The legal framework for public-private partnerships (PPPs) and concessions in the SEMED region

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For the first time the countries of the southern and eastern Mediterranean (SEMED) region, namely Egypt, Jordan, Morocco and Tunisia, which are potential EBRD countries of operations, have been evaluated as part of the EBRD’s assessment of the legal and institutional frameworks for PPPs and concessions. This evaluation serves as an important tool to measure the investors’ risk in each country and to identify reform needs and possible technical assistance to be provided.

It was important to assess the position of these countries with respect to concession and public-private partnership (PPP) legislation, thereby setting the framework for overcoming the limitations of the public infrastructure budgets by making use of private sector resources, including financing and know-how. Many of the countries in which the EBRD operates have major deficiencies in their concession framework and this often acts as a barrier to investment and further economic development.

It was also crucial to assess the effects of the political events which occurred in these four countries as far as concessions and PPPs are concerned and to analyse whether PPP still appears to be a politically acceptable development solution, or whether new social priorities generated by the Arab uprising have created uncertainty as to the future of PPPs.

The Assessment

It is first worth noting that these four SEMED countries are civil law jurisdictions with long-standing and sophisticated legal structures, and with eminent jurists and Islamic legal schools, which first originated in Egypt. The influence of these schools spread far beyond their own boundaries towards the rest of North Africa at the beginning of the last century, bringing an “Islamic touch” to the civil codes of Morocco and Tunisia inherited from France. This influence later reached Jordan, and from Jordan has extended to the judicial systems of many Gulf countries over the three last decades.

For the first assessment of the SEMED countries, it was important not only to evaluate the compliance of existing concession/PPP legislation (that is, “the law on the books”), and to benchmark it against international best practice including the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, European Union legislation applicable to concessions and related European Union materials (the EU acquits) and other such international standards, but also to measure the effectiveness of such legislation through an analysis of the way in which such laws are applied in practice (which refers to "how it works").

The results of the 2012 assessment of the SEMED countries’ compliance and effectiveness (“the Assessment”) are summarised in the two graphs below. The graphs compare the Assessment results for the SEMED region to the Assessment results for the EBRD region as a whole and to other sub-regions such as central Europe and the Baltic states (CEB), south eastern Europe (SEE), Central Asia (CA) and Eastern Europe and Caucasus (EEC).
Note: The chart shows the score for the extensiveness of national PPP laws. The scores have been calculated on the basis of a legislation questionnaire benchmarked against internationally accepted best standards and practices, including the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, European Union concession *acquis communautaire* and other related materials. Total scores are presented as a percentage, with 100 per cent representing the optimal maximum score for these benchmark indicators. Extensiveness is measured on the following scale: high (70 to 90); medium (50-70); low (30 to 50). For more details see: www.ebrd.com/concessions


Note: Effectiveness is calculated on the basis of a questionnaire measuring policy, institutional and enforcement environment on the following scale: high (70 to 90); medium (50-70); low (30 to 50), very low (below 30). For more details see: www.ebrd.com/concessions

Source: EBRD 2012 PPP Assessment. Legal Indicators Survey (LIS).
Egypt

Egypt also has a tradition of concessions, starting with the famous concession of the Suez Canal in 1854 and developed through the country's concession legislation of 1947 (Law N°129 of 1947; revised in 1958) which still exists today, but contains severe restrictions that make it unworkable, such as a maximum profit of 10 per cent of the capital. This is the reason why, in the late 1990s, when Egypt decided to reassess the possibility of private sector provision of public services – which had been prohibited for nearly half a century – it was necessary to enact sector-specific laws. By derogation to the 1947 concession law, such laws have been enacted for electricity, airports, specialised ports, the railway and roads sectors, allowing more flexibility in the drafting of related concession agreements. These exceptions have allowed for the construction of three power plants, as well as a number of airports, ports and road projects, although such projects have faced controversial policy issues. BOT financing has been abandoned in recent years in favour of a PPP policy.

A special PPP central unit was established within the Ministry of Finance in 2006. It has conducted the drafting of a general PPP law and the initiation of a PPP project in parallel. The New Cairo Wastewater Treatment Plant was the first PPP project awarded in Egypt by the Egyptian Ministry of Housing, Utilities & Urban Development in June 2009, before the PPP law was even enacted.

Egypt was the first of the SEMED countries to adopt PPP specific legislation (Law N°67 of 2010) which, without repealing the former Concession law, has provided for a wide scope of PPP contracts to be implemented including the delegation of public services according to the PFI model. As such, the Egyptian legal framework for concessions and PPPs has been ranked as "highly compliant" in the Assessment, and is the most compliant of all SEMED countries when compared with the international best practice.

The law further made official the establishment of the central PPP unit, which was headed at the time by a very dynamic director, Mrs Rania Zayed, with most of the officials coming from the private sector.

Following the revolution, conflicting signals are being given in relation to the development of PPPs in Egypt. The Alexandria Hospital project reached contractual closing and is now looking to secure financial close, which is a positive sign, whereas the central PPP unit has decided to cancel the "6 October" wastewater PPP project that had reached the pre-qualification stage, officially for technical and financial reasons. There is therefore some remaining uncertainty as to the future of PPPs in Egypt following the revolution although, for the time being, following a year on hold, the PPP development policy is apparently still in place.

Jordan

In Jordan the status of the legal framework is quite different, PPPs and concessions are governed by the provisions of the Privatization Regulation Number (80) of 2008 for Implementing Privatization Transactions Issued under Article (20) of The Privatization Law Number (25) of 2000 ("the Privatization Law").

The Privatization Law (Article 4) provides that the restructuring and privatisation of public institutions or enterprises owned by the public sector can be carried out by adopting the following type of agreement or license in addition to traditional methods of privatisation: BOT, BOO, build-operate-own-transfer (BOOT), as well as granting the private sector the right to build a particular enterprise with a monopolistic and exclusive right to exploit it under a licence or an agreement signed with the government for this purpose, or any other method not specified in the law as decided by the Council of Ministers.

Although designed for the development of the private sector participation in public services and infrastructure and not specifically for PPPs, it is nonetheless the Privatization Law that has provided the legal framework for PPPs. Jordan officially launched its PPP programme on 23 June 2008, and assigned the implementation of this programme to the Executive Privatization Commission as a way to maintain its privatisation programme.

The current legislation does allow for all types of PPP, although there is no specific legislation or regulation dealing in detail with PPP procurement, and no regulation at all concerning PFI or PPP which is applicable to the non-merchant sector.

Numerous successful PPP projects in Jordan, but also the withdrawal of several projects which could not be achieved on a project finance basis, have led the government to enlarge the scope of PPP and to open the PFI route to smaller projects. A new PPP law has now been under consideration for some time and, when enacted (possibly in the near future), will become the legal framework applicable specifically to concessions and PPPs in Jordan. There are, however, currently a number of social and political obstacles to PPPs in Jordan.
Morocco

Morocco’s longstanding tradition of PPP projects was revived in the 1990s with the first North African Jorf Lasfar build-operate-transfer (BOT) power plant project which achieved successful financial closing in 1997. During the same period, management of the distribution of drinking water and electricity as well as sewage management for the Greater Casablanca area was delegated to a private company. This was followed by similar delegations in Rabat and Tangier-Tetouan along with various other concession projects such as the El Guerdane irrigation project which received interest from the global PPP industry.

The law n° 54-05 pertaining to contracts for the delegation of the management of public services or infrastructure concluded by municipal authorities or public enterprises was enacted in 2006, and was based on the state's past experiences. The scope of the law is, however, very restrictive and does not apply to concessions by ministries or other government entities, nor does it apply to companies even if they are fully owned by the state and, as such, are no longer considered to be public enterprises.

This limitation in scope has contributed to the ranking of this law as "medium compliant" under the Assessment, which is below the average level of the EBRD’s countries of operations. The 2006 Moroccan law allows for the carrying out of different forms of PPP, but major international institutions working on PPP development agree that the legal framework for concessions and PPP in Morocco would benefit from a number of improvements, or even the adoption of a new PPP-specific law.

A new PPP unit was created within the Ministry of Economy and Finance last September and is already in operation, cooperating closely with a number of international institutions such as the European Investment Bank (EIB) and the International Finance Corporation (IFC). This unit has started work on a new PPP law which we understand will cover all types of PPP including government and public company concessions. It will, however, only provide the main principles, leaving the implementing rules to determine the detail of the procurement process. The PPP unit may also play a significant role in the development of PPP pilot projects within the country.

If the new PPP law, which is currently at the final study stage, is accurately drafted, its enactment would further contribute to the development of PPP in Morocco. It is also worth noting that the Moroccan PPP development policy does not seem to have been affected by the recent change in government. Some social and political resistance is, however, periodically experienced with respect to the existing delegation of management of municipal utility services, and this may jeopardise the prompt development of PPP in Morocco in the future.

Tunisia

During much the same period as Morocco, Tunisia also saw the negotiation of a build-operate-own (BOO) power plant project in Rades achieving its financial closing in the late 1990s following the enactment of an electricity law in 1996 which allowed derogations from the state company STEG production monopoly. This project did not, however, trigger much further development of PPP projects, except for the Enfidha airport concession which was inaugurated in 2007 – and a few other project attempts in the field of water treatment and desalination. This lack of activity explains the "low effectiveness" ranking of Tunisia in the Assessment.

Tunisia’s law on concession was enacted in 2008, and was also based on the state’s previous experience. It incorporates principles of administrative law including some notable advantages such as the step-in right and the right of mortgage of construction on public land, as well as provision for the modification of contracts in the event that the financial/economic balance of the contract is disrupted by unforeseen circumstances. This law appears to be a great achievement in facilitating the understanding of the existing legal framework for concession in Tunisia and is intended to provide the general framework for numerous sector-specific laws which existed previously. As such, this law has led to a "high compliance" notation in the Assessment.

The Tunisian concession law has been supplemented by Concession Procurement Decree N° 2010- 1753 dated 19 July 2010, which fixes the modalities and procedure for the award of concessions, and Decree N° 2008- 2965 which creates the unit in charge of the follow-up of concessions. As a result of the late publication of these implementing regulations, no concession agreement was ever implemented under the new law before the revolution of January 2011; the projects which were awarded under this law have been suspended pending the audit of the awarding process. An example of such a situation is the Djerba desalination plant.

The revolution has not, contrary to appearances, affected the determination of the Tunisian government to proceed with PPP projects. At the conclusion of the 9th Facility for Euro-Mediterranean Investment and Partnership (FEMIP) Conference held on 30 May 2011 in Casablanca, the PPP potential within the region was reaffirmed in a joint statement by the EIB and the Ministers of Finance of Tunisia and Morocco. Mindful of the potential for regional initiatives to promote PPP in the Mediterranean region, the EIB and the Ministers invited Mediterranean partner countries to: “(i) assess and
review their legal and financial ability to engage with PPP, and enhance, the legislative, regulatory and institutional frameworks as appropriate, as well as the financial environment required to meet the funding needs of PPP projects; (ii) strengthen expertise on the processes and procedures for implementing PPP programs and projects; and (iii) reinforce especially with the involvement of existing PPP units, regional cooperation and knowledge-sharing on PPP issues."

Following the same pragmatic trend towards extending the scope of potential PPPs noticed in most of the EBRD’s countries of operations, Tunisia began to review its 2008 Concession law soon after the revolution. The changes to the law (which have been assessed as highly compliant with international best practice despite there being room for improvement) do not seem to be prompting the development of any sort of PPP in the country. What is really needed in Tunisia is a new instrument that would respond specifically and simply to the need for Private Finance Initiative (PFI)-type projects without having to reopen the debate or redraft the 2008 Concession law.

Unfortunately the Concession law is oriented towards traditional concessions and the delegation of public services with payment being due by end-users in consideration of the service provided as opposed to payment being made by the public authority as sole user for the availability of a facility or services. The law further excludes the non-merchant sectors which renders its application more difficult, especially in relation to the PFI form of PPP.

This is precisely the form of PPP which would be very useful for the development of small- and medium-sized social projects such as hospitals or schools in remote areas, which are a priority for the Tunisian government. Such projects are not exposed to commercial or traffic risk related to ensuring the proceeds necessary for a return on investment and could be financed by the private sector based on the still-creditworthy signature of the Tunisian government entities. Despite its recent downgrading to "BB" by certain credit rating institutions, the bankability of Tunisian PFI projects could be enhanced by the support promised by international financial institutions following the Deauville conference.

In Tunisia, as in most civil law countries, passing a law on concession where public services and public wealth are involved is invariably socially and politically sensitive. In such circumstances, the enactment of an additional PPP instrument may be a simpler and quicker approach.

The new draft PPP law is expected to be available soon but there is still no clear view of what it may contain. In addition to this new law, which will hopefully respond to Tunisia’s needs, it would be advisable to develop the Concession Unit into a PPP central unit – as is the case in Egypt – in order to maximise existing resources and increase PPP expertise.

**General comments and conclusion**

The Assessment shows that traditional concessions have existed in all of the SEMED countries for a long time, even though the Concession law in two of these four countries (Morocco and Tunisia) is quite recent. The legal frameworks of Egypt and Tunisia are both deemed highly compliant in relation to best international practice, whereas Morocco and Jordan are only rated as medium compliant. The effectiveness of concession law in Jordan, Morocco and Egypt is higher (although still in the medium range) than in Tunisia (low effectiveness), which shows that the situation with respect to concession and PPP development in all four SEMED countries is not bad, although further progress must still be made.

The same dynamic attitude towards the enactment of new PPP legislation has been observed in all four countries in recent years as compared with the other EBRD countries of operations. The four SEMED countries have all actively followed the various trends detected in the overall assessment, including the move towards a greater use of PPP in addition to concession, the introduction of the PFI model and the creation of PPP units; in short, a trend towards pragmatism.

This can be seen through the enactment in Egypt and in the preparation in Morocco, Tunisia and Jordan of new PPP legislation, in addition to the existing legal frameworks for concession, allowing the introduction of the PFI model inherited from the United Kingdom and the creation of PPP units observed in Western Europe.

Over the past year, all four SEMED countries have, however, been affected by the political events of 2011, and it is not yet clear, despite some positive signs from each of the four countries as best seen in the dynamic approach to the abovementioned legislative reforms, that they will all continue their trend toward liberalisation, or that their PPP development policy will survive the plans for reform of the countries' political and economic systems.
In due course the Bank may implement its expansion and initiate investments in the SEMED region, subject to shareholders' ratification.