



Tunisia

ASSESSMENT OF THE QUALITY OF THE PPP LEGISLATION AND OF THE EFFECTIVENESS OF ITS IMPLEMENTATION 2011

I- PPP Legislative Framework Assessment (LFA)	Compliance of the PPP legal framework with PFI Guide recommendations¹ and Best Practice		
Core Area		Rating	Assessment
1- PPP Legal Framework	Existence of specific PPP law or a comprehensive set of laws regulating concessions and other forms of PPP and allowing a workable PPP legal framework	12/18	
2-Definitions and Scope of the Law	Existence of a clear definition of the boundaries and scope of application of the concession legal framework (e.g. definition of "PPP", sectors concerned, competent authorities, eligible Private party) limiting the risk of a challenge to the validity of PPP contracts, irrespective of whether the act is specifically targeted at PPP	13/18	
3-Selection of the Private Party	Mandatory application of a fair and transparent tender selection process. Limited exceptions allowing direct negotiations, competitive rules for unsolicited proposals and the possibility to challenge illegal awards.	29/42	
4-Project Agreement	Flexibility with respect to the content of the provisions of the Project agreements which should allow a proper allocation of risks without unnecessary or unrealistic/not bankable/compulsory requirements/interferences from the Contracting Authority (obligations, tariff, termination, compensation).	19/27	
5-Security and Support Issues	Availability of reliable security instruments to contractually secure the assets and cash-flow of the Private Party in favour of lenders, including "step in" rights and the possibility of government financial support, or guarantee of, the Contracting Authority's proper fulfilment of its	13/21	

¹ UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects*, 2001 (hereinafter the "PFI Guide")

Checklist Tunisia



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	obligations.		
6-Settlement of Disputes and Applicable Laws	Possibility to obtain proper remedy for breach under the applicable law through international arbitration and enforcement of arbitral awards.	13/15	
General LFA Rating			
		71,2/%	High Compliance
II-Legal Indicators Survey (LIS)	Effectiveness Assessment : How the PPP law works in practice		
Core Area		Rating	Legal Indicator Survey
7- Policy Framework	Existence of a policy framework for public private partnerships	9/24	
8 Institutional Framework	Existence of an institutional framework for public private partnerships	12/27	
9- PPP Law Enforcement	Award and implementation of PPP projects in compliance with the Law	8/15	
General LIS Rating		45%	Low Effectiveness
OVERALL RATING		58%	Medium Compliance/ Effectiveness

Local Expert: Gide Loyrette Nouel Tunisia



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RATING: Key for assessment of Each Question

✓ ✓ ✓	Yes	3 points
✓ ✓	Yes, with reservations	2 points
✗ ✗	No, with Limited compliance / redeeming features	1 point
✗ ✗ ✗	No	0 point
N/A	Not applicable	0 point/ Not included in total

Key for Assessment of Each Core Area and for Overall Assessment

≥ 90%	Very High Compliance/Effectiveness
≥ 70%-89%	High Compliance/ Effectiveness
50%-69%	Medium Compliance/ Effectiveness
30%-49%	Low Compliance/ Effectiveness
< 30%	Very low Compliance/ Effectiveness

TERMINOLOGY

So as to keep answers consistent and avoid ambiguity, we set out below some brief definitions of the terminology used in this questionnaire. Any definition is provided solely to clarify some of the terminology used below. The reader should note that any such definition does not correspond with any given definition under best international practice (which does not provide for any standardised PPP legal definitions recognised worldwide) neither should it be interpreted that we recommend the adoption of such definitions under actual documentation, but they are included in the interests of clarity for the completion of this questionnaire, and we should be grateful if you could adopt such definitions for the purposes of completing the questionnaire.

Checklist Tunisia



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- **"Public Private Partnership" - "PPP" or "PPP project"** includes all types of long-term arrangements between public authorities and private institutions, including but not limited to; Concessions, BOT and derived forms, PFI and Institutional PPP. For the purposes of this questionnaire, PPP excludes the sale of public assets or of public company shares which are part of a privatisation process and also excludes public works, services or supply contracts which are subject to public procurement rules.

The following types of Public - Private Partnership Agreements may be adopted by a Contracting Authority for undertaking infrastructure projects. These are solely indicative in nature and the Contracting Authority may seek to adopt a combination of the different contractual arrangements, which incorporate some of their elements or combine elements.

- **"BOT" - (Build-Operate-and-Transfer)- and derived forms** : a contractual arrangement whereby the Private Party undertakes to finance, design, construct under a turnkey risk basis, operate and maintain an Infrastructure project for a specified period after which period the project facilities are transferred to the Granting Authority usually without payment of any compensation.

The Private Party has the right to collect contract or market based tariffs or fees from the users of the infrastructure project, as specified in the PPP agreement, to recover its investment and operating and maintenance expenses for the project. A BOT type of PPP arrangement may provide for all the implementation and operational efficiencies of the private sector, together with new sources of infrastructure capital. Derived forms of BOT contractual arrangements exist such as Build-Own-Operate-and-Transfer (BOOT) similar to the BOT agreement, except that the Private Party owns the Infrastructure project during the specified term before its transfer to the Contracting Authority or its designee, or such as Build-Own-and-Operate (BOO) which is a contractual arrangement similar to the BOT agreement, except that the Private Party owns the Infrastructure project and no transfer of the project to the Contracting Authority or its designee at the end of the fixed period is envisaged. Derived forms incorporating Lease right rather than Ownership or dealing with rehabilitation or extension rather than construction which extend the possible combination which for the purpose of this questionnaire will all be hereafter referred to as BOT for simplification purpose except where legal specificity requires specific treatment.

- **"Concession"**: is an act attributable to the State whereby a Contracting Authority entrusts to a third party the total or partial management of public services for which that authority would normally be responsible and for which the third party assumes all or part of the risk.
- **"PFI" (Private Finance Initiative)** : a form of cooperation and partnership between public authorities and Private Parties which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of service to the infrastructure without the delegation of the public service itself. It is a contractual arrangement whereby the Private Party



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undertakes the financing and the construction of an infrastructure project and after its completion transfer it to the Contracting Authority or its designee. This arrangement may be employed in the construction of a public service facility for which the public service must be operated directly by the contracting authority for whatever reason but the operation and maintenance of the facility remain the responsibility of the Private Party for the entire duration of the PPP agreement. The contracting authority will reimburse the total project investment on the basis of a rent based of an agreed schedule with the payment starting from the date of commencement of operation and pay for the services rendered to the facility on a performance basis.

- **"IPPP"**(Institutional PPP): a structural or corporate form of PPP which provide for the cooperation between public authorities and a Private Party through a joint venture or mix (publid- private shareholding) company in which case all reference to the slection process refers to the selection of the Private Party.

Other definitions:

- The **"Law"** or **"PPP Law"**: a law regulating any form of PPP including but not limited to Concession, BOT, PFI, IPPP and including, for the purpose of this questionnaire, the set of rules applicable to any PPP in the absence of a specific PPP law. The Law for the purpose of this questionnaire also includes any implementing regulation and any form of governemental act regulating PPP.
- **"BOT Law"** : a law regulating a BOT type of PPP in their multiple forms.
- **"Concession Law"**: a law regulating a Concession form of PPP.
- **"Contracting Authority"**: a public authority empowered to award a PPP and enter into Project Agreements
- **"PFI Law"**: a law regulating a PFI form of PPP.
- **"PPP unit"** : specialized institution/agency/ministerial department established to promote and take care of PPP.
- **"Private Party"** : Private Party or other entity in the form of a special purpose company to which a Project Agreement in general has been awarded. [*The word Private party will be used for the sake of this study even in case the PPP regulation allows PPP business partner to be a mix company or even a public entity.*]
- **"Project Agreement"**: an agreement(s) between the Contracting Authority and the Private Party regulating their respective rights and obligations with respect to the PPP project.



REFERENCE TO BEST PRACTICE

- UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, 2001 (hereinafter the "**PFI Guide**") and UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, 2003 (UNCITRAL Model Legislative Provisions).
- EC - Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000; together with additional EU major documents/decision /recommendation on concessions including Directives 2004/18/EC and 2004/17 EC of 31 March 2004; Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004; Report on the public consultation on the Green Paper (SEC(2005) 629- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (Brussels, 15.11.2005.COM(2005) 569) European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI)); European Commission Guidelines for Successful Public-Private Partnerships (2003).Commission Interpretative Communication Brussels, 05.02.2008 C (2007)6661on the application of Community law on Public Procurement, and Concessions to Institutionalised Public-Private Partnerships (IPPP);
- EBRD Core Principles for a Modern Concessions Law – selection and justification of principles Prepared by the EBRD Legal Transition Team.2005;
- UNIDO Guidelines for Infrastructure Development through Build Operate Transfer (BOT) Projects, 1996 (UNIDO BOT Guidelines); and
- OECD Basic Elements of a Law on Concession Agreements, 1999-2000.



OVERALL ASSESSMENT 2011 TUNISIA

Tunisia has a history of user based concession projects and a potentially attractive environment for PPP despite the economic and political uncertainties with respect to PPP following the Revolution.

The 2008 law on Concession based on previous experience (Enfidha Airport, Rades Power plant) and incorporating principles disseminated in the administrative law with some noticeable advantages such as the "*step in right*" and the right of mortgage of construction on public land as well as the principle of revision of contract in case the financial / economic balance is disrupted by unforeseen conditions is a great achievement toward facilitating the understanding of the existing legal framework for concession in Tunisia as such law is intended to be the general framework for the numerous sectorial law which previously existed.

Whilst the domestic banking sector has limited capacity and expertise on PPP, long-term foreign currency funding may be a viable option for funding the projects currently being proposed in the water, renewable energies, electricity and road sectors. A stronger strategic direction with the role of PPP being extended to PFI type of PPP including the non merchant sector (hospital, schools, prisons, and public facilities) may be also envisaged which will require some amendment to the existing concession legislation or preferably a new specific law on PPP creating an additional instrument for such financing.

By leveraging current experience, the development of a formal PPP policy and the establishment of a PPP centre of expertise in addition to the existing PPP follow unit with the Prime minister office could assure a coordinated and effective implementation of PPP programmes in Tunisia at a larger scale as acknowledged by the recent EIB PPP study of South Mediterranean countries.

The procedure for the selection of concessionaire as provided by the 2010 Decree appears however, to be much complicated at least for PPP/PFI of small size. The requirement of some more provisions concerning the use of securities and government guarantees for the proper implementation of PPP by the granting authorities would also favour the development of PPP .

The reinforcing of local government/Municipality financial and decision autonomy is absolutely needed for the proper development of infrastructure around Tunisia an in particular in the non costal area and for the preservation of the budget balance of the country especially in view the construction efforts needed in various sectors and in particular in the remote area of the country after the revolution.



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Furthermore the selection of an appropriate pilot project with all chances to be successful and well accepted by the population would also promote the starting of a significant trend of new private investment in public infrastructure. The risk would be then to favor difficult and large scale projects in a remote area for political considerations only, without taking into account the limited appetite for risk of the financial community and foreign investors.

ASSESSMENT & LEGAL INDICATOR SURVEY

1. LEGAL FRAMEWORK

1.1 Existence of different forms of PPP legal framework

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the country have a single act dealing specifically with Concessions or a generalised act incorporating the legal framework for PPP, including Concessions ?	✓ ✓ ✓		<p>Concession Act: Law N° 2008- 23 dated April 1st 2008 concerning the concession regime (The Law)</p> <p>Concession Procurement Decree N° 2010- 1753 dated 19th July 2010 fixing the modalities and procedure for the award of Concession (the Decree)</p> <p>Decree N° 2008- 2965 creating the unit in charge of the follow up of concessions.</p> <p>Decree N° 2008- 2034 fixing the modalities of keeping the register of real rights/mortgage over concession assets.</p>



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2. Does the country have an act that allows BOT or derived forms such as BOOT, BOO or other forms either as part of a specific act or as part of a general PPP Law?	✓ ✓		The Law also applies to BOT. BOO and BOOT are not possible under article 36 which provides for the transfer, at the end of the contract, of the ownership of assets (including land and constructions) which qualify as "biens de retour" and which concur in a substantial manner to the functioning of the public service at stake in the contract.
3. Does the country have an act that allows PFI, either as part of a specific act or as part of a general PPP Law?	XX	Art 2 Art 34 Law	The law is oriented towards delegation of public service with payment by the end users of a remuneration in consideration of the service provided and not to non merchant sectors with payment by the public authority only.
4. If the answer is <i>No</i> to any of the three first questions concerning a specific form of PPP does the Constitution or other general act (ex: the Civil Code, sectoral law) recognise the basic principles of the concerned PPP and regulate its granting?	N/A		

For our general information: Is a new PPP Law or an amendment to the existing Law being prepared, or considered, in the country?

If so, at what stage of the legislative process is such new PPP Law or amendment to the existing Law?

To our best knowledge there is no new PPP law or an amendment to the existing law being currently prepared, however we noticed a great interest of the public authorities to examine the effectiveness of using the current legal framework to promote the PPP technique in the implementation of a large number of projects (in infrastructure- energy and water mainly) in the regions where there is a significant lack of infrastructure.



This increasing interest lay ultimately result in an amendment or completion of the current law and regulations.

1.2 Specificity and integration of PPP legal framework

5. If the country has a Public Procurement Law, is it clear to what extent does the Public Procurement Law apply or not to the granting of a PPP?	✓ ✓		Not specified but should not apply as a result of the existence of a specific law on Concession with its own selection procedure
6. If the country has sectoral laws regulating PPP in specific sectors, is it clear which law is applicable to the granting of PPP for each particular sector?	✓ ✓	<p>Decrees N° 87-654 and 87-655 dated April 20, 1987 for road infrastructure-</p> <p>Decree N°99-2318 dated October 11, 1999 for railways.</p> <p>Decree N°17-720 as of April</p>	<p>Not specified but the specific sectorial law should apply:</p> <p>I. <u>Infrastructure:</u></p> <ul style="list-style-type: none"> • The occupation and operation of the State roads public domain by the private party through concession agreement is possible under conditions set forth by 1987 decree.; • railways operation by the state owned public enterprise SNCFT through a concession agreement approved by 1999 decree ; • Highways the construction and/or operation of existing highways by public and privately jointly owned Tunisie Autoroutes through a concession agreement and a cahier des charges



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	<p>17, 1995 -</p> <p>Law N° 2002-47 dated May, 14, 2002 relating to fishing ports.</p> <p>Civil Aeraunotic code enacted by Law N°99-58 as susquently amended by Law N°2004-54 and 2005-84.</p> <p>Decree N° 2007-1216 fixing the list</p>	<p>approved for each highway by a decree (for eg Decree N°17-720 as of April 17, 1995 approving the concession agreement for the operation of Hamam Lif -Msaken highway by Tunisie Autoroutes- Decree N°2004-1074 as of April 13, 2004 approving the concession agreement for the construction operation and maintainance of highway A1 El Jem- Sfax);</p> <ul style="list-style-type: none"> • Ports: Fishing ports (to the exclusion of commerce ports) may be occupied by a private party for their operation by way of concession- A cahier des charges approved by decree is also required. • Airports: the construction and operation of airports by the private party by way of concession agreement. <p>II. Public services</p> <ul style="list-style-type: none"> • Public services relating to airports operation may be delegated through concession agreement to a private party by the Civil
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		<p>of public services activities that may be subject to concession by the Civil Aviation and Airports Office;</p> <p>Law N° 2004 - 33 dated April 19, 2004 relating to the organisation of earth transportation and Ministerial Order dated August 9, 1989.</p> <p>Law N°96-41 dated June 10, 1996 relating to waste management-control and disposal</p>	<p>Aviation and Airports Office;</p> <ul style="list-style-type: none"> • Public transportation: the operation of the public service of the earth transportation of public may be made by private transporter by way of concession agreement. • Waste management and disposal: the waste management- control and disposal may be carried out by a private party subject to the prior authorization of the Ministry in charge of Environment and to certain conditions set forth in the law.
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7. Does the country have a Law allowing the Institutional form of PPP (IPPP) which regulates IPPP participation to PPP?	✓ ✓	Art 3 Law	c) concessionnaire : is defined as being the public or the private personne which is granted the concession and which enters into the concession agreement The law can apply to public concessionnaire. No reference to Joint venture public private. No specific rules
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2. DEFINITIONS AND SCOPE OF THE PPP LAW(S)

2.1 PPP definition²

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>1. Does the Law define one or several term(s) (<i>i.e.</i> "PPP", "Concession", "BOT", "Partnership" <i>etc. and/or respective agreements</i>) for the arrangements to be regulated by the Law which specify the limits of application of the Law?</p> <p>For our general information,: <i>please provide the given definition(s), if any.</i></p>	<p>✓ ✓</p>	<p>Art. 2 Law</p>	<p>The law defines only "Concessions"</p> <p>- In the meaning of the present law, the concession agreement is the contract whereby the public person designated as the granting authority delegates for a limited term to another public or private person designated as the concessionaire the management of a public service or the utilisation or operation of the public domain or equipments in consideration of a remuneration collected from the serve end users in conformity with the contract terms.</p> <p>The concessionaire may, in addition, be in charge of the implementation, modification or extension of any</p>

² PFI Guide, Consolidated Legislative Recommendations, Recommendation 3and Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000; together with additional EU major documents/decision /recommendation on concessions including Directives 2004/18/EC and 2004/17 EC of 31 March 2004; Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004; Report on the public consultation on the Green Paper (SEC(2005) 629- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (Brussels, 15.11.2005. COM(2005) 569) European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI))



			constructions, equipments and installations or to acquire assets which are necessary for the contract implementation.
2. Does the Law apply to all contracts entered into that fall under the definition(s) given above, irrespective of the name given to such contract (<i>concession, license, usufruct right, lease, etc.</i>)?	✓ ✓ ✓	Art 33 Decree	The law applies to all concessions
3. Does the Law make a clear distinction between a PPP agreement (<i>such as a Concession</i>) and a license (<i>i.e. an authorisation to operate by a public authority</i>)?	✓ ✓		Not specified in the law itself but the distinction is clear under tunisian law

2.2 Contracting Authority

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law identify (<i>or allow clear identification by reference to other laws or regulations</i>) the public authorities ("Contracting Authorities") that are empowered to select projects, prepare for, and award PPPs and enter into Project Agreements ?	✓ ✓	Art 2 Law	<p>Yes the law identifies the granting authority being the State, the public enterprise or establishment which is authorized as per its articles or governing laws to grant concessions.</p> <p>The local authorities as well as public enterprise and establishments are represented in the concession agreements that they conclude by the authorized person</p>



		Art 13 Law	(as per their deliberative organ) without prejudice to the application of approbation rules of the supervisory authority.
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For our general information: *If yes, which of the following authorities are identified:*

- *National authorities (e.g.: the government, ministries, and independent agencies);*
- *Regional/state-level authorities;*
- *Local or municipal authorities; or State owned companies?*

2.3 Private Party and Project Company

QUESTION	ANSWER	ARTICLE	COMMENTARY
5. Is it possible for a PPP be awarded to a foreign company, a Private Party or to a domestic company with foreign participation in the share capital and/or management (<i>without discrimination</i>)?	✓ ✓ ✓	Art. 5 -Law	Yes, however, the foreign participation to the share capital of the project company must be funded by way of importation of hard currencies in conformity with foreign exchange regulations and laws in force applying to foreign investments.

For our general information: *can a PPP be awarded to public entities or to entities jointly owned by private and public entities (IPPP)? Are there restrictions imposed on such contracts? there are no restrictions imposed on such contracts bu the practice trend of concessions in Tunisia is to award PPP to privately owned entities.*



2.4 Concerned sectors³

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law identify (<i>or allow identification by reference to other laws or regulations</i>) the sectors and/or types of infrastructure and/or services in respect of which a PPP may or may not be granted?	XX		Not specified, no exclusions.
7. Do the list of sectors eligible for PPP correspond to an open-ended one (<i>as opposed to being exhaustive</i>) allowing (<i>or at least not preventing</i>) PPP to be granted in numerous sectors”?	N/A		
8. Do the sectors eligible for PPP includes non commercial activities such as the provision of government services (such as <i>schools, hospitals,</i>	N/A		

³ For further information on the concerned sectors please refer to:PFI Guide, Consolidated Legislative Recommendations, Recommendation 3 and 4.



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<i>prisons, defence and housing</i>) in addition to the merchant sectors of the economy (<i>energy, transport, water, oil and gas</i>).			
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For our general information: Please indicate the restrictions if any imposed by the Law on the sectors eligible for PPP: N/A



3. SELECTION OF THE PRIVATE PARTY⁴

3.1 General Considerations

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law require, in principle, the Contracting Authority to select Private Parties through a competitive tender process?	✓ ✓ ✓	Art. 9 Law	- Yes, the law require in principle that the contracting authority selects the concessionnaire through a competitive tender process in order to ensure the candidates equal treatment and the procedure tranparency. However, in certain cases expressly and restrectively mentionned in article 10 of the Law and 24 of the Dcree the direct choice of the private party is exceptionnally authorized.
2. Is there reference in the Law to the principles of transparency, equal treatment and proportionality?	✓ ✓ ✓	Art 9 Law Art 2 Decree	No referenece to proportionality in the law but referenece to neutrality and objectivity in the Decree
3. Is there a provision in the Law concerning the publication of information related to the competitive procedures in the country media	✓ ✓ ✓	Art 4 Decree	Yes. The tender offer must be published by way of press and as the case may be, by any other media mean at

⁴ For further information on the selection of the Private Party, please refer to:PFI Guide, Consolidated Legislative Recommendations, Recommendations 14 to 39 included.



and in the international media (<i>for large projects</i>)?			least 30 days before the day fixed for receiving the candidates applications.
4. Are there provisions within the Law or any special manual or recommendations governing in detail the selection of the Private Party (<i>i.e.: the pre-selection of bidders, the procedure for requesting proposals or other procedure such as competitive dialogue/two stage procedure</i>)?	✓ ✓ ✓		Concession Procurement Decree N° 2010- 1753 dated 19th July 2010
5. Does the Law provide that if the Contracting Authority rejects an applicant at the time of pre-selection or disqualifies a bidder, it must make public the reasons for the decision (<i>or inform the rejected bidder thereof explaining the reasons for rejection</i>)?	✓ ✓	Art 17 Decree	Yes if requested by the disqualified bidder.

3.2 Award of PPP

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law provide that all proposals are ranked solely on the basis of a predefined evaluation criteria set forth in the pre-selection	✓ ✓	Art 20 -21 Decree	Yes, to be noted however that for offers which are considered as equivalent, the granting authority has the option to request new financial offers



documents/ request for proposals?			
7. Does the Law provide for the publication of a notice of the award of the project, identifying the Private Party and including a summary of the essential terms of the project agreement?	XX	Art 13 Decree (last bullet)	The tender offer rules for each concession must specify the modalities of the award declaration and execution of the concession agreement
8. Does the Law provide that the Contracting Authority or any other public authority maintain records of key information pertaining to the selection and award proceedings?	XX	Art 22 Decree	Records of key information pertaining to the selection and award proceedings together with the internal debates and qualifications of the committee in charge of the concession award process are recorded in a written report communicated to the concession follow up unit without any specific rules for the conservation of such records .
9. If the answer to the previous question is <i>Yes</i> , does the Law provide that such record is accessible to the public, or at least to interested parties?	N/A		Such provision does not exist.

3.3 Final negotiations

QUESTION	ANSWER	ARTICLE	COMMENTARY
10. Does the Law contain provisions regulating final negotiations (i.e. post contract award) so	XX	Art 23 Decree	final negotiations are conducted by the special committee created for each contract



that transparency, equal treatment and competition are preserved?			
11. Does the Law provide that the Contracting Authority has the authority to terminate negotiations with the invited bidder if it becomes apparent that the bid will not result in an agreement and start negotiations with the second ranked candidate?	XXX		No

3.4 PPP Award without competitive procedure

QUESTION	ANSWER	ARTICLE	COMMENTARY
12. Does the Law provide that the Contracting Authority has the authority to award a PPP without a competitive process only in limited/ exceptional circumstances?	✓ ✓ ✓	Art. 10 Law and 24 Decree	Yes, the concessionnaire may be awarded a PPP without a competitive process or by way of direct negotiations in limited cases listed in a restrictive manner as follows: a) if the competitive bid is declared unsuccessful b) for national defense or public safety reasons, c) if and when the continuity of the public service must be ensured on a urgent basis , (<i>quite large</i>) d) if and when the contract purpose relate to services



			which implementation can only be granted to a determined person or pertain to an activity the operation of which is exclusively reserved to a paten holder.
13. Does the Law provide for a procedure, set of rules or principles to be respected when awarding a PPP without a competitive process?	✓ ✓ ✓	Art 25 Decree	The granting authority is required to enlarge the non competitive consultation and to follow a written procedure to preserve the equal treatment of the candidates, the transparency of choice and equivalence of chances.

For our general information, please specify the conditions which would allow such direct negotiations?



3.5 Special case of unsolicited proposals

QUESTION	ANSWER	ARTICLE	COMMENTARY
14. Does the Law provide for an adequate framework for the Contracting Authority to manage unsolicited proposals/private initiatives (i.e. a proposal relating to the implementation of a PPP that is not submitted in response to a request or solicitation by the Contracting Authority) that ensures transparency and equal treatment and does not distort competition?	✓ ✓ ✓	Art. 11- 12 Law and 28 Decree	Yes, any person may spontaneously propose to carry out an investment in the form of a concession, in which case such person is required to present its offer to the competent public authority together with a technical - economic, environment impact and financial study of the project. The decision of the public authority must be notified to the private party by preserving confidentiality of the information contained in the offer, and in case of acceptance by the public authority of the unsolicited proposal it must invite the private party to present an offer which complies with the rules applying to competitive bids.

3.6 Review procedures

QUESTION	ANSWER	ARTICLE	COMMENTARY
15. Does the Law allow the bidders who claim to have suffered, or that may suffer loss or injury, to seek review of the Contracting Authority's	XX		Such provisions are not provided by the Law, however as per common law rules the bidders who claim to have suffered, or that may suffer loss or injury may bring an action before competent courts.



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actions or failure to act?			
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4. **PROJECT AGREEMENT**⁵

4.1 **Model or list of provisions**

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law give flexibility to the negotiation of most terms of the Project agreement and if it contain (or refer to): (i) a model PPP agreement it is an optional template agreement for guidance only or (ii) a list of mandatory material provisions which must be included in the agreement, the content of such provisions is left for negotiation)?	✓ ✓		No specific provisions in the law on this topic. In practice the documentation made available to the pre-qualified bidders (in a process which includes a pre-qualification stage) would receive the draft of the main project agreements terms including the concession agreement.

4.2 **Duration and extension of the Project Agreement**

QUESTION	ANSWER	ARTICLE	COMMENTARY

⁵ For further information on the project agreement definition, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 12 and 40 to 68 included.



<p>2. Does the Law provide that the duration of the Project Agreement should depend on the length of time taken for the amortisation of the Private Party's investment and an appropriate return on the capital?</p>	<p>✓ ✓ ✓</p>	<p>Art. 18 Law</p>	<p>The duration of the Project Agreement is determined in the concession agreement by taking into consideration the nature of the tasks of the private party and the investment intended to be made.</p>
<p>3. Does the Law provide that the renewal or extension of the Project Agreement should be limited and depend on exceptional circumstances (<i>such as Contracting Authority default or an event of force majeure</i>)?</p>	<p>✓ ✓ ✓</p>	<p>Art 18 Law</p>	<p>Yes the Law provides for the extension of the Project Agreement in limited cases only listed by Art 18:</p> <ul style="list-style-type: none"> -for public interest grounds and for a maximum additional term of 2 years; -in case of delay or interruption of the assets management due to unforeseeable events which are beyond the parties will, -in the event that the private party is obliged, for the proper implementation of the public service underlying to the contract, to carry out (at the request of the granting authority and with its approval) additional works which were not anticipated in the initial contract and which are likely to modify the global economic balance of the concession. In such a case, the extension of the contract term must be limited taking into consideration the delays necessary for restating the financial balance of the contract and preserving the public service continuity. <p>In any case, the extension of the concession agreement can only take place once subject to a formal request</p>



			from the private party upon a motivated report explaining the extension reasons. If accepted, the extension of the concession term must be reflected in a written amendment to the initial contract.
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For our general information, please provide the given minimum and maximum duration (if any) N/A (see answers above)

4.3 Termination of the Project Agreement

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law leaves open to the Project Agreement negotiations the list of possible ground for termination and the content of to the termination provision?	✓ ✓	Art. 22 Law	<p>- In addition to the usual provisions relating to the termination of the agreement, the latter also includes provisions relating to its early termination in the following cases: :</p> <p>a) if the concession is boughtback by the granting authority after the expiry of a period determined in the agreement, in conformity with article 27 of the law,</p> <p>b) if the private party is forfeited by the granting authority of its rights as a result of a significant breach of any of its substantial obligations in conformity with article 26 of the law;</p> <p>c) the termination of the agreement by the private party</p>



			<p>in case of breach by the granting authority of any of its substantial obligations in conformity with article 31 of the law;</p> <p>d) the termination of the contract in case of force majeure.</p> <p>It being noted that by virtue of Art. 23 the contract may include additional provisions as the parties may agree in relation to the contract termination cases. -</p>
<p>5. If the answer to the previous question is <i>No</i> does the Law provide for a list of grounds of termination which does not affect the balance between the parties rights and obligations (<i>one sided provisions</i>) or the stability of the contractual relation under the Project Agreement (e.g.: <i>too large or non exhaustive list</i>)?</p>	N/A		
<p>6. Does the Law provide for (<i>or at least does not prevent</i>) compensation of the Private Party for losses incurred as a result for termination on the grounds of public interest for losses incurred as a result of public authority acts?</p>	✓ ✓		The administrative law allows such possibility



7. Does the Law provide for (<i>or at least does not prevent</i>) compensation of the Private Party for all cases of early termination (<i>including in case of serious breach or failure by the Private Party</i>), for fair value after depreciation of the assets financed by the Private Party?	XX	Art. 31 Law	The Law does not prevent the principle of compensation of the private party for termination of the contract in case of breach by the granting authority of any of its substantial contractual obligations provided that the compensation should reflect the direct and material loss suffered by the concessionaire which resulted in the request of termination of the contract by the private party.
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4.4 Tariff setting, service standards

QUESTION	ANSWER	ARTICLE	COMMENTARY
8. Does the Law provide clear guidance on all aspects of interaction between the bodies that have the power to award PPP and the bodies that regulate tariffs and service standards?	XX		The law does not specifically provide guidance in this respect however in certain sectors like aviation the public bodies which regulate tariffs are expressly identified as well as the criteria of fixing such tariffs.

4.5 Financial responsibilities of the Private Party and Contracting Authority

QUESTION	ANSWER	ARTICLE	COMMENTARY
9. Does the Law provide that the Private Party can	✓ ✓ ✓	Art. 19 Law	- The law provides that the contract addresses the right of the private party to collect monies from the end users



<p>collect tariffs or fees for the use of the facility or its services?</p>			<p>of the service</p>
<p>10. Does the Law provide for the possibility of fixed and/or consumption-based payments to the Private Party by the Granting Authority or other public authorities (<i>in the case of Power Purchase Agreement , shadow tool or PFI for instance</i>) ?</p>	<p>✓ ✓</p>		<p>Not specified, not prevented, it's a matter of contract between the parties.</p>



5. SECURITY AND SUPPORT ISSUES⁶

5.1 Security Interests

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law provide for (<i>or does not specifically prevent</i>) a Private Party to create security interests over the project assets, rights and proceeds or other valuable guarantees related to the project?	✓ ✓ ✓	Art. 39- 40- 41 Law	- The Law provides that the private party has ownership rights over the constructions and equipments built over the land belonging to the State. Such ownership rights are granted to the private party for the duration of the contract and are registered on a special registry at the Ministry in charge of the State Domain. Such rights as well as immovable constructions -works and installations may be mortgaged but only to secure the financing of their construction, modification or extension. They cannot be transferred or otherwise disposed of in any manner whatsoever during the concession term.
2. If the answer to the previous question is <i>Yes</i> , does the Law clearly state which types of security can be provided and include some of the most common type of guarantees in project	✓ ✓		Not clearly specified apart from pledge and mortgage, other security such as pledge of the share not prevented by Tunisian Law

⁶ For further information on support and financial securities, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 13, 49, 57 and 60.



financing (such as those listed in the request for general information below)?			
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For our general information, please can you confirm whether a Private Party may pledge or assign by way of security:

- *the proceeds and receivables arising out of the PPP; Yes as per common law rules*
- *the assets for which it has rights of use under a project agreement; Only pledge or mortgage such assets in conformity with the laws in force, the Law expressly prohibits their assignment.*
- *its property; yes, as long as it qualifies as "biens propres "*
- *shares of the Project Company; Yes as per common law rules*
- *the project agreement; or Yes as per common law rules*

obtain other valuable guarantees (please specify)?

5.2 Government support

QUESTION	ANSWER	ARTICLE	COMMENTARY
3. Does the Law provide for (or does not specifically prevent) the public authority to provide support to the Contracting Authority and a guarantee for the proper implementation of the PPP by the Contracting Authority?	XX		Not specified, Not prevented In practice however, direct agreements have been entered into by the State with the lenders for only one PPP project (Radès power plant). Ever since the State is reluctant to conclude such contracts or to provide its guarantee, in particular financial guarantee which



			requires an approval by law.
4. Does the Law provide for (<i>or does not specifically prevent</i>) the Public Authority to provide financial or economic support for the implementation of PPP?	✓ ✓	Art. 5 Law	The private party may be granted in conformity with the laws in force certain incentives.
5. If the answer to the previous question is <i>Yes</i> , does the Law clearly state which public authorities may provide such support and which types of support can be provided? (i.e. <i>tax and customs benefits; foreign exchange protection (convertibility and transfer guarantees; subsidies; equity or loan participation)</i>)?	XX		The law does not state which public authorities may provide such support and which types of support can be provided this is determined on a case by case basis by the project nature in the common law rules, such as tax - customs benefits or foreign exchange rights.



5.3 Lenders' rights

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law provide for the Parties to arrange the financing with reasonable flexibility under the Project Agreement without strict time constraints or other constraints (<i>except with respect to security package and government support</i>)?	XX:		Not specified. Short negotiation period
7. Does the Law provide, in the event of the default of the Private Party for the lenders to “ <i>step-in</i> ” or substitute the Private Party with a qualified new Private Party without initiating a new tender process?	✓ ✓ ✓	Art. 26 Law	-Yes the "step in rights" of the lenders are expressly authorized by the Law in the specific case of the private party forfeiture under article 26 of the Law. The granting authority must however approve the transfert of the concession to any third party proposed by the lenders by virtue of their step in rights to be substituted to the initial private party.



6. SETTLEMENT OF DISPUTES AND APPLICABLE LAWS⁷

6.1 Settlement of disputes

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law permit the Contracting Authority to enter into a Project Agreement that is subject to international arbitration?	✓ ✓		The Law does not specify it nor prevent it. However, the Project Agreement qualifies as international contracts as per Tunisian international private law and in such contracts the parties may validly enter into an international arbitration provision. In practice this was the trend for all PPP implemented in Tunisia in the last 15 years.
2. Has the government of the country ratified the Washington Convention on the Settlement of Investment Disputes (ICSID) (1965)?	✓ ✓ ✓		In force since 1966

⁷ For further information on the settlement of disputes, please refer to: PFI Guide, Consolidated legislative Recommendations, Recommendations 57, 69 and 71.



3. Has the government of the country ratified the New York Convention on recognition and enforcement of foreign arbitral awards (1958)?	✓ ✓ ✓		In force since 1967
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6.2 Applicable laws

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law permit (<i>or does not prevent</i>) the Contracting Authority) to enter into side agreements to the Project Agreement (such as <i>a direct agreement with the lenders to the project or a support and guarantee agreement in respect of the Project Agreement</i>) that is governed by foreign law.	✓ ✓		The law does not address nor restrict such possibility. Note however that any guarantee agreement which results in a financial obligation of the State must be approved by a law to be valid and enforceable.
5. Has the country ratified any international convention for the protection of foreign investments?	✓ ✓ ✓		Yes with most of its economic partners.



II- EFFECTIVENESS ASSESSMENT: HOW THE LAW WORKS IN PRACTICE:

(Please comment based on the previous 2006 effectiveness general assessment)

7. POLICY FRAMEWORK

7.1 Existence of PPP Policy Framework

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Is there a general/national policy framework (explicit or implicit) for PPPs for infrastructure or public services?	✓ ✓		<p>There is no specific policy framework for Concession and PPP in Tunisia but Concession and PPP is part of the general privatisation and concession program which objective is to transfer to the private sector part of the State financial burden for the financing of the infrastructure and to develop the private sector.</p> <p>Joint Statement signed by the Tunisian Minister of Finances and EIB namely concerning the Mediterranean Infrastructure Challenges: The Potential of Public-Private Partnerships <i>Conclusions of the 9th FEMIP Conference, 30 May 2011, Casablanca, Morocco</i> <i>Mindful of the potential for regional initiatives to promote PPPs in the Mediterranean region.</i></p>



2. Is there any administrative guidance or printed information edited by the government or the PPP Unit concerning the legal framework for PPP projects in the country?	XXX		Except the laws and regulations themselves which are published in the Tunisian Official Gazette
3. Is there a municipal/regional policy framework (explicit or implicit) for PPPs in infrastructure or public services?	XXX		

7.2 PPP Awareness and Sustainability

4. Is there a national and/or municipal /regional long term programme for PPP promotion and awareness?	XXX		No
5. Are there PPP training programmes on a national and/or municipal/regional level for public servants and other PPP concerned people?	✓ ✓		No specific PPP training programmes on national level dedicated to public servants but general training sessions are available from time to time through public seminars and international conference like the PPP seminar organized in Tunis by the Ministry of Finances on 18/10/2011 for the major local public and private actors in the potential field of PPP



41.

6. Are there PPP courses as part of university curriculum or specialist departments and faculties in universities teaching PPP?	XX		No PPP courses but certain administrative law teachers in law universities come across PPPs and concessions in the course of legal consultancy that they are invited to provide to public authorities or international investors.
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7.3 Obstacle to implementation of PPP Policy

<p>7. Are you of the opinion that there are no social/political obstacles to implementing PPP in the country (e.g. grass roots opposition, policy measures against private sector participation in public infrastructure/services, etc.)?</p>	<p>✓ ✓</p>	<p>Social/political obstacles Despite recent political turmoil, relatively stable macroeconomic conditions provide a solid platform for PPP investment in Tunisia.</p> <p>In addition, Tunisia’s experience with concession contracts offers a valuable foundation to develop PPP initiatives.).” European Investment Bank Volume 2 – May 2011 Comparator Countries: Tunisia</p> <p>There is no social or political major obstacle to PPP in Tunisia despite the fact that like in all civil law countries you may face some resistance every time the transfer of public services to the private sector is concerned and concession appears as a kind of privatisation with the risk of higher tarif imposed by foreign concessionaire.</p> <p>The fact that the concession of the Enfidha airport for instance is priodically criticized in the press since the revolution show that risk of social rejection of PPP exists.</p> <p>The transition government was very favorable to PPP but there is presently no clear view on the position which will be taken by the new government at the time it will be appointed.</p>
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<p>8. Are you of the opinion that there are no legal obstacles to implementing PPP in the country (e.g. non-publication of a decree provided under the Law and necessary for such law to become effective, etc.)?</p>	<p>✓ ✓</p>		<p>The legal obstacle in order to broaden the scope of PPP in addition to concession is the necessity of a new PPP law involving all type of PPP and which could remedy the gaps of the few drawback of the concession law.</p> <p><i>EIB/FEMIP 2011 PPP report:</i> <i>"The Concession Law, despite being a successful framework for private sector engagement, does not provide a formal platform for project financed PPP where the public sector takes demand risk through the use of availability payment funding. The "unique user" interpretation of the Concession Law, through which the conceding authority pays the concessionaire directly, has allowed the adaptation of the concession model to project financed PPP. Nevertheless, investors, especially those willing to commit to long term PPP, would be reassured were such an interpretation to be formalised so that the power of public authorities to sanction and operate such projects is robust. Preferably this would be done by being enshrined in a legal instrument with preeminent status in Tunisian law (such as a legislative act or decree)." European Investment Bank Volume 2 - May 2011 Comparator Countries: Tunisia</i></p>
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For our general information, please describe the existing impediment and obstacles if any with respect to the two previous questions

8. INSTITUTIONAL FRAMEWORK

8.1 Existence and role of PPP Central Units/Agency

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Is there a specialised institution/agency/ministerial department established to promote PPP and to serve as Central PPP Unit?	✓ ✓	Decree N° 2008-2965dated September 8, 2008-creating a concession follow up unit (Article 1)	Concession follow up unit set up within the Pime Ministry. .
2. Is such Central PPP Unit composed mainly of specialists recruited from the business community and not exclusively composed of civil servants coming from different public ministries?	XX	Decree N° 2008-2965dated September 8, 2008 creating a concession follow up unit -Article 2	The members are appointed by a prime ministry order , They are recruited amongst the senior civil servants having legal - financial and technical expertise.
		Decree N°	The follow up PPP unit does not interfere directly in the



3. Is the role of such Central PPP Unit comparable to a "task force" assisting in the development of projects in general and not limited to promotion of PPP?	✓ ✓	2008-2965dated September 8, 2008 creating a concession follow up unit -Article 1	negotiation preparation and granting of individual PPP projects except for advice concerning the tender and contractual documentation and other matters concerning the negotiations and to give its recommendation to the Prime minister concerning the granting reports.
4. Is the consent or recommendation of such Central PPP Unit necessary for the development and granting of most PPP projects (<i>except small or local PPP</i>)?	✓ ✓	Art 8 of Decree N° 2010-1753 as of July 19, 2010 fixing the conditions and procedures for granting concessions,	The follow up PPP unit does not interfere directly in the granting of individual PPP projects, which is the responsibility of the special committee created by Decree N° 2010-1753 as of July 19, 2010 fixing the conditions and procedures for granting concessions, The members of the follow up unit are prohibited from participating to individual committees but the follow up unit is in charge of presenting the special committee reports to the Prime minister together with its recommendation to allow the Prime Minister to take a decision.
5. Is one of the roles of the Central PPP Unit to assist in building capacity namely of the public sector with respect to PPP?	XX		Not specified in the Decree

For our general information, please name such establishment and specify its place in public hierarchy, format and key functions (regulatory, operational, know how collecting, etc. or a combination thereof). *Unité de Suivi des Concessions, located at the Prime Ministry, placed under the hierarchy of the Prime Ministry, its role is to study all PPP projects and issue an advice in relation thereof at the request of*



the prime ministry. It assesses the benefits of suchs projects and makes recommendations as the case may be-the Unit issues also advice concerning the tender offer documentation and legal documentation (including their amendements). The unit examines all questions realting to the concessions negotiations and implementation.The unit fonctionning budget is provided by the Prime Ministry.

8.2 Other institutions concerned by PPP

6. Is there any PPP unit/agency or department of the Central PPP unit either at the municipal or regional level?	XXX		
7. Is there any specific PPP unit department in any ministry (other than the central PPP unit) or at sectoral level?	XXX		
8. Is there either a specific "one stop shop" for PPP authorisations and formalities or a "one stop shop" which services are available to the sponsors of PPP project as well as other investors?	✓ ✓		API like for other type o investment
9. Is the division of power between different public authorities involved in the PPP granting process simple and coordinated?	✓ ✓		Yes its coordinated through the special committee which is appointed to follow up the concession procedure from its granting until its implementation.



9. PPP LAW ENFORCEMENT

9.1 Effectiveness of PPP enforcement and compliance with the Law

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Have any PPP projects in any form ever been awarded in the country on the basis of the Law discussed above ? <i>(with or without specific reference to the Law)</i>	XXX		Not as of yet
2. Have such PPP projects, if any, been awarded generally following a transparent competitive selection procedure <i>(and only through direct negotiation under exceptional legal circumstances as may be provided by the Law)</i> ?	N/A		
3. Have any PPP projects or similar long term agreements <i>(falling under the definition of PPP under this questionnaire)</i> never been awarded on any legal basis different from the Law since the Law has been in force?	✓ ✓		

For our general information, please give example of legal instruments, or reasons used, to bypass the Law and establish a PPP. N/A



9.2 Statistics on PPP implementation under the Law

4. Have most of the awarded PPP projects been successfully implemented and put into operation in compliance with the Law?	✓ ✓		The PPP projects awarded in country have generally been successfully implemented however, no PPP has been granted as of yet under the Law.
5. Has a PPP project ever been awarded and implemented in the country at the local /regional /municipal level in compliance with the Law?	XXX		No
6. Have PPP project ever been awarded in the country in the non merchant sector (<i>such as Hospital, School, prisons</i>) and not exclusively in the merchant sector (<i>energy, water, transport</i>)?	XXX		No

For our general information:

Approximately how many PPP projects are presently in operation (figure or order of magnitude) in the country and in what sectors have PPP projects been awarded (energy, water, education, health for example)? PPP projects in operation have been granted in energy and aviation infrastructure and road infrastructures. Are presently in operation Radès Power Plant PPP- and Enfidha Airport BTO. El Bibane PPP in power private production.

- Please give some examples of the most significant project awarded: The most important projects in operation are Radès Power Plant PPP- and Enfidha Airport



under which legal form have such PPP projects been awarded (Concession, BOT, PFI, other): BOO for Radès Power Plant and BTO for Enfidha Airport construction and operation

- have such PPP project been granted by (i) central, (ii) sub-sovereign/regional (if applicable) or (iii) municipal government as Contracting Authority; Central
- when did PPP begin to be awarded in the country: (i) in the last 10 years or before;
- please give examples of any PPP projects awarded but not implemented (or not implemented under a PPP form): Unit Desalination of Djerba
- are there any PPP/Project Agreements in discussion? Three major projects are concerned :
 1. The construction , financing and operation of dessalination plant in Djerba
 2. The construction, financing and operation of a transbording port in deep near Enfidha.
 3. The construction, financing and operation of two water treatment plant (Tunis West "El Attar II" and Tunis-South "El Allef ") and the operation of three water treatment units under construction.

9.3 Challenge of PPP

<p>7. Are you of the opinion that there is a reasonable chance for an unsuccessful bidder to successfully challenge in the country a PPP awarded under conditions contrary to the Law?</p>	<p>✓ ✓</p>		<p>As per law , yes.</p>
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8. If the answer to the previous question is <i>Yes</i> , are you of the opinion that there is a reasonable chance for the plaintiff to get some compensation or for such action to result in the cancellation of the award?	✓ ✓		Yes, If the claim is validly motivated
9. Have PPP project been implemented by the parties most generally without serious claims/arbitration by either Party concerning the performance of the Project Agreements under the Law?	N/A		Since the enactment of the Law in 2008 there was no new PPP granted
10. If any Project Agreement has been terminated prior to the end of the contractual period by the Contracting Authority, has fair compensation been paid to the Private Party in compliance with the Law?	N/A		No Project Agreements have been concluded since the enactment of the Law in 2008

For our general information, can you provide any examples of a successful legal challenge in the courts or otherwise of a PPP award in the country based on the PPP Law? Please describe the matter and, if known, the outcome of such matter. N/A.