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FEEDBACK ON EBRD`S DRAFT ENVIRONMENTAL AND SOCIAL POLICY

The Danish Institute for Human Rights (the Institute) welcomes this opportunity to comment on the draft revised Environmental and Social Rights Policy (E&S Policy). Changes to the Policy include positive elements of progress towards alignment with international responsible business conduct standards such as UN Guiding Principles on Business and Human Rights (UNGPs) and OECD Guidelines for Multinational Enterprises. For example, we positively note the new references to impacts associated with digitalization and data privacy, as well as the stronger requirements for clients on reprisals and gender-based violence and harassment. The Institute's feedback below focuses on select issue areas that, from our perspective, remain critical for EBRD to deliver on its commitment to respect human rights as expressed in para 2.5 of the E&S Policy.

The feedback points are listed in the order of their appearance in the E&S Policy for usability considerations. We have flagged the comments that are also relevant for the revised Access to Information Directive.

E&S POLICY - SECTION III EBRD OPERATIONS

COMMITMENT TO HUMAN RIGHTS (PARA 2.5)

We welcome EBRD's commitment to respect human rights in its projects as well as the references to "avoiding infringing the human rights of others" and "addressing adverse human rights impacts" which reflect how the responsibility to respect human rights has been articulated in the UNGPs. We also take note that the UNGPs are mentioned in the Glossary under the definition of 'human rights'. For further clarity, the E&S Policy should clarify that consequently EBRD is

also committed to conduct human rights due diligence in accordance with the UNGPs. For example, the definition of human rights in the Glossary only references the UNGPs in respect to the substantive human rights standards EBRD is committed to uphold in its projects.¹ This neglects the important fact that the UNGPs also set a benchmark of expected conduct in terms of the human rights risk management or due diligence processes and procedures required to ensure respect for human rights as listed in the International Bill of Human Rights and other instruments.

Recommendations

- i. Modify para 2.5. “The EBRD will respect human rights in projects financed by the Bank in accordance with the UN Guiding Principles on Business and Human Rights” or
- ii. Add a reference to UNGPs in footnote 4 “The EBRD will continuously improve the projects it finances in accordance with the UNGPS (.....)”.

EBRD ACCOUNTABILITY (PARA 4.4.)

The section on EBRD accountability does not recognize EBRD’s own potential responsibility for remediation in cases where harms materialize in its investments. The UNGPs expect businesses including financial institutions that caused or contributed to an adverse human rights impact to provide for or cooperate in their remediation. Financial institutions that are directly linked to an adverse impact are expected to exercise leverage so that the entity or entities causing or contributing to the adverse impact provide remedy or engage in remediation. Correspondingly, for human rights impacts associated with its investment, EBRD is expected to provide for or cooperate in remediation when its actions or omissions have contributed to an adverse impact, and exercise leverage over clients to provide remedy when it is only directly linked to adverse impacts.

Recommendation

- i. EBRD should commit to provide or exercise leverage for remediation in respect to adverse impacts that it has contributed to or that are directly linked to its investments.

¹ According to the definition, human rights refer to the right “provided under the UNGPs, the International Bill of Human Rights, and the ten core conventions of the International Labour Organization and one protocol”.

DESIGNATION AND ASSESSMENT OF RISK (PARAS 7.1-7.3)

We welcome the additional specifications on EBRD's approach to risk assessment through the new paras. 7.1., 7.2, 7.3. However, a few areas of ambiguity and under-specification in the text should be addressed to ensure that external stakeholders can adequately gauge EBRD's approach to risk identification (see recommendations below). First, it remains unclear whether this newly added section addresses risk to EBRD, risks to people and environment or both. On the one hand, the para 6.3. seems to indicate that a 'double materiality' approach is being taken. On the other hand, the reference to "residual reputation risks" in para 7.1. implies a risk-to-EBRD / financial materiality perspective. It should be noted that the UNGPs defines risks as "potential human rights impacts", i.e. risks of harm to people, independent from potential reputational or other harm to the organisation.²

Second, we welcome the reference to contextual risks as an important layer of analysis that can reveal systemic human rights concerns and/or circumstances that point to a high likelihood of clients not being able to comply with the ESR. It would be useful to specify whether and how human rights considerations e.g. gaps in national legislation and enforcement; systemic patterns of human rights abuses associated with certain sectors; risk of reprisals against human rights defenders; previous allegations of human rights abuses against the client's business partners, are explicitly considered as part of the contextual risk analysis.

Third, according to para 7.3 there will be circumstances in which EBRD may rely on alternative frameworks for environmental and social risk assessment. While capital market transactions are given as an example, it is unclear whether this is the only case when that might occur. This is an important deviation from EBRD's standard approach of risk management through its own performance requirements and more details are needed for external stakeholders to understand e.g. how widespread this practice is, the roles and responsibilities of EBRD and clients and business partners, and what other due diligence options have been considered and are available to EBRD when investing in financial instruments that appear to pose a constraint on the application of the E&S framework.

²See Office of the High Commissioner for Human Rights, [The corporate responsibility to respect human rights. An interpretative guide](#), p. 7: "A business enterprise's human rights risks are any risks that its operations may lead to one or more adverse human rights impacts. (...) This is separate from any risks that involvement in human rights impact may pose to the enterprise, although the two are increasingly related."

Recommendations

- i. Clarify in para 7.1. if the environmental and social risk assessment conducted by the EBRD includes risks to people, risks to EBRD and/or both risk to people and EBRD. Alignment with UNGPs would require that this analysis also includes risks to people. This could be done, for example, by specifying that a key consideration to be included in the risk assessment process is the “severity or seriousness of risks to people (and the environment)”.³
- ii. Specify in a footnote or the glossary that contextual risks include human rights such as human rights gaps in national legislation and enforcement, systemic and industry wide human rights abuses, risks of humanitarian law violations in conflict affected areas, etc.
- iii. In para 7.3., further clarify what is meant by “alternative approaches to risk management” and all the circumstances in which EBRD will rely on such approaches. Further specification is needed on whether the EBRD will use the client’s framework instead of its own risk assessment methodology or whether EBRD will delegate the responsibility for risk assessment to its clients and partners under these circumstances.

FINANCIAL INTERMEDIARIES – PARA 7.9

We take note of the requirement included in para 7.9 stipulating that category A projects financed by financial intermediaries (FIs) should meet ESR 1 to 8 and 10. Given that this is the only requirement that EBRD directly establishes for sub-projects/sub-clients, it should be accompanied by additional information on how it will be enforced and monitored, including by specifying e.g. whether the requirement will be included in the EBRD’s contract with the FI, whether EBRD will ensure that the FIs’ legal documentation with the sub-project includes this requirement, and whether EBRD plays a role directly monitoring Category A sub-projects’ compliance with the ESR by conducting site visits. Such clarity is important to better understand the precise roles and responsibilities of EBRD and FIs in the enforcement of this clause. It can also help remove any ambiguity related to the interpretation of this

³ According to the UNGPs, the severity of a human rights or social risk is a function of its scale, scope and degree of irremediability. Also note that in a human rights analysis, the severity of risk takes precedence over the likelihood of risk.

provision in the context of the broader E&S Policy. For example, ESR 1 stipulates the expectation that clients should report directly to EBRD (see for example para 37, 38, 39 in ESR 1). It is unclear how such requirements should be interpreted in the context of category A sub-projects - are sub-projects required to report directly to EBRD or to the FI?

Recommendation

- i. Provide more information about how EBRD enforces and monitors the requirement that category A sub-projects financed by the FI should comply with ESR 1-8 and 10.

OTHER FINANCIAL INSTRUMENTS (PARAS 7.10 – 7.14 & WITH IMPLICATIONS FOR ACCESS TO INFORMATION DIRECTIVE)

We welcome the effort to further specify EBRD's approach to risk assessment in the context of 'other financial instruments' against the backdrop of diversification of financing modalities away from project finance. While the revisions add clarity to EBRD's approach, more can be done to further specify the scope of application of these provisions and the measures EBRD takes to ensure that its E&S risk management has been effectively and adequately tailored to different financial instruments with a view to preventing and addressing risks.

First, it should be further clarified whether the new heading 'other financial instruments' covers scenarios where EBRD itself invests in these 'other financial instruments', where EBRD's financial intermediaries on-invest in these instruments or whether both scenarios are covered. It is also unclear what financial instruments are covered by the 'direct investment' heading – with the references to general corporate finance and equity financing included in para 7.12, it appears that the 'direct investment' section might only cover project finance, but that should be made explicit.

Second, it remains unclear whether the provisions in this section apply only to those instruments explicitly mentioned (i.e. general capital market transactions, corporate finance, working capital, equity financing) or whether there are other financial instruments not mentioned that fall under this category. For example, there is no reference to microfinance, which is emerging as an area of human rights risk related to abusive debt collection and over-indebtedness. In respect to microfinance, it is unclear to what extent the EBRD's E&S requirements or "alternative risk assessment frameworks" apply and how/whether end-clients (microfinance borrowers) are included in the

scope of the E&S Policy noting that they can represent a vulnerable group. The reference in para 7.10 whereby “other financial instruments will be subject to categorization in a manner consistent with direct investment or, where appropriate, FIs” further compounds this ambiguity. It is unclear how that should be interpreted and/or how it is practically enforced - e.g. will these instruments be given a high, medium, low risk categorization?

Third, para 7.14 on capital market transactions could be strengthened by the inclusion of more information on the legal, commercial and operational leverage available to EBRD to ensure compliance with ESR after subscription.

Finally, the addition of the new sub-heading ‘other financial instruments’ to complement the ‘direct investment’ and ‘financial intermediaries’ sub-headings raises questions about how other parts of the E&S Framework where similar changes have not been made should be interpreted. For example, the Access to Information Directive makes no reference to ‘other financial instruments’ and only establishes disclosure requirements for direct investments and FI projects. It therefore remains unclear how to interpret those in terms of EBRD’s disclosure practice in respect to capital market transactions, for example.

Recommendations

- i. Specify all the ‘other financial instruments’ that EBRD invests in and the extent to which the para 7.12 on the use of ‘alternative risks assessment frameworks’ apply thereto. Illustrate or clarify what these ‘alternative risk assessment frameworks’ refer to and how EBRD assess whether such frameworks are “commensurate with the Bank’s Environmental and Social Policy”.
- ii. Clarify how EBRD can enforce its requirement that clients comply with ESRs in the context of capital market transactions.
- iii. Clarify the EBRD disclosure commitments for transactions falling under the category of ‘other financial instruments’ such as capital market transactions.

STAKEHOLDER ENGAGEMENT – PARA 7.18

We take note of para 7.18 on stakeholder engagement. Its emphasis on what EBRD requires clients to do however leaves many questions open about EBRD’s own responsibilities and efforts in this area. The only reference to EBRD’s own responsibility “The Bank *may*, in some cases,

conduct its own public engagement activities to gauge stakeholder views” seems to imply that stakeholder engagement is an optional activity. That is not aligned with the expectations on stakeholder engagement embedded in the UNGPs which also apply directly to EBRD. It is acknowledged that financial institutions face practical challenges in engaging directly with affected stakeholders across all their business relationships. However, the general expectation is that financial institutions should develop a risk-based approach to engagement with affected stakeholders and their legitimate representatives rather than opt-out from this important dimension of human rights due diligence.⁴ At a minimum, the E&S Policy should specify the circumstances under which EBRD considers direct engagement with potentially affected and affected rights-holders and their legitimate representatives. Such engagement could for example be considered in high-human rights-risk scenarios such as projects where free, prior and informed consent (FPIC) is needed but there is weak capacity at the client and government levels to follow international standards; in projects in countries/regions with endemic attacks and reprisals against human rights and environmental defenders; in projects in conflict-affected countries/regions; in projects where EBRD is considering an unplanned exit with potential human rights consequences etc.

It should also be noted that stakeholder engagement is a cross-cutting dimension of human rights due diligence and therefore relevant not only for the impact identification in the appraisal stage, but also for the monitoring of effectiveness of prevention, mitigation and remedial measures. A stand-alone section on stakeholder engagement (rather than a paragraph in the appraisal section) with information on stakeholder engagement at different steps in EBRD’s risk management process would be a more appropriate way to communicate responsibilities in this area.

..

⁴ See on the role of stakeholder engagement “Under the RBC due diligence process, identification and assessment of real and potential impacts should also be informed by stakeholders. (...) In some cases, it should also involve financial institutions engaging with actually or potentially impacted stakeholders to verify risk assessment or monitoring information provided by the client/project sponsor or supplement it as necessary. Financial institutions can engage with stakeholders directly or through hiring an expert to undertake the consultation on behalf of a financial institution. This may be particularly important in the context of high-risk project finance transactions, for example where the potential impacts are serious or where projects are located in countries where free expression is not protected, and stakeholders and human rights defenders are at risk of reprisal.” (p.30) in OECD (2022) [Responsible business conduct due diligence for project and asset finance transactions](#).

Recommendations

- i. Focus para 7.18 on EBRD's own responsibilities and approaches in the area of stakeholder engagement including by specifying that EBRD commits to engage directly with affected and potentially affected stakeholders and their legitimate representatives.
- ii. Introduce a stand-alone section on stakeholder engagement with information on how EBRD consults stakeholders across the investment life cycle.

EBRD PROJECTS

VALUE CHAIN – ESR 1

We take note of para 21 in ESR 1 outlining expectations for clients to identify significant E&S risks associated with the project's core supply chains. This approach is however not fully aligned with the baseline requirement established in the UNGPs whereby companies should assess risks across all their business relationships (not only core relationships) both in the upstream and downstream side of their value chain. EU regulation on sustainability due diligence and sustainability reporting further does not make use of 'core supply chain' definitions but rather covers impacts throughout the upstream supply chain. A narrow focus on core suppliers might end up directing clients' attention and resources to social matters which do not necessarily pose the most severe risks to people as these may lie further down the supply chain tiers. In the case of certain clients such as the fintech, technology or healthcare sectors, a supply chain analysis according to ESR1 would further miss important impacts arising in the downstream value chain linked to human rights risks for end-users.

Recommendations

- i. Remove the restriction that clients should only assess and address E&S risks and impacts in respect to core suppliers.
- ii. Specify that clients should identify and address impacts throughout the value chain following a risk-based approach.

DIGITALISATION (PARA 17 WITH IMPLICATIONS FOR PARA 2.12 IN E&S POLICY)

We welcome the new provisions on adverse impacts⁵ associated with EBRD's investments in projects and clients with digital activities and services. Given the increasing digitalisation of the economy and public administration, such safeguards are necessary and expected of a

⁵ For example, para 2.12 in E&S Policy and para 17 in ESR 1.

responsible investor. We would encourage EBRD to further strengthen and unpack these provisions to better reflect international business and human rights standards and the specificities of human rights impacts associated with digital technologies.

First, according to para 17 of ESR 1, EBRD's clients are required "to consider environmental and social risks and impacts associated with cybersecurity, data protection and privacy". From a human rights perspective, however, the negative impacts documented in digital activities go well beyond data protection and privacy and can include negative impacts on the rights to non-discrimination, freedom of expression, economic and social rights, and even the rights to life and liberty and security.⁶ A narrow focus on cybersecurity, data protection and privacy might inadvertently narrow the scope of E&S assessment conducted by EBRD's clients, potentially resulting in missed human rights risks, under-estimates of the severity and scope of human rights impacts, and/or ineffective prevention and mitigation measures.

Second, we take note of the reference to national legislation in the newly added para 2.12 in E&S Policy - "The Bank will consider where the use of significant digitalisation can have adverse environmental and social impacts in the projects it finances in line with national legislation." Reliance on national frameworks, however, should be considered only if national law is aligned with and/or consistent with human rights standards. It should be noted that the UNGPs clarify that the responsibility of businesses including DFIs to respect human rights "exists over and above compliance with national laws and regulations protecting human rights".⁷ This is particularly important in the context of the development, deployment and use of digital technologies where generally speaking national regulation has been slow to emerge and shortcomings in national regulation have contributed to enhanced human rights risks.

Third, the management of impacts associated with digital technologies can be different from managing impacts associated with traditional development projects with a heavy physical footprint (e.g. infrastructure, energy, agriculture). For example, the scope of impacts in the context of certain digitalisation projects, such as the development of a digital ID or fintech solution, can be geographically far reaching with thousands or millions of individuals facing human

⁶ For an overview of the diversity of human rights impacts of digital activities, see DIHR (November 2020), [Human rights impact assessment of digital activities. Phase 3: Analysing impacts](#), p. 11-15.

⁷ UNGPs, Commentary to principle 11.

rights risks, which can complicate, amongst other, processes of stakeholder engagement and grievance handling. In 2020, the DIHR published a [guidance on human rights impact assessment for digital activities](#) which can be consulted for an overview of how impact assessment methodologies and can be implemented in the context of digital activities. The ESRs do not currently include enough specificity on the management of digital risks, which might leave EBRD staff and clients ill-equipped to properly manage human rights risks associated with digitalisation.

Recommendations

- i. Expand the list of impacts associated with digitalisation that EBRD and clients are required to consider by including other human rights risks documented in digital activities including economic and social rights, right to non-discrimination, right to freedom of expression, right to life and liberty and security, amongst others.
- ii. Ensure that the identification of impacts associated with digitalisation is benchmarked against relevant international human rights standards and reliance on national frameworks is only considered when such frameworks are consistent with international standards.
- iii. Further develop the ESRs requirements for projects and clients which significantly rely on the use of digital technologies by providing bespoke and tailored guidance on identification of impacts, stakeholder engagement, and grievance resolution, amongst others.

REMEDY – ESR1 & ESR10

The EBRD's expectations for clients to remediate adverse impacts they have caused or contributed to - a baseline expectation under the UNGPs - are not clearly articulated across ESRs. For example, ESR 1 only refers to remediation in the context of addressing impacts as part of supply chain management (see para 21). The definition of environmental and social management system as a risk management system to identify, prevent, and mitigate impacts should be upgraded to clearly stipulate the objective of remediation of actual adverse impacts. An emphasis on remediation is also missing from ESR 10 where the requirement on the establishment of grievance mechanisms do not explicitly require clients to play a role in remediation of adverse impacts.

Recommendations

- i. Require clients to remediate adverse impacts they caused or contributed to by introducing explicit references to remediation in relevant ESRs, specifically ESR 1 and 10.

FINANCIAL INTERMEDIARIES – ESR 9 (WITH IMPLICATIONS FOR ACCESS TO INFORMATION DIRECTIVE)

While we welcome some of the additions to this standard, we are concerned that EBRD's commitments in this area are not robust enough to ensure that human rights risks linked to financial intermediaries are properly identified and addressed.

First, we are concerned that the deletion of the FI referral list, which we have identified as good practice in a recent publication on financial intermediaries,⁸ is a regressive step that further narrows down the universe of FI projects that can be assessed by EBRD (which is limited to category A sub-projects). Such reviews can be critical for building FI's own ESMS capacity as well as verifying the effectiveness of a FI's ESMS in practice. Given concerns that the MDBs' delegated approach to FI financing increased the likelihood of human rights risk in indirect financing, EBRD should re-assess the removal of the referral list.⁹

Second, EBRD requires only category A sub-projects, arguably a minority of FI's clients, to meet ESR 1 to 8 and 10¹⁰, with the only expectation set for the other sub-projects being compliance with national law and Exclusion List. This can be a potentially significant protection gap for stakeholders affected by category B and C projects specifically in those jurisdictions where national law is inconsistent with or has gaps vis-a-vis international human rights standards. The restrictive approach to the application of ESR for FI's sub-projects raises questions about the consistency of EBRD's commitments given that all direct clients (irrespective of their risk categorization) are required to comply with ESRs. To illustrate, it appears that a category B project could be subject to different requirements depending on whether it is funded directly or indirectly by the EBRD.

Third, para 15 on stakeholder engagement only includes expectations for FIs in respect to external communication and grievance mechanism.

⁸ DIHR (April 2024), [Fit for purpose? An analysis of development finance institutions' management of human rights risks in intermediated finance](#), p. 49.

⁹ See for example DIHR (April 2024) [Fit for purpose? An analysis of development finance institutions' management of human rights risks in intermediated finance](#).

¹⁰ As per para 7.9 in section III EBRD operations.

However, FI clients should be also required to consult with stakeholders, notably affected people and their legitimate representatives, as part of their efforts to identify and address contextual risks and project specific risks. One of the stated advantages of supporting local economic development via financial intermediaries is their enhanced understanding of local realities and proximity to end-clients. That assessment is also relevant for stakeholder engagement – FIs are well-placed to identify and engage with human rights actors in the country to understand the type of impacts and risks relevant for their portfolios. A requirement on stakeholder engagement is particularly important given that the EBRD Guidance Note on Financial Intermediaries only *recommends* “(...) that FIs identify and map relevant external stakeholders....” (para 3.5.2).

Fourth, in the absence of references to remediation in the ESR 9, it is unclear what the EBRD expectations are for FIs in this important human rights area. Not only financial institutions should require remediation of adverse impacts by their clients, but they should also be prepared to contribute to remediation efforts where they have contributed to harm.

Fifth, the sections on monitoring and reporting to EBRD appear minimal and a missed opportunity for EBRD to further specify the modalities available to exercise leverage over FIs to ensure FIs remain in compliance with ESMS requirements and that their own due diligence and monitoring is effective. For example, it would be important to know under what circumstances EBRD undertakes site visits and whether those visits include visits of FI sub-projects as well. FIs should also be required to report to EBRD the most severe risks and impacts identified and mitigated across portfolio in that respective year, information on grievances handled and notification of incidents in respect to sub-projects.¹¹ The Guidance Note on Financial Intermediaries stipulates that EBRD “*may* request a detailed sector and investment portfolio breakdown and other project documentation, such as ESIA for Category A and ESDD reports for high-risk investments/loans” (para 3.5.2) – that should be made mandatory.

Finally, we also note certain areas of ambiguity in the formulation of ESR 9 that should be further clarified. For example, Para 2 states that “the nature of delegation may take various forms depending on a

¹¹ On incident notification, the EBRD Guidance Note on Financial Intermediaries stipulates that the “EBRD requires notification of material accidents and incidents related to the FI if they occur on any site used by the FI or if they are caused by any facilities, equipment or vehicle used for or relating to the FI” (p. 15). This formulation seems to exclude an expectation for the FI to report on serious incidents at their sub-projects.

number of factors such as the type of finance provided and where FIs make equity investments”. Specifying how the delegation system might look different across financial instruments needs to be spelled out for stakeholders to better understand the expectations for clients and EBRD’s own responsibilities and critical for ensuring accountability in those situations where human rights risks might materialize. As another example, paragraph 5 states that “the requirements of this ESR will be applicable to all sub-projects and sub-borrowers that received EBRD financing”. However, most of the requirements in ESR 9 are tailored to the realities of the FI and it is not clear which sections/paras could be applicable to sub-projects. If by sub-projects is meant other financial institutions that the FI clients on-lend or on-invest to, that should be explicitly stated.

Recommendations

- i. Reinststate the FI referral list that was deleted in the revision of the E&S Policy.
- ii. Ensure that a broader range of FI sub-projects with human rights risks are required to comply with ESRs.
- iii. Require FIs to conduct stakeholder engagement, including with affected rights-holders, and to play a role in remediation of negative impacts in accordance with the expectation of the UNGPs.
- iv. At a minimum, FIs should be required to disclose core project information and E&S documentation for higher risk projects and information on the involvement of EBRD in the financing arrangements, including the possibility to lodge complaints with the EBRD’s Independent Project Accountability Mechanism. The Access to Information Directive should be amended to require that EBRD disclose the name, location and sector of higher risk sub-projects financed through FIs regardless of the financial instruments used and all E&S documentation for higher risk sub-projects.
- v. Clarify under what circumstances EBRD will conduct site visits and whether such visits include FI sub-projects facilities.
- vi. Require FIs to report to EBRD the most severe risks and impacts identified and mitigated across portfolio in the reporting year, including relevant information on grievances handled and notification of incidents in respect to sub-projects.

- vii. Remove ambiguities and further specify how certain paras such as para 2 and 5 should be interpreted.

Yours sincerely,

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