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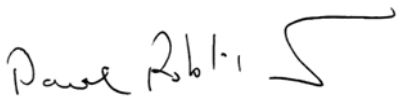

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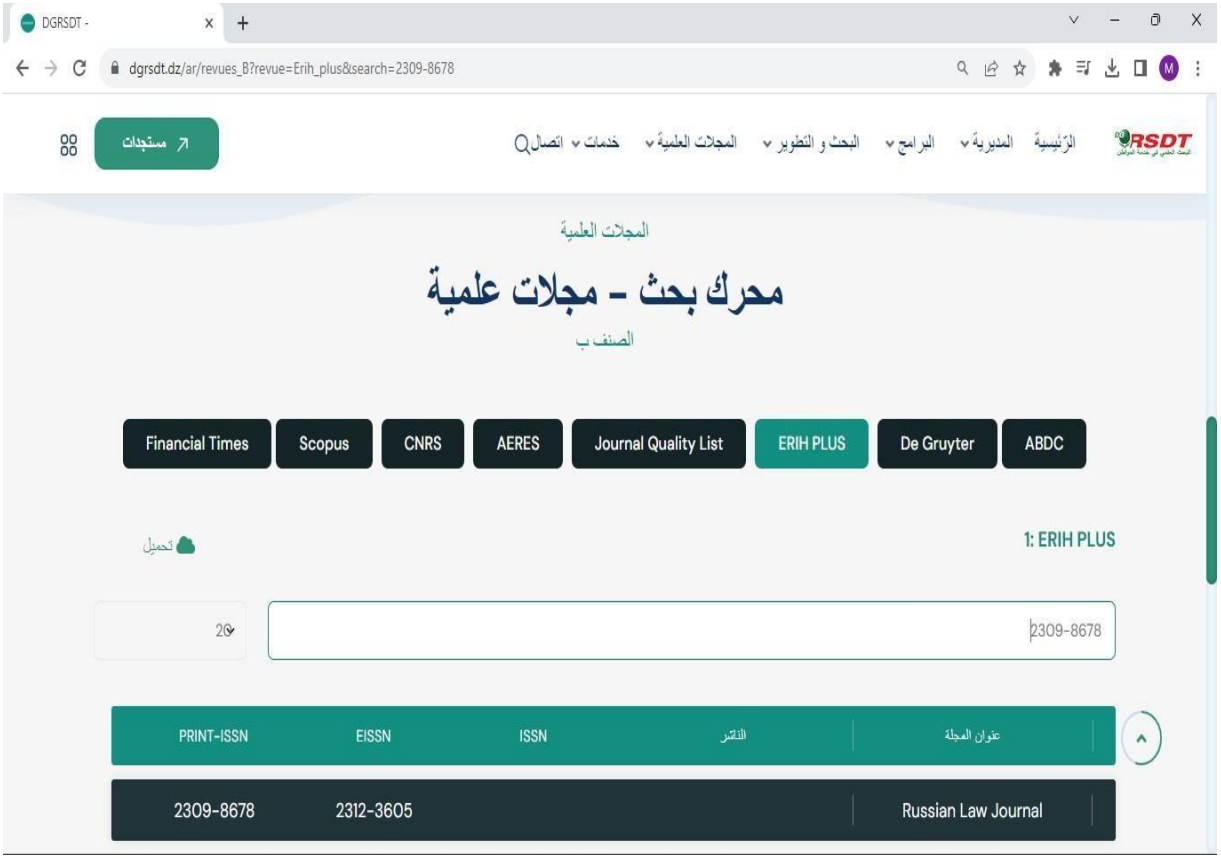

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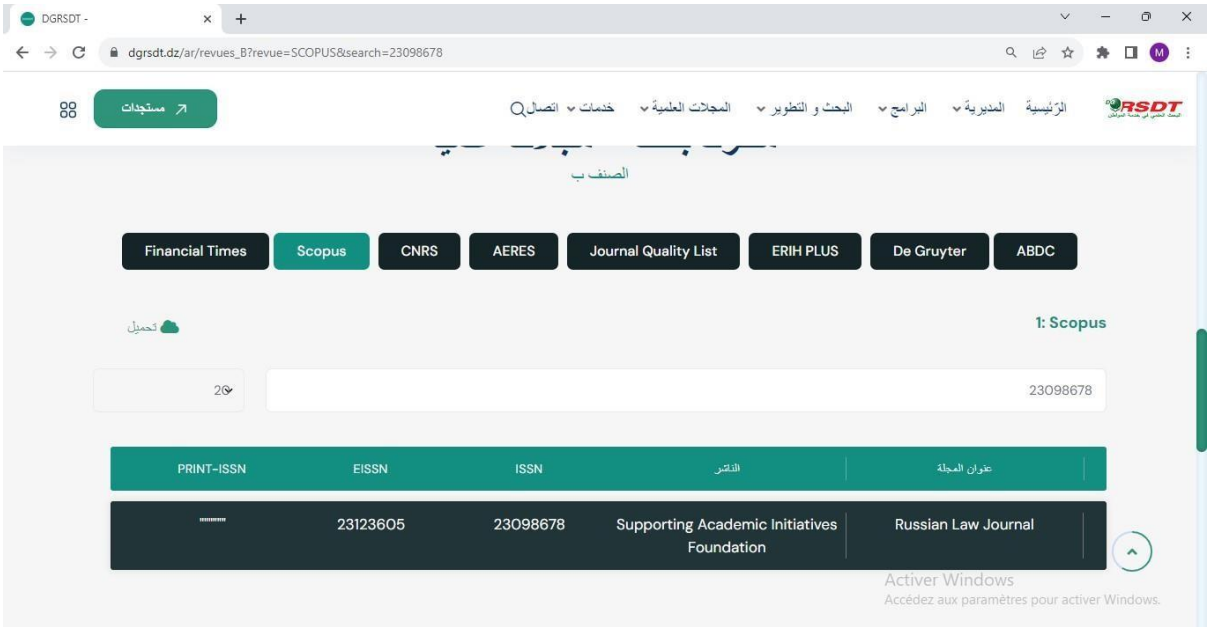

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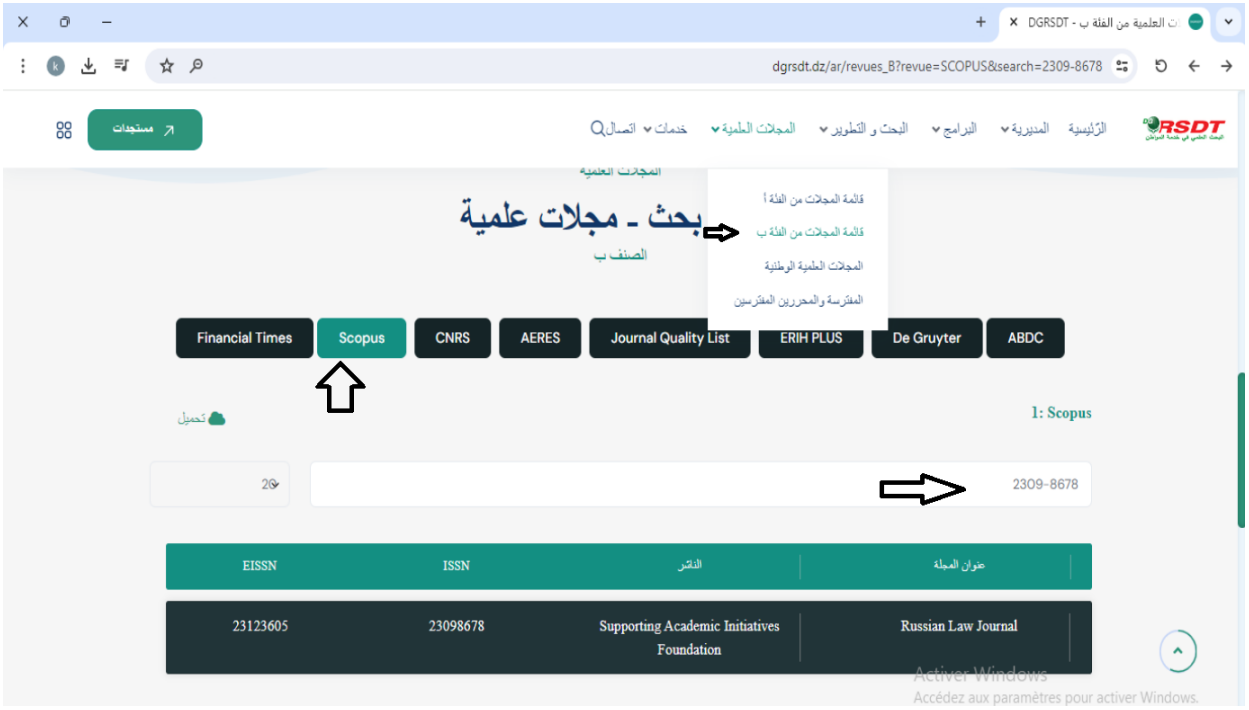

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THE MANIFESTATIONS OF THE RETREAT OF ADMINISTRATIVE LAW IN FAVOR OF COMPETITION LAW RULES IN ALGERIAN LAW

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Abstract:
While administrative doctrine has affirmed the established rule that administrative law is based on foundations - which are at the same time more controversial - the most important of which are the public service and the public contract, this rule is witnessing changes in light of the newly established competition law rules. The legal development proves that the economic aspect has an impact on the public aspect, through the new conception by competition law of the administrative concepts represented in the concept of the public service and the principles on which the public contract is based. This has currently formed the idea of "the retreat of administrative law in favor of business law in general and competition law in particular." To what extent has competition law imposed its rules on these concepts and their variables?
Keywords: *Public Service, Public Contract, Economic Activity, Competition Law, Intervener, Administrative Law, Enterprise, Administration, Judiciary.*

INTRODUCTION:

Competition[1] law encompasses the orientations of public authorities to establish the principle of freedom of competition in the market, as a principle resulting from the constitutional enshrinement of freedom of trade[2]. However, one of the current challenges on the legal scene is the concern about its impact on administrative law[3], in addition to the challenges facing this law, whether at the local or international level. These include the transition from a monopolistic to a competitive system, the non-competitive features of the market such as natural monopoly, digitalisation and the flow of information in the financial market, the practices of multinational companies and the liberalisation of international exchanges between institutions.

If competition law, as a newly emerging economic legislation, is in line with the market economy and belongs to the branches of economic law, and its content is comprehensive rules that do not recognise legal boundaries and controls that govern and frame any market, regardless of the type of activity carried out in it or the status of the institution active in it, whether it has a political (public authority guidelines), social (indirect consumer protection) or economic (economic project and its concentration) dimension, it has been extended to laws that previously had their own specificities, as is the case with public law (administrative law).

Administrative jurisprudence has emphasised the rule that administrative law is based on several foundations and principles, which are at the same time more controversial, the most important of which is the public service. On the other hand, the public administration can achieve its administrative objectives by means of administrative contracts, the most important of which are public procurement contracts. The legal and economic evolution that has taken place shows that the economic aspect has an impact on the public aspect, through the conception of competition law of administrative concepts that were previously considered constant and unchangeable, such as the concept of public service and the principles on which public procurement is based. This has given rise to the idea of “the retreat of administrative law in favour of economic law in general and competition law in particular”.

If competition law, which is an economic law, is in line with the market economy and is characterised by specificity and does not recognise legal boundaries, and if on the other hand the foundations and

objectives of administrative law (the concepts of public service and public procurement) were characterised by stability, to what extent has competition law imposed its rules on these concepts and their variables?

In order to address this issue, we have chosen the analytical approach, given its importance and the appropriateness of its use in the study and analysis of legal texts, as well as the expanded powers of the judiciary in this vital area, based on a review of the main concepts of administrative law, which constitute two hypotheses: the first is the retreat of public service in favour of competition rules, and the second is the retreat of public procurement in favour of competition rules.

The article as a whole aims to address a fundamental issue, which is one of the consequences of the current trends towards the disappearance of the distinction between public and private law, which is one of the pillars of economic law.In order to examine this issue, I have structured my study according to the following plan:

Chapter One - The decline of the concept of public service in favour of competition rules

Section One - The rule that all public services are subject to competition law

Section Two - The Established Exceptions to the Rule of Subjection of All Public Services to Competition Law

Chapter Two - The decline of public procurement principles in favour of competition rules

Section One - The Rule of Subjection of Public Procurement to Competition Law

Section Two - The Exceptions Created to the Rule of Subjection of Public Procurement to Competition Rules

To be continued:

Chapter One - The decline of the concept of public service in favour of competition rules

The concept of the public service, according to the proponents of the public service school, is the core of administrative law, to which all its subjects are attributed and the scope of its competence and jurisdiction is determined[4]. This concept is considered one of the most controversial in administrative law. Anyone who wishes to study this law must take a certain position on this concept and thus participate in the ongoing debate on the definition of the public service and its legal system[5]. Competition law, on the other hand, is "the set of legal rules that regulate the competition between companies to win and keep market shares and customers"[6]. Therefore, we distinguish between the rule that all public services are subject to competition law and the exceptions that are imposed on them:

The first requirement - the rule that all public utilities are subject to competition rules

Before discussing this rule, it is appropriate to take a brief look at the concept of public utility in administrative law and to distinguish it from the concept of public institution, both through the new understanding of the concepts of public utility and public institution in competition law and through the opening of public utilities to competition and the explanation of the concept of institution in competition law:

The First Branch - The Concept of the Public Utility and its Distinction from the Public Institution

First - The concept of public utility:

One researcher[7] mentioned that attempts to define the public utility are represented in two main trends: a trend that focuses on the subjective (formal) criterion, which is called the public utility institution, and a trend that focuses on the material (objective) criterion, which is called the public utility activity.

Public utilities are diversified and divided into several classifications, according to the nature and subject of their activity, into administrative public utilities, social public utilities, economic public utilities and professional or trade union public utilities, and on a regional basis, into central and national public utilities and local public utilities[8].

As one of the reasons that have contributed to the emergence and aggravation of the crisis of the public service as the basis of administrative law, jurists mention the extension of public law instruments beyond the scope of public services to apply to private activities of public interest[9]. From another point of view, some have pointed out[10] that competition law, as a recently established legal

framework, but the originality and uniqueness of its rules is highlighted by the fact that it represents a revolution in the concept of economic law due to its link with the economic system and economic activity, which has come to touch all areas of contemporary life.

Competition law, which has evolved from a special competition law to a general competition law[11], has raised the question of the jurisdiction of the administrative courts. The competent judge has become the judge who hears cases of public liability aimed at determining the damage caused by anti-competitive practices. This jurisdiction in competition matters conflicts with a fundamental principle of the Constitution, namely the hierarchical order of legal rules. In addition, this tradition does not regulate all the legal problems that should be within the competence of the ordinary judge, which is established by law[12].

Apart from the fact that the administrative judge is also the competition judge, the more important problem is the administrative judge's experience in applying the competition rules, whether it be in setting the standards for their application or because of the complexity of economic analysis and economic concepts, of which his understanding is still weak[13].

In an action for damages, the administrative judge intervenes when competition is affected as a result of a contract between an economic operator and a public authority (as is the case when a concession contract is drawn up for the management of a public service or when a public contract is concluded), causing damage that allows others to bring an action for damages[14].

Second - The distinction between the concepts of "public service" and "public institution":

If the theory of the public service is the creation of the judiciary and the formulation of jurisprudence, the idea of the public institution is an innovation of the legislator, driven by the necessities of organising society and managing the economy[15]. Some say[16] that public services are projects entrusted with the provision of public services, while the institution is a concept that exists in itself and is distinct from the status of public services.

The second branch - the perception of competition law of a new concept of public service and public institution:

The transition from public monopoly to competition has led to a re-examination of the functions of the State and its relationship with the economy, by completely separating its functions as an economic commercial agent from its functions as a public authority guaranteeing the public service[17]. The law applicable to its institutions is one aspect of the distinction, but it is not a decisive criterion, since it is a partial submission related to production and sales relations (relations with others), but in its relations with the State it remains subject to the rules of administrative law, in particular the rules governing the operation of public services[18].

Firstly, the opening up of public services to competition:

The rules of competition have replaced the traditional rules of administrative law. For example, whereas public services were subject to the principle of proportionality between price and service, the principle of freedom to set prices now governs the activities of public operators[19].

The rationale for this approach is that in the application of the constitutionally guaranteed principles of freedom and equality, everyone, including state interests, must be subject to the same legal rules. However, the principle of equality in the economic field remains one of the most important and prominent applications of the principle of equality at the present time[20].

The concept of economic operator has been extended to include public operators, as stated in the Competition Act, "...including those carried out by public persons..."[21].

However, its application depends on the extent to which the economic activity is linked to the performance of public service tasks and the exercise of the powers of the executive authority, as addressed by the legislator in the 2008 amendment: "However, the application of these provisions shall not impede the functioning of the public service or the exercise of the powers of the public authority"[22].

The special features of public undertakings, in particular those relating to the non-use of enforcement methods provided for in private law, are not intended to affect competition, given that

a balance must always be struck between the requirements of continuity of public services and the principle of equality established in the competitive game[23].

The concept of "public service for all" was introduced in Algeria by Law No. 2000/03 of 5 August 2000, which lays down the general rules governing postal and telecommunications services[24].

The legislator adopted the provisions of Decree 95/06 on competition (repealed by Law 03/03) for the development and provision of its services, while Article 1 of Law 2000/03 states: "The purpose of this Law is ... to create a competitive environment without discrimination ..."[25].

However, there are those who[26] believe that subjecting public entities to competition law raises doctrinal controversies because, in addition to their natural competence as a public authority, they exercise the activity of economic enterprise. We can ask the following question: Can the State, through its institutions, engage in commercial activity? And, consequently, be subject to special rules, the most important of which are the rules of competition? Some[27] have said that there is no doubt that public legal persons have the right to engage in commercial activities, as this is the basis of their activity (articles 1 and 2 of the Commercial Code).

The question arises as to whether the acquisition of the status of trader by the State is contrary to the principle of freedom of trade and industry. There are two opposing views: one group prohibits any state intervention in commercial activity, while the other group allows circumstantial state intervention in commercial activity[28].

In reality, the calm interpretation of the State's intervention or non-intervention is linked to the economic approach it has chosen for itself, whether it is a capitalist or a socialist approach[29].

According to some[30], in any case, the answer will lead either to a retreat of state intervention in the economic field, leading to a reduction of public law rules, especially administrative law rules, or to the opposite, where administrative law rules will be strengthened and expanded.

Others believe that[31], behind the appearance of the consolidation of the principle of the withdrawal of the State from the economic sphere, there is a revival of the classical instruments for the regulation and control of economic activity, which suggests that the reception of liberal law in Algeria was merely a stock-taking exercise.

It should be noted that the opening up to competition and the transition from a situation of "shortage" to one of "surplus", in the words of economists, has transformed the relationship between the commercial and industrial public services and their beneficiaries into a purely commercial one[32].

Second, the concept of the institution in the context of competition law:

1. The concept of legal personality:

The Civil Code[33] enumerates them, including: the State, the wilaya (province), the municipality, public bodies of an administrative nature, civil and commercial companies, associations and institutions, foundations and any group of persons or assets granted legal personality by law.

In Algeria, there are public entities with legal personality: the State, the former Prefecture of Greater Algiers, the wilaya, the commune and the public institution. These entities also have organs and financial assets, as well as rights and obligations. Their activities entail responsibilities[34].

2- Personality of the moral person in competition law:

The concept of "undertaking" in competition law is based on the economic activity carried out by the market participant, without taking into account its legal form and the extent of its legal personality[35]. In order to broaden this concept, it has followed the example of the European Court of Justice in one of its decisions on the enterprise, which defines it as "an economic unit having as its object the subject matter of the agreement in question, even if that economic unit is legally composed of several natural or legal persons"[36].

In order to determine when we are dealing with an "enterprise", we note that the Legal Committee of the European Union, for example, has based itself on the idea of the degree of participation in the competitive game in the market, and has therefore considered any person acting freely in the market as an enterprise[37].

It should be noted that at the end of the nineteenth century and the beginning of the twentieth century, economic entities worked on concentration and aggregation in order to withstand

competition in the market, either by using their power of existence or by controlling product prices and their markets[38].

Second requirement - exceptions to the rule that all public services are subject to competition rules:

If the general rule is that all public services should be subject to competition law, this rule is not absolute, since there are exceptions relating both to natural monopoly and to the social character and privileges of public authority, which we will discuss below:

Section One - On Natural Monopolies:

This justifies the state monopoly over certain strategic sectors, known as natural monopolies, where the state has the exclusive right to intervene. Examples include electricity, gas, postal services and rail transport.... And other[39]. However, technological development is a source of crisis for natural monopolies. In the mobile telephony sector, for example, the use of "Hertzian networks" allows each operator to set up its own network, eliminating the need to use wireline networks[40].

It is observed that the monopolistic company tries to serve its own interests, even if this is contrary to the public interest, such as reducing production in order to increase prices[41].

Section two - The social aspect:

Activities of a non-economic nature, such as the provision of purely social services[42], do not fall within the scope of this law. These public entities carry out general social activities aimed at achieving social objectives and meeting social needs, such as the social security system. This type is subject to a mixture of administrative and private law[43].

Section Three - Prerogatives of the public authorities:

The Algerian legislator has exempted from competition rules[44] the activities of public persons in the exercise of public authority and the performance of public service missions. However, some have concluded[45] from Article 2 of the Competition Law that the legislator did not exclude the public sector from the application of competition law, but that the difficulty lies in the restrictive practices resulting from the acts of legal persons closely linked to administrative activities.

Chapter Two - The decline of public procurement principles in favour of competition rules

In addition to public service as an aspect of the decline of administrative law in favour of competition rules, public procurement is another manifestation of this trend. We will look at the rule that public procurement is subject to competition rules and the exceptions to this rule.

The first requirement - the rule of subjecting public contracts to competition rules:

The aim of the reform of public procurement legislation is to enable the contracting authorities to meet their needs in a transparent manner, while respecting the conditions of a competitive economy and ensuring the optimal use of public funds[46]. This is what the new Public Procurement Act has recently guaranteed[47].

The economic nature of the competition law has manifested itself in the fact that all economic activities are subject to its provisions, which are reflected in the production, distribution and service activities, import activities and activities related to the distribution process and public procurement[48].

The First Branch - The Public Procurement Law includes competition law among its references:

If we refer to the aforementioned Public Procurement Law, we find that it includes among its references the Law regulating competition, indicating the close relationship between the two laws, all in support of the legal and judicial protection of the exercise of free competition in the light of the conclusion of public contracts[49].

The legislative will has introduced reforms in the organisation of public procurement and public service delegations, taking into account the principles of competition, investment[50], the position of public contracts in the State's finances and trade as a whole, in order to ensure the proper use of public funds.

The second branch - principles of competition and public procurement:

Since public procurement is linked to the public purse, the administration must be subject to specific methods for concluding contracts, as well as a defined and diverse control framework, with the aim

of rationalising public expenditure and limiting, as far as possible, negative behaviour and the waste of public funds[51].

Conversely, the importance attached by investors to a stable and clear legal and institutional framework, i.e. to attract foreign investors, as well as the requirements arising from our country's integration into the regional and global economy, are among the reasons that have led Algeria to reconsider the competitive path[52]. These objectives are expressed in the Public Procurement Law[53], which stipulates that "public procurement shall respect the principles of free access to public tenders, equal treatment of candidates and transparency of procedures", making them a means of ensuring the efficiency of public procurement and the proper use of public funds.

These principles, which are inspired by global and constitutional objectives relating to citizenship and human rights, as well as equality of opportunity, all revolve around the orbit of freedom of competition, which concerns, among other things, public procurement from the announcement of the tender to the final award of the contract[54].

Firstly, the principle of free access to public contracts:

Presidential Decree No. 08/338, in Article 2 (bis) (corresponding to Article 5, paragraph 1, of the new Law 23-12), for the first time enshrined the principles of freedom of competition in public procurement, unlike previous regulations, and even if not explicitly mentioned, these principles have evolved in the successive regulations in this field[55].

Freedom of access to public tenders means that any person who fulfils the conditions announced in the procurement procedures may compete to benefit from the performance or acquisition of the contract[56].

Since the rules of competition are general freedoms that must be respected, since they allow institutions and economic operators equal opportunities in access to public procurement, they are the best means for them to exercise their legitimate rights in the exercise of the freedoms of trade and competition[57]. However, contracts concluded with public entities subject to the legislation governing commercial activity have been excluded when they carry out an activity not subject to competition[58].

Therefore, the criterion under consideration is both subjective (public entities subject to the legislation governing commercial activity) and objective (the exercise of an activity not subject to competition)[59].

This freedom means that access to public procurement is possible for anyone who fulfils the objective conditions laid down, and these conditions must be as far removed as possible from subjective or discriminatory considerations that favour one person to the detriment of another, for whatever reason, as stated in competition law[60]. The way to establish the principle of free access to public procurement is through mandatory formal and substantive advertising, which is necessary to create a real field of competition among those who wish to contract with the administration and has been established in mandatory terms[61].

Secondly, the principle of equality between economic operators, whether private or public, where competition law applies to production, distribution and service activities, including those carried out by public entities when they do not fall within the exercise of public authority or the performance of public service tasks[62].

Some argue[63] that if private activities cannot be carried out and performed in competition with public monopolies, the latter should be excluded from the scope of the principle of freedom of competition. Article 8 of Law No. 06/01 on the prevention and combating of corruption stipulates that public procurement procedures must be based on the principles of transparency, fair competition and objective criteria[64]. This has made the field of public procurement a fertile ground for the crimes of bribery and favouritism, despite the Algerian legislator's persistent efforts to address and combat them through various amendments affecting the organisation of public procurement and the law on the prevention and combating of corruption[65].

Thirdly, the principle of procedural transparency:

This means the clarity of the procedures, the prior information of the competitors on the selection criteria, the need to advertise through the established channels and others. The Competition Act has provided examples of unfair practices in this area, including obstruction of pricing according to market rules[66].

The second requirement - exceptions to the rule that public procurement is subject to competition rules:

Presidential Decree No. 15/247 on public procurement introduced more effective measures, including the promotion of national production and the national production tool, the allocation of a percentage of contracts to national companies and the obligation for foreign contractors to invest in a partnership[67]. This is in line with what the new Law No. 23-12 has included in the third chapter on government policies, which, in addition to the promotion of national production and the national production tool, includes the promotion of employment and professional integration[68].

The first branch - what is related to the promotion of national production and the national production tool:

Through the case of the obligation to invest within the framework of a partnership[69], and the case of meeting the needs of the contracting authorities by small or very small enterprises or emerging enterprises bearing the brand or employing a minimum percentage of workers with physical disabilities[70], and these needs can be up to 20% of the public demand[71]. Craft services are allocated to national craftsmen[72] and a margin of preference is granted to products of Algerian origin and/or to companies subject to Algerian law whose majority capital is held by resident Algerians[73].

In order to promote the national product in the face of fierce competition, some have suggested[74] including the protection of the local product from competition with similar imported products, as well as the phenomenon of market dumping through the import of large quantities of foreign products that can be produced locally.

The second part - relating to the promotion of employment and professional integration:

Calls for tenders for national participation must include minimum conditions relating to the promotion of employment and professional integration, particularly in the administrative, legal, financial, technical and environmental fields, in addition to the initial qualification conditions relating to the subject of the contract[75]. In the case of foreign contractors or subcontractors, calls for tenders must include a commitment to a minimum level of professional integration of local workers and qualified national executives, in order to enable them to develop skills and acquire experience[76].

Conclusion:

We conclude that the new concept of public service and the principles of public procurement in competition law, as manifestations of the decline of administrative law in favour of competition rules, are characterised by specificity. As far as the public service part is concerned, since competition law does not recognise the status of intervener, even when it concerns a public legal entity, any natural or legal person has the right to engage in economic activity, even when it concerns the State, since it is subject to the rules of the free market and the principle of equality linked to the freedom of competition, which are constitutionally guaranteed and form the basis of contemporary economic systems, which has led to a new shift in the concept of legal personality in competition law.

This openness has also been reinforced in the principles governing public procurement, which as a whole revolve around the freedom of competition from the announcement to the final award of the contract, protecting it from anti-competitive practices and considering public procurement as a fertile ground for crimes of bribery and favouritism.

From our point of view, in order to activate these concepts, we propose to address the deficiency in the legal system that regulates the foundations of administrative law and its principles related to public services and public procurement, which would contribute to ensuring the investment and competitive climate for the specificity of this market.

Finally, on the basis of the developments and specificities of the concepts of public service and public procurement in competition law, we can ask the following question: Does the consecration of the liberalisation of public services and the strengthening of the principles of public procurement in competition law reflect the future of not violating the "principle of equality between operators"?

Footnotes:

[1]- Decree No. 03-03 of 19 July 2003 (Official Gazette, No. 43 of 20 July 2003), as amended and supplemented by Law No. 08-12 of 25 June 2008 (Official Gazette, No. 36 of 2 July 2008), as amended and supplemented by Law No. 10-05 of 15 August 2010 (Official Gazette, No. 46 of 18 August 2010).

[2]- Article 61 of Presidential Decree No. 20/442 of 30 December 2020, relating to the promulgation of the constitutional amendment approved in the referendum of 1 November 2020 (Official Gazette of 30 December 2020, issue 82), which states: "Freedom of trade, investment and enterprise shall be guaranteed and exercised within the framework of the law."

[3]- In our study, we refer to the concepts of "public service" and "public procurement principles", as they are among the most controversial concepts in administrative law. See the works on administrative law by Ahmed Mahiou, Lectures on Administrative Institutions, translated by Dr. Mohamed Arab Saassila, University Publications Office, Third Semester of the Bachelor of Laws, Fourth Edition, Ben Aknoun, Algeria, 1986, p. 32 et seq. and p. 425 et seq. Labad Nasser, Concise Administrative Law, El Majid Publishing and Distribution House, Algeria, Sétif, 2010, p.28 et seq. Ammar Boudiaf, Concise Administrative Law, Jussour Publishing and Distribution, fourth edition, Algeria, 2017, p.118 et seq. and p.429 et seq.

[4]- Ammar Boudiaf, op.cit., p.125.

[5]- Ahmed Mahiou, op.cit., p.429.

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[7]- Labad Nasser, op.cit., p.187.

[8]- Ammar Aouiddi, Administrative Law, Administrative Activity, University Publications Office, Algeria, 2002, p.62.

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[17]- Boudjemeline Walid, Economic Regulatory Authorities in Algerian Law, Dar Belkis, Algeria, 2011, p.5

[18]- Masaoud Chiheb, General Principles of Administrative Disputes, Volume II, Theory of Jurisdiction, Office of University Publications, Algeria, 2013, p.22. (ed.)

[19]- Brahimi Fadhila, The Principle of Free Competition in the Case of Delegated Management of Public Services, Doctoral Thesis in Law, Mouloud Mammeri University, Faculty of Law and Political Science, Tizi Ouzou, 2020, p.23

[20]- Tiourssi Mohamed, Legal Controls on Competitive Freedom in Algeria, Houma Publishing, Algeria, 2013, p.358

[21]- Article 2 of the aforementioned Competition Law No. 03-03.

[22]- (Ben Hamida Sami, Competition Law, Numidia for Printing, Publishing and Distribution, Algeria, 2006, p.49. adapted)

[23]- Taoufiki Mohamed, op. cit., pp. 359 and 360. Adapted)

[24]- Labad Nasser, op. cit., p. 34 and following. Adapted

[25]- Adja Al-Jilali, The Previous Reference, p.496

[26]- Bouguelmouna Walid, Law of Economic Regulation in Algeria, Dar Balqis, Algeria, 2015, p.99

[27]- Feriha Zarawi Saleh, The Complete Algerian Commercial Law, Commercial Acts - Merchants - Craftsmen - Organised Commercial Activities - Commercial Register, Published and Distributed by Ibn Khaldoun, Second Edition, Oran 2003, p.360 et seq

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[29]- Tripoli Programme, Newsletter of the Ministry of Information and Culture, Algeria, August 1976, p.41, cited in: Ajja Al-Jilali, Company Law, p.17

[30]- Labad Nasser, supra, footnote p.48.

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