PPPs: The path to progress?

Tribonian Law Advisors analyse how Public-Private Partnerships are helping the economy of Jordan to move in the right direction.

Amidst the crisis currently faced by the Middle East, the Hashemite Kingdom of Jordan (Jordan) struggles in the eye of the storm. Between waves of Syrian refugees, spill-overs from the Israeli-Palestinian conflict and the continued cut of gas supplies from Egypt, it would be euphemistic to state that the economy of Jordan faces many challenges. Despite those challenges, the International Monetary Fund sees Jordan's economy on a path to stronger growth with a GDP growth rate expected to reach 3.5 per cent in 2014. Behind the resilience of Jordan's economy to the surrounding turmoil, stands Jordan's will to introduce reforms through, *inter alia*, strategies aimed at encouraging foreign and local investments.

IMPLEMENTING PPPS

One of the areas where Jordan has succeeded to attract foreign and domestic investments is public-private partnerships (PPPs), mainly in the transport, water and telecommunications sectors. PPPs could be generally defined as contractual long-term agreements between a private party and a governmental authority aimed at delivering public infrastructure projects on the basis of, *inter alia*, risks and costs sharing. PPPs are portrayed as likely to provide a number of advantages compared to the conventional public procurement. In fact, PPPs are built around performance-based outcomes rather than work specifications which create strong incentives for the private sector to maintain performance levels. Further, the cross-transfer of public and private sector expertise, knowledge and skills stimulates more efficiency and innovation. Moreover, PPPs help improve infrastructure project selection by using the inputs of private sector investors to filter non-viable projects. Given financing constraints on governments and the urgent needs for developed infrastructure, there is a general tendency to turn towards PPPs.

Jordan has already experienced the successful completion of PPPs in its recent past. Until today, the Jordanian Privatisation Regulation No. 80 of 2008 for implementing privatisation transactions issued under article 20 of the Privatisation Law No. 25 of 2000, as well as other sector-specific laws, have provided the legal framework for PPPs in Jordan. Among the major PPPs completed on the basis of the current legal framework, it is worth mentioning the project for the expansion of Amman's Queen Alia International Airport (2007), the Disi Water Treatment Project (2009) and the Samra Waste Water treatment Plant Construction Project (2012). With costs ranging between USD200,000,000 and USD950,000,000, all of said projects were developed through "build, operate, transfer (BOT)" arrangements of 25 years entered into between the government and private companies partially funded by a consortium of private banks.

DEALING WITH THE CHALLENGES

Yet, the transfer of asset ownership from the public to the private sector by means of privatisation has been perceived by the public opinion as a loss of ownership and control over national vital assets. Furthermore, the lack of transparency and public information on the objectives behind privatisations and the revenues generated thereby has led to uncertainty and skepticism among Jordanians regarding the privatisation processes in particular, and deals with the private sector in general. Finally, the failure of a project involving public assets could have a substantial impact on an economy with scarce resources such as Jordan. Hence emerged the need for Jordan to improve the legal framework for public-private relationships to achieve more balance between public and private interest.

In light of said imperatives, royal directives were issued to the government in late 2012 to conduct a comprehensive review of all privatisation deals, assess the mechanisms and procedures followed and their social and economic effect. The Privatisation Evaluation Committee (PEC) formed by the government to that effect issued its report in March 2014 and highlighted, *inter alia*, that privatisation helped increase the performance of privatised entities and the competitiveness in Jordan's economy by attracting foreign investment, and yet, many transactions lacked the basic requirements of compliance with the laws. The PEC's report also stressed the importance of completing public-private transactions with the utmost transparency and, as an alternative to privatization and transfer of ownership from the public to the private sector, the urgent need to pass a full-fledged law on PPPs which safeguards the rights of the public sector in national resources.

THE DRAFT PPP LAW

In light of the PEC's report, His Majesty King Abdullah II sent a letter to the Prime Minister on March 29, 2014 in which he called for the development of a strategy for the Jordanian economy based, *inter alia*, on the principle of cooperation between the public and private sectors given the importance of promoting the role of the private sector. Said letter gave impetus to the Jordanian legislator to expedite the passing of a draft PPP law (the Draft Law) which has been in the midst of discussions for over three years.

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The Draft Law covers all economic sectors with certain exceptions that will be decided by the Jordanian Council of Ministers. This has led to the Draft Law becoming subject to anti-constitutionality accusations, as Article 117 of Jordan's Constitution provides

that any concession/privilege granting a right in respect of the exploitation of mines, minerals or public services must be approved by a law. Some legal scholars have criticised the Draft Law on the basis that any concession made by the government (or granting a right to exploit public services) must be specifically approved by a law akin to sector-specific laws such as the Water Authority Law No. 18 of 1988, the Public Electricity Law No. 64 of 2002 and the Telecommunications Law No. 13 of 1995 which allow the implementation of PPPs in the water, electricity and telecommunications sector respectively.

Another criticism to the Draft Law pertains to the fact that it does not clearly set forth the procedures for the bidding mechanics through which PPPs will be granted. Article 18 of the Draft Law provides that "the proceedings for the submission of tenders for the execution of PPPs will be subject to the prevailing rules and regulations" without specifying the rules and regulations to be followed; said ambiguity may not serve well the transparency feature sought to be achieved by the Draft Law. One has to wait for the implementing regulations to see whether any light will be shed in this respect.

Furthermore, the Draft Law aims at establishing a PPP committee (the PPP Committee) in charge of setting forth Jordan's PPP public policies, prioritising the activities and sectors in need of PPPs, liaising with the government for the approval and granting of PPPs (including choosing a winning bidder), approving draft PPP agreements, settling disputes which may arise in this respect and, in general, overseeing and monitoring PPPs. The Draft Law also contemplates the establishment by the government of a separate unit within the Jordanian Ministry of Finance which will be granted wide powers, including the review of the projects feasibility studies as well as the draft PPP agreements. In this context, based on the Draft Law, it is worth noting that the private sector will not be represented in the PPP Committee. This has led to a number of criticisms being directed at the Draft Law which was considered as precluding the private sector from the PPP decision making process. Also, the law appeared to many as having been tailor-made to serve the interests of foreign investors as, *inter alia*, there is no express provision in the Draft Law guaranteeing minimum levels of participation by the local private sector.

The Draft Law has met criticisms also among members of the Parliament who refused to vote in favour of it. Hence, since its submission by the Council of Ministers to the Parliament, the Draft Law has been sent back and forth between the Senate and the Lower House of the Jordanian Legislative Authority, and the bill has been finally approved by the Senate only on 17 September 2014 in the version referred from the Lower House for the second time. The Draft Law is now to be sent to His Majesty King Abdullah for ratification, after which it will become effective once published in the Official Gasette.

A SUCCESS?

In light of the above and the implications which PPPs can have on a Jordanian economy struggling in the heat of regional troubles, it should not come as a surprise that the Draft Law was placed on top of the Parliament's agenda. Yet, no accurate assessment or estimate can be made as to the success of the PPP legal framework which would be put in place following the entry into force of the new PPP law. Key features to scrutinise in this respect are the passing of secondary legislation to give effect to the good governance principles set forth by the new PPP law, the degree of transparency and fair competition in the bidding processes (with proper units to monitor and manage the PPP projects), strong incentives for the private sector to maintain performance levels, adequate risk allocation between the private and public sectors and, most importantly, the need to ensure accountability in the provision of infrastructure, as PPPs are likely to generate a moral obligation on the part of the government to live up to the local community's expectations with regards to the quality of the infrastructure for public utilities and services.

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