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The Scope of the Activity of Occupying National Property Subject to Competition Law

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Abstract:

This study focuses on the compliance of national public assets with competition rules. We have looked at the management and exploitation of national properties with the aim of clarifying the extent to which the activity of exploiting national properties is subject to competition rules without conflicting with the exercise of public authority powers. The importance of this study lies in the enrichment of the academic and research perspectives on the issue of competition law regulation of production, distribution and service activities, including those carried out by public entities.

We have concluded with several findings that can serve as a reference for public administrations, as well as clarifying the vision of economic operators regarding the limits of decisions that enjoy public authority privileges. This, in turn, can foster trust among them. In addition, these findings can serve as an interpretative aid in the event of different points of view.

Keywords: State property, public bodies, competition law, administrative decisions, public institutions.

1. Introduction:

National public property is an important resource for the State. These properties include all movable and immovable assets and rights owned by the State and its regional entities. The Constitution and Algerian law classify national property into two types: public property, which is allocated for the public good and is used by everyone either directly or through public institutions, and private property, which is intended solely to generate income and increase state resources.

The Algerian legislator has established in specific laws various mechanisms and methods for the management of state property, but has ultimately opted for management by contract. The management of national assets by contract may affect competition if the actions resulting from the contract fall within the scope of production, distribution or services, according to Article 2 of the amended and supplemented Competition Law 03-03. Therefore, the issue of administrative decisions concerning the exploitation of national properties raises ambiguities as to whether they enjoy the privileges of public authority and whether they are subject to the provisions of competition law.

The aim of this study is to clarify how national property is used and to what extent administrative decisions in the context of the use of national public property enjoy the privilege of public authority, and thus to what extent the activity of using national public property is subject to competition rules. The importance of the study lies in enriching the academic and research discourse on the issue of public authority privileges in activities carried out by public entities[1]. In addition, it aims to provide a reference for public institutions, economic operators and students studying this field, by addressing the following problem:

What is the scope of the activity of occupying national property under competition law?

The temporal and spatial framework of the research is defined from the promulgation of decree 03-03 on competition in Algeria to the present day. This includes a specific human and subject scope within the categories of economic agents and public institutions engaged in production, distribution and service activities.

We used a descriptive methodology to outline the national property characteristics and their content, as well as an analytical approach to analyse and classify the administrative decisions, which was necessary to address the issue at hand. We have divided this topic into two main sections: the first section deals with the rules governing the use of national assets, while the second section examines the position of licences and contracts for the use of national assets in relation to competition law.

2. Rules governing the use of national properties

[1]- Order 03-03, dated 19 Jumada al-Awwal 1424 (July 19, 2003), concerning competition, published in Official Gazette No. 43, amended and supplemented by Law 08-12 dated 21 Jumada al-Thani 1429 (June 25, 2008), Official Gazette No. 36, and Law 10-05 issued on Ramadan 8, 1431 (August 18, 2010), Official Gazette No. 46.

National properties are divided into two main types: public national properties and private national properties[2]. Article 61 of Law 90/30 states that the public can directly use public national properties and that they can also be used through a public service, either through agency management or under a concession. The rules governing the use of public property thus vary according to the way in which it is allocated, distinguishing between the collective public use of public property and its private use.

2.1 Collective use of national public goods

Definition of collective use

The term "collective use" of public national properties refers to ordinary use in accordance with the general objectives of allocation, such as the use of roads, beaches, rivers and seas by everyone. This direct collective use is governed by general principles that include freedom of use, free access, and equality of use[3].

2.1.1 Freedom of use:

This principle allows individuals to use public property freely and at any time, as long as the use does not contradict the designated purpose of the facility. Use must be normal and in accordance with the rules laid down by law and regulation, such as the prohibition of swimming on polluted beaches; Mandatory observance of traffic signs;…….

2.1.2 Equality of use

This principle is enshrined in Article 155 of Executive Decree 91/454, which sets out the conditions for the management of public and private property owned by the State. It states that all individuals should have equal access to public national property[4]. However, this equality should be understood in a positive rather than a negative sense. This means that equality does not apply indiscriminately to all citizens, but rather to those who meet the same conditions - specifically, within the same category of individuals. For example, equality in

[2]- Article 17 of the Algerian Constitution and Article 02 of the National Property Law. Law No. 90-30 dated December 1, 1990, concerning national property, Official Gazette No. 52 dated December 2, 1990, amended and supplemented by Law No. 08-04 dated July 20, 2008, which amends and supplements Law No. 90-30 concerning national property, Official Gazette No. 44 dated August 3, 2008.

[3]- Samaaini Hajar, "Protection of Public and Private National Properties and Resulting Disputes," Algerian Comparative Public Law Journal, Volume 4, Issue 2, 2018, pp. 234-245.

[4]- This principle is constitutional, as all constitutions affirm equality before the law, including the Algerian Constitution in Article 29.

applying for a job is granted to anyone who has the relevant qualifications or credentials.

2.1.3 Free use:

The principle is that citizens do not pay for the use of public facilities. However, the law may authorise the imposition of certain charges for the use of certain types of national property. Undoubtedly, these revenues are aimed at ensuring the proper functioning of public facilities and providing resources to enable their effective use and maintenance[5].

It is worth noting that there may be exceptions to the collective use of public national assets. In general, these exceptions relate to the authority of the administration to maintain public order and security, or to temporarily restrict use for maintenance purposes, whether partially or completely.

2.2 Private use of public property

Private use is the use by individuals of a portion of public property intended for common use by the public. Private use is authorised by a unilateral contract issued by the administration managing the national property or on the basis of a bilateral contract between the administration or managing authority and the beneficiary[6].

2.2.1 Private use of property through administrative licences

The private use of public property is possible with a unilateral administrative licence, which the legislator has defined as a "parking permit" and a "road permit".

A. Parking Permit

This is a situation in which the administration grants an individual permission to use public properties for a certain period of time (Aili, 2018). The legislator referred to this in Article 70 of Executive Decree No. 12-427 on the management and administration of state public property, which states that the use of these properties is subject to fees. These authorisations are temporary and

[5]- Abdel Salam Youssef, Hattash Abdel Aziz, "Graduation Thesis for Obtaining a Degree from the Higher School of Justice," Higher School of Justice, Algeria, 2007, p. 13.
[6]- Article 64 of Executive Decree No. 427-12, dated 2 Safar 1434 (December 16, 2012), specifies the conditions and methods for managing and operating public and private properties belonging to the state, Official Gazette No. 69.

revocable in the public interest or for the maintenance of order, and are granted on the basis of a unilateral contract.

Article 71 of the same decree defines it as the authorisation to occupy a piece of public land for private use, without building any structures on the land, and it is granted to a specific beneficiary. According to Article 71 of Decree No. 12-427, it is the authorisation to occupy a piece of public land for private use, without building on it, granted to a specific beneficiary by the administrative authority responsible for the safety of traffic through the public land in question. This authority also has the discretion to refuse to grant the authorisation.

From the above, it can be concluded that this is a temporary authorisation. The use of public property does not require a permanent connection to the property and the granting of the permit does not pose a risk to public property[7].

Example: Allowing a shopkeeper to display some of his goods outside his shop, or allowing a café owner to use part of the pavement to set up tables.

B. Road concession

According to Article 72 of Executive Decree No. 12-427, which concerns the conditions for the management of private and public property owned by the State, a road permit is defined as "the authorisation to use a piece of public property intended for public use for private purposes, with the construction of structures on the land, granted to a specific user. This includes works that alter the fundamental aspects of the occupied property".

This permission often results in changes to the roadway or its configuration. Examples include permits for the installation of petrol stations, kiosks, mining permits and permits for the installation of gas and water pipes, among others. The authority responsible for managing public property grants or refuses the road permit. It may also be granted by the mayor or governor through a decision if the management of public properties is supervised by another administrative authority (Dahlouk, 2017).

From this, we conclude that the road permit is an individual administrative act, and therefore this decision enjoys the prerogatives of public authority. Its application is often manifested in specific legal texts, including those related to mining activities, postal services and telecommunications, as well as laws

[7]- Aili Ridwan, "The Algerian Administration and Contracts of National Property," Academy of Social and Human Studies, Department of Economic and Legal Sciences, Issue 20, June 2018, pp. 118-126.

governing the exploration, extraction and transport of hydrocarbons through pipelines[8].

2.2.2 Private use of property through a bilateral contract

This refers to the use of a portion of public property on the basis of a contract concluded between the administration and an individual with the aim of exercising an unusual use of a portion of public national property[9] (Mohamed Farouk, 1984, p. 698). In addition to the provisions of Article 64 of Executive Decree No. 12-427, which outlines the conditions and methods for the management of public and private property[10], Presidential Decree No. 15/247 on public contracts and the delegation of public services also specifies several forms of contracts for the occupation of public property[11], including: the concession contract, the management contract, the lease contract and the incentive agency contract. The occupation of these properties may also take other forms, according to certain rules[12]. The main characteristics of these contracts, as defined by the legislator, are set out below.

A. Concession Contract

Unlike the National Property Law of 1990, which did not define the concession contract, the 2008 amendment to the National Property Law provided a detailed definition. Article 64 bis of the aforementioned law states: “The granting of a concession for the use of public national property, as provided for in this contract, allows the public entity that owns the property, referred to as the authority with the right of concession, to grant to any legal or natural person, the concessionaire, the right to exploit the annexes of the natural public property, to finance, construct or operate a public facility for the purpose of public service for a specified period of time. At the end of this period, the facility or installation subject to the concession is returned to the authority holding the concession...”.

[8]- Aili Ridwan, ibid
[9]- Muhammad Farouk Abd al-Hamid, "The Legal Status of Public Property: A Comparative Study," University Publications Bureau, Algeria, 1984, p. 698.
[10]- Executive Decree No. 427-12 specifies the conditions and methods for managing and operating public and private properties belonging to the state, previous reference.
[11]- Presidential Decree No. 15-247, dated 2 Dhu al-Hijjah 1436 (September 16, 2015), includes the organization of public procurement and public facility delegations.
[12]- See Article 210 of Presidential Decree No. 15-247, dated 2 Dhu al-Hijjah 1436 (September 16, 2015), concerning the organization of public procurement and public facility delegations.

The terms of the concession contract define the specific conditions that must be met in order to fulfil the requirements of the public service. This definition shows that the concession contract consists of several elements:

- The public administration grants a legal or natural person the right to use public property or to finance or construct a public facility for the purpose of providing a public service.

- The temporary nature of concession contracts, since the "Law 90-30 on National Property, as amended and supplemented" does not specify this duration. However, Article 75 of Decree No. 12-427 states that these concessions may not exceed 65 years.

Examples of such contracts include concessions for the occupation of market spaces, beach concessions, concessions for the exploitation of air services (Civil Aviation Law) and the management of public parks (Aili, 2018).

The contract creates a set of rights and obligations for the concessionaire, which are outlined below:

A.1. Rights of the concessionaire

In accordance with Article 65 of Law No. 90-30 on National Property and Article 76 of Executive Decree No. 12-427 on the conditions for the management of private and public property owned by the State, the concessionaire's rights are as follows:

- The right of exclusive use of a part of the national public property.

- The right to receive the fees paid by the users of the facility.

- The right to rent to temporary tenants and the right to use reserved areas or properties as part of public service obligations.

- The right to compensation if, for example, the public administration changes the designation of the public property or cancels it before the end of the agreed term. However, the right to compensation is denied if the contract is terminated due to the concessionaire's failure to comply with the terms of the contract.

A.2. The concessionaire's obligations

According to Article 64 bis 1 of the amended and supplemented National Property Law, the concessionaire's obligations include the following:

- The obligation to maintain the public property.

- The obligation to pay an annual fee based on the rental value of the public property granted to it, which shall be collected for the benefit of the public entity that owns it, as specified in the terms of the contract.

B. Lease contract

Article 210 of Presidential Decree No. 15/247 on the organisation of public contracts and the delegation of public services defines a lease as "the obligation of the delegated authority to the delegate to manage and maintain a public facility in exchange for an annual fee paid to it. The delegate then operates at its own expense and responsibility. The delegating authority itself finances the construction of the public facility and the delegate's salary is paid by collecting fees from the users of the public facility".

From this definition we can deduce the following:

- The public entity must provide the facilities, buildings and essential equipment for the delegated public facility, while the delegate is responsible for the maintenance and upkeep of the facility.

- The amount of investment made by the public entity granting the delegation is a criterion for determining the duration of the lease; the greater the investment, the longer the duration, and vice versa. In both cases, however, it will be shorter than the duration of a concession contract.

- In practice, the delegate collects the fees from the users of the public facility, but the article states that the delegating authority is responsible for the collection and then pays the delegate's salary, which is procedurally difficult to implement. The text regulating this procedure should therefore be reviewed.

- The delegate is obliged to pay annual fees to the delegating authority and, in exchange for the use of the facilities, to transfer to the delegating authority (the public entity) part of the financial returns obtained from the operation of the public facility, and these funds can be invested in the development of the public facility.

C. Incentive Agency Contract

The incentive agency contract is defined as "a contract by which a public entity entrusts a public facility to a private individual in exchange for a fee paid by the latter to the contracting party, ensuring the proper operation of the facility, while the administration bears the financial risk of the project".

The Algerian legislator defines the incentive agency contract in Article 210 of Presidential Decree No. 15/247 on public contracts as follows “the delegation of the power to manage or supervise and maintain the public facility by the contracting authority to the delegate. The delegate operates the public facility on behalf of the delegating authority, which finances the construction of the public facility and retains the management. The delegate’s salary is paid directly by the delegating authority through a grant determined as a percentage of revenue, supplemented by a productivity bonus and, where appropriate, a share of profits. The delegating authority, in conjunction with the delegate, determines the fees to be paid by the users of the public facility and the delegate collects these fees on behalf of the delegating authority”.

From this definition, we can deduce that the essential elements (Fadl, 2018) of the incentive agency contract are:

- Parties to the contract: a public legal entity (the delegating authority) and an economic operator (the delegate).

- Subject matter of the contract: The contract relates to the management or supervision and maintenance of the public facility on behalf of the public legal entity.

- Financial compensation: The delegate receives financial compensation paid directly by the delegating authority, which consists of two components:

- Fixed component: A fixed amount of money, determined as a percentage of revenue, which the delegate receives regardless of whether the facility is profitable or not.

- Variable component: a bonus linked to the operating results of the facility, based on either the net profit of the project or the total income.

- Operational risks: the public entity bears the operational risks, while the delegate also bears part of this risk as his salary is linked to the operational results[13].

D. Management contract

[13]- Fadel Elham, "Provisions of the Encouraging Agency Contract in Light of Decree 15/247," Annals of Qalam University for Social and Human Sciences, Issue 25, December 2018.

The Algerian legislator has regulated the management contract under "Law Nº. (89/01)[14] of 7 February 1989 amending Decree No. (75/58)[15] of 26 September 1975 on the Civil Code". Article 1 defines the management contract as "the contract by which an operator of recognised repute, called the manager, undertakes to manage all or part of the assets of a public economic entity or a mixed economic entity in its name and on its behalf in return for a fee".

In the context of Article 210 of Presidential Decree No. 15/247, the management contract is described as the commitment of the delegating authority to the delegate to manage the public entity on behalf of the delegating authority. The delegate manages and maintains the facility and collects fees for the benefit of the delegating authority in exchange for a subsidy determined as a percentage of the revenue, together with a productivity bonus. The delegating authority sets the fees to be paid by users of the public facility and retains the profits. In the event of a deficit, the delegating authority compensates the manager, who receives a fixed fee in this contract.

The main difference between a management contract and an incentive agency contract is the financial compensation received by the delegate; in a management contract, the compensation is determined as a percentage of the revenue.

The management company benefits from the fees collected by the delegate and retains the profits. In cases where the delegate runs a deficit - where expenses exceed operating income, such as when maintenance costs exceed income - the delegating authority compensates the manager. Thus, the manager does not bear any financial risks arising from the management of the public facility [16].

3. The Scope of Licences and Contracts for the Use of State Property under Competition Law

With regard to the provisions on competition in articles one, two and three, we note that the legislator has established that the rules of this law apply - in general - to all areas of economic activity, including production, distribution, services and public contracts. However, it is emphasised that "the application of

[14]- Law (89/01), dated February 7, 1989, concerning the amendment of Order (75/58) regarding the Civil Code, Official Gazette No. 06 dated February 8, 1989.
[15]- Order No. (58/75) dated September 26, 1975, concerning the Civil Code, Official Gazette No. 78, issued on September 30, 1975.
[16]- Mabkhout Ahmed "Modern Forms of Delegation Contracts Related to the Management and Operation of Public Facilities," Journal of Legal and Economic Research, Volume 04, Issue 01 (2021), pp. 406-430.

the provisions of competition law must not hinder the performance of public service tasks or the exercise of public authority powers"[17].

Thus, the legislator has excluded from the scope of this law the actions of public entities carried out in the context of the fulfilment of public service tasks and the exercise of public authority powers. Furthermore, Article 61 of Law 90/30 on national property confirms the possibility for the public to use national public property through a public service in the form of management by delegation or concession, typically structured as licences and contracts. We therefore ask to what extent the licences and contracts relating to the exploitation and management of public assets are subject to competition law?

The answer to this question requires the following elaboration:

When public entities enter into contracts, they either act as public authorities and enter into administrative contracts, which have their own unique nature and administrative characteristics and are governed by public law rules during their formation and execution; or they do not act as public authorities, renouncing their public authority prerogatives, and are thus subject to private law[18] (Brahimi, 2004, p. 24).

But when do public entities act with the privileges of public authority, and when can they not rely on these privileges and stand on an equal footing with private law entities? The answer to this question lies in the distinction between public entities of an economic nature and those of an administrative nature.

3.1 Economic public bodies

In this category we distinguish between economic public bodies and public bodies with industrial and commercial characteristics[19] (Qaid, 2000, p. 178).

3.1.1 Economic public institutions

Article 1 of Law No. 88-01, which is the guiding law for public institutions, states that the state shall establish and supervise the operation of economic public institutions. This law distinguishes these institutions from other public bodies and

[17]- See Articles 1, 2, 3 of Order 03-03 dated Jumada al-Awwal 19, 1424 (July 19, 2003), concerning competition, Official Gazette No. 43, amended and supplemented by Law 08-12 dated Jumada al-Thani 21, 1429 (June 25, 2008), Official Gazette No. 36, and Law 10-05 issued on Ramadan 8, 1431 (August 18, 2010), Official Gazette No. 46.
[18]- Brahimi Nawal. "Prohibited Agreements in Competition Law in Algeria," Thesis for Obtaining a Master's Degree in Law, Business Law Branch, Faculty of Law, University of Algiers, 2003-2004, p. 24.
[19]- Kaid Yasin, "Competition Law and Public Entities in Algeria," Master's Thesis in Business Law, Faculty of Law, University of Algiers, 2000, p. 178.

groups. The Algerian legislator has defined economic public institutions in several instances, including the following

Article 05 of "Law No. 88-01 on the guiding law for economic public institutions" defines economic public institutions as "joint-stock or limited liability companies in which the State and/or local communities directly or indirectly own all the shares and/or stakes...". Thus, we can define an economic public institution in a narrow sense as a commercial entity that appears in the form of joint-stock companies or limited liability companies[20] (Bouzeid, 2010-2011, p. 88).

While commercial law defines public economic entities as "legal entities subject to the rules of commercial law; these entities are established in the form of joint stock companies or limited liability companies"[21].

Ordinance 01-04 on the Organisation, Management and Privatisation of Public Economic Entities defines them as[22] "commercial companies in which the State or another legal entity governed by public law directly or indirectly holds the majority of the share capital and which are subject to public law". Article 05 of this regulation further states that "the establishment, organisation and operation of public economic institutions shall be governed by the forms applicable to capital companies, as provided for in commercial law".

From the above, it can be concluded that economic public institutions have the following characteristics:

1. Economic public institutions are commercial companies: The Algerian legislator, in article one of decree no. 01-04, identifies two forms for these institutions: either joint-stock companies or limited liability companies. As a result, they are subject to commercial law, including the conditions for their creation and the specific laws governing economic activities, and are therefore inevitably subject to competition law.

[20]- Bouzeid Ghlabi, "The Concept of Public Institutions," Master's Thesis in Administrative Law, University of Arab Ben Mehidi, Um El Bouaki, 2010-2011, p. 88.
[21]- Law No. 88-04, dated January 12, 1988, amending and supplementing Order No. 75-59 dated September 26, 1975, concerning the Commercial Code, which sets forth the specific rules applicable to public economic institutions.
[22]- Law No. 88-04, dated January 12, 1988, amending and supplementing Order No. 75-59 dated September 26, 1975, concerning the Commercial Code, which sets forth the specific rules applicable to public economic institutions.

2. The State holds all or most of the capital: This characteristic places economic public institutions within the public sector of the state. They are also considered as mixed-economy companies in cases where there is a partner.

3. Legal personality of public economic institutions:

Economic public institutions have legal personality, which implies financial liability, capacity to act within the limits defined by the contract of establishment, a domicile where their administrative centre is located, a representative who expresses their will and the right to litigate, as stipulated in Article 50 of the Algerian Civil Code.

Unlike administrative public bodies, economic public bodies do not have the characteristic of specialisation; they carry out commercial activities and seek to make a profit wherever possible. Consequently, they are:

- Are fully subject to the rules of the market, in particular commercial law[23].

- Are considered commercial enterprises, subject to the same rules as private enterprises.

- Operate in all sectors, whether strategic or non-strategic, with the constant aim of making a profit.

Therefore, the rules of competition law are necessarily apply to them.

3.1.2 Public entities with industrial and commercial characteristics

The term “public body” refers to a public administrative entity that directly manages an entity that serves a public interest or provides a public service. Public bodies have their own budget, often structured similarly to the state budget, and are subject to its rules, being included in the budget of the administrative authority to which they belong.

Professor Nasser Labad defines them as “those entities whose activities are industrial and commercial in nature, similar to those of private entities, established by the state and local communities as a means of managing their industrial and commercial facilities, and they are subject to both public and private law, each within a defined scope” (Chayeb Rass, 2017, p. 20).

[23]- Law No. 88-04, dated January 12, 1988, amending and supplementing Order No. 75-59 dated September 26, 1975, concerning the Commercial Code, which sets forth the specific rules applicable to public economic institutions.

The Algerian legislator defines public entities with industrial and commercial characteristics in article 44 of the "law no. 88-01 on the guiding law for public economic entities" as entities capable of financing all or part of their operating expenses from the proceeds of the sale of commercial production, carried out in accordance with a pre-established tariff and a specifications document that specifies the expenses borne by the entity, the rights and powers attached thereto and, where applicable, the rights and obligations of users.

Thus, the public entity with industrial and commercial characteristics is distinguished by the presence of three elements:

- Commercial production

- Pre-determined prices

- Existence of a general specification document[24] (Bouzeid, 2010-2011, p. 76).

Regarding its legal framework, article 45 of the same law states that the public entity with industrial and commercial characteristics is subject to the rules applicable to the administration in its relations with the State and is considered a trader in its relations with others, and is therefore subject to commercial law[25]. It has financial liability and a special budget.

From this it can be concluded that public entities with industrial and commercial characteristics are subject to the jurisdiction of the administrative courts in disputes relating to their relations with the State, while they are subject to the rules of private law in disputes relating to their relations with non-state entities in the areas of production, distribution, services, importation or any profit-oriented activity.

We therefore conclude that:

- Public bodies with industrial and commercial characteristics are subject to competition law when their activities are commercial.

- The rules of competition law do not apply when their activities are social and not profit-oriented.

[24]- Bouzeid Ghlabi, "The Concept of Public Institutions," Master's Thesis in Administrative Law, University of Arab Ben Mehidi, Um El Bouaki, 2010-2011, p. 76.
[25]- See Article 45 of Law No. 88-01, dated January 12, 1988, concerning the Guiding Law for Public Economic Institutions. Previous reference.

Among the public entities with industrial and commercial characteristics in the national economic landscape, we can mention:

- The National Electricity and Gas Company
- The National Railway Company
- The National Tobacco and Matches Company
- Algeria Water
- The National Meteorological Office
- National Office for University Publications

3.2 Public corporations of an administrative nature

The category of public entities with an administrative nature constitutes the core of public legal entities, as they are established by legal texts (laws or regulations) and are characterised by their structures, financial liability and public authority powers (Badaoui and Henan, 2020).

These public entities carry out activities referred to as public administration, which are different from activities of an economic and commercial nature[26] (Qaid, 2000, p. 241).

If we try to define this category, there is no specific list of public entities of an administrative nature in Algeria; however, we can mention the main ones based on article 800 of the Civil and Administrative Procedures Code, which includes the State, the province[27], the municipality and public entities of an administrative nature.

In principle, the exercise of administrative functions in the material sense by administrative bodies is carried out by means of administrative acts; these are administrative acts that manifest themselves in the form of administrative decisions. In this context, a distinction can be made between acts that are limited to the internal functions of administrative structures, such as the organisation of their services or the delegation of powers to some of their agents, and acts that go beyond their structures. For example, a municipality may take actions of an organisational nature, such as the organisation of weekly markets within its

[26]- Kaid Yasin, "Competition Law and Public Entities in Algeria," Previous reference, p. 241.
[27]- See Article 800 of Law No. 08-09, dated 18 Safar 1429 (February 25, 2008), concerning the Law on Civil and Administrative Procedures.

jurisdiction, or a province may take organisational actions, such as the creation of economic entities.

In both cases, the actions of the administration take a specific legal form, often referred to as a "decision", and follow specific legal procedures for their adoption.

Current classifications depend on the decision-making authority, where we find individual administrative actions, joint actions or individual administrative decisions and joint administrative decisions. They have the following characteristics in common:

Administrative actions are characterized as follows: they are actions issued by an administrative authority; they are legal actions; and they are enforceable actions[28] (Qaid, 2000, p. 245).

The administrative action has precise specifications and procedures depending on the position of the administrative authority within the hierarchy of the state. The nomenclature also varies from one action to another, including:

- Individual decisions
- Regulatory decisions
- Individual decrees
- Regulatory decrees

To understand which administrative actions are subject to competition law, we will identify a category of administrative actions each time and examine whether they can have an impact on competition, thus determining whether they should be subjected to competition law (Badaoui and Henan, 2020).

3.2.1 Unilateral Administrative Actions

These are legal actions issued by an administrative authority or body of its own accord. In this context, a distinction can be made between:

- Internal Administrative Actions
- External Administrative Actions

A. Internal Regulatory Administrative Actions

[28]- Kaid Yasin, "Competition Law and Public Entities in Algeria," previous reference, pp. 245-246.

These refer to actions taken by administrative authorities in the context of performing their internal functions, managing their human and material resources, and organizing their internal affairs. Examples include:

- Actions or decisions directed at a specific individual operating within this administrative body, which may involve their appointment within an internal department or delegating them certain powers.

It is evident that this category of administrative actions is remote from any economic or commercial activity, and therefore has no impact on competition. Consequently, competition law does not apply to these actions[29].

- Actions or decisions that include directives (guidelines) and instructions to coordinate work between departments within the administrative body. They are mostly internal organizational decisions directed to all administrative departments and agents. Their provisions do not exceed the internal framework of the departments affiliated with the administrative body issuing them, and all of these actions Or the decisions do not have any effects on the legal positions of citizens, as they are not directed to them, and they in turn are not bound by them because they do not concern them. We mention, for example, the decision of the director of a public institution, which includes: Determining working hours to ensure the continuity of public service at the level of the administrative body that supervises it is considered a unilateral administrative and internal organizational decision.

What is certain in this case is that such administrative actions cannot be linked to competition-related issues, because such actions, whether they are internal regulatory decisions or internal regulatory decrees, are all outside the scope of application of competition law and therefore the competition law has no authority over them.

B. External administrative action

In this case, the administrative action shall take one of the following forms:

- Individual administrative decision

- Individual administrative decree

- Regulatory decision

- Regulatory decree

[29]- Kaid Yasin, "Competition Law and Public Entities in Algeria," previous reference, pp. 247-248.

For the group that includes external individual decisions, these concern a specific person, whether natural or legal. Through such decisions, that person may be granted privileges or licences, or have previously granted privileges withdrawn; thus, the decision may be in their favour or against them.

An example of this is certain decisions taken by administrative authorities that allow individuals to use public spaces or structures belonging to them, such as parking permits or road licences issued by the head of the municipal council, the governor or the minister in charge of public works, depending on the jurisdiction[30] (Baouni, p. 15).

In this context, Article 64 of the National Property Law states that the licence is subject to the payment of a financial fee. This provision is reiterated in Article 70 of Executive Decree 12-427, which states that private use is subject to a fee and that the licence for the use of public property must comply with its stated purpose; Some argue that the financial compensation is a fee, while others consider it to be a tax. The latter view seems to be more accurate, as the user of public resources in this context is not in a contractual position, but rather in a regulatory position, subject to pre-established regulatory rules. Thus, the financial compensation received by the administration for granting user licences can be classified as a tax similar to indirect financial taxes[31] (Baouni, p. 16).

From this perspective, we conclude that these licences are not subject to competition law.

However, legal scholars distinguish between licences that allow the holder to occupy or use public property ‘for economic exploitation’ and licences issued for other purposes, such as licences granted to charitable organisations or individuals to organise private events. The former are mandatorily subject to competition law, while the latter are exempt from the scope of competition[32] (Arnaud, 2017).

There is also a category of regulatory decisions or decrees with an external orientation, such as those issued by a central or local administrative body. They

[30]- Khaled Baouni, "Regulating Special Non-Ordinary Use Licenses for Public Property," Legal Studies, Volume 11, Issue 23, pp. 61-76. Available at: [ASJP Article](https://www.asjp.cerist.dz/en/article/64267).
[31]- Khaled Baouni. "Regulating Special Non-Ordinary Use Licenses for Public Property," Legal Studies, Volume 11, Issue 23, p. 16.
[32]- Arnaud DA SILVA, "The Competition for Public Domain Occupation Authorizations," ATD Actuality No. 272, July 2017. Available at: [ATD Article](https://www.atd31.fr/fr/base-doc/domanialite-1/domaine-public/la-mise-en-concurrence-des-autorisations-d-occupation-du-domaine-public.html), consulted on July 16, 2022.

are aimed at an entire sector and do not refer to an individual; they are organisational in nature and concern matters outside the internal organisation of the issuing body. In this case, there is a potential risk of harming competition, especially if the decision regulates a matter related to the economic field;

In principle, these decisions are considered to be regulatory administrative acts that do not aim to compete with or influence any commercial or economic activity; Therefore, they generally remain outside the scope of competition law. However, this is not absolute; a decision may indirectly affect competition, in particular when it regulates matters relating to economic sectors; In this respect, such decisions are subject to the provisions of "Article 36 of Ordinance 03-03, as amended and supplemented, on competition"[33], which stipulates that the Competition Council must be consulted on any legislative or regulatory project or measure that could affect the market or competition. This includes the imposition of exclusive fees in certain areas or activities, the imposition of special conditions for the performance of production, distribution and services, or the establishment of uniform practices regarding sales conditions, In general, whenever a regulatory decision includes any of these issues that may affect competition, any interested party has the right to challenge it for annulment or revocation before the competent administrative judicial authorities, which will determine the legality of the decision in accordance with the provisions of competition law[34] (Qaid, 2000, p. 250).

3.2.2 Joint administrative action

At times, several administrative authorities may come together to take regulatory decisions aimed at organising a common sector or common interests, such as joint ministerial decisions. In this context:

- If the joint regulatory decision does not affect an activity of an economic nature, competition law does not apply to it[35] (Badaoui and Hennan, 2020).

- However, if the decision is related to a matter or regulation concerning the economic sector, any interested party may base its claim on the provisions of the

[33]- Arnaud DA SILVA, "The Competition for Public Domain Occupation Authorizations," ATD Actuality No. 272, July 2017. Available at: [ATD Article](https://www.atd31.fr/fr/base-doc/domanialite-1/domaine-public/la-mise-en-concurrence-des-autorisations-d-occupation-du-domaine-public.html), consulted on July 16, 2022.
[34]- Kaid Yasin, "Competition Law and Public Entities in Algeria," previous reference, pp. 250-251.
[35]- Abdeldjalil Badaoui Ali Hennan, "The Scope of Application of Competition Law Regarding Entities According to Order 03-03 Amended and Supplemented Regarding Competition," Noor Journal of Economic Studies, Volume 06, Issue 11, 2020, pp. 48-63.

second paragraph of Article 36 of Ordinance 03-03, as amended and supplemented, on competition, which states that the Competition Council must be consulted on any legislative or regulatory project related to competition or which includes measures that could impose exclusive fees in certain areas or activities.

4. Conclusion

In this study we have looked at the extent to which the operation of State property is subject to competition law. We have examined the way in which national properties are used and the related administrative decisions, as well as the extent to which they enjoy the privileges of public authority. We reached several conclusions, which can be summarised as follows:

- National property can be used for general collective purposes as well as for private use.

- The collective use of national properties is characterised by fundamental principles: freedom of use, equality and gratuitousness. Therefore, the general collective use of national property is not subject to competition law, as it is not a profit-oriented activity.

- Private use may take the form of administrative licences or contractual concessions; it may also involve the management of public facilities by economic public bodies or public bodies with industrial and commercial characteristics.

- In the first case, the management of the facility by an economic public entity is necessarily subject to competition law.

- In the second case, the management of the facility by public bodies with industrial and commercial characteristics is subject to competition law if their activities are commercial, but not if their activities are social and not profit-oriented.

- With regard to administrative acts or decisions concerning a specific person, whether natural or legal, through which that person obtains a management agency contract or the management and maintenance of a public facility on behalf of the delegated administrative authority, although these acts are issued by an administrative authority for the operation of a public facility, they fall under the named contracts established by the Public Procurement Law and the delegations of public facilities (incentive agency contracts, management contracts). As such, they are subject to competition law under Article 02 of the Competition Law when their activities are profit-oriented, and not when their activities are social and not

profit-oriented. It is therefore essential to clarify the purpose of the contract in the specifications.

- This research clearly shows that the management of public facilities through incentive agency contracts and management agency contracts are the best forms of using and benefiting from national properties for users on the one hand, and for the national economy and development on the other. We therefore propose the widespread use of this type of contract in public facilities.

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