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## Kingdom of Morocco. A new law to promote public-private partnerships.

- > A new law regarding public-private partnerships established a new type of contract involving the public and private sectors.
- > Morocco has for a long time been a pioneer among countries in the Middle-East and in Africa in the use of public-private structures.
- > Drawing on both domestic experiences and best international practice, the new law should facilitate significant investments in non-market sectors.
- > Sectors with strong potential include infrastructure, education and health.

On 24 December 2014 Morocco enacted a new law (the “**Law**”) establishing a new type of contract: public-private partnerships. The purpose of the Law is to entrust a private partner with an overall objective of designing, financing, construction or rehabilitation, maintenance and/or operation of works or infrastructure necessary for the provision of a public service<sup>1</sup>.

The Law complements the current legislative framework, including the law on delegated management under which projects in the water and infrastructure sectors were until now carried out in the form of concessions (Tanger Med harbor, Rabat-Salé tramway). It also complements the practice of financing under BOT (Build, Operate and Transfer) and BOOT (Build, Operate, Own and Transfer) schemes in the energy sector (Safi coal power plant, Jorf Lasfar coal power plant, Tarfaya wind farm, Ouarzazate solar plants).

This development also builds on Morocco’s role as a pioneer in promoting contracts between the public and private sectors ever since the 1997 Jorf Lasfar power plant, the first BOT in Africa and in the Arab world.

Under traditional concession-based projects, the private partner derives its revenues from users. This legal tool is however not suitable for projects in sectors in which the private partner cannot be paid by users, such as

<sup>1</sup> Article 1 of law n°86-12 of 24 December 2014 regarding public-private partnerships provides that: “*the public-private partnership contract is a fixed-term contract, whereby a public authority entrusts a private partner with the responsibility to carry out an overall mission of conception, financing, construction or rehabilitation, maintenance and/or operation of works or infrastructure or provision of services necessary for the provision of a public service*”.

King Mohammed VI insisted on “*the need to develop contractual and public-private mechanisms in order to maximise the investments*”.

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education or health, or for some infrastructure projects the profitability of which is insufficient but which have a strong socio-economic value.

A new law was therefore necessary to enable the public sector to entrust private partners with schemes spanning from the design to the operation of works in exchange for remuneration from the public sector.

The public-private partnership contract (“**PPP**”) created by the Law addresses this challenge by promoting the development of private sector innovation and financial skills.

The principles of the Law are broadly consistent with those adopted in the UK and in France<sup>2</sup>. Mechanisms provided by the Law are thus in line with international standards with which both operators and investors are familiar.

### **Entry into force**

The Law will come into force from the date of publication in the Official Bulletin of the Kingdom of Morocco of the decree implementing it.

This decree is expected to be adopted soon, with a draft being currently subject to public consultation (the “**Draft Decree**”).

### **Investing in non-market sectors**

Several projects have already been developed in the electricity, infrastructure, urban transport, irrigation (El Guerdane), desalination (Agadir), water, waste management and agriculture sectors<sup>3</sup>.

Morocco wishes today to use PPPs in order to meet growing expectations of public services<sup>4</sup>. One of the needs identified is the development of projects in sectors in which the private partner cannot be compensated by users, such as public lighting, hospitals, justice, police stations, universities or schools<sup>5</sup>. Sectors targeted by the Law are therefore mainly the non-market ones.

The Kingdom has also declared its intention to develop roads, motorways and railways and to facilitate airport and port extensions.

To implement those projects, several billion euro will need to be invested<sup>6</sup>.

Moreover, a PPP unit, attached to the Ministry of Economy and Finance, has been created. It is in charge of identifying a list of projects to be carried out as PPPs.

*According to the World Bank, “Morocco has developed valuable experience in PPPs during the past decade. Yet, use of PPPs remains ad hoc, lacking a strategic vision and constrained by a number of shortcomings”.*

<sup>2</sup> The UK model is the Private Finance Initiative. The French model is the one resulting from the Order of 17 June 2004 on public-private partnerships.

<sup>3</sup> Report n°50316-MA of the World Bank and the International Finance Corporation on Country partnership strategy for the Kingdom of Morocco, 30 December 2009.

<sup>4</sup> Preamble of the Law.

<sup>5</sup> Speech of the director of the Directorate of public companies and privatisation, Mr. Samir Tazi, during the conference of Morocco PPP Club of 26 February 2015 in Rabat.

<sup>6</sup> Speech of the Minister of Transport, Mr. Jamal Ramdane, during the Club PPP Morocco conference of 26 February 2015 in Rabat.

## What is the subject matter of a PPP?

- > The public authority entrusts private partners with an overall mission including the (i) design, (ii) financing, (iii) construction or rehabilitation and (iv) maintenance and/or operation of works or infrastructure necessary for the provision of a public service. The public authority will also be able to entrust the provision of services to private partners, such as repair works of roads.
- > This means that it is not possible to conclude a PPP to only finance or operate a public service, for example. In addition, PPPs cannot be used merely for simple financial operations, such as outsourcing public debt.

## Who can enter into a PPP?

- > The State and its *établissements publics* (public institutions) can enter into a PPP<sup>7</sup>.  
  
Public companies can also conclude a PPP, as for example the Moroccan Agency For Solar Energy (MASEN).
- > Local authorities are not yet allowed to use PPPs; but a change in law is expected in this regard allowing them to enter into PPPs once the institutional law on local finance of local authorities has been enacted<sup>8</sup>.

## What is the term of a PPP?

- > The term of a PPP is between 5 and 30 years, but it can be extended in certain cases up to 50 years depending on the complexity and the technical, economic, accounting and financial features of the project.
- > The term of a PPP is determined according to the depreciation of investments to be made, financing arrangements and the nature of the service provided.

## How is the private partner compensated?

- > The private partner is compensated by the public authority over the entire contract period. This compensation is tied to the availability of the service and to performance targets.

<sup>7</sup> To date, there are 243 *établissements publics* of the State (cf. Synthesis of the report included in the draft of the 2015 Finance Law). They operate in all the sectors of the economy, such as energy (ex: Morocco's National Electricity Office), infrastructures (ex: Morocco's National Railways Office and the National Airport Office), agriculture (ex: National Interprofessional Office for Cereals and Legumes), health (ex: hospital centres) and education (ex: universities).

<sup>8</sup> Opinion of the Economic, Social and Environmental Committee of 24 July 2014 on the draft law n°86-12.

- > However, it will be also possible for the private partner to be partially compensated by third-party revenues (from users and/or sales of resources).
- > Those principles also exists in the French PPP contract and in the British Private Finance Initiative, for example.

## What is the content of a PPP?

- > The legislature decided not to characterise the contract as administrative, contrary to what was contemplated by the draft of the Law. This means that it will be necessary to analyse on a case-by-case basis if, according to the provisions of the contract, it is a private or administrative contract<sup>9</sup>.
- > The Law provides that a PPP must contain a certain number of provisions, including performance targets, subcontracting, total or partial transfer, modification of the contract, control and sanctions.
- > When the PPP expires, all goods necessary to the operation of the public service will be transferred to the public authority.
- > The PPP must establish risk-sharing between parties and allocate risks to the party which is best able to manage them.
- > In the case of default of the private partner or in the case of the occurrence of an event justifying termination, the public authority can substitute itself for the private partner.
- > The PPP must establish the conditions in which parties have a right to financial equilibrium in the case of unforeseen circumstances or force majeure.
- > The PPP can be terminated in the case of force majeure, disturbance of the financial equilibrium of the contract, amicable settlement, serious misconduct, or for reasons of public interest.

## What are the specific provisions regarding project financing?

The Law contemplates different measures to protect lenders:

- > It provides the possibility for private partners to assign products and receivables arising from the contract or to “agree to any other appropriate security”.

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<sup>9</sup> Such characterisation will have consequences on the regime of the contract. If the contract is administrative, the public authority will be able to modify or terminate it for a reason of public interest, subject to compensating the private partner. Moreover, the characterisation of the contract will have an impact on the judicial forum which will be competent to solve disputes. Administrative courts will be competent to solve disputes arising from the PPP if the contract is administrative in nature.

- > The text does not expressly seek the possibility of resorting to the assignment of professional receivables as collateral provided by articles 529 *et seq.* of the Moroccan commercial code. However, this possibility is implicitly covered by the words “agree to any other appropriate security”. It is worth recalling that most of the financing raised on the French PPP market is secured through assignments of receivables. In France, those assignments are systematically accepted by public authorities by way of an *acte d’acceptation* entered into in accordance with the provisions of the *Code monétaire et financier*, which enables the funding partners to benefit from a waiver by that public authority of the right to raise any defence otherwise available to it under the assigned receivable. It should be noted, however, that French legislation prohibits the acceptance of more than 80% of the compensation owed to the private partner for investments and financing costs. In the absence of specific conditions in the Law, it is likely that the acceptance of the assignment by public authorities, which is a possibility provided by article 536 of the Moroccan commercial code, will not be subject to such restrictive conditions regarding a PPP.
- > The private partner has rights *in rem* in regard to works that it carries out and equipment. The acknowledgment of the right to assign products and receivables arising from the contract would logically lead to the conclusion that it is also possible to obtain security over the rights *in rem* of the private partner. However, the Law specifies that the ability to assign any security is “without prejudice to any legal provision forbidding the provision of surety on a public good or belonging to the public domain”.
- > It should be noted that the Law provides that the contract must set out the parties’ compensation if the contract is terminated for force majeure, disturbance of financial equilibrium of the contract or amicable settlement. It does not provide for establishing compensation in the case of serious misconduct or for reasons of public interest. However, funders are likely to expect compensation to be provided even in those cases to cover some or all the debt owed to them.

Moreover, in cases in which compensation is provided, the Law does not indicate what the compensation will be but leaves it up to the parties to agree.

- > The Law provides the possibility for lenders to request the public authority to substitute the private partner in the case of default. This ability awarded to lenders should make it possible to implement in Moroccan law the “step-in” mechanism used in the financing of European PPPs.

According to the World Bank, “considering (i) the important infrastructure needs of the country and (ii) the necessity to maintain its budget balance, Morocco can benefit significantly from a well-conceived PPP initiative”.

### How are unsolicited offers dealt with?

- > To benefit from the innovative capacities of the private sector, a private partner can solicit the public authority with innovative technical, economic or financial ideas, to be carried out in the form of a PPP.
- > Once the project is accepted, the public authority must complete a prior assessment and implement an award procedure, such as described below.
- > Therefore, there is no risk of the private partner being excluded as a candidate for the sole reason that it solicited the public authority with the project. It should be noted that in France, the legislation was required to clarify this matter to avoid the exclusion of private partners which solicited public authorities on the ground that they were favoured compared to other candidates since they had special knowledge of the project.
- > Finally, the public authority will be able to grant a bonus to the private partner which solicited it with the project but was not selected. Granting conditions of this bonus will be specified by decree.

### Under which circumstances is it possible to enter into a PPP?

- > A “public sector comparator” approach was chosen, as is the case in the British Private Finance Initiative regime. Before any award procedure, the public authority must complete a prior assessment, based on a similar economic efficiency criterion to the one used for French PPPs. The prior assessment must determine whether concluding a PPP is more advantageous than any other form of contract.
- > Moreover, the Draft Decree provides that the authorisation of the Ministry of Economy and Finance will be necessary to conclude a PPP. The Ministry will be assisted by an interministerial committee referred to as the “PPP Committee”<sup>10</sup>.

### What is the award procedure of a PPP?

#### Three possible procedures:

- > The call for tenders is a procedure involving prior publication and no negotiation.

The call for tenders is “open” when all candidates are allowed to tender. It is subject to “preselection” when only candidates which have been allowed to tender following a preselection process may do so.

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<sup>10</sup> Moreover, the Draft Decree provides that the PPP committee will also give its opinion to the Ministry of Economy and Finance on draft amendments of PPPs.

- > The competitive dialogue is a procedure which allows the public authority to enter into discussions, after prior publication, with candidates in order to identify the solution(s) that can meet its needs, on the basis of a functional programme.

The public authority will be able to use this procedure when it is unable to (i) define alone and in advance the technical means to meet its needs or (ii) establish the financial or legal arrangements of the project.

This procedure is the one which will allow public authorities to benefit the most from the innovative capacities of the private sector and will therefore probably be the procedure used in most cases. The PPP unit is likely to publish guidelines explaining how to accomplish this procedure.

- > The negotiated procedure is a procedure whereby the public authority negotiates the PPP conditions with one or several candidates, after prior publication but without a competitive dialogue.

The use of this procedure is only possible in very limited cases<sup>11</sup>.

## Principles applicable to all procedures

- > The PPP is allocated to the candidate who presents the most economically advantageous tender, which is the criterion usually used under the EU public procurement rules.
- > It should be noted that the public authority will be allowed to apply account a domestic preference criterion. It will have to evaluate measures taken in favour of domestic companies and the usage rate of input of domestic origin<sup>12</sup>. Indeed, the Government has stated that it wishes the development of PPPs to contribute to the “*promotion of the emergence of domestic champions*”<sup>13</sup>.
- > Moreover, regarding the domestic preference criterion, the Draft Decree provides that the public authority will also have to take into account the portion of performance of the contract which will be subcontracted to small and medium size domestic companies.
- > As soon as the public authority chooses the contractor, it must inform other candidates within 60 days that their tender was rejected.
- > PPPs must be subject to a specific approval. State PPPs are approved by decree of the Ministry of Economy and Finance. The Draft Decree

<sup>11</sup> The public authority can use the negotiated procedure in the following cases: (i) where the service can only be carried out or operated, for technical or legal considerations, by one private operator; (ii) in an emergency resulting from unforeseeable events for public authorities; (iii) for national defence or public security reasons; or (iv) to conclude a PPP with a private partner which solicited the public authority with a project, if it results from the prior evaluation that the project meets an urgent need, is innovative and is financially competitive. In the last case, the negotiated procedure can be completed without prior publication.

<sup>12</sup> The Draft Decree defines inputs as goods, services, human, technical and technological resources of Moroccan origin for the performance of a PPP.

<sup>13</sup> Preamble of the Law.



provides that the PPP Committee will give a consultative opinion to the Ministry on the signing of PPPs.

- > PPPs entered into by State *établissements publics* are approved by their boards and validated by their relevant authority. Public companies' PPPs are approved in accordance with their statutes.

### Third-party claims and dispute resolution

- > The State must publish an extract of PPPs and of the decree approving them<sup>14</sup>. This publication triggers time limit of 60 days for third parties to bring legal actions against the decision to sign the PPP<sup>15</sup>. Once this period has expired, the decision to sign the contract may no longer be challenged by third parties.

The Law does not provide any publication measures for PPPs that are entered into by *établissements publics* of the State and by public companies.

- > Regarding dispute resolution, four procedures are possible: (i) conciliation, (ii) arbitration, (iii) mediation and (iv) legal proceedings.
- > The Law only provides that the competent court of arbitration has to be mentioned in the PPP, which suggests that the use of international arbitration should be possible.
- > To avoid a legal quagmire, the Government favours the use of alternative dispute resolution procedures, that is to say conciliation, arbitration and mediation<sup>16</sup>.
- > Regarding legal proceedings, Morocco has both administrative and judicial jurisdiction. Since the Law does not characterise PPPs as administrative contracts, the competent judge depends on the characterisation of the contract on a case by case basis. Arbitration will be possible whether the contract is administrative or not, and is likely to be the favoured dispute resolution procedure among investors.

In this respect, the director of the Directorate of public companies and privatisation has stated that the non-characterisation of PPPs as administrative contracts “*will give more freedom for dispute management and more possibilities for negotiations between parties*”<sup>17</sup>.

<sup>14</sup> An example of the extract to publish will be established by decree.

<sup>15</sup> Law n°41-90 of 10 September 1993 establishing administrative courts.

<sup>16</sup> Speech of the director of the Directorate of public companies and privatisation, Mr. Samir Tazi, during the conference of Morocco PPP Club of 26 February 2015 in Rabat.

<sup>17</sup> Speech of Mr. Samir Tazi during a conference of 30 January 2015.



## Our experience in Morocco and Africa

Linklaters is deeply committed to Morocco having supported both our Moroccan and international clients investing in Morocco for many years.

Our experience of African legal systems, and in particular the Moroccan legal system, has allowed us to acquire a deep understanding and valuable expertise in all areas and sectors in which we have advised. We have also built strong professional relationships with the key Moroccan legal advisers.

In particular, we have been involved in the following Moroccan projects:

- > the financing of the Safi 1,320 MW coal-fired power plant (Project Finance Magazine's North African Power Deal of the Year);
- > the financing of the Jorf Lasfar IPP expansion (approx. 700 MW) (Project Finance Magazine's African Power Deal of the Year);
- > the bid for solar plants in Ouarzazate;
- > the financing of the Tarfaya wind farm project (300 MW);
- > the bid for the Taza wind farm (150 MW);
- > the financing of the Tahaddart combined cycle power plant (380 MW);
- > the financing of the second GSM licence; and
- > the development of Seksaoua copper mine.

Our experience also includes advising on:

- > the privatisation of the Compagnie Nord Africaine et Intercontinentale d'Assurances;
- > the acquisition of Maroc Telecom from Vivendi and the Kingdom of Morocco;
- > the potential acquisition of an oil major's downstream business in 19 jurisdictions within Africa (including Morocco, Tunisia, Ghana, Senegal, Equatorial Guinea, Mauritius, Mali and Egypt);
- > the sale of a major company's packaging business in various jurisdictions, including Morocco, to Amcor Limited;
- > the acquisition of a 100% interest in Barrus Petroleum, an independent exploration company with assets in Morocco and Ivory Coast;
- > the oil exploration contracts of a listed exploration company; and
- > various corporate matters relating to Air Senegal/Royal Air Maroc.

We have also acted as:

- > the sole arbitrator in an ICC arbitration between a Belgian company and a Moroccan company; and
- > the sole arbitrator in an ad hoc international arbitration under Moroccan law.

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