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Failure to fly

Challenges and lessons learned from public-private partnerships in Tunisia

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Contents

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Acronyms

AfDB	African Development Bank
ARP	Assembly of People's Representatives in Tunisia
ASFL	African Legal Support Facility
BOO	Build, own and operate
BOT	Build-operate-transfer
CSO	Civil society organisation
CwA	Compact with Africa
EFF	Extended Fund Facility
EIB	European Investment Bank
FEMIP	Facility for Euro-Mediterranean Investment and Partnership
GPOBA	Global Partnership for Results-based Aid
IBRD	International Bank for Reconstruction and Development
ICSID	International Centre for Settlement of Investment Disputes
IFC	International Finance Corporation
IFIs	International Financial Institutions
IGPP	Tunisian PPP unit (Instance Générale des Partenariats Public Privé)
IMF	International Monetary Fund
IPPPs	Institutional Public Private Partnerships
ISDS	Investor-state dispute settlement
MENA	Middle East and North Africa
NICTs	New information and communication technology
OACA	Office de l'Aviation Civile et des Aéroports
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OFID	OPEC Fund for International Development
ONAS	National Office for Sanitation
OPEC	Organization of the Petroleum Exporting Countries
OTE	Observatoire Tunisien de l'Economie
PPIAF	World Bank Public Private Infrastructure Advisory Fund
PPP	Public Private Partnership
SDG	Sustainable Development Goal
STEG	Société Tunisienne de l'Electricité et du Gaz (Tunisian Electricity and Gas Company)
WB	World Bank
WBG	World Bank Group

Executive summary

Public-Private Partnerships (PPPs) are increasingly being promoted as the solution to the shortfall in financing needed to achieve the Sustainable Development Goals (SDGs). With ever greater frequency, PPPs are being used to deliver economic infrastructure, such as railways, roads, airports and ports, as well as key services such as health, education, water and electricity in both the global north and the global south.

A wide range of institutions, donor governments and corporate bodies have worked to incentivise or actively promote PPPs in developed and developing countries alike, with a concerted effort at global, regional, national and sectoral levels.

Many developing countries have enacted PPP laws and set up 'PPP units' to scale up their capacity to implement projects. This has been in line with loan conditionalities and policy guidance coming from international financial institutions like the World Bank (WB) and the International Monetary Fund (IMF). In recent years, countries from the Middle East and North Africa (MENA) region have focused on attracting private investment through PPPs to help fund major infrastructure projects.

Tunisia was the first country in the region to implement PPPs through "user pays" concession projects, and now PPPs are high on the national political agenda. The five-year Tunisian development plan, launched in 2016, included energy, water, waste management and agriculture projects to be financed through PPPs.

This report – carried out by researchers based in Tunisia and Europe - looks at the recent changes in the legal framework for PPPs and zeroes in on the first major infrastructure project – or 'megaproject' – carried out in Tunisia – the Enfidha and Monastir airports. It analyses the implications of the recent changes in the national regulatory framework considering: (1) how the different risks associated with PPP projects are allocated; (2) the procedures for awarding PPP contracts, including the provisions for conducting impact assessment studies; and (3) the opportunities for civil society participation.

This report also examines the wider role of the World Bank Group (WBG) – and the influence that they and other IFIs have exerted in the country.

The Enfidha and Monastir Airports

This project was launched in 2003 and began operating in 2009. It entailed building a new airport (Enfidha) and manage the existing airport (Monastir). The World Bank initially promoted this PPP as a flagship project. It carried construction costs of €560 million.

TAV Airports Tunisia was the chosen private sector partner and debt financing came from the International Finance Corporation (IFC) – the WBG's private sector lending arm - but also from the AfDB; the EIB; French development finance institution, Proparco; and the OPEC Fund for International Development. TAV airports Tunisia also received a subsidy from the Tunisian state.

This report finds that:

- The decision to develop Enfidha Airport as a user-pays PPP was questionable from the beginning. This new airport was not considered profitable by the public authorities in the first place, but it was hoped that the revenue of Monastir Airport would cancel out any losses at Enfidhar.
- The selection of TAV was not transparent and its bid was questionable from the start. The concession fees offered by TAV to the Tunisian state were higher than the other bids, but at the same time the estimation of the traffic that the airport would generate were not realistic or feasible, with or without the crises that subsequently hit the country.
- TAV Tunisia began lengthy and costly renegotiations with the Tunisian government in 2010 to review the concession fee due to be paid by the company. The global economic crisis had hit the world in 2008 and it was followed by the Tunisian revolution in 2010-2011. This impacted tourism in Tunisia. This was exacerbated by the fact that Enfidha airport mainly hosts charter flights for tourists travelling through tour operators. TAV then stopped paying fees. Threatened with costly investor-state dispute settlement (ISDS) procedures, Tunisia is in negotiations with TAV airports to find an agreement. The payment of fees has been suspended since 2010.

Tunisia's regulatory framework for PPPs

The national government reformed the regulatory framework to encourage PPP projects at around the same time that the airport was being developed. They worked with the WB and other donors, such as the European Investment Bank (EIB), the Organisation for Economic Co-operation and Development (OECD) and the African Development Bank (AfDB). The WB, for instance, provided finance through a loan dedicated to "improv[ing] the business environment".

Our analysis shows that international institutions have exerted undue influence over the domestic regulatory framework in Tunisia. The new PPP law has been introduced against a backdrop of criticism from elected national parliamentarians and civil society organisations and is problematic on several grounds. For instance, the level of transparency and public disclosure has not been satisfactory; community consultation and stakeholder engagement are not properly addressed and the development impact is not assessed throughout the project lifecycle.

Moreover, 2019 amendments paved the way for additional risks, as they weakened administrative control over PPP projects. They did not adequately take into account the fiscal risks of PPPs and major incentives for unsolicited partnerships were promoted, which opened the door for projects that respond to donor country companies' business strategies. These changes confirmed concerns that the law that donors have promoted does not adequately protect either the public entity or citizens.

The future of PPPs in Tunisia

In order to make sure that the legal framework is fit for purpose in Tunisia, the role of the national parliament and civil society needs to be strengthened, there needs to be greater transparency and oversight of PPP contracts, and strengthened capacities to negotiate and monitor contracts to make sure that projects are operating in the best interests of the people they are supposed to serve.

In conclusion, this research identifies huge risks associated with PPPs, particularly for a country like Tunisia, which needs resources to implement policies that address poverty and inequalities, including gender inequalities. Lessons do not seem to have been learned from the Enfidha Airport case. The shortcomings unveiled have cast doubt over the future of PPPs in Tunisia, and the role of donors like the WB.

Recommendations

This report recommends a set of concrete actions that could have a crucial impact on this debate and prevent future problems.

A) The Tunisian legal framework needs to be fixed as quickly as possible in order to address the following issues:

- **Governance of PPPs:** Tunisian law should provide for the highest possible standards of **transparency** and the disclosure of documents and information related to public contracting. To ensure **democratic ownership** of the PPP projects, they should be part of a national development plan adopted by the Tunisian Assembly of Representatives. The government's annual report on PPPs to the Tunisian parliament should enclose the yearly development impact assessments. The possibility of unsolicited partnerships should be drastically limited. For any major infrastructure project, the Tunisian government should ensure **democratic accountability** through informed consultation and broad civil society participation and monitoring. This includes engaging with local communities, trade unions and other stakeholders throughout the life cycle of the PPP. Governments should also ensure the right to redress for any affected communities. Furthermore, the law should ensure government control over PPPs and strengthen its capacity to manage, supervise and control PPP projects, as well as evaluate their environmental, social, human rights impact, including the impact on gender equality.
- **Development outcomes**: This implies addressing concerns in terms of affordability of the services for the public sector and the infrastructure users, and equitable access to infrastructure services, as well as avoiding negative impacts on the environment or raising inequalities, especially as regards the gender gap.
- **Fiscal risks and contingent liabilities of PPPs**: PPPs should be registered on-balance sheet and counted as debt.
- **Renegotiation and litigation in PPP contracts**: the contract should also specify the conditions under which renegotiation should be allowed, especially when it is related to the financial balance of the contract. In addition, the use of international public or private arbitration in the clauses of PPP contracts should be prohibited.

B) Although it is key to close the loopholes of the legal framework, this will not be enough to address all the problems that we have encountered. The utmost caution is needed in the implementation of PPPs, in order to protect the public interest.

- The scope of different types of PPPs should be limited to major projects carried out by the central public authority in the law. Local authorities should only be allowed to implement PPP projects if the Court of Auditors approves it, after auditing their competences and resources to manage this type of complex project.
- National capacity to deal with PPPs has proved problematic in the case of Tunisia. It is key to ensure that project outcomes are designed and assessed through the whole project lifecycle to benefit everyone in society. Governments should develop clear outcome indicators and effective monitoring to measure the impacts of PPPs on the poor, from the project selection phase to the operational phase of the project.

C) We call on the World Bank, the International Monetary Fund and other public development banks and donors to halt the aggressive promotion and incentivising of PPPs for social and economic infrastructure financing in Tunisia and globally. We ask them to publicly recognise the poor track record of PPPs and the financial and other significant risks involved in PPPs. They should ensure that the highest possible transparency standards apply, particularly with regards to accounting of public funds, and disclosure of contracts and performance reports of social and economic infrastructure projects. And they should make sure that PPP projects are delivered in the interest of citizens rather than in the interest of external funders who may have different priorities.

Introduction

Public Private Partnerships (PPPs) are increasingly being promoted as the solution to the shortfall in financing needed to achieve the Sustainable Development Goals (SDGs). With ever greater frequency, PPPs are being used to deliver economic infrastructure, such as railways, roads, airports and ports, as well as key services such as health, education, water and electricity in both the global north and the global south.

A wide range of institutions, donor governments and corporate bodies have worked to incentivise or actively promote PPPs in developed and developing countries alike, with a concerted effort at all levels: global, regional, sectoral and national. Globally, the Third United Nations Conference on Financing for Development, which took place in Addis Ababa in 2015[1] and the 2030 Agenda for Sustainable Development,[2] have both established PPPs as a significant means of leveraging private finance.

Many developing countries have enacted PPP laws and set up 'PPP Units' to scale up their capacity to implement PPP projects, in line with loan conditionalities and policy guidance coming from financial institutions, such as the World Bank (WB) and the International Monetary Fund (IMF), and donor governments.[3] In recent years, countries from the Middle East and North Africa (MENA) region have focused on attracting private investment through PPPs.[4] The belief that "scaling up PPPs is essential if MENA countries are to address the multifaceted set of challenges they face"[5] has resulted in concrete changes in how laws, policies and strategic (development and sectoral) plans are designed at a national level.

Tunisia was the first country within the region to implement PPPs through concession laws, making it a good testing ground.

Firstly, its experience with concession projects (or user-funded PPPs) and private sector involvement in infrastructure financing, construction and management dates back to the 1980s. Since 1998, PPPs have been awarded to projects including electricity, transport, water and wastewater, thereby allowing for case study analysis of existing PPPs.

Secondly, PPPs are high on the national political agenda. For the Tunisian government, PPPs are a tool to help mobilise funds to implement major infrastructure projects. The five-year Tunisian development plan, launched in 2016,[6] included energy, water, waste management and agriculture projects to be financed through PPPs.

Thirdly, in 2015, 2017 and 2019, the national government reformed the regulatory framework to encourage PPP projects, working with the World Bank and other donors, such as the European Investment Bank (EIB), the Organisation for Economic Co-operation and Development (OECD) and the African Development Bank (AfDB). The WB, for instance, provided finance through a loan dedicated to "improv[ing] the business environment".[7]

Against this backdrop, this report aims to understand how policy space in Tunisia is being redefined as a result of the global promotion of PPPs. It will take into special consideration the role of the World Bank Group (WBG) and other relevant donors, and the influence that they have exerted in the country. It analyses the implications of the recent changes in the national regulatory framework considering: (1) how the different risks associated with PPP projects are allocated; (2) the procedures for awarding PPP contracts, including the provisions for conducting impact assessment studies; and (3) the opportunities for civil society participation.

We also aim to review Tunisia's experience with PPPs by analysing its largest PPP project to date: the Enfidha-Monastir airports project. It was supported by the International Finance Corporation (IFC), the private sector arm of the World Bank, which considered it to be a "model for other PPPs in Tunisia and the region".[8] We looked at:

- whether the fiscal, social and environmental risks associated with the project were properly assessed and monitored
- the level of transparency and citizen engagement
- which companies were involved
- what lessons can be learned in terms of best-practice procurement protocols for governments considering PPP contracts for infrastructure or public service provision.

Box 1: What is a Public Private Partnership (PPP)?

There is no universally accepted definition of the term *Public Private Partnership*. For the purpose of this report, we define PPPs as long-term contractual arrangements, whereby the private sector provides infrastructure and services traditionally provided by governments – such as hospitals, schools, prisons, roads, airports, railways and water and sanitation plants – or where, in some agreed way, the public and private sector share the associated risks.

Civil society organisations (CSOs) have been active in the global debate on PPPs. This joint CSO report follows the *PPP Manifesto*,[9] launched in October 2017, which was supported by more than 150 organisations and trade unions from around the world. This current briefing assesses the extent to which the associated risks and challenges identified by the *Manifesto* have been addressed by the new Tunisian legislative framework. Building on Eurodad and partners' work on PPPs, this report aims to deepen the policy debate and to provide input on ongoing policy processes at national, regional and global level. It also aims to shed light on the role of the World Bank in Tunisia's PPPs and highlight the need for greater transparency and oversight, paving the way for a stronger role for the national parliament and civil society going forward.

This report aims to deepen the policy debate and to provide input on ongoing policy processes at national, regional and global level

This report is a combination of desk-based research and fieldwork. It includes an analysis of existing literature, including official documents from the national government and donor agencies, as well as interviews with officials and relevant stakeholders at country level to cross-check and validate information.

This report is structured as follows:

Chapter 1 examines the PPP phenomenon in Tunisia. It presents the existing projects, the legal environment along with the influence of multilateral development banks. It then analyses the former and current legal frameworks to assess whether they address CSO concerns.

Chapter 2 presents the implementation challenges, identifying problems that authorities have faced with the new framework and drawing lessons from Tunisia's most expensive PPP project to date – the Enfidha-Monastir airports.

Chapter 3 suggests concrete recommendations and avenues for reform.

1. The PPP phenomenon in Tunisia

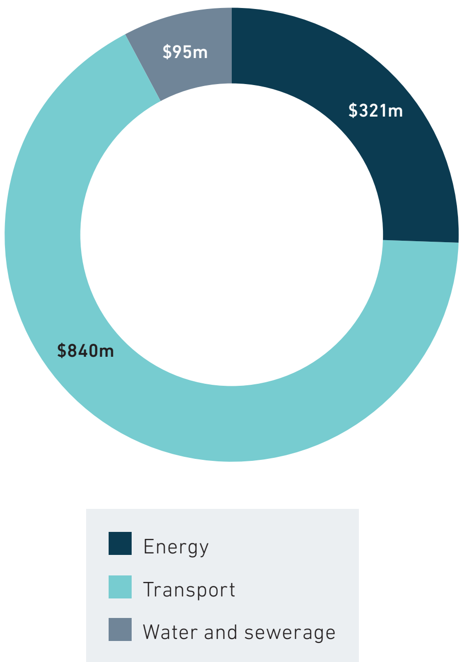
Since 1998, Tunisia has implemented several infrastructure projects through PPPs. After 2011, international donors and international financial institutions promoted adopting a new legal framework. This resulted in the adoption of a law on government-pays PPPs in 2015. However, as of mid-2019 no contract has yet been implemented under the new law and decrees. An analysis of the former and current legal frameworks is therefore important. This is needed to determine whether the current system is well suited to fostering private investments while also protecting the Tunisian people and governments from potential risks associated with PPPs, which have been well documented in the past.[10]

1.1 Figures, sectors and types of PPPs used in Tunisia

Tunisia has considerable experience with private involvement in infrastructure financing, construction and the management of public infrastructure. The current data regarding PPPs in Tunisia shows that a total of five contracts have been signed since 1998, amounting to US$1.2 billion. Four of these projects were unsolicited partnerships and two of them were supported by multilateral development banks. None of these contracts has been disclosed publicly.

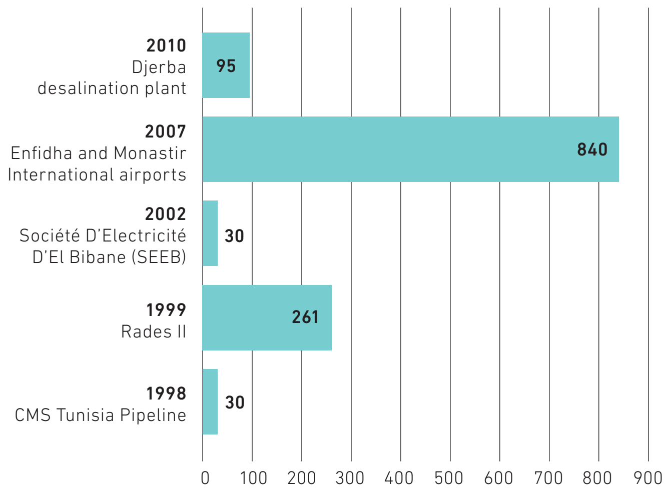
By far the most significant PPP is the Enfidha and Monastir International Airports project, awarded in 2007. This makes the transport sector the most prominent for assessing PPPs. While the first PPPs in Tunisia were 'Build, own and operate' (BOO) PPPs, the two latest projects included transferring ownership from the private to the public sector (for more on the types of PPPs, see Box 2).

Figure 1: Amount invested in PPP projects since 1998 per sector (in U$Sm)



Source: World Bank. Data excludes the Miskar project as well as the divestiture of Tunisia telecom and Ooredoo Tunisia.

Figure 2: Total investment per infrastructure project from 1998 to today (in US$m)



Source: World Bank. Data excludes the Miskar project as well as the divestiture of Tunisia telecom and Ooredoo Tunisia.

Box 2: Different types of government-pays PPPs

There are different types of PPPs, which result from a combination of the different functions that the private sector performs in the partnership. For instance, the most common types of PPPs are:

BOT: This stands for Build-Operate-Transfer. It is a contractual agreement by which the private party undertakes to finance, design, build, operate and maintain an infrastructure project for a specified period of time, after which the project facilities are transferred to the licensing authority generally without payment of any compensation.

BOOT: This stands for Build, Own, Operate and Transfer. In this case, the private party owns the infrastructure project for the specified period of time before it is transferred to the contracting authority.

BOO: This stands for Build, Own and Operate. In this case the private partner owns the infrastructure project.

The legal framework governing PPPs in Tunisia makes the distinction between two types of projects: 'user-pays PPPs' and 'government-pays PPPs'.

User-pays PPPs are financed by infrastructure users and are called "concessions" under Tunisian law. They have existed since the 1990s and are governed by sectoral laws, a general framework law and decrees detailing the procurement procedures for certain major infrastructure projects. However, the concession regime was modified in 2013[11] and more recently in 2019. All the PPP projects that have been implemented so far in Tunisia are concessions.

Government-pays PPPs are contractual arrangements whereby the private partner provides for the financing and construction of an infrastructure project and, once completed, transfers it to the government, the contracting authority. The contracting authority will pay the total investment of the project through an annual fee over the entire duration of the contract. This type of government-pays PPPs is called 'Public Private Partnerships' under Tunisian law.

The Tunisian PPP framework also includes '**Institutional PPPs**' (IPPPs), which are structural or corporate entities that provide for cooperation between public authorities and a private party through a joint venture (public-private shareholding). Since this report focuses on PPP contracts rather than legal entities, IPPPs are excluded from the scope of our research.

1.2 The legal framework for PPPs

Over the years, International Financial Institutions (IFIs) and donor governments have promoted private investment, identifying (government-pays) PPPs as a tool to leverage these funds. This promotion has resulted in concrete changes in how laws, policies and plans are designed at a national level.

The Tunisian legal framework is two-fold in nature. On the one hand, user-pays concessions, such as water and electricity, have been governed by sectoral laws from the 1960s and by a dedicated law since 2008, which was modified in 2013 and 2019. Most of the existing projects were implemented under this framework.

On the other hand, the new government-pays PPP law has been shaped by the World Bank and other international institutions. However, the resulting legal framework presents major risks for the public purse. It paves the way for unfair risk sharing between the private and public partner, as the public entity might end up ensuring the profitability of the PPP, from the demand risk to the currency risk, without protecting taxpayers' money in case the private partner fails to meet its obligations. There are many loopholes in terms of governance, thus raising concerns over unsolicited partnerships, lack of community consultations and transparency issues. Obligations and administrative capacity to manage and assess the social, environmental and human impact of the projects, including gender impact, is also a key issue in terms of SDG outcomes, as well as to ensure national ownership and oversight of the development outcomes of PPPs.

1.2.1. The user-pay concession PPPs

Concessions are the first type of PPPs to be authorised in Tunisia. According to the 2008 Framework Law on Concessions, concessions are PPP agreements by which the public entity – the 'licensor' – delegates the management of a public service or infrastructure to a private partner, the 'concessionaire', for a fixed period of time. The main features of concessions are:

- The infrastructure remains the property of the licensor, which means that no property rights are transferred to the concessionaire. However, the concessionaire obtains the exclusive right to use the assets, operate the facilities, maintain and make investments from the licensor.
- The concessionaire's revenue comes from user fees. The private entity depends on contractual tariffs and the numbers of users, which are evaluated by the private partner in the bidding phase. As such, it should assume the demand risk. The concessionaire then pays a fee to the licensor (public entity) for exclusive rights to an installation, which is either a fixed sum, a percentage of revenue or a combination of both.
- The contract determines the conditions under which the concessionaire uses these facilities and the price at which it provides the service.

Figure 3: Historical perspective of sectoral and general laws relating to user-pays concessions in Tunisia

Sector

- Transport
- Power generation
- Sanitation and waste management
- ICT
- All sectors / General framework law

1987: The Decrees N°87- 654 and 87-655 for road infrastructure authorise the occupation and exploitation of the state's public road domain by the private sector through a concession contract.

1995: The Decree N°17-720 for motorways allows for the construction and/or operation of existing motorways through concession agreement, followed by implementation decrees (Decree N°17-720 approving the concession agreement for the operation of the Hammam Lif-Msaken motorway by motorways of Tunisia. The Decree N°2004-1074 approving the concession for the construction and operation of the A1 El Jem- Sfax road).

1996: Law N°96-27 creates and organises the Tunisian Société of Electricité and Gas and authorises the granting of concessions for the provision of electricity to people. Decree N°96-1125 sets the conditions and modalities for granting the production concession of electricity to private persons.

1996: Law N°96-41 regulates waste management, control and disposal, which may be carried out by a private party subject to prior authorisation by the Ministry of the Environment and under certain conditions provided for by law.

1999: The Decree N°99-2318 for railways authorises the operation of the railways by the state-owned public company SNCFT under a concession agreement.

2002: The Law N°2002-47 relating to fishing ports allow for fishing ports (excluding commercial ports) to be occupied by an individual for their operation as a concession. Specifications approved by decree are also required.

2004: Law N°70/2004 stipulates that the state may grant concessions to private persons for the financing, construction and operation of sanitation infrastructure (ONAS).

2004: Law N°2004-33 on the organisation of land transport and ministerial order of 9 August 1989. The operation of the public land transport service by public transport may be carried out by a private carrier by means of a concession agreement.

2004/2005: Civil Aviation Code enacted by Act N°99-58 and amended by Acts N°2004-54 and 2005-84 and Decree N°2007-1216 establishing the list of public service activities eligible for a concession by the Civil Aviation and Airports Office. The construction and operation of airports by the private sector under a concession contract are authorised.

2005: Decree N°2005-3280 on the conditions and procedures for granting financing and building and operating sanitation infrastructure.

2007: Law N°35/2007 sets out the conditions and procedures for granting these concessions. It has authorised ONAS to grant concessions for the operation of its wastewater treatment plants and for some of its services for a maximum period of 30 years.

2007: Orientation Law N°2007-1 on the establishment of the digital economy (first experience of PPPs applicable to the ICT sector). End of 2011: 13 PPP agreements were signed (six in the ICT sector, four in the intelligent transport systems sector, three in the banking sector in accordance with the 2007 law on the establishment of the digital economy).

2008: Decree N°2268-2008 on the list of ONAS services that may be subject to concessions.

2008: Framework Law N°2008-23 on the concession regime (regulating private sector participation in the implementation of infrastructure and public infrastructure projects in all sectors in the form of concessions) and decree N°2008-2965 creating the PPP unit.

2013: Decree N°2013-4630 creates the PPP unit under the Presidency. Decree N°2013-4631 amends and supplements Decree N°2010-1753, setting the conditions and procedures for granting concessions.

The section below analyses the evolution of the legal framework of the user-pays concessions PPPs and their implementation. It also analyses the driving forces behind recent changes and whether they have fixed the shortcomings of the existing framework.

The IMF and WBG have promoted user-pays concession PPPs in Tunisia since the 1980s. Concessions were gradually authorised by sectoral laws in Tunisia from 1987 onwards (as illustrated in Figure 3) in the context of a structural adjustment plan with the IMF (1986-2001) and a joint programme with the World Bank. The main conditionalities were the liberalisation of foreign trade, investment, the financial sector, prices and a disengagement in the role of the state to benefit the private sector.[12] According to the documents reviewed for this report, the World Bank has played a leading role in shaping the legal framework for concessions in Tunisia, as part of the promotion of privatisation.[13] In 1996, the World Bank recommended Tunisian PPPs for roads, dams, energy supply and water treatment,[14] thus leading to the first sectoral laws. After 2004,[15] the World Bank Group encouraged Tunisia to engage in projects for sanitation and land transportation sectors, thus leading to a second package of sectoral laws.[16] As illustrated in Figure 3, the framework was fragmented and failed to specify the terms, rights and obligations of the parties, etc.

This prompted the Tunisian authorities to adopt a general legal framework for user-pay concession PPPs in 2008, which widened the scope[17] and generalised the type of PPPs being granted to all sectors[18] and that pose many challenges today.

Below we identify the three main problematic loopholes:

- **The legal framework places excessive fiscal risks on the public purse**

  First, according to Article 4 of the law, the grantor or contracting authority (the public entity) must ensure the contract's financial sustainability[19] without specifying the restrictive conditions under which the state assumes certain risks with the private partner, or requiring that the contract stipulates the conditions under which such balance should be attained. In fact, the law remains very vague concerning the allocation of risks and obligations, which paves the way for controversial and costly interpretations.

  In practice, in previous user-pays concession contracts, the Tunisian state has ensured the contract's financial sustainability while preserving affordable access to water by subsidising user fees, as in the case of the project of wastewater treatment plants in the North and South Tunis.

  Indeed, in that case the public entity ONAS charges a low price to water consumers (users), and the government adds state subsidies to cover the costs of the project while ensuring affordable access to water. User fees may increase in order to ensure payment for the project in the future.[20] This example shows that, in practice, the concession law allowed for user-pays PPPs where the public entity actually bears the demand risk. This puts a question mark over the usefulness of the new legal framework dedicated to government-pays PPPs. The law on user-pays concessions was sufficient to carry out (government-pays) PPPs in Tunisia, with some amendments if necessary, without needing to commit to a new legal framework.

- **The law does not properly address the currency risk**

  Currency or exchange-rate risks arise from one currency's devaluation in relation to another. This risk should not be overlooked in the case of PPPs. Rather, it must be negotiated so that the public partner is not in a situation where it has to assume this risk. In view of the current devaluation of the Tunisian dinar, this risk is all the more important to consider. In the law on concessions, it is not clear who bears this risk. In addition, the law stipulates that: "The participation of foreigners in the capital of the company set up to carry out the user-pays concession is possible by importing foreign currency, in accordance with exchange regulations and the legislation in force on foreign investment" to ensure foreign exchange earnings for the state. The state must be particularly vigilant with regard to this risk, which can be reflected in the project's cost, including a fee increase regarding PPPs financed by direct payments.

- **The law is very weak on addressing the contractual obligations for the private partner**

  The Concessions Law does not require all bidding documents to be included as part of the contract (Articles 14 to 23). This was confirmed by the ongoing dispute between the TAV and the Tunisian state regarding Enfidha airport. Here TAV, the private partner, has refused to consider the technical offer as a binding contractual document. Thus, it is imperative that the law expressly mentions the documents constituting the contract, particularly the file the company submitted during the tender process (technical and financial bids in this case) and the specifications.

  The 2008 law on concessions was recently amended by the so-called *loi tranversale* – translated here as 'overarching law' (including the 2008 law on concessions, the 2015 law on Public Private Partnerships and the investment code adopted in 2016). This was adopted on 23 April 2019 by the Tunisian Parliament to improve Tunisia's position in the World Bank's Doing Business ranking.[21] Once again, the World Bank Group was the driving force behind the changes in the legal framework rather than the Tunisian government.[22]

  What is more, the rationale behind the amendments were also driven by WB conditionalities.

- **The legal framework does not take into account administrative capacity limitations**

  It is difficult to determine how decisions around the infrastructure and service delivery financing are made in practice, including support for PPPs, since no PPPs have yet been put in place under the new legal framework. However, the laws and decrees have set up an institutional framework whereby the highest level of decision-making is the Strategic Public-Private Partnership Council. This is chaired by the Head of Government and attended by the Minister of Justice, Finance and Development and Investment, the President of the General Authority for PPPs, four representatives of relevant professional organisations, the private sector, civil society and academics with experience in the field. It approves the national PPP strategy. The responsibility for implementation is in the Ministry of Finance's[23] PPP unit, which is called the General Authority for PPPs[24] (IGPPP in French), led by Mr. Atel Madjhoub.[25] However, the PPP unit lacks the expertise and human resources to manage PPPs. Finally, the law[26] and decrees[27] provide for regular monitoring and evaluation by the Court of Auditors (with the publication of reports as provided for by law) – and a control commission.

The new overarching law, amending previous PPP laws, does not address the above-mentioned shortcomings, and instead creates new loopholes.[28] **Four key points** can be mentioned:

1. While **the central government lacks the required capacity to manage extremely complex user-pays concession contracts**, local and regional authorities can now also engage in PPP contracts, which seems unrealistic.
2. **The amendments weaken administrative control over the PPP throughout its lifecycle**. Grants given to user-pays concession projects are now subject to simplified procedures. Moreover, the private partner should have obtained all the necessary administrative authorisations to fulfil the contract (unless otherwise stipulated in the contract), which involves implicit risks.
3. **The amendments weaken good governance and equal opportunities rules in tendering procedures**. Unsolicited partnerships have now been extended to projects not including a direct or indirect financial contribution from the state. The time limits for replies from public authorities (90 days)[29] have been specified. The margins of preference of the spontaneous bidder have been increased to 15 per cent instead of 2 per cent), thus questioning value for money in the final choice of the call for tender.
4. Creating the category of concessions 'with simplified procedures' for large public services and infrastructure projects removes important safeguards.

As a matter of fact, the 2008 framework law governing user-pays concessions has failed to deliver. The most important and ongoing user-pays concession projects were granted and implemented under sectoral laws prior to the 2008 concession law. In the last 11 years, no user-pays concession projects have been carried out, despite incentives to involve the private sector in infrastructure. Calls for tenders were launched after 2008 but failed to attract bidders, either because the project was not financially sustainable, or the private partner was reluctant to share the risk, as in the case of the cross-border deep-water port near Enfidha, or due to non-transparent and unlawful procedures, as in the case of the Djerba seawater desalination plant.[30]

Now, however, some projects have received bids, which are under review. Given the identified loopholes of the legal framework, this raises some red flags. Among the bids, there is a BOT concession project in the water and sanitation sector with the National Office of Sanitation (ONAS). The project consists of the construction of a major infrastructure spread over 3,000 km and including 15 wastewater treatment plants and 300 pumping stations in Tunis North (two regions including Grand Tunis and Ariana) and Tunis South (four provinces for a period of ten years). The call for tender is in its final bidding phase.[31]

Several shortcomings have been identified in the 2008 concession law and have not been revised, despite recent amendments. They were prompted by international pressure rather than the public sector's desire to improve management and allocation of risks in PPP projects. This has resulted in a (user-pays) concession framework with many shortcomings.

1.2.2. Shaping the legal framework for government-pays PPPs

In 2011, a new era started after the so-called Arab Spring uprisings in Tunisia, during which the WBG has been a key player in promoting PPPs. Under Béji Caid Essebsi's transitional government,[32] three essential changes were introduced:[33]

1. The Directorate-General for PPPs was set up. This office is responsible for "strengthening international and regional cooperation in the field of public-private partnership to benefit from financing mechanisms in this field", "monitoring and steering the preparation and allocation of programmed projects between the public and private sectors" and for "creating a data bank and compiling statistics for public-private partnership projects".[34]
2. 13 (users-pay) PPPs were identified.
3. The (government-pays) PPP law was drafted.

A law enabling government-pays PPPs was passed following strong international pressure by the IMF and World Bank, through loan conditionality and policy advice. Below we list different players that influenced the law-making, in a period characterised by government instability (eight governments between January 2011 and August 2016).

a. The World Bank Group intensively pushed for PPPs

In Tunisia, World Bank promotion dates back to 1996 and intensified after the Arab Spring**, leading to the new regulatory framework for government-pays PPPs.**[35] It promoted PPPs in sectors such as new information and communication technology (NICTs), energy and water desalination[36] and private sector participation in the provision of basic services.

The IFC, the private sector lending arm of the Bank, played an important role in the development of PPPs in Tunisia, not only in terms of capacity building but also in identifying and executing PPP transactions.[37] **They also provided technical assistance** to water operator ONAS and to the Minister of Investment to "restructure the incentive scheme and introduce necessary legislative and institutional changes".[38]

The International Bank for Reconstruction and Development (IBRD), which is the arm of the Bank that provides loans to middle-income and creditworthy low-income countries, worked on the "enabling environment for business" to attract private investment to the energy (including renewables), water and transport (including logistics centres and ports) sectors, which built on 'successful PPPs' in the MENA region.[39]

Thus, by establishing a new legislative framework for renewable energy projects, combined with the Tunisian electricity company STEG's willingness to support such projects, the World Bank expected to launch new private investments in the region with IFC support. To date, Tunisia has received World Bank finance through a US$500 million loan from the IBRD promoting "strengthening the regulatory framework for PPPs"[40] and PPPs for mega projects such as infrastructure to connect industrial areas and technology parks to motorways.

b. The IMF pushed for PPPs through loan conditionality

The **International Monetary Fund (IMF)** has been a key player in moving PPPs forward in Tunisia through its loan **conditionalities**. Faced with political and economic uncertainties, the Tunisian government requested financial assistance[41] in 2012 from the IMF, which was granted in 2013. From August 2014 onwards,[42] PPPs have continuously[43] appeared in IMF-requested reforms. The IMF first welcomed "the authorities' determination to promote competition law, investment law, and bankruptcy and public-private partnerships as key government priorities for the new Parliament's programme",[44] but later referred to discussions in parliamentary committees, regretting delays in the final approval of the PPP Act.[45] To obtain the last payment of this sixth review, Tunisia promised its adoption by December 2015 and the IMF exerted pressure on the Tunisian authorities until the law was adopted.[46] In 2016, IMF assistance through the Extended Fund Facility[47] was conditional on the country's economic and financial reform programme, including the adoption of laws on PPPs but also, on implementing its decrees.[48]

c. The Deauville partnership and G20 supported law making and PPP implementation

Following the Arab Spring uprisings,[49] **the Deauville Partnership was launched in May 2011 at a G8 meeting, allowing the concerted promotion of PPPs by IFIs and donors**. The G8 brought together international organisations – the WBG, the IMF,[50] the AfDB, the Islamic Development Bank, the European Bank for Reconstruction and Development (EBRD), the EIB; International Financial Institutions and Associated States (Gulf countries, Turkey in particular) – with the objective of promoting and organising bilateral and multilateral action to support Egypt, Tunisia, Morocco, Jordan, Libya and finally Yemen.[51] This alliance of countries and IFIs agreed on reforms to be made as conditionality in exchange for substantial funding and implementation through coordinated technical assistance through the MENA transition fund.

Donors and IFIs exerted direct influence on the drafting of the law through the Deauville Partnership. The partnership's economic pillar identified the "private sector as an engine for growth".[52] The project 'Operationalising PPPs in Tunisia', launched in January 2013[53] and, partially financed by the MENA Transition Fund,[54] assisted the Tunisian government in shaping the new PPP law, setting up an institutional framework and strengthening the future PPP unit's capacities. Through this project, the OECD and the AfDB have played a key role in the law's evolution.[55] Their interlocutor was the User-pays Concession Monitoring Unit within the President's administration. When the law was adopted on 27 November 2015 by the Assembly of People's Representatives (ARP),[56] the OECD was satisfied that it was "in line with many of the international good practices" presented in the report.[57]

Concerted pressure was exerted through different organisations, including those from Europe. In 2015, the OECD also recommended using international assistance funds for project preparation – the WBG's Public Private Infrastructure Advisory Fund (PPIAF); the African Legal Support Facility (ASFL) or the most recent Africa 50 Fund from the AfDB; the EIB's MED 5P initiative (2014); and the Global Partnership for Results-based Aid (GPOBA).[58] The Deauville Partnership was accompanied by the extension of the European Bank for Reconstruction and Development's (EBRD)[59] mandate to MENA countries in democratic transition, and its support for certain potentially controversial economic policies.[60] Similarly, the EIB continued to operate in the region through the Facility for Euro-Mediterranean Investment and Partnership (FEMIP), which focused its operations on infrastructure financing and support for the private sector.[61] The European Commission also encouraged the implementation of reforms through aid. In 2014, Tunisia became the first recipient of a so-called Umbrella grant in the 'more for more' incentive mechanism framework, which rewards progress made in terms of reforms.[62] The 2014-2017 EU-Tunisia European Neighbourhood Policy (ENP) programme foresees PPP promotion including an indicator specifying an increase of the number of PPPs signed in the second strategic objective, which is dedicated to governance, transparency and business climate.[63]

The G20 Compact with Africa (CwA) continued the concerted promotion of PPPs of the Deauville Partnership. Most of the donor countries and IFIs in the Deauville Partnership are also involved with the G20 CwA. The G20 CwA was initiated under the German G20 Presidency (March 2017) to promote private investment in Africa, including in infrastructure.[64] They recommend "accelerat[ing] the operationalisation of PPPs" by publishing a pipeline of priority projects where private investment accounts for at least 51 per cent of the total, to reinforce the institutional capacity of the PPP Unit and create an online platform for PPP projects.[65] In 2018, they also recommended that the Council of Ministers should identify and adopt a proposed law to amend the current legislative framework in order to introduce financial instruments for PPPs (contracts, risk mitigation, etc.) by 2020. The CwA identifies a deadline and a 'partner' – IFC, EBRD, WBG, AfDB – for each recommendation.[66]

d. The Tunisian parliament was reluctant to pass the law

It was apparent that the law was not drafted by the Tunisian Government. As soon as the law was introduced to the Constituent National Assembly (ANC) in October 2012, linguistic inconsistencies were noted. Some observers concluded that this bill was a translation, given the legal terms used.[67] Indeed, the Tunisian government and the European Union had chosen French lawyer Xavier Ghelber[68] "to adapt the current law on concessions as required by the donors", namely the European Union, the WBG and the AfDB.

There was some reluctance to pass the law in the Tunisian parliament. The proposal was drawn up under the transitional government in 2011 and submitted to the Tunisian parliament in October 2012. But discussions delayed the adoption, while the reform's success was a donor condition to grant budgetary support to Tunisia.[69] It was therefore envisaged to bypass the democratically elected legislative assembly.[70]

- **Two decrees were issued in 2013 by the Government without parliamentary approva**l,[71] setting out the conditions and procedures for granting user-pays concessions and creating a unit to monitor user-pays concessions within the Presidency.[72]
- **The adoption of the 2019 transversal law bypassed the Parliament Finance Committee.** Some investors and donors were not satisfied with the adopted law, as the Tunisian Parliament Finance Committee had excluded, for example, the "operation of infrastructure" from the scope of the law. This issue was fixed by the "Business Climate Improvement Act" of 29 April 2019, which amended the laws on PPPs, without any discussion in the country's own Finance Committee.[73]

1.2.3. Does the new PPP law protect Tunisian people's interests from risky PPPs?

As demonstrated above, international donors and creditors exerted undue influence on Tunisia's legislative and regulatory framework to make sure the new PPP law was adopted. But the resulting law has many loopholes and does not address the many challenges of PPPs already highlighted in extensive literature:[74]

Transparency: PPP contract negotiations are extremely complex and are usually conducted under "commercial information confidentiality".[75] This lack of transparency can significantly increase the **risk of corruption** and reduce the **capacity of governments to regulate in the public interest.**[76] Addressing this problem would allow for a better assessment of fiscal risks.[77]

Stakeholder engagement: PPPs are a popular way to finance 'mega-infrastructure projects'. But dams, highways, large-scale plantations, pipelines and carbon-intensive energy infrastructure can wreck natural habitats, displace communities and destroy natural resources such as lakes and rivers. As a result, PPPs can lead to forced displacement, repression and other abuses of local communities and indigenous peoples. Engaging with local communities and conducting impact assessments throughout the project's lifecycle is one way to mitigate these risks.

Dispute settlement: PPP contracts tend to favour **opaque and unaccountable international adjudication**. By favouring international arbitration that lacks transparency, over local or national courts, and by not taking the disadvantages associated with these ISDS systems into account, **PPPs can threaten democracy at the local level.**[78]

Fiscal impact: In most cases, PPPs are the most expensive financing method for projects.[79] **The fiscal risks of PPPs have been widely acknowledged** by international institutions,[80] Courts of Auditors, CSOs and researchers. The fiscal costs are not simply the result of explicit liabilities (such as compensation mechanisms for possible income shortfalls) as expressed in contractual provisions and mentioned in the decree, but also potential guarantees and other contingent liabilities. Examples include payments required from governments in certain circumstances, such as in the case of a devaluation of the national currency, or in the event that demand falls below a specified threshold.

Below we assess whether the new Tunisian law addresses these challenges and ensures a fair sharing of risk regarding direct (cost of capital, rates of return, construction costs) and indirect costs (transaction, renegotiation, limited competition)[81] between the private and public partners. Tunisian law rightly mentions the "principle of contractual balance through risk sharing in the contract between the public entity and the private partner".[82] In our assessment we stress the following points:

- **The level of transparency and public disclosure is not satisfactory**

  The new Tunisian (government-pays) **PPP law standards for disclosure and transparency are very low.** The 2015 law provided for greater transparency[83] in awarding and implementing (government-pays) PPP projects to limit conflicts of interest, corruption or unethical behaviour risks. This was reflected in new requirements such as publishing decisions to the partnership contract by the public entity[84] or control and audit reports.[85] But publications by the general (government-pays) PPP authority are limited to "an extract of the signed partnership contract" on their website.[86] The "registry of real rights encumbering buildings, works and fixed equipment built under public-private partnership contracts" is public but provides very limited information.

  Meanwhile, the Tunisian PPP unit (IGPPP) website has only a few numbers and photos of existing projects and no impact assessment for projects that are in the pipeline. This lack of transparency is reinforced by strong confidentiality requirements for civil servants involved in PPPs.[87] Full transparency – which would imply the full disclosure of impact assessments, contractual documents, etc. – is not guaranteed and so prevents citizens and local communities from engaging with the public authorities. Moreover, the annual report on the implementation of PPPs, which the government must submit to the assembly of people's representatives each year, is not published. Nor is the report annexed to the budget, which gives an overview of all (government-pays) PPP commitments in the entire public sector.[88] The law is also not in line with the General Principles of Open Procurement.[89] This is a particularly sensitive issue in a country going through a democratic transition process, where fighting corruption has been at the heart of the people's demands and the costs of poor **transparency** have been widely recognised.

- **Community consultation and stakeholder engagement are not properly addressed**

  Local community engagement is not foreseen by the new (government-pays) **PPP law**. Even though it would improve PPP development outcomes (government-pays), simultaneously creating a smoother operating environment for all parties, including the government and the private sector.[90] Experience has shown that the lack of local community consultation is a problem for democratic accountability.[91] This consultation is neither included in the new law, its decrees nor in the preliminary phase of the various technical, financial, economic, environmental and social impacts, including gender impact. The OECD already pointed out this shortcoming in 2016, along with the need to "broaden the scope and coverage of existing public participation instruments in Tunisia so that civil society can be appropriately involved in all phases of (government-pays) PPP preparation and monitoring and communicate with private providers in a regular and effective manner".[92]

- **The development impact is not assessed throughout the project lifecycle**

  The new (government-pays) **PPP law is strong on assessing the development impact in the preparatory phase of the project, but not through the whole of its life cycle**. In the phase prior to submitting the project, the new legal framework ensures that the public authority conducts legal, economic, financial, social, technical and environmental impact studies, including gender impact, as well as the elements that justify using a (government-pays) PPP rather than another contractual form, particularly regarding the public entity's financial situation and whether the necessary funds to implement it are available.[93] In terms of sustainability and human development criteria, the law foresees that the call for tenders shall mention the minimum percentage of activities covered by the partnership contract, which the private partner will be required to award to small and medium-sized enterprises in Tunisia via subcontracts,[94] as well as the percentage of products used that are produced at national level, and the response of the offer to the requirements of sustainable development.[95] However, once the preliminary study phase has been completed, these criteria do not seem to be regularly evaluated.

- **2019 amendments pave the way to additional risks**

  The 2019 overarching law raises concerns as it removes requirements related to administrative licences necessary for the implementation of the partnership contract concluded with it. It could pave the way for environmental authorisation exemptions by the Tunisian environmental agencies,[96] thus suppressing important environmental safeguards.

- **Fiscal risks are not adequately taken into account**

  The new law requires the fiscal impact of (government-pays) **PPPs to be evaluated when this type of contract is chosen. However, it does not require either the methodology, the modalities or the criteria** for the comparative cost/benefits analysis, to determine whether it is more economically and socially advantageous to use a PPP rather than a public contract.[97] The fiscal risks should also be subject to close monitoring throughout the lifecycle. **Lack of competition and excessive emphasis on unsolicited partnerships both raise concerns about governance.**

  In the new Tunisian legal framework, competition is the rule,[98] but the law also allows competitive dialogue,[99] restricted tendering,[100] direct negotiation and 'unsolicited partnerships',[101] which undermine the competitive process. PPPs entail many different fiscal risks, through both direct and indirect costs. Among the indirect costs, competition is a key issue. Indeed, few companies have the capacity to apply for mega infrastructure projects. This reduces governments' choice and competition in tendering processes.[102] Limited competition among companies can increase the final project cost and increase the opportunities for corrupt behaviour.[103] In addition, limited competition creates increased risk for the public sector because companies are large and powerful enough to take on the regulators in the case of conflict and can force contracts to be renegotiated on more favourable terms.

  Moreover, PPP costs are accounted for off-balance sheet, which means that they do not appear in the national budget balance sheet and therefore are not counted as debt. Meanwhile the government is supposed to ensure that "any PPP project is affordable and that the overall budget allocation for investment is sustainable",[104] especially given Tunisia's fiscal pressures[105] and the absence of a sustained growth path in Tunisia.[106] Indeed, the fact that PPPs can be accounted for off-budget, combined with international pressures to facilitate foreign direct investment, can create fiscal sustainability risks for the government. Without a systematic approach to cost identification, allowing a consolidated view of the risks combined with the absence of a published balance sheet, presenting all assets and liabilities from the Tunisian general government, "the future PPP regime will [continue to] be a source of risk for public finances in the long term" (IMF).[107] Similarly, in the event of bankruptcy, the government may have to launch a rescue plan at its own expense to ensure the continuity of the public service, as was the case in 2018 with the collapse of the construction giant Carillion.[108] Detailed analysis of contracts and their obligations to identify[109] the full fiscal costs, their statistical and budgetary treatment, are recommended to allow current and potential costs (also called contingent liabilities) to be considered in debt calculations and more specifically in the Tunisian medium-term expenditure planning (MTEF) framework.

The latest version of the law provides major incentives for unsolicited partnerships. This paves the way for tied aid, which is foreign aid that must be spent in the country providing the aid (the donor country) – for example, by awarding the PPP contract subsidised by aid to a multinational of the donor country. It favours projects that are not necessarily in line with its development plan but in line with donor countries companies' expectations. It also weakens the rule of good governance and the principles of procedural transparency, equality and equivalence of opportunities, enshrined in Article 5 of the law. That is why the delicate issue of spontaneous proposals has been subject to several revisions in the different versions of the law.

The new Tunisian legal framework provided that the investor may submit an unsolicited PPP to the public entity for the implementation of a project, but with three safeguards: 1) the company should present a 'preliminary opportunity study of the project'; 2) the public person may accept, reject or amend it; and more importantly 3) the preferential margin for the private initiator of an unsolicited partnership in the competitive bidding process was limited to 2 per cent. However, the new 2019 law stipulates that, in the event of recourse to a call for tenders preceded by an unsolicited tender, the tenderer carrying the tender shall automatically be included in the shortlist after the pre-qualification phase and shall be granted a margin of preference at the tender evaluation stage of up to 20 per cent. This has the result of affecting the final decision, which should be based on the best value for money and development outcome.

This is to be understood in a global context where more than one sixth of development aid (ODA) is tied. As a result, in 2016, nearly US$25 million was officially reported as conditional aid – more than half of the total ODA budget for health, population and water. Tunisia does not seem to have escaped unscathed. The Rades C station under construction received a US$1 million ODA loan from Japan, while a joint venture between Mitsubishi Hitachi Power Systems and Sumitomo Corporation won the contract to build the Rades C plant.

- **Renegotiation and dispute settlement create uncertainty for the public sector**

  The law provides the parties with recourse to arbitration, in the event of a dispute over the contract, in the absence of friendly settlement and in the event that the conciliation process fails.[110] Moreover, as the law is not clear on which documents are legally binding, it creates legal uncertainty in case of litigation.

  Tunisia has signed more than 60 bilateral investment treaties and has already been a respondent in four International Centre for Settlement of Investment Disputes (ICSID) court cases. Three have reached closure:[111] two were discontinued and one was lost by Tunisia. One ongoing case by a Dutch investor (ABCI Investments v. Tunisia) remains open.[112] The arbitration case Tunisia lost concerned state guarantees in a concession contract, but the case was not fully disclosed, in particular regarding the financial information.

  Arbitration has already cost states trying to regulate their economies hundreds of millions of dollars.[113] It also poses a problem for democratic control and respect for the rule of law, as investors could demand compensation for the fact that the Tunisian government has legislated on worker protection, health or environmental protection.[114]

  In summary, the global promotion of PPPs by IFIs such as the World Bank and IMF has exerted undue external influence over the domestic regulatory framework in Tunisia. The new PPP law has been introduced against the backdrop of criticism from elected national parliamentarians and civil society organisations and is riddled with loopholes. Our analysis, which is bolstered by findings from the case study laid out in Chapter 2, demonstrates that the new law is weak and problematic and does not work for the good of Tunisia's population. In order to make sure that the legal framework is fit for purpose in Tunisia, the role of the national parliament and civil society needs to be strengthened as a matter of urgency and there needs to be greater transparency and oversight of PPP contracts going forward to make sure that these national projects are operating in the best interest of the people they are supposed to serve.

2. New projects and old problems? Lessons learned from Tunisia

This chapter looks at the poor track record of delivering PPP projects in the public interest in Tunisia and illustrates the undue influence of international donors by looking in detail at one specific case study – the Enfidha-Monastir airports concession.

2.1 Projects in the pipeline

Once the law and decrees were adopted, donors have continued to promote implementation intensively through loan conditionality, conferences, technical assistance and the promotion of specific projects. The IMF used loan conditionality, as loan disbursements are linked to changes in PPP laws[115] and PPP implementation. **This conditionality was combined with soft influence through technical assistance**, for example, by preparing a pipeline of projects for the "Tunisia PPP 2018" high-level conference conveying government officials, donor countries and businesses. EBRD, IFC, IBRD, AfDB[116] and French ministries[117] also provided technical assistance. For example, a consultancy with ONAS aimed to increase the private sector's share in water management from 25 per cent to 50 per cent.[118] The related pilot project was part of the MENA Transition Fund's technical assistance.[119]

This influence resulted in the government's ambitious project pipeline but has not led to any signed contracts so far. The Tunisian development plan clarified the intentions and infrastructure investments programming for the 2016-2020 period. By mobilising US$60 billion in investments over five years – 60 per cent of which would come from the private sector from Asia, Europe and the United States – the Tunisian development plan aimed to achieve a growth rate of at least 4 per cent[120] and to reduce the unemployment rate to 12 per cent by 2020.[121] When it was launched, the Tunisian development plan was expected to generate more than 50 investment projects, including 12 PPPs in several sectors.[122] In 2018, the government announced 34 megaprojects totalling US$9 billion (22.2 billion dinars) – a third of Tunisia's national income;[123] 90 per cent of these are reported to be "under development"[124] in addition to the two pilot projects. However, it should be noted that:

- No infrastructure (government-pays) contract has been signed so far under the new (government-pays) PPP law.[125]
- The eight calls for tenders published between 2017 and 2019 fall under the old concession regime and do not appear in the 2016-2020 development plan.

These developments therefore throw into question the ability of the (government-pays) PPP legislative frameworks, promoted by the World Bank, to successfully foster investment. It unfortunately confirms criticisms expressed when the law was adopted by elected national parliament representatives regarding Tunisia's ability to achieve its objectives.[126] Rather than going down, the national unemployment rate reached 15.5 per cent in 2018.[127]

2.2 PPP project pipeline not aligned with Tunisia's development plan

Most of the government-pays PPP projects in the pipeline and recently signed or foreseen (user-pays) **concessions are not in line with the Tunisian development plan.** First, projects were identified by the World Bank in April 2016,[128] without prior impact assessments and before the adoption of the Tunisian development plan in July 2016. This does not respect Tunisia's democratic ownership of its development plan. Second, only two government-pays PPPs in the pipeline today (the Sfax metro and the Gabes-Medenine railway line) were initially included in Tunisia's 2016-2020 development plan (including 12 PPP projects).[129] Only one user-pays PPP project in the pipeline today was included in the initial plan: the Enfidha deep water port,[130] a project that had already failed in the past[131] due to land expropriation and state compensation issues.[132] Looking at the user-pays concessions granted since 2017, none appeared in the initial 2016-2020 development plan.

Desperate to attract foreign investments, Tunisia seems ready to engage in megaprojects that are not included in the 2016-2020 plan or in the 2018 project selection.[133] This trend seems to be confirmed by looking at three Memorandums of Understanding signed with China in 2019. These include new projects such as a metro in Nabeul, or a study of the motorway project between Boussalem and the Algerian border, neither of which was originally included in the development plan priorities regarding PPPs.[134] Similarly, the user-pays concession for the treatment and recovery of household and similar waste and technical landfill for the Province of Gabès, whose call for tenders was open between December 2018 to February 2019, did not appear on the list of projects presented to the press in the autumn of 2018. Moreover, the project is financed by a loan from the German investment bank KfW to the Tunisian government, which imposes its own rules for the award of supply, works and associated service contracts within the framework of financial cooperation with partner countries in these projects, despite the new legislative framework.[135]

Thus, the spectre of uncontrolled development, of prioritising projects that benefit the private sector rather than human development and of seeing project choices dictated by donors, now hangs over Tunisia. The country urgently needs to invest in its infrastructure, but it also needs to prioritise its investments and control its debt, as well as making sure its people are getting access to the services they deserve.

2.3 The failure of the Enfidha-Monastir airport

The Enfidha airport is the first major infrastructure project or 'megaproject' carried out under a PPP in Tunisia and the first international airport operated by a private company in the Northern African region.[136] This project was launched in 2003 and began operating in 2009 as a BOT concession (see Table 1 for more details). We chose to look more closely at this project not only because it is the only major PPP project completed to date, but also because the period since its inception – ten years – has provided a time-period to study the challenges related to the implementation of PPPs in Tunisia and to draw lessons for managing future PPP projects. Last but not least, this is the only WBG-supported PPP project in Tunisia. The project to build the new airport in Enfidha resulted from the 1998 strategic study for the development of the airport master plan for 2020. Indeed, the end of this master plan stressed the need to build a new airport given that capacity at the eight airports on Tunisian territory (19 million passengers) was soon to be reached.[137] In 2003, Tunisia saw 20 million passengers passing through its airports.

The contract's preparation and conclusion took two years, from 2005 to 2007. The BOT Enfidha-Monastir concession was signed on 18 May 2007 between TAV Tunisia, a wholly-owned subsidiary of TAV Airports Holding, and the Ministry of State Lands and Land Affairs, the licensing authority, until 2047.

Table 1: TAV Tunisia liabilities per airport

	Enfidha Airport	Monastir Airport
Type of contract	BOT Concession	BOT Concession
TAV legal obligations under the contract	Designing Construction Maintenance Repair and maintenance Improvement Exploitation Public service management Pay an annual concession fee to the Tunisian State	Maintenance Repair and maintenance Improvement Renovation Exploitation Public service management Pay an annual concession fee to the Tunisian State
Duration	40 years	40 years

Source: TAV Airports Annual Report 2012

- **A questionable PPP from the start**

There is a lack of transparency around this PPP. We based the case study on studies and annual reports of the concessionaire (TAV airports) from 2007 to 2018, as well as a series of interviews with the key stakeholders involved in this project. This included the Ministry of Transport's Air Transport Department[138] and the General Authority for Public Private Partnerships.[139] The Ministry of Finance did not respond to our request for an interview. The request for access to information submitted to the Tunisian authorities to obtain a copy of the PPP contract for this project was refused on the grounds of confidentiality. Our request to the EIB allowed access to parts of the financing contract between TAV and IFC.

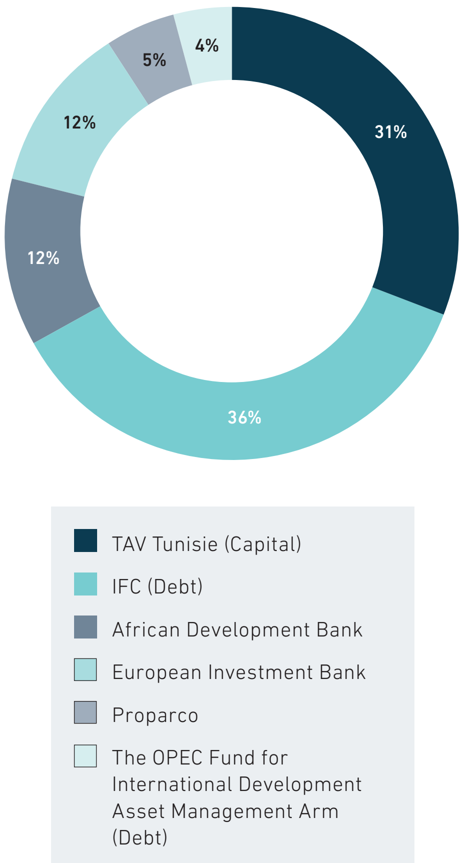
The Enfidha airport was not considered profitable in the first place. The feasibility studies commissioned by the Tunisian state concluded it was necessary to use a PPP, given that the high cost could not be solely financed by the Tunisian state, as initially envisaged. At that time, the total estimated cost of the project was €2 billion. Additionally, the project's technical study commissioned by the Tunisian state concluded it was necessary to combine both the construction and management of the new Enfidha airport with the management of Monastir International Airport (located 65km from Enfidha-Hammamet) to help with its economic sustainability.

The selection process, based on overestimated revenue, was also questionable. TAV Airports won the tender to carry out the project in March 2007, having proposed a higher fee to be paid by the company to the public entity. There was suspected corruption involved in the final choice of concessionaire in the Enfidha-Monastir's concession decision-making process. Nabil Chettaoui, former Tunisair CEO, launched the Enfidha airport PPP, and granted it to the TAV on behalf of Belhassen Trabelsi, brother-in-law of former President Ben Ali with a 5 per cent commission. He was reportedly promoted to President and Chief Executive Officer of Tunisair on 1 February 2007, following these negotiations for services rendered.[140] However, the Tunisian judiciary has not yet been able to close the court case as B. Trabelsi has been arrested in France but not yet extradited to Tunisia.

The construction was slightly delayed. Construction of Enfidha began in July 2007 and was completed in December 2009 with three months' delay. The first flight landed in December 2009[141] and TAV Tunisia began operating Monastir airport on 1 January 2008.[142]

The overestimated demand made the offer attractive during the bidding process but economically unsustainable in the mid-term. TAV Tunisia must pay a variable annual concession fee to the Tunisian state, which has been set as a percentage of the annual revenues of the two airports and which will increase at a rate between 11 per cent and 26 per cent of annual revenues.[143] At the time of the bid, additional capacity was needed: the Monastir airport was undersized (theoretical capacity of 3.5 million passengers) while facing a growing demand (4.3 million international passengers in 2007). The stated objective of the Enfidha concession was not only to face this demand, but also to become one of the main air transport hubs in North Africa and to reach a flow of 7 million passengers per year, with the possibility of reaching 22 million passengers in the long run.[144] TAV Tunisia has planned to create 2,200 direct jobs during the construction phase and 1,200 direct jobs during the operating phase. The operation of Monastir airport was also granted to TAV Tunisia SA in order to ensure the project's economic profitability.

Figure 4: Financing structure of the Enfidha project €560 million (in %)



Source: Observatoire Tunisien de l'Economie (OTE)

The IFIs that promote PPPs were involved in the project. The construction of Enfidha airport cost €560 million. TAV Tunisia financed the project mainly through debt (69 per cent of the project financing, see Figure 4) and equity (up to 31 per cent), which was the minimum required by the Tunisian state:

- The IFC[145] 15 per cent equity stake in TAV Tunisia in June 2009 worth €28 million equity investment;[146] a full financing package of **€398 million**, including direct long-term senior and subordinated loans of €135 million;[147] and a €263 million syndicated loan underwritten by ABN Amro, Société Générale and Standard Bank in 2008.[148]
- The AfDB – **€70 million** loan in 2009.[149]
- The EIB – **€70 million** in Enfidha Airport in 2009 but this loan defaulted in 2016 and 2017.
- Proparco (French Development Finance Institution) – **€30 million** loan in 2009.[150]
- OPEC Fund for International Development (OFID)[151] – **US$22 million**.[152]

TAV Tunisia received an **€11 million** subsidy for this project from the public sector. IFIs are also the main promoters of PPPs in Tunisia, which would explain their significant financial support in this project. Additionally in 2009, TAV Tunisia sold 15 per cent of its shares to the IFC.

- **A financially unsustainable project**

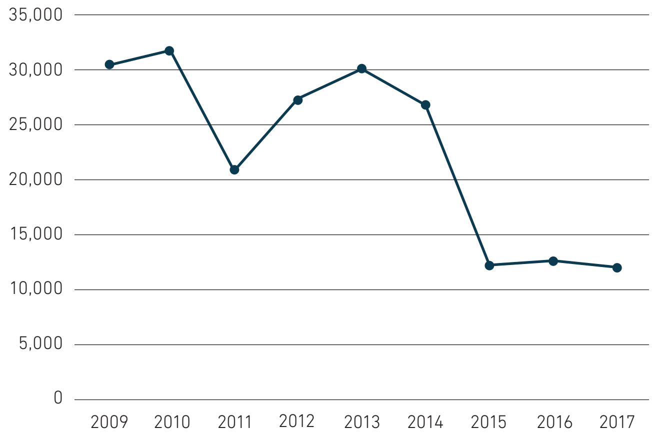
In 2009, the project began operating in a difficult economic context. The global economic crisis in 2008, followed by the Tunisian revolution in 2010-2011, impacted on tourism to Tunisia. This is all the more important since Enfidha is an airport that mainly hosts charter flights for tourists travelling with tour operators, making it extremely dependent on tourism. However, these difficulties were already flagged in the technical and feasibility studies prior to the launch of the Tunisian state's call for tender. This was the reason for the construction and operation of the new Enfidha airport and the operation of Monastir airport being combined to help with its economic sustainability.

Figure 5: Tourist flows at Tunisian airports from 2007 to 2018

Source: OACA, Ministry of Tourism; TAV Airports Annual Reports, 2007 to 2018

Figure 6: Number of commercial flights to Enfidha-Monastir airports

Source: TAV Airports Annual Reports, 2007 to 2018

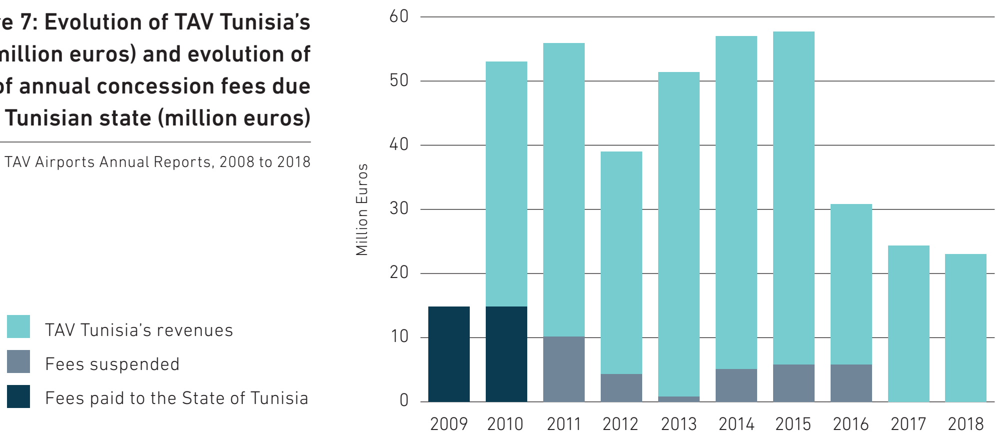


The traffic forecasts were overestimated when the technical and financial offers were submitted and the financial offer was based on these. Thus, when analysing the evolution of tourist flows (in millions of passengers) since the two airports opened, the actual flows are well below the estimates submitted in the financial offer. As we see in Figure 5, since 2007, Tunisia has welcomed as many as 7 million passengers per year at all eight airports. Since 2009, the flow of tourists in Enfidha-Monastir airports (see Figure 5) has not exceeded 4 million and is generally on a downward trajectory. These figures are being discussed in the renegotiation process.[153] Since 2015, the year in which deadly attacks took place in tourist hotspots Sousse and Le Bardo, passenger numbers have fluctuated between 1.4 and 2.5 million per year to Enfidha and Monastir airports.[154] The number of commercial flights has decreased from 30 million in 2009 to 12 million in 2017 (see Figure 6).

In 2010, TAV Tunisia began negotiations with the Tunisian state to review the annual concession fee due by TAV, given that external factors had disrupted the project's economic sustainability, leading to an imbalance in the contract (see Figure 7). TAV Tunisia asked the Tunisian state to share the damage and adopt new adjustments in risk sharing by activating Article 44 of the contract. This stipulates that, in the event of an unforeseeable event external to the parties and which causes a disruption in the financial equilibrium of the concession, both parties shall take the necessary measures to restore the conditions needed for the balance of the contract, such as, for example, the suspension or renegotiation of the fee.[155]

Figure 7: Evolution of TAV Tunisia's revenues (million euros) and evolution of the amount of annual concession fees due to the Tunisian state (million euros)

Source: TAV Airports Annual Reports, 2008 to 2018



The suspension of fee payments has not improved the project's financial balance and, since 2016, TAV Tunisia has been in deficit, with revenues dropping by more than 50 per cent (see Figure 7). The flow of tourists resumed tentatively in 2018 with 2.5 million passengers (Figure 5), but this is far from the 7 million estimated by the TAV in its traffic forecasts and financial offer.

TAV no longer pays the fees. According to the contract,[156] TAV Tunisia has a 40-year concession period and the annual concession fee is paid on the basis of the annual revenues of Monastir and Enfidha airports, which is calculated according to the annual turnover. However, as TAV's revenues have fallen since 2010, TAV Tunisia has been renegotiating with the Tunisian state to request a revision of the contract, the business plan and the annual concession fee. In addition, the contract was suspended and no concession fees have been paid since 2010.

Threatened with costly ISDS procedures, Tunisia gave up on most of the TAV fees in 2012-2013. An Intergovernmental Commission has been set up to oversee the ongoing negotiations with the TAV, which brings together representatives from all ministries, including the First Ministry, the Ministries of Finance, Transport and State Affairs. Negotiations are taking place between the Tunisian state, TAV Tunisia and also the main donors of the project (in this case, the WBG and the AfDB). Several rounds have already been completed and the Tunisian state came close to bringing the dispute to the International Centre for Settlement of Investment Disputes (ICSID), with TAV Tunisia having activated Article 44 of the contract as well as the Bilateral Investment Treaty between Tunisia and Turkey.[157] At the close of the 2010 and 2011 rounds of negotiations, the royalty payments from 2010 onwards were negotiated downwards and postponed. Two new amendments were signed in 2012 and 2013 between TAV and the Ministry of Public Domain, which was the granting authority at that time. On the basis of these negotiations:[158]

- The concession fee payable for Enfidha International Airport for the year 2010, expiring on 31 January 2013, was reduced and the payment deferred.
- The concession fees payable were reduced by €4.3 million in 2011, €5.192 million in 2012, €5.788 million in 2013 and €6.428 million in 2014, after which they were suspended and deferred pending the outcome of the ongoing negotiations.

Negotiations are still ongoing between TAV Tunisia, the Tunisian state and donors to reach a final agreement. Following the fatal attacks in 2015, tourist flow through the two airports fell by 58 per cent. During that same year, TAV Tunisia once again entered into negotiations with the Tunisian state and its lenders under the principle of the financial equilibrium of the contract with a view to a possible restructuring aimed at restoring the concession's economic balance. Negotiations have resumed and the suspension of fees since 2010 has been maintained to date. A financial and technical audit of the Enfidha-Monastir concession was commissioned by the Tunisian state and carried out by Mazars in 2014/2015. The conclusions of this audit have not been made public, but they have been the subject of several different interpretations by both parties.

TAV is still threatening Tunisia with filing a request for arbitration. TAV Tunisia is currently pursuing negotiations with the Tunisian authorities and its lenders with a view to reaching an agreement on restructuring its concession and financing. Negotiations are at an advanced stage and an agreement covering the entire period from 2010 to 2019, during which no concession fees or debt have been paid, is due to be agreed and signed by the parties.[159] According to its annual reports, TAV Tunisia is in great financial difficulty and its long-term financial debts amount to €1.2 billion. However, arbitration proceedings or even terminating the contract are not ruled out if the overall project fails: "Although management believes that it is very likely the standstill agreement will be signed in the near future, in the event that a common solution cannot be reached in due course, TAV Tunisia is exposed to material legal and financial consequences including, but not limited to, the use of its legal rights including the filing of a request for arbitration for the rebalancing of the concession contract and, if unable to do so, the termination of the concession contract."[160]

If these proceedings are concluded in favour of TAV then this would raise a question mark over the future of PPPs and the involvement of donors, in particular the World Bank. This PPP was supposed to have served as a model for other PPPs in Tunisia and the broader region.[161] According to IFC, its portfolio in Tunisia has experienced difficulties due to the TAV Tunisia project, which has been affected by the slowdown in tourism resulting from the financial crisis and events in 2015. Since then, the IFC has tried to rebalance this concession "in a way that is acceptable to the various stakeholders" because of the "crucial role that this PPP plays for the future of PPP programmes and overall investor confidence in Tunisia."[162]

- **Problems encountered in the concession's management**

  This research found that the concession PPP was mismanaged from the start:

  – *Mismanagement in monitoring the concession contract*

  The Tunisian state failed to monitor the Enfidha-Monastir concession properly. Two major follow-up problems were raised during our interviews with the Tunisian PPP unit (IGPP) and the Ministry of Transport:

  There is a lack of required skills and competences on the public authority side. Indeed, the licensing authority that signed the contract with the TAV, namely the Ministry of State Domains and Land Affairs, did not have the specific technical skills required for monitoring purposes. The Ministry of State Domain was designated as the contracting authority and as TAV Tunisia's counterpart, because they are responsible for the public domain and the land operated by TAV. However, this ministry does not have the necessary skills to monitor the PPP, unlike the Ministry of Transport, which lacks the necessary resources. Current negotiations also focus on changing the granting authority to transfer monitoring of the concession to the Ministry of Transport. The most appropriate licensing authority, which also has the necessary expertise, is the Office de l'Aviation Civile et des Aéroports (OACA). However, the latter is also an airport operator, which raises the issue of conflict of interest.[163]

  There was a lack of dedicated resources. Indeed, the various interviews we conducted with the Tunisian authorities also highlighted the lack of skills and monitoring tools for PPPs. These are new financial arrangements and their contracts are extremely complex to manage and monitor, requiring specific expertise that is still lacking within the Tunisian administration. Monitoring them requires the use of additional human and financial resources, namely specialised firms. In the case of the Enfidha concession, neither the Ministry of State Domains, the Ministry of Transport nor the IGPP used any real monitoring tools or dedicated human resources, which is a real problem.

  – *Costly renegotiations for the public purse*

  While the provisions in the Enfidha-Monastir concession contract cited by the Deputy Director of Air Transport state the private partner should assume most of the risks, the state is also responsible for the financial balance of the contract, according to the law.[164] The risk sharing conditions and the contract's notion of financial equilibrium are unclear and open to different interpretation depending on the licensor or concessionaire's perspective. It presents a significant challenge that the state is also responsible for the general financial equilibrium of the contract, but without specifying the restrictive conditions under which these risks are assumed. The state can either assume high-cost risks or, as in the case of Enfidha airport, drastically reduce the concession fees collected.

  – *Lessons learned from the Enfidha-Monastir concession*

  The Enfidha-Monastir concession case has enabled the concession authorities to experience the challenges of managing a major PPP infrastructure project and allowed us to learn from the issues raised. Given that it is failing, it is no longer mentioned in World Bank PPP literature in the MENA region as a model project.[165]

A. Ensuring value for money and a sustainable contractual business model

The technical and financial offer should be subject to particular attention when studying the bidders' individual offers. Indeed, the amount of the proposed annual concession fee is often one of the determining criteria for selecting the bidder in addition to the technical criteria. Thus, the bidder proposing the highest annual fee is, in most cases, the one who wins the call for tenders. This creates an incentive for the bidder to present an overly optimistic scenario during the bidding process and to renegotiate the contract later on. Moreover, the public entity is legally responsible for the financial equilibrium of the project, according to the law. It is essential to counterbalance this incentive by ensuring that the private concessionaire subsequently bears the risks related to the business model proposed in the bid, which implies a change in law and particular attention to the drafting of the contract.

The contract's provisions should be drafted in a concise and clear manner, especially on risk sharing, and all bidding documents should be included in the contract to avoid divergent interpretations. Renegotiation is all the more risky for the state because the private partner has several treaties and legal texts in its favour, such as the Bilateral Investment Treaties, which protect private investors to the detriment of the state. The outcome of renegotiations often leads to a risk sharing arrangement whereby the state assumes a larger share or is forced to revise its fees collection rights downwards.

B. Better monitoring: the need for project dedicated human resources

The absence of a dedicated entity for monitoring and controlling the Enfidha concession was a major failure on the part of the Tunisian state. The inter-ministerial commission set up a joint commission, which brings together several senior executives from different ministries. However, this commission remains insufficient. It is necessary to have an entity dedicated to monitoring and control for each PPP project, whether through a specialised firm or a dedicated public entity. The ongoing negotiations should remedy this problem by amending the competent licensing authority in the air transportation field (namely the Ministry of Transport and not the Ministry of State Domains) on the one hand, and the creation of an entity dedicated to monitoring the project on the other hand. Both have been raised for the Enfidha-Monastir concession.

Managing this type of PPP project requires dedicated skills, both in the ministry concerned and within the PPP unit. The Enfidha airport case has shown that the concession represents a very complex and cumbersome management structure and can be costly for the state. That is why it must be restricted to certain specific cases and public services management should be managed and funded through concessions. The dedicated entity should be responsible for follow-up after the call for tenders, the choice of the concessionaire as well as the project follow-up.

The World Bank and Tunisian authorities have not learned the lessons from this floundering PPP project. Unfortunately, the overarching law adopted in April 2019 does not take into account these lessons learned. Worse still, the scope of concessions has been extended to local authorities, and administrative procedures have been simplified for small and large concession projects. The PPP unit is still understaffed and lacks expertise. The law still puts all the financial risks on the public purse and includes an article on arbitration. There is nothing in the law on renegotiations and the bidding offers are still not legally binding as part of the contracts. The law does not allow room for transparency, thus paving the way for corruption.

The World Bank Group continues to recommend the extensive use of PPPs.[166] In fact, a new airport project is in the pipeline of projects within the Ministry of Transport. Feasibility studies are currently underway for the construction of a new airport, Airport City, to replace Tunis-Carthage airport and other options are also under consideration, including renovating the actual Tunisian airport. The national authorities should learn the lessons from the Enfidha airport concession to make sure they put in place safeguards to prevent the catastrophic failure of another major PPP project and ensure these megaprojects fit with a national development plan.

The WBG continues to recommend the extensive use of PPPs. In fact, a new airport project is in the pipeline.

3. Conclusions and recommendations

PPPs have been widely promoted by IFIs in Tunisia, and indeed around the world, as a way to attract private investment to build major infrastructure projects. As part of this, the national legal framework has been recently reformed in Tunisia, under the influence of the World Bank Group and other IFIs and donors. However, as this research shows, the new framework is centred on investors' interests and places too much risk on the public purse. This has been illustrated by the failure of the most expensive PPP in Tunisia: the Enfidha airport.

As this report is published, the 2019 new law has just been passed and PPP implementation remains part of IMF and WBG conditionality,[167] as well as on the agendas of the G20 Compact with Africa (CwA) and MENA transition fund for Tunisia. **The World Bank Group continues to recommend the extensive use of PPPs for infrastructure in the MENA region, especially for airports.**[168] The pressure to use public money to finance PPP infrastructure projects that have not been approved in the Tunisian development plan remains strong, while Tunisia needs support to implement policies to address poverty and inequalities. Indeed, significant inequality still exists in the labour market, with high unemployment, especially among women and young people (25.22 per cent), as well as widespread informal and precarious employment.[169] Gender gaps are significant, as women often have less skilled jobs and employment-to-population rates are at least three times lower for women than for men.[170] Unemployment rates for people with a university diploma reached 30.5 per cent in 2016, and even higher for women (40.4 per cent).[171] There are also significant regional inequalities in terms of living standards and employment[172] – in the North-West and Centre-West rural areas, poverty rates are reaching high levels of 28.4 per cent and 30.8 per cent respectively.[173]

While in the short term, PPPs may appear cheaper than traditional public investment, as in the case of the Enfidha-Monastir airport, over time they can turn out to be more expensive and undermine fiscal sustainability, thus shrinking the national fiscal space and preventing future investment in finance policies to reduce inequalities, including regional unbalances and gender gap. Beyond the costs, fiscally unsustainable social infrastructure can have a negative impact on access to public services and, therefore, on people's lives.

As this report shows, IFIs and donor countries have prompted the Tunisian authorities to adopt a legal framework for PPPs through two major laws, one dealing with user-pay concession PPPs (2008) and one dealing with government-pay PPPs (2015). These were both modified by an overarching law in 2019. The law was adopted because of pressure through soft and hard conditionality and despite reluctance at a national level. The resulting framework has many loopholes, and paves the way for risky PPPs. Combined with the off-balance sheet treatment of PPPs in the national budget, this places excessive fiscal risk on the public purse. Our research shows that community engagement, transparency and disclosure, the prevention of unsolicited partnerships, assessment of the human, social and environmental impact, including gender impact, throughout the whole lifecycle of a PPP are not being properly addressed.

The Enfidha airport project offers a perfect illustration of why Tunisia is not ready for the implementation of risky and expensive PPPs. Indeed, the case study has shown that the technical and financial offer should be subject to particular attention when studying the bidders' individual offers. The contract's provisions should be drafted in a concise and clear manner, especially on risk sharing and all bidding documents should be included in the contract. The absence of a dedicated entity for monitoring and controlling the Enfidha concession was a major failure on the part of the Tunisian state. Indeed, managing this type of PPP project requires dedicated skills in the ministry concerned – skills that are currently lacking.

Unfortunately, the legal framework put in place between 2008 and 2019 does not take into account these lessons learned; neither does it prevent major problems from happening again in future. Worse still, the scope of concessions has been extended to local authorities, and administrative procedures have been simplified for small and large concession projects.

This report recommends a set of concrete actions that could have a crucial impact in this debate and prevent future problems.

A) **The Tunisian legal framework needs to be fixed as quickly as possible in order to address the following issues:**

- **Governance of PPPs:** Tunisian law should provide for the highest possible standards for **transparency and disclosure** documents and information related to public contracting, in line with Open Contracting Global Principles – disclosing all contracts and bidding documents, as well as impact assessments throughout the project lifecycle. To ensure **democratic ownership** of the PPP projects, they should be part of a national development plan adopted by the Tunisian Assembly of Representatives. The government's annual report on PPPs to the Tunisian parliament should enclose the yearly development impact assessments. The possibility of unsolicited partnerships should be drastically limited. For any major infrastructure project, the Tunisian government should ensure **democratic accountability** through informed consultation and broad civil society participation and monitoring. This includes engaging with local communities, trade unions and other stakeholders throughout the life cycle of the PPP. Governments should also ensure the right to redress for any affected communities. Furthermore, the law should ensure government control over PPPs and strengthen its capacity to manage, supervise and control PPP projects, as well as evaluate their environmental, social, human rights impact, including its impact on gender equality.

- **Development outcomes:** This implies addressing concerns in terms of affordability of the services for the public sector and the infrastructure users, and equitable access to infrastructure services, as well as avoiding negative impacts on the environment or raising inequalities, especially as regards the gender gap.

- **Fiscal risks and contingent liabilities of PPPs:** PPPs should be registered on-balance sheet and counted as debt. A systematic approach to cost identification, which would involve creating a database of existing projects with their objectives, the parties to the contract, the investment made in each clause, and the project schedule until project closure. The law should ensure that the contract does not allocate an excessive level of risk onto the public sector – including exchange rate risk.

- **Renegotiation and litigation in PPP contracts:** the contract should also specify the conditions under which renegotiation should be allowed, especially when it is related to the financial balance of the contract. The contract, the technical and financial offer submitted to the call for tenders, as well as the specifications, should be binding and part of the contractual documents. In addition, the use of international public or private arbitration in the clauses of PPP contracts should be prohibited. PPP contracts with arbitration clauses that point to international courts represent a threat to government's ability to regulate in the public interest, including the need **to adapt the country to climate change commitments.**

B) **Although it is key to close the loopholes of the legal framework, this will not be enough to address all the problems that we have encountered. The utmost caution is needed in the implementation of PPPs, in order to protect the public interest.** PPPs should be limited to major projects carried out by the central public authority. Local authorities should only be allowed to implement PPP projects if the Court of Auditors approves it, after auditing their competences and resources to manage this type of complex project.

National capacity to deal with PPPs has proved problematic in the case of Tunisia, so it is key to ensure that project outcomes are designed and assessed through the whole project lifecycle to benefit everyone in society. Governments should develop clear outcome indicators and effective monitoring to measure the impacts of PPPs on the poor, from the project selection phase to the operational phase of the project.

C) **We call on the World Bank, the International Monetary Fund and other public development banks and donors to halt the aggressive promotion and incentivising of PPPs for social and economic infrastructure financing in Tunisia and globally.** We ask them to publicly recognise the poor track record of PPPs and the financial and other significant risks involved in PPPs. They should ensure that the highest possible transparency standards apply to PPPs, particularly with regard to accounting of public funds, and disclosure of contracts and performance reports of social and economic infrastructure projects. And they should make sure that PPP projects are delivered in the interests of citizens rather than in the interest of external funders who may have different priorities.

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Eurodad

The European Network on Debt and Development (Eurodad) is a network of 50 civil society organisations (CSOs) from 20 European countries, which works for transformative yet specific changes to global and European policies, institutions, rules and structures to ensure a democratically controlled, environmentally sustainable financial and economic system that works to eradicate poverty and ensure human rights for all.

Observatoire Tunisien de l'Economie

The Tunisian Economic Observatory (OTE) is an NGO created in 2012 by a network of researchers, analysts and activists after the advent of the revolutionary process in Tunisia. Through its work, studies and analyses, OTE works to decipher and democratize economic issues and their impact on development and aims to engage in critical and constructive debate outside the technocratic sphere and foster citizen engagement in economic policy making.

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