 20 per cent of the nominal value of such other tranches can convene a general bondholders' meetings within five days after the tranche bondholders' meetings and the issuer have made a change to the terms and conditions of the bonds of the relevant tranche. If bondholders of the other tranches holding two-thirds of the nominal value of the other tranches reject the decision of the tranche bondholders' meeting, then such latter decision becomes invalid. Such general bondholders' meeting must be held within 15 days of it being convened.

This rule creates an intercreditor relationship among different tranches of a bond issuance and cuts across the principle that tranches are independent. It is likely that the notion of a decision adversely affecting the rights of the general bondholders will be subject to much debate. The requirements to convene a potentially large group of bondholders within a short timeline and to obtain the necessary majority will probably limit the practical impact of this provision.

Secured bondholders cannot take part in the general bondholders' meeting, unless the decision at stake relates to security interests.

c. Convening bondholders' meetings

Bondholders' meetings are convened by the issuer, through its board of directors, or by the bondholders. Whether each individual bondholder has the right to convene the bondholders' meeting or whether this right can only be exercised by more than one bondholder is not clear. Until this point is clarified by law, one can expect various approaches in the issuance documentations. In most cases it will be the issuer who will take the initiative to convene the bondholders' meeting to request an amendment, consent or waiver with respect to certain terms and conditions of the bonds. However, in a restructuring scenario, the initiative will most likely come from the bondholders, and the bondholders' representative will play a crucial coordination role. For this reason, it may be appropriate to also entitle the bondholders' representative to convene a bondholders' meeting.

d. Meeting format

Meetings can be held physically or electronically in line with the relevant regulations (for example, registration to the e-meeting system of the Central Registry Agency). But resolutions can also be adopted without physical or electronic meeting, by circulating the resolutions among the bondholders for signatures. This flexibility is important. Indeed, during the Covid-19 pandemic the holding of shareholders' meetings has proven quite difficult. Flexible solutions in this area are now a necessity.

The important rules about notice periods, invitation methods, announcement of the meeting, determination of the agenda, payment of meeting costs, appointment of proxies, management of the meeting, evidence of bond ownership are left for the issuer to determine in the issuance documentation. Equally, rules about furnishing of information to bondholders in advance of the meeting (for example, proposed resolution, any report submitted by the issuer in the meeting) or after the meeting (minutes) are not expressly regulated. This approach will require market participants to design their own rules. Potential investors will be well advised to carefully review the proposals made by the issuer in the draft offering document. With time, it is likely that some standard market practice will emerge.

INDIVIDUAL BONDHOLDER'S RIGHTS IN CASE OF DEFAULT

The communiqué provides that if the terms and conditions of the bonds are restructured due to the issuers' default, all enforcement proceedings initiated for payment of the bonds and all interim injunctions must be automatically suspended as of the date the bonds' terms have been changed. This seems to indicate that a bondholder retains its right to start enforcement proceedings for its own bonds until a collective decision has been taken. This approach may trigger a race of individual bondholders to obtain enforcement and seize issuer's assets before a collective decision is made. An alternative would be to prohibit individual actions entirely and let the bondholders' representative take action on the basis of the collective decision of bondholders.

The communiqué remains silent on the role of the bondholders' representative in an insolvency scenario. It may be of benefit if the individual would be entitled to represent the bondholders in the proceedings and register their claims.

CONCLUSION

The Turkish lira volatility and the Covid-19 crisis have adversely affected activity on the Turkish lira corporate bond market. However, once the Covid-19 impact will be mitigated, this market will revive. The new legal regime on bondholders' meetings and bondholders' representatives will then come to the forefront of market participants' attention. The legislator has taken an important positive step in providing the framework. Issuers have been given a broad margin to design the rules in detail. The next bond issuances will certainly be followed with much attention and one can expect an interesting period of experimentation before a settled standard emerges.

SMALL AND MEDIUM-SIZED ENTERPRISE GROWTH CONSTRAINTS: AN UZBEK PERSPECTIVE

"It is widely acknowledged that SMEs are a driving force for economic growth, a possible solution to social problems among young people and women, such as unemployment and poverty, and can lead to a rise in gross domestic product."

SMEs represent over 99 per cent of the total number of businesses across the economies where the EBRD invests,[2] and fulfil an important role in any economy. It is widely acknowledged that SMEs are a driving force for economic growth, a possible solution to social problems among young people and women, such as unemployment and poverty, and can lead to a rise in gross domestic product. In 2018 we launched a technical assistance project with Uzbekistan to discover existing policies to support SMEs as well to summarise difficulties faced by SMEs in the country.

A vibrant small and medium-sized enterprise (SME) sector is a vital ingredient for a healthy market economy. In the context of much of the EBRD regions and their economic legacy, having a large and dynamic SME population is particularly important. Given that former communist economies were organised around large state-owned enterprises and conglomerates, small firms can provide a key counterbalance and promote greater competition. However, due to internal inefficiencies and constraints in the business environment, their contribution can be well below its potential.

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1 The authors would like to thank Meryem Uyar, Analyst, Economics, Policy and Governance, EBRD for her excellent assistance with the BEEPS data.

2 https://www.ebrd.com/what-we-do/sectors-and-topics/why-small-businesses-matter.html (last accessed 10 December 2020).

SMEs have attracted increased attention in the Republic of Uzbekistan lately. This comes as no surprise, given their strategic importance to the economy and the country. The sheer number of SMEs is overwhelming, as they account for more than 90 per cent of enterprises. They play a vital role in providing employment, employing almost 78 per cent of the workforce and account for a substantial part of the economic output.[3] Those figures can be further put into context when considering that Uzbekistan is the most densely populated country in the Central Asian region, with one-third of the population under the age of 29 and half of the population residing in rural areas. As 800,000 people under the age of 29 join the labour market every year, job generation is an urgent and challenging priority.[4]

Although SMEs' economic importance attracts the attention of policymakers, it does not solely provide the basis for intervening in the private sector. Smaller businesses tend to be more flexible and quick to change than larger corporates; they are however much more vulnerable to deterioration in the business environment. They are also more sensitive to harassment from government institutions and have fewer resources to draw on when times are hard. It can therefore be argued that SMEs can develop and grow on their own and rely on the general and nondiscretionary activities of the government in relation to the private sector, however in certain cases there is rationale for governments to intervene.

LEGAL FRAMEWORK FOR SMEs

The government plays a leading role in creating an enabling legal and regulatory environment that would encourage SMEs to grow across various sectors. An SME-friendly environment that would promote growth must at the very least be characterised by certainty and clarity.

At the EBRD, we believe that creating the conditions for small businesses to thrive is fundamental for economic growth. We recognise that the challenges facing small businesses are complex. For this reason, we go beyond our usual work with firms and financial institutions: interacting with policymakers and sharing our economic and legal expertise through policy dialogue, in order to help improve the business environment across the economies where we invest.

In this regard, the EBRD launched a technical assistance project at the end of 2018 with the Chamber of Commerce and Industry of Uzbekistan. The project's aim was to provide an overview of existing policies to support SMEs as well as an assessment of difficulties faced by SMEs in Uzbekistan. The key objective of the assignment was to identify legislative and institutional reforms to improve the operational environment for SMEs in Uzbekistan. As part of the project, we carried out a mapping exercise, which has included national stakeholders that work on SME development specifically including ministries, agencies and quasi-governmental organisations. In addition, listening to small businesses and their experience has been important to complete the picture. To this end, the EBRD together with the European Investment Bank and the World Bank has conducted an enterprise survey in Uzbekistan and other countries where the Bank operates: the Business Environment and Enterprise Performance Survey (BEEPS).[5] The BEEPS VI is a firm-level survey based on face-to-face interviews with managers. It examines the quality of the business environment. In the ensuing paragraphs we will set out some of our key findings.

3 https://www.adb.org/sites/default/files/publication/524081/adbi-wp997.pdf (last accessed 10 December 2020).

4 ADB Sector Assessment https://www.adb.org/sites/default/files/linked-documents/42007-014-ssa.pdf (last accessed 10 December 2020).

5 In this article we refer to the data collected in the latest round of the Enterprise Surveys conducted in 2018-20 by the EBRD, the European Investment Bank (EIB) and the World Bank Group and covering more than 25,000 randomly selected firms across the EBRD regions and hereinafter referred to as BEEPS VI. See https://www.beeps-ebrd.com/ (last accessed 10 December 2020).

Defining an SME

The term "SME" embraces a broad spectrum of definitions. There is no consistent guideline, nor universal definition. Different organisations and countries set their own guidelines for defining SMEs, often based on headcount, sales or assets. Ideally, the SME definition should reflect the overall size of the economy and be based on structural business statistics that help identify those companies most in need of support. In most instances, SME laws define criteria (number of employees, turnover, and/or balance sheet) and corresponding ceilings (from ... to) for the classification of enterprises into different sized categories. Looking at the European Union (EU), SMEs also need to be "autonomous" in addition to meeting certain size criteria. This is because SMEs tend to have fewer resources than, for example, a group of linked or partnered enterprises as a whole who do not face the same disadvantages. The same logic also applies when excluding state-owned enterprises from an SME definition. The inclusion of an autonomy criterion also avoids the multiplication of business entities under the same ownership solely for the purpose of benefiting from SME support measures or being exempt from regulation that applies to larger enterprises. In EU member states, the definition also includes a time dimension where exceeding the definition in a single year does not immediately remove a company's SME status. A company needs to outgrow the definition over a period of at least two years to lose their right to SME support. This is to avoid fluctuation around the threshold of the definition and provide legal certainty to companies about their SME status.

To date the legislation in Uzbekistan contains no definition of SMEs. However, the development of this area has been declared a priority by the Uzbek government, and it has developed a strategy for the SME sector. According to the draft President Resolution,[6] the government intends to propose amendments to legislation and expand the scope of prerequisites required to qualify for being treated as a small business.[7]

"Ideally, the SME definition should reflect the overall size of the economy and be based on structural business statistics that help identify those companies most in need of support."

In that respect, the Uzbek authorities have created a national agency fully focused on supporting their growth: the Agency for the Development of Small Business and Entrepreneurship. The agency is a state body established under the Ministry for Economic Development and Poverty Reduction and should provide a focal point for business development.

Challenges to SME growth

There is no doubt that policies are essential to support SMEs as they are constrained by their size.

Literature indicate that in spite of their influence, SMEs continue to face many challenges. The World Bank has identified the following key challenges:

- regulatory and legal frameworks - which includes licensing and registration requirements, and the application of commercial legal frameworks
- access to finance – SMEs also face high costs of credit, which includes land ownership rights and the ability to use collateral as security, information asymmetry and alignment with international accounting standards

6 Draft President Resolution "On measures to further stimulate the expansion of small businesses and private entrepreneurship in order to create competitive companies." Available at: https://regulation.gov.uz/oz/d/639

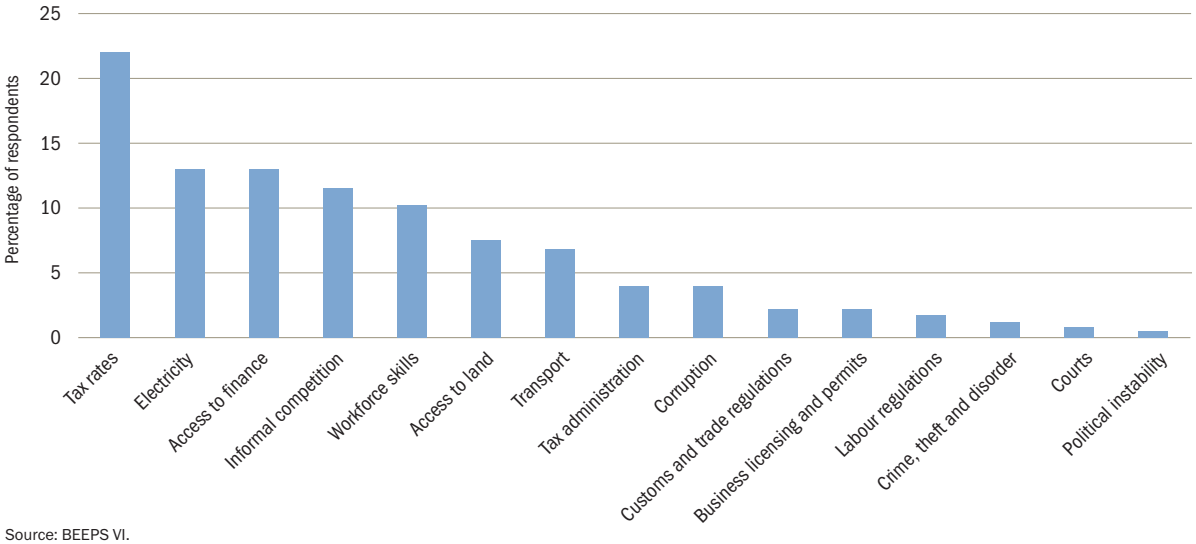
7 https://www.adb.org/sites/default/files/publication/524081/adbi-wp997.pdf (last accessed 10 December 2020).

- SME support activities – they struggle to define their key competitive edge that allows them to continue to grow and deliver, for example, business development service and access to markets.[8]

In the Uzbek context, the BEEPS VI provides important insights into the challenges SMEs face when it comes to their business operations. Asked what their most pressing issue is, SMEs indicate that they struggle with tax rates, access to electricity and access to finance most. Competition from informal firms and an inadequately educated workforce are also important concerns (see Chart 1).

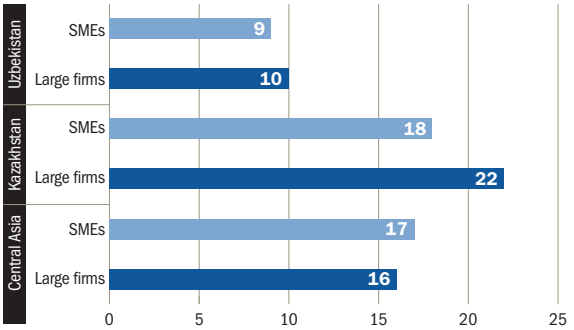
In regards to the issue of access to electricity, there is a clear difference between getting an initial grid connection and having a reliable power supply. Initial access is relatively good compared with other Central Asian countries: with SMEs waiting less than 10 days to get connected, compared with nearly 17 days on average in the Central Asia region. However, power supply is an issue with the incidence of electricity outages far higher than the average in the region (see Charts 2.1 and 2.2). This also leads to higher economic damage in terms of losses in sales.

Chart 1: Most pressing challenge SMEs face in Uzbekistan (share of respondents)



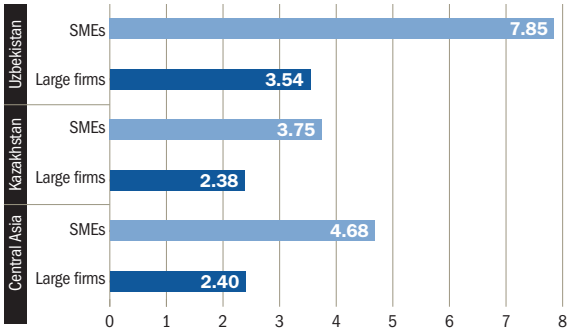
Source: BEEPS VI.

Chart 2.1: Days to connect to grid



Source: BEEPS VI.

Chart 2.2: Number of outages per month

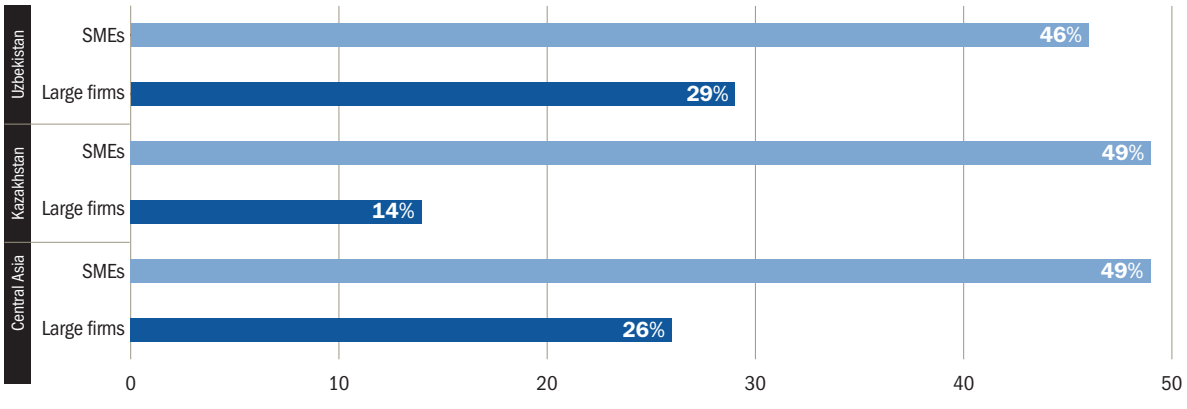


Source: BEEPS VI.

8 N. Yoshino and F. Taghizadeh-Hesary (2016), "Major Challenges Facing Small and Medium-sized Enterprises in Asia and Solutions for Mitigating Them", Asian Development Bank Institute, Tokyo.

SMEs in Uzbekistan also indicate that access to finance is an important issue. Generally, SMEs tend to struggle more with accessing external finance than larger firms because of higher perceived risk, a lack of collateral, but also an inability to present a bankable project due to shortcomings in terms of financial management and business planning. Not all firms want or need a loan. However, access to finance can allow a firm to invest into new assets for an expansion of production, or facilitate working capital management, in particular in environments where reliance on a supplier or buyer credit is low, such as Uzbekistan. It is therefore important that those firms that identify a need for credit can have a reasonable chance of getting a loan. In Uzbekistan, of those firms that said they needed a loan, a significant share were credit constrained, meaning they were either rejected when applying, or were discouraged from applying in the first place, due to high interest rates, excessive collateral requirements or complex loan application procedures. Chart 3 shows that SMEs tend to be significantly more credit constrained than larger firms. In Uzbekistan, nearly half of SMEs that say they need a loan feel that they cannot access one, an experience comparable with that of other countries in the region.

Chart 3: Share of credit-constrained firms



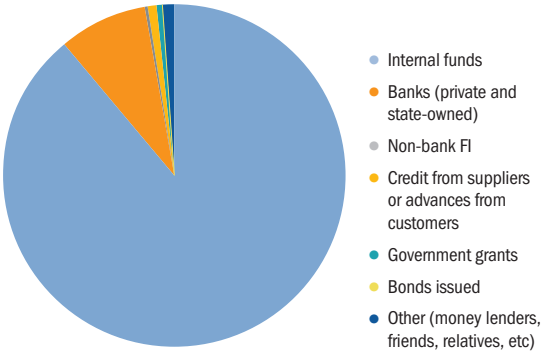
Source: BEEPS VI.

At the same time, SMEs in Uzbekistan who are able to access external financing seem to rely more on bank financing than other types of sources, compared with their peers in Kazakhstan (see Charts 4.1 to 4.4). This suggests that the banking system is a major source of financing for those that are able to tap into it, whereas the reliance on supplier or buyer credit or government grants appears to be comparatively low. Nevertheless, it is worth noting that nearly half of the SMEs are financed through state-owned banks. Their presence is significantly stronger in the country compared with, for example, Kazakhstan or the EBRD region at large, where only around 13 per cent of SME lending is channelled through state-owned banks. Interestingly, non-bank financial institutions such as microfinance organisations, leasing or factoring companies play a negligible role in facilitating access to finance although they can be important alternatives to banks, especially for SMEs. This suggests ample room for development. In many cases, an insufficient legal or regulatory framework inhibits the emergence and growth of such alternative finance providers. In certain economies, introducing a regulatory framework can lead to fair competition as there are clear rules for all participants. Authorities are able to ensure business standards and provide the often-needed assurance for investors and clients.

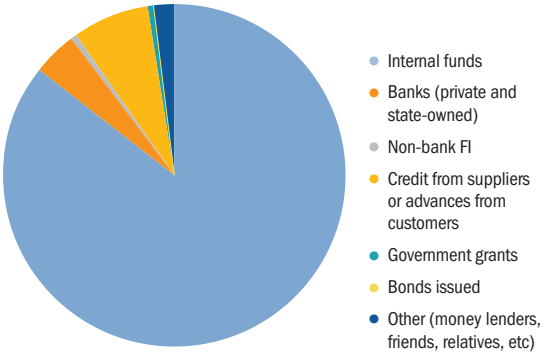
One area that is important for SMEs in particular is their limited capacity to deal with legal and regulatory requirements. As many small businesses are managed by their owner, or have very limited managerial staff, it is particularly crucial for SMEs to have an efficient public service when it comes to permits, licensing, tax administration and similar issues. Ease of use, reduction in administrative steps, and different access points for businesses are important aspects in this context. For example, the provision of e-government services, or one-stop shops where several government services can be accessed in one go, are ways to ease the burden on businesses. In this regard, the Uzbek government has made important progress by putting in place one-stop shops and cutting the number of required licences and permits required to run a business. Indeed, managers of Uzbek SMEs spend less time dealing with government regulation than their counterparts in larger firms, or in Central Asia and the EBRD regions more widely (see Chart 5).

Charts 4.1 to 4.4: Source of financing for SMEs in Uzbekistan and Kazakhstan

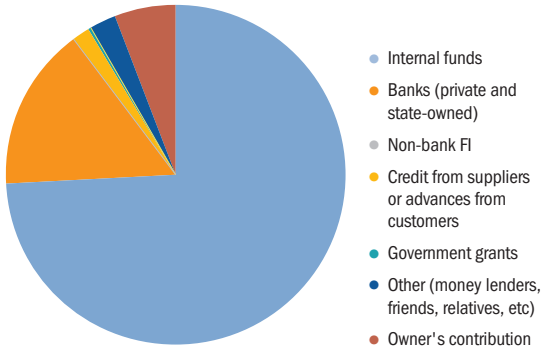
4.1: Uzbekistan - Sources of financing for working capital



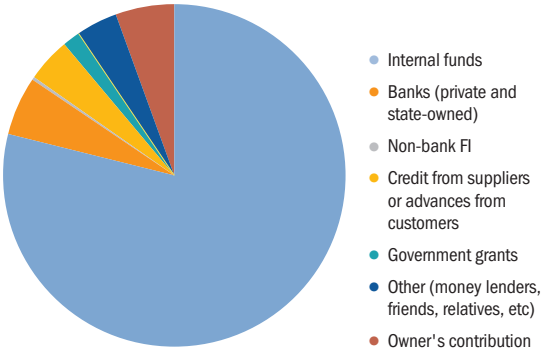
4.2: Kazakhstan - Sources of financing for working capital



4.3: Uzbekistan - Sources of financing for fixed assets purchases

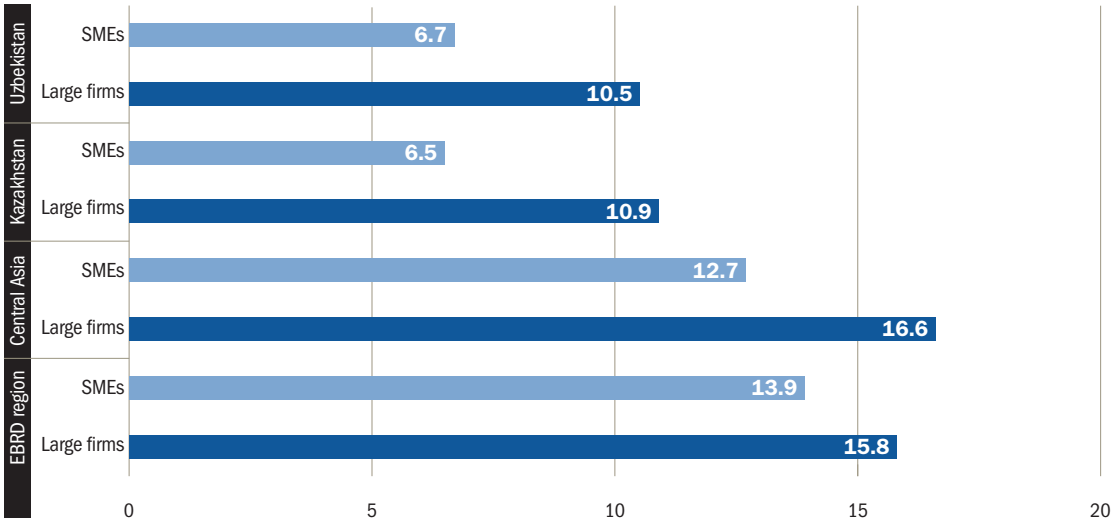


4.4: Kazakhstan - Sources of financing for fixed assets purchases



Source: BEEPS VI.

Chart 5: Percentage of time spent by senior management to deal with government regulation



Source: BEEPS VI.

Uzbekistan has made major reform efforts in recent years in this regard and climbed a number of ranks in the annual *Doing Business* reports.[9] It currently ranks 69th out of 190 economies. However, there is further room for improvement. When looking at the Doing Business results, an area that stands out is the ease of trading across borders. Uzbekistan has huge potential for producing and exporting goods. But the time and cost of filling in documentation and getting physical goods across the border is a multiple of that in other Central Asian countries. Again, SMEs would be disproportionately affected as they tend to have fewer resources to deal with such obstacles. However, for SMEs in particular, issues associated with the attempt to reach foreign markets tend to go much deeper. They span from complying with quality requirements and obtaining internationally recognised certification, to identifying clients or suppliers abroad. In all of these areas, government services can play an important role to facilitate access to international markets.

CONCLUSION

SMEs make a substantial contribution to the growth and development of economies globally. They can lead to job creation, generate productivity, and in some instances export trade and act as a key link in value chains. While their contributions in these areas may differ by country, size or statistical definition, there is little doubt as to their importance regarding economic activity. Recognition of their contribution has generated interest from policymakers at both the political and bureaucratic levels. That interest has grown over time in Uzbekistan as it has in other regions.

The main reason for policy intervention is that SMEs face market failures that inhibit their survival and growth. These failures should be the focus of government policy. Regulations remain an obstacle for SMEs as these firms tend to be poorly equipped to deal with problems arising from regulations. Access to information about regulations should also be made readily available to SMEs by policymakers.

As revered as SMEs are, the fact is that many SMEs in Uzbekistan remain fragile, immature and undeveloped. There is a need for them to reach their full potential and enhance competitiveness. Based on the above, this can be achieved through the provision of sustainable and pertinent support mechanisms, including access to credit, through the assistance of the government, but also the private sector can play a key role in providing the right environment to thrive.

9 http://www.doingbusiness.org (last accessed 10 December 2020).

GLOSSARY

ADB
Asian Development Bank
ADR
alternative dispute resolution
BEEPS
Business Environment and Enterprise Performance Survey
CA
Central Asia
CEDR
Centre for Effective Dispute Resolution
CEE
central and eastern Europe
CEPEJ
European Commission for the Efficiency of Justice
EBRD
European Bank for Reconstruction and Development
EEC
eastern Europe and the Caucasus
EU
European Union
FINTECH
financial technology
GET
green economy transition
ICT
information and communications technology
IDLO
International Development Law Organization
IFI
international financial institution
LTP
Legal Transition Programme
MDB
multilateral development bank
OECD
Organisation for Economic Co-operation and Development
PPP
public-private partnership
SDGs
Sustainable Development Goals
SEE
south-eastern Europe
SEMED
southern and eastern Mediterranean
SMEs
small and medium-sized enterprises
SOE
state-owned enterprise
TC
technical cooperation
UN
United Nations

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