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Economic public order and the guarantee of free competition in the market

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Abstract---Various economic and legal studies emphasise that the growing phenomenon of market competition may lead to the creation of a monopoly, which constitutes one of the practices contrary to free competition, through the exploitation of a dominant position by a particular undertaking, thereby causing harm to the remaining market participants. In this context, the State bears the responsibility of ensuring protection and safeguarding the various interests involved in a manner that ultimately guarantees the public interest. This falls within the concept of *competitive public order*, which can be realised only within a framework that ensures freedom while simultaneously setting limits to it. This approach is embodied in the provisions of competition law.

Keywords---Economic public order, competitive public order, free competition, freedom, market.

Introduction

The protection and safeguarding of economic public order are among the most significant requirements of the modern state, as revealed by the crisis of the market economy. The economy cannot grow and develop except within an organised framework of laws and legislation targeting various economic activities. In the contemporary era, public order has transcended the confines of tranquillity and security to extend to the economic sector, as it is affected by diverse economic relations. This has prompted the State to enact a set of legal texts specifically addressing this field, particularly in competition and consumer protection legislation.

Crises affecting the market economy have led to an expansion of the state's role in economic life. Many economists have recognised the complex and interdependent relationship between the state and market mechanisms. Just as there are manifestations of market failure that necessitate State intervention, there

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are also manifestations of government failure that require market forces and mechanisms to play central roles. Consequently, the debate is no longer centred on the role of the State itself but rather on how the State exercises a more effective economic role capable of achieving the desired economic and social development, regardless of the size, nature, or level of that role.

In this context, the World Bank has introduced a set of indicators based on the concept of good governance, which rests upon the effectiveness of the State in performing its economic role. These criteria include six criteria: the effectiveness of governance management; the quality of implemented procedures and the rule of law; the control of corruption; political representation and accountability; political stability and the absence of violence and terrorism; and the stability of the government.

For a market economy system to function efficiently, it must be supported by a government that establishes a network of regulations and laws while simultaneously ensuring its enforcement and application across the numerous parties operating within a given national economy. The state also intervenes in determining the standards governing transactions, such as price setting and the imposition of taxes and fees. Accordingly, the most important role assumed by the State in this field is the protection of the application of law and public order, without which a market economy cannot function or endure.[1]

This role played by the State in economic life, and the legal, supervisory, and regulatory framework it establishes, is primarily aimed at protecting economic public order to eliminate any arbitrariness or abuse in the market, thereby ensuring the public interest through the exercise by market actors of their activities in accordance with the controls delineated or imposed by the State. The concept of public order constitutes a general framework that expresses the legitimacy of the system, its supreme values, and its fundamental principles, since the State is required to guarantee the application of legislation by conferring it the character of legal rules governing public order.[2]

Given that Algeria is among the states that have constitutionally enshrined freedom of trade and industry, this principle has led to the development of freedom of competition. This has been affirmed from the Constitution of 1989 through the Constitution of 2020. In this context, Free Competition Act No. 03/03, as amended and supplemented, was enacted to establish various controls and rules applicable across competitive fields and sectors, thereby ensuring comprehensive protection for both the market and individuals against diverse abuses and violations. Within this framework, the Competition Council has been entrusted with preserving free competition through its consultative and enforcement powers.

This article attempts to develop a legal approach that links the rules of economic public order with the regulations governing free competition, with the ultimate aim of establishing the relationship between their objectives and revealing the aspects of complementarity between them. Accordingly, the following structure is adopted:

First Section: The Intellectual and Legal Foundations of the Economic Public Order
Second Section: Role of Economic Public Order in Preserving the Balance of Interests in the Market

First Section: The Intellectual and Legal Foundations of the Economic Public Order
In light of the economic crisis that the State has experienced in the modern era, it has been compelled to increase its interventions in economic activity to advance the public interest and maintain the State's economic balance, in accordance with the requirements of its development plans and overall economic policies. This is manifested through the restrictions imposed by the State on various free economic

[1] Website available at *https://www.saaid.net* (accessed December 4, 2025).
[2] Mohamed Tioursi, *Legal Controls of Competitive Freedom in Algeria* (Algiers: Houma Printing, Publishing, and Distribution, 2008), 265.

activities, such as freedom of trade and industry, as well as the different controls placed on freedom of competition and price determination. According to modern legal doctrine, such matters fall within the legislative authority's competence.

The legislative authority determines the legal framework governing economic activity, thereby justifying the characterisation of specific economic objectives defined by the State as matters of public order and, consequently, the existence of independent administrative authorities. This has led to the introduction of a new element into the concept of public order: economic public order, which emerged from the necessity of compulsory pricing and the regulation of import and export operations. Thus, public order extends beyond public security and public tranquillity to encompass economic relations and to be influenced by them.

Moreover, the traditional concept of public order has no longer been able to accommodate all developments in legal relationships, leading to the emergence of other forms of public order. The evolution of the role of the State in the economic sphere, together with the proliferation of rules aimed at protecting the market, has contributed to the crystallisation of the concept of economic public order, which differs from traditional public order in both substance and characteristics.[3]

First Requirement: The Concept of Economic Public Order

First Branch: The Legal Basis of the Concept of Economic Public Order

The concept of public order is a prevailing idea across all branches of law and a cornerstone of the legal system of any state.[4] Nevertheless, its meaning remains ambiguous and difficult to define. The idea of public order was initially associated with the principles of the French Revolution, particularly the principle of individual freedom, which was further strengthened following the promulgation of the French Civil Code, whereby the principle of autonomy became a fundamental element in the formation of contracts, thereby entailing the primacy of individual freedom and the necessity of refraining from restricting it.[5]

However, this principle led to excessive reliance upon it, particularly in contractual relations. The principle of the autonomy of will was regarded as the optimal rule governing such relations between the parties to a contract, as it emanates from their free agreement. Once they consent to these rules, they are deemed the most appropriate to achieve justice and balance.[6] In this context, the functions of the State were confined to the narrowest limits out of respect for individual freedom, intervening only to the extent necessary to preserve security. The State was thus characterised as the "watchman State." In the economic sphere, the sanctification of individual freedom led to the recognition of economic freedom, leaving economic activity open to individual initiative. This is known as the individualist doctrine in liberal economic thought, which holds that any interventionist tendency on the part of the State to impose restrictions on economic activity would obstruct economic growth.[7]

From a legal perspective, the adoption of the doctrine of individual freedom and the recognition of the principle of autonomy imply that an individual is bound only by his or her own will, within the limits and in the manner he or she chooses. Consequently, free will constitutes the source of rights and obligations, creating them, defining their content, and endowing them with binding force. This has rendered free will and freedom of contract both the foundation and the objective of law.[8]

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[3] Ilham Bouhlaïs, *Legal Protection of the Market under the Rules of Free Competition* (PhD diss., Faculty of Law, Mentouri Brothers University, Constantine, 2016–2017), 60.

[4] Tioursi, *Legal Controls of Competitive Freedom in Algeria*, 276.

[5] Bouhlaïs, *Legal Protection of the Market*, 61.

[6] François Terré, Philippe Simler, and Yves Lequette, *Droit civil des obligations*, 9th ed. (Paris: Dalloz, 2005), 42.

[7] Adda Aliyan, *The Concept of Public Order and Freedom of Contract in Light of Algerian Law and Islamic Jurisprudence* (PhD diss., Faculty of Law and Political Sciences, Abou Bekr Belkaid University, Tlemcen, 2015–2016), 97.

[8] Aliyan, *The Concept of Public Order*, 98.

However, individual freedom failed to achieve the required contractual balance. Among the most significant reasons for this failure are the following:
– The excessive application of the principle of the autonomy of will, which came to be regarded as the source of every obligation, including legal rules, insofar as the latter were viewed merely as an expression of the aggregate wills of individuals.
– Individualist doctrine is affected by a range of political and economic factors. The emergence of large corporations employing vast numbers of workers contributed to the rise of socialist or social doctrines that developed in opposition to individualism. Consequently, the latter was founded upon economic bases and subsequently declined under the influence of economic factors as well.[9]

As a result, the individualist doctrine enabled the stronger party to exploit the weaker party. Employers came to dominate workers, subjecting them to oppressive conditions, whereas imbalances between supply and demand allowed specific individuals to exercise control over others. In this context, individual freedom was reduced to the imposition of arbitrary terms by one party upon another.
In light of these developments, the State was compelled to intervene in the economic sphere through its management, thereby leading to the evolution of the traditional concept of public order and the emergence of a new notion: economic public order. The rules of economic public order corrected the imbalance in economic contractual relations. Moreover, the transformation of the State's role and its intervention in the regulation of economic relations—whether in production, distribution, or exchange—and in guaranteeing freedom in the market through the entrenchment of the law of supply and demand further influenced the concept of public order.[10]

This situation prompted the State to intervene in contractual matters between individuals by restricting contractual freedom in several respects. The State began participating in contract formation and determination of their content while also assuming responsibility for protecting the economically, socially, and culturally weaker party. As a result, the contract departed from its individualistic character and became a means of collective life and an instrument for achieving the public good.[11]

Second Branch: Defining the Concept of Economic Public Order
It is evident that the emergence of the concept of economic public order was the product of the crisis experienced by the principles of the autonomy of will and individual freedom and of their failure to achieve the necessary balance between the parties to a contract. This was accompanied by a transformation of the state's role in the economic sphere, particularly in establishing legal rules governing various economic activities, in the context of the freedom advocated by liberal economic doctrine. Necessity thus requires state intervention to regulate the market by organising specific mechanisms to ensure the proper functioning of competitive processes, address monopolistic situations, and protect consumers from various practices that might harm them. Such interventions involve regulatory authorities in organising economic freedoms. The judiciary has affirmed, in numerous judgments, the economic character resulting from the expansion of the concept of public order to encompass economic public order, in which administrative regulatory authorities intervene in the economic field.[12]

The concept of economic public order entails an increase and expansion in state intervention within economic sectors, as leaving the field open to individuals and allowing them absolute freedom leads to numerous adverse effects on both society and the economy. Consequently, this form of public order has come to be characterised as a positive public order, through which the State has moved from a phase in which it was merely an actor in the economy to a new era in which it has become the director

[9] Ibid., 99.
[10] Bouhlaïs, *Legal Protection of the Market*, 62.
[11] Ali Filali, *Introduction to Law* (Bordj El Kiffan, Algeria: Moufem Publishing and Distribution, 2005), 50.
[12] Walid Mohamed Al-Shannawi, *The Regulatory Role of Public Administration in the Economic Field* (PhD diss., Faculty of Law, Mansoura University, Egypt, 2008), 543.

of economic life by enacting mandatory legal rules binding upon all. The purpose of these rules is the protection of private individual interests, which constitutes the substance of the concept of economic public order.[13]

Defining the concept of economic public order remains complex and ambiguous, much like traditional public order does. The public order protects both individual interests and collective interests. Within this framework, the legislator organises and directs contractual relations, particularly those involving imbalances of economic power, while protecting the economically weaker party.[14] Economic public order concerns the direct regulation of the distribution of wealth and services and determines the content of contracts. It is characterised by two aspects: directive public order and protective public order.[15]

Economic public order is founded upon the restoration of balance among distorted positions and is based on the dual objectives of protection and guidance, extending further to encompass regulation. This ensures the rigorous organisation of interventions by economic operators and the proper functioning of the market. In this context, the State acts as a regulator, intervening moderately and indirectly through framing and regulation.[16] Georges Ripert has argued that public order has expanded to include a new element, namely, economic public order, which seeks to satisfy urgent needs beyond security and tranquillity and grants regulatory authorities the right to take into account specific economic objectives that reflect the new requirements of public order.[17]

Accordingly, there is no contradiction between the rules of economic public order and those of traditional public order; instead, there is an extension in their application. All are mandatory rules aimed at advancing society's public interest.[18] Economic public order seeks to satisfy necessary or urgent needs, the failure to satisfy which would give rise to various disturbances. This expansion in the scope of public order encompasses a range of objectives related to the requirements and measures of compulsory pricing, the regulation of export and import operations, dealings in free currencies and trade therein, and the provision of housing for those without shelter.[19]

Third Branch: Forms of Economic Public Order

The concept of economic public order assumes two forms: directive public order and protective public order.

First: Directive Economic Public Order

Society requires individuals to participate in achieving an economic or social objective through their relationships, thereby compelling them to do so despite their unwillingness. The purpose of the rules of directive public order is to realise the general economic interest. Accordingly, the State intervenes directly to regulate transactions between individuals to preserve economic balances.[20] Directive public

[13] Abdelnasser Belmihoub, "Public Order in Private Law: A Changing and Evolving Concept," *Academic Journal of Legal Research and Law*, special issue (Faculty of Law and Political Sciences, Abderrahmane Mira University, Bejaia, 2015), 379.

[14] B. Lefebvre, "Quelques considérations sur la notion d'ordre public à la lumière du Code civil (1994) du Québec," in *Développements récents en droit civil* (Cowansville: Éditions Yvon Blais, 1994), 148.

[15] Vincent Karim, "L'ordre public économique: contrats, concurrence, consommation," *Les Cahiers de droit* 40 (1999): 410.

[16] Jacqueline Morand-Deviller, "Ordre public économique, ordre public écologique," *Revista de Direito Econômico e Socioambiental* 9, no. 1 (April 2018): 7.

[17] Bouhlaïs, *Legal Protection of the Market*, 63.

[18] Belmihoub, "Public Order in Private Law," 400.

[19] Massouda Amara, "The Problem of Defining the Concept of Public Order and Its Legal Applications," *Academic Journal of Legal Research*, special issue (Faculty of Law and Political Sciences, Abderrahmane Mira University, Bejaia, 2015), 399.

[20] Belmihoub, "Public Order in Private Law," 384.

order refers to the economic and social foundations upon which a given society is based, and it seeks to embody national policy by intervening in individual freedoms.[21]

Economic public order aims to protect the whole competition in the market, as evidenced by constitutional and legal rules, as well as by various administrative and judicial measures, particularly in the fields of anticompetitive practices and the control of economic concentrations. Economic public order extends beyond competition rules to encompass mandatory orders binding upon individuals.[22] Directive economic public order seeks to protect the public interest in general by intervening in and directing individual conduct in accordance with political, social, and economic rules. It therefore ensures the implementation of directed economic policy.[23]

These rules aim to guide economic relations and organise transactions to preserve the public interest and achieve economic prosperity. The state monopolises the role of directing and supervising the national economy on the premise that individuals are incapable of achieving the public interest and the interest of society. In this context, individuals are required to sacrifice their personal interests to uphold public order. Moreover, directive economic public order contains prohibitions and restrictions, similar to those found in traditional public order, while simultaneously embodying a positive dimension that allows individuals to participate in economic and social life, provided that they respect and comply with the substance of contracts. This is reflected in the categories of regulated, prohibited, or supervised contracts.[24]

Second: Protective Economic Public Order

The economic and social developments in contractual relations led to the emergence of a protective public order, which reflects the set of values and principles that must prevail in contractual relationships among individuals to ensure justice, equality, and fairness. Protective public order has played a decisive role in expanding the obligations imposed upon professionals, in contrast to the fragile traditional framework.[25] previously drawn by the general rules of law. This is evident in the incorporation of contractual liability provisions, the protection of the weaker party, and the safeguards afforded to consumers and workers.[26]

Accordingly, legislation concerning the protection of workers, as well as that relating to consumer protection, is considered part of the rules of protective public order.[27] The State is not merely a regulator of the market; it also intervenes directly to preserve and structure social and economic balance through a set of rules.[28] Protective economic public order thus encompasses laws concerning consumer protection, professional licensing, labour relations, social security, and housing.[29]

Second Requirement: Characteristics of Economic Public Order

Economic public order is characterised by its positive dimension, its inclusion of mandatory rules, its concern with achieving contractual justice, and the oscillation between the possibility of its being raised ex officio by the judge and the absence of such a possibility.

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[21] Boulgane Fatima Nessakh, "The Concept of Public Order between General Theory and Special Legislation," *Academic Journal of Legal Research and Law*, special issue (Faculty of Law and Political Sciences, Abderrahmane Mira University, Bejaia, 2015), 415.

[22] Tomas Pez, "L'ordre public économique," *Nouveaux Cahiers du Conseil Constitutionnel* 49 (October 2015): 44.

[23] Jacques Ghestin, *Les obligations: Le contrat—Formation*, 2nd ed. (Paris: LGDJ, 1988), 132.

[24] Nessakh, "The Concept of Public Order," 416.

[25] Rabia Sbaihi, "The Development of the Role of the Judiciary in Protecting Consumers from Unfair Terms," *Academic Journal of Legal Research*, special issue (Faculty of Law and Political Sciences, Abderrahmane Mira University, Bejaia, 2015), 482.

[26] Dalila Mokhtor, "The Protection of Economic Public Order in Its Economic Dimension," in *Academic Journal of Legal Research*, special issue (Bejaia, 2015), 535.

[27] Bouhlaïs, *Legal Protection of the Market*, 64.

[28] Patrick Wéry, *Droit des obligations*, vol. 1, *Théorie générale des contrats* (Brussels: Larcier, 2010), 280.

[29] Karim, *L'ordre public dans le droit économique*, 414.

First Branch: The Positive Dimension of the Economic Public Order

Economic public order is based on rules that define proper conduct, which individuals are expected to observe to achieve both the public interest and the individual interest, in addition to identifying prohibited conduct from which individuals are barred.[30]

Second Branch: The Extension of Mandatory Rules to Economic Public Order

Economic public order encompasses all mandatory rules, as its scope has expanded to include the protection of individual interests where the objective is the realisation of collective interests. A violation of public order does not merely result in nullity but may also give rise to criminal prosecution, as is the case with infringements of the fundamental rights of workers. All legal rules enshrining such rights are mandatory rules that form part of public order, and their violation entails criminal liability.

Economic public order has enabled the consolidation of mandatory legal rules, whether they aim to serve individual or collective interests. As a result, the distinction between mandatory rules and public order has ceased to be of concern to legal doctrine, particularly following the consensus that the rules of public order encompass all mandatory rules. Consequently, they constitute synonymous concepts in the absence of a criterion for distinguishing between them.[31]

Third Branch: Ensuring Contractual Justice within the Framework of Economic Public Order

The principle of autonomy will fail to achieve contractual justice, as economically unequal positions created situations in which one party to the contract enjoyed greater power and advantage than the other, whose interests require protection. The economic power that one of the contracting parties may possess, in particular, has rendered legal equality merely presumptive rather than real. Consequently, the rules of protective economic public order aim to achieve substantive balance rather than contenting themselves with formal legal equality.

Fourth Branch: The Role of the Judiciary within the Framework of Economic Public Order

A distinction must be drawn between directive public order and protective public order in this regard. In the case of directive public order, the judge, the regulatory authority, or the Competition Council may raise it ex officio, as it accords with the rules of classical public order. However, in matters of public order, the judge is required to uphold the interests of the party entitled to protection under the contract.[32]

Second Section: Role of Economic Public Order in Ensuring the Balance of Interests in the Market

Among the principal foundations of the market is economic freedom, which grants individuals the freedom to transact, exchange, and compete. The principle of the autonomy of will constitutes the basis of contractual freedom. It is merely a reflection of economic freedom, which enables individuals to freely exchange wealth and services. This is translated into the legal framework by allowing them to contract as they wish, as this represents the most effective means of establishing fair and equal relations between them and is more beneficial from a social perspective. Moreover, individual initiatives can achieve economic prosperity and balance.

However, the inability of the principle of the autonomy of will to achieve contractual balance and equality among individuals, as previously discussed, together with developments at the scientific, technological, and economic levels, has led to the emergence of numerous monopolistic enterprises in the market. Consequently, economic freedom and the principle of autonomy have created multiple imbalances across various aspects of the market, including competition and consumer relations. This situation has prompted State intervention to restore balance through the imposition of directive and protective rules within the framework of economic public order.

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[30] Belmihoub, "Public Order in Private Law," 387.
[31] Ibid., 388.
[32] Ibid., 389.

In the field of competition, competition laws have been enacted to curb practices that undermine market rules and the rules of economic public order. These laws aim to achieve justice, integrity, and transparency in the market. According to economic theory, competition operates among three parties within the market: economic operators seeking to maximise profits, workers striving to obtain the highest possible wages, and consumers seeking to satisfy their needs.[33]

First Requirement: Free Competition within the Framework of Economic Public Order

Competition law aims to protect the market and is therefore characterised as a law of public order. The legislature has relied on the regulatory mechanism to safeguard this particular form of public order,[34] making use of an independent administrative authority, namely, the Competition Council, as a new form of regulation, and adopting methods that ensure the organisation and regulation of competitive freedom without sacrificing it for the sake of preserving public order.[35]

Competition law falls within the economic public order in both its directive and protective dimensions.

First Branch: Directive Public Order of Free Competition

Anti-competitive practices entail serious risks at the economic, political, and social levels. Competitors may resort to all possible means to eliminate rivals from the market and erect barriers and obstacles to the establishment of new competing enterprises. They may also engage in various practices, such as predatory pricing and monopolisation. This results in the spread of unemployment, job losses, a decline in consumption, and an unfair income distribution.[36]

Within this framework, there has been a call to establish a regulatory system governing competition, as the inclination towards competition may lead to monopolistic situations that enable the stronger party to control the market and impose its conditions on weaker parties. Consequently, the existence of competition rules prevents numerous abuses. Competition law is intended not only to enshrine competitive freedom but also to establish prohibitions and controls binding upon economic operators. It contains rules that, by their nature, prohibit certain competitive practices in the public, regardless of their impact on market laws.[37]

In light of economic developments, economic blocs, and international economic treaties, as well as States' accession and their commitment to removing all obstacles to free competition and free exchange, it has become necessary for legislators to intervene in the field of domestic competition regulation. This intervention constitutes a constitutional guarantee of the state's economic organisation.[38]

Protecting the market from various obstacles and impediments arising from competition is achieved by protecting economic operators, particularly against the greatest threat to the market: monopoly. Accordingly, the market must be protected, and this can be achieved only by ensuring the protection of competitors. Competition policy may also aim to protect SMEs against major production conglomerates and extensive distribution networks.[39]

Accordingly, competition law aims to protect free competition and the market and is therefore characterised as a law of directive economic public order. It embodies two aspects of the State's role: first, ensuring the liberalisation of the market; second, State intervention to organise and protect its economic system. The concept of competitive public order corresponds to that of economic public

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[33] Arzgui Zoubir, *Consumer Protection under Free Competition* (PhD diss., Faculty of Law and Political Sciences, Mouloud Mammeri University, Tizi Ouzou, 2011), 5–6.
[34] Mokhtor, "Protection of Economic Public Order," 532.
[35] Tioursi, *Legal Controls of Competitive Freedom in Algeria*, 267.
[36] Ibid., 268.
[37] Ibid., 269–70.
[38] Ibid., 271.
[39] Bouhlaïs, *Legal Protection of the Market*, 65.

order, as it seeks to achieve economic efficiency while adopting an effective competition policy and protecting competition from all obstructive and restrictive practices.[40]

Competition law also constitutes the core of the directive economic public order, embodying the spirit of contemporary economic law. The development of competition law has contributed to linking economics with legal rules. The protection of competitive public order is realised through the prohibition of practices that restrict competition and the control of economic concentrations. Accordingly, the objective of competition law is to safeguard the proper functioning of the market and the conditions of free competition.[41]

Second Branch: Protective Public Order of Free Competition

Competitive public order raises a fundamental question: is the competitive system merely one component of directive public order, given that the latter aims at achieving balance rather than protection? In this context, Professor Fabrice Riem has argued that continuing to regard competition rules as part of directive public order is no longer clear, particularly in light of the linkage between competition law and contract law. This has led to a shift towards speaking of a regulatory public order or a mixed public order in competition law, which protects both competitors and the rules of competition equally.[42]

The protection of economic public order and the guarantee of fair competition among economic operators have led to the enactment of rules prohibiting and preventing anti-competitive agreements. Economic public order constitutes one of the most significant factors influencing the general law of contracts,[43] which is founded upon the principle of the autonomy of will. By referring to Articles 6, 7, and 9 of Order No. 03--03 related to competition, as amended and supplemented, it is evident that the legislator has expressly departed from the binding force of contracts and from the principle of the autonomy of will by prohibiting a range of agreements and contracts, even though they were validly formed with the consent of both parties. Such agreements would ordinarily remain lawful and not subject to nullity under the general theory of contracts; however, their violation of competition rules and infringement of competitive justice render them subject to prohibition and invalidation.[44]

The prohibition of practices that restrict competition falls within the sphere of public order, thereby limiting freedom of contract. Contractual freedom remains subject to general rules, without the economic system ceasing to be liberal. The rules of protective economic public order are more clearly manifested in the fields of consumer and worker protection. In contrast, in the field of competition, they oscillate between protective and directive public orders. The distinction between the two is drawn by reference to the interest being protected: directive public order concerns safeguarding the public interest, whereas protective public order focuses on protecting the legitimate interests of groups of persons unable to safeguard them independently. Given that competition law protects competition and the market rather than individual competitors, it is classified as a law of directive economic public order. Nevertheless, the continuous evolution of competition law raises questions about whether it may also assume a protective dimension.[45]

This is exemplified by the abuse of a position of economic dependence, which enables an undertaking to exploit its economic power within the framework of its contract with another party occupying a

[40] Mokhtor, "Protection of Economic Public Order," 334.
[41] Ibid., 335.
[42] Ilham Bouhlaïs, *Legal Protection of the Market under the Rules of Free Competition* (PhD diss., Faculty of Law, Mentouri Brothers University, Constantine, 2016–2017), 65.
[43] Romain Rambaud, *L'institution juridique de régulation: Recherches sur les rapports entre droit administratif et théorie économique* (Paris: L'Harmattan, 2012), 544.
[44] Aïcha Khalil, *The Role of Independent Administrative Authorities in Renewing the General Law of Contracts* (Master's thesis, Faculty of Law and Political Sciences, University of May 8 1945, Guelma, 2015–2016), 115–16.
[45] Dalila Mokhtor, *op. cit.*, 536.

weaker position, thereby imposing unjustified and oppressive clauses. The general principle of competition law is to protect and regulate markets, allowing competing undertakings the freedom to choose their commercial policies. It is therefore immaterial whether the contract concluded between a distributor and a supplier maintains a balance of rights and obligations between the parties. However, specific clauses that disrupt the balance of rights and obligations between the parties may adversely affect the market. In such cases, competition law intervenes to regulate the contract to protect the market.[46]

Second Requirement: Competitive Public Order in Algerian Legislation

The legal and legislative enshrinement of the principle of free competition represents one of the most significant requirements introduced by the new orientation of state economic policy based on freedom. This enshrinement has enabled openness to numerous sectors and activities that were previously reserved for the State, such that entry into and exit from the market by individuals have become legally guaranteed and protected freedoms. However, such protection can be achieved only within the limits and controls established by competitive public order, which applies to all individuals and undertakings, as well as to the activities they carry out. Ensuring and enforcing this system further requires imposing a set of constraints to regulate competitive practices in the market. Accordingly, it is necessary to identify the scope of application of competition law (First Branch) and the regulatory controls set out in the relevant legislation (Second Branch).

First Branch: Scope of the Application of Competition Rules

Article 2 of Order No. 03/03, as amended and supplemented, sets out the economic fields to which the rules and provisions of competition apply. These include activities of production, distribution, and services, without distinction as to whether natural or legal persons carry them out or whether they are private or public. Accordingly, within the scope of application of competition law, two areas may be distinguished: the first concerns economic activities subject to competition rules, and the second relates to the persons to whom the provisions of competition law apply.

First: Scope of the application of competition rules with respect to economic activities

The legislator has enumerated the economic activities falling within the scope of application of competition rules through Article 2 of Order No. 03/03 relating to competition, as amended and supplemented, which provides that "... the provisions of this Order shall apply to the following: production activities, including agricultural activities and livestock breeding; distribution activities, including those carried out by importers of goods for resale in their original condition, agents and intermediaries in livestock sales, wholesale meat sellers; service activities; traditional industries; and maritime fishing …". Consequently, competition rules apply to all sectors of economic activity whenever they relate to production, distribution, or services, regardless of the entity carrying them out. Thus, competition law applies to every economic market in which the elements of supply and demand are present.

Accordingly, activities that do not possess an economic character fall outside the scope of application of this law, such as those provided for social purposes. In this context, both the judiciary and the French Competition Council have refused to subject practices carried out by social security bodies to competition law.

Activities carried out by public legal persons, regardless of their form, purpose, or law governing them, are likewise subject to competition law insofar as they concern production, distribution, or the provision of services, including public services of an industrial or commercial nature. Excluded from

[46] Ibid., 537.

this scope, however, are practices that fall within the exercise of public service functions or the prerogatives of public authority.[47]

The Algerian legislature defined the concept of production in Law No. 09/03[48], which is related to consumer protection and the suppression of fraud, in Article 3. According to the wording of this provision, production comprises operations including livestock breeding, crop collection and harvesting, maritime fishing, slaughtering, processing, manufacturing, transformation, assembly, and packaging of products, including their storage during the manufacturing phase prior to their initial marketing. The same article defines a product as any good or service that may be the subject of transfer, whether for consideration or free of charge. A service is defined as any act provided other than the delivery of a good, even where such delivery is ancillary to or supportive of the service rendered.

Accordingly, it is clear that the term "product" refers to anything produced, whether through industrial or mechanical processes, through human effort alone—as in agricultural products—or through a combination of human effort and industrial processes, such as agricultural products to which industrial operations are added, as well as natural products. This category, therefore, includes agricultural products that arise naturally from the land without human effort, as well as medical or pharmaceutical products, including substances and preparations possessing preventive properties against diseases affecting humans or animals.[49]

Competition law does not define distribution activities. However, Law No. 90/39, related to quality control and the suppression of fraud, refers to this in Article 2, which provides the following: "Marketing consists of all operations involving the storage of all products at the wholesale or semWholesale level, their transport, possession, and display for sale or free transfer, including import and export operations and the provision of services."

Forms of distribution range from traditional models, such as purchases for resale, which are subject to the general rules governing commercial contracts, to more modern distribution mechanisms. The latter take the form of distribution networks based on multiple and interrelated contractual relationships, consisting of a supplier on the one hand and, on the other hand, a group of distributors linked to the supplier through ongoing relationships governed by various contracts.[50]

In addition to production, distribution, and service activities, the legislature has included public procurement within the scope of the application of competition law. This clearly reflects the will of public authorities to activate market economy mechanisms and to subject public economic operators to the principle of free competition, making its observance mandatory in the context of public procurement contracts.

Public procurement constitutes one of the most important administrative contracts used by public administrations to deliver public services and projects. Competition, through the multiplicity and diversity of bids it allows, enables public authorities to select the most rational offer in terms of resource use and at the lowest cost. Consequently, the process of selecting the appropriate bid requires a high degree of transparency and integrity, opening opportunities to all who wish to obtain the contract.

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[47] Mohamed Tioursi, *Legal Controls of Competitive Freedom in Algeria* (Algiers: Houma Printing, Publishing, and Distribution, 2008), 45–46.

[48] Algeria, *Law No. 09-03 of February 25 2009, Relating to Consumer Protection and the Suppression of Fraud*, Official Gazette of the Algerian Republic, no. 15 (March 8, 2009).

[49] Amina Mekhanché, *Mechanisms for Activating the Principle of Free Competition: A Comparative Study between Algerian and French Legislation* (PhD diss., Faculty of Law and Political Sciences, University of Batna 1, 2016–2017), 21.

[50] Ibid., 31.

This is reflected in Article 5 of Presidential Decree No. 15/247, which regulates public procurement and the delegation of public services.[51] which provides the following: "To ensure the efficiency of public procurement and the proper use of public funds, public contracts must observe the principles of freedom of access to public procurement, equality of treatment of candidates, and transparency of procedures, in compliance with the provisions of this Decree."
The principle of free competition in public procurement consists of granting every competitor, provided that the legally required conditions are met, the opportunity to submit a bid to the contracting authority for the conclusion of a public contract.[52]

Second: Scope of the application of competition rules with respect to persons
A reading of Article 2 of Order No. 03/03, as amended and supplemented, shows that the principle of free competition applies to all economic operators, meaning all undertakings and activities related to production, distribution, and services, regardless of whether their nature is civil or commercial. Accordingly, the concept of the undertaking assumes great importance in determining the personal scope of application of competition rules. In this context, the Legal Committee of the European Union relied on the concept of competitive freedom, treating any person who acts freely in the market as "undertaking".[53]

In this sense, an undertaking exists where two conditions are fulfilled: the exercise of an economic activity and the autonomy of decision-making. Notably, the French legislature confined itself to using the expression "activities of production, distribution, and services" and did not resort to the term "undertaking" in either competition law or commercial legislation.
Turning to the Algerian legislature, it is apparent that it has defined the nature of the persons subject to the application of competition law, as set out in Article 3 of Order No. 03/03, as amended and supplemented, which provides that an undertaking is any natural or legal person, regardless of its nature, that permanently carries out activities of production, distribution, services, or importation.

Accordingly, the persons involved in competition law include those subject to private law, whether natural or legal, who engage in the activities specified in the aforementioned provision. The application of competition law also extends to persons governed by public law, encompassing any undertaking that acts as an economic operator in the competitive industrial and commercial sphere whenever its purpose is production, distribution, or the provision of services.[54]

Second Branch: Restrictions and Controls on Competitive Freedom in Algerian Legislation
The legislative and legal enshrinement of the principle of free competition is one of the most significant requirements introduced by the new orientation of state economic policy toward liberalism and freedom. This enshrinement has enabled openness to numerous sectors and activities that were previously reserved for the State. From this perspective, entry into and exit from the market have become legally guaranteed and protected freedoms.

This protection has allowed various economic operators and undertakings to expand their activities and relationships, which may give rise to practices that hinder the proper functioning of competition, particularly in the context of competitive rivalry and undertakings' pursuit of market dominance.
Accordingly, the legislature has established a set of controls and limits designed to preserve a balanced competitive system that guarantees the freedom of new operators to enter the market while also protecting undertakings from their competitors' practices and safeguarding consumer interests and living conditions.

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[51] Algeria, *Presidential Decree No. 15-247 of December 16 2015, on the Regulation of Public Procurement and the Delegation of Public Services*, Official Gazette of the Algerian Republic, no. 50.
[52] Mekhanché, *Mechanisms for Activating the Principle of Free Competition*, 54.
[53] Tioursi, *Legal Controls of Competitive Freedom in Algeria*, 47.
[54] Ibid., 51.

The legislation relating to competition includes several provisions prohibiting restrictive practices, imposing limits on price freedom, and imposing controls over economic concentrations.

1. Prohibition of Practices Restrictive of Competition

The increase in the principle of free competition to the rank of principles governing economic policy has enabled the development of various mechanisms that promote freedom of trade and investment, as well as freedom of individual or private initiative. This has prompted public authorities to combat all forms of obstacles and restrictions that may impede such freedoms. Since competition represents a form of confrontation between undertakings, each seeking to increase its market share, the reactions of competing undertakings may threaten market equilibrium and thus shift it away from a state of free competition.

To address this situation, a specific system has been established to regulate the conduct of market participants, which constitutes the objective and subject of special competition regulation. Competition is exposed to two types of obstacles: interference arising from various practices and behaviours that hinder it and abuse by undertakings resulting from their market position.[55]

Article 6 of Order No. 03/03, as amended and supplemented, identifies the practices that fall within the category of prohibited acts and conduct, constituting an obstruction, restriction, or distortion of free competition. These include all acts, practices, and agreements and express or implicit arrangements that aim, or may aim, to restrict access to the market and the pursuit of commercial activities therein; that seek to limit or control production, marketing outlets, investment, or technological development; or that involve the sharing of markets or sources of supply. The provision likewise prohibits interference with price determination in accordance with market rules by artificially encouraging price increases or decreases. It also forbids the application of unequal conditions to equivalent services in dealings with trading partners, thereby depriving them of the benefits of competition or making the conclusion of contracts subject to the acceptance of additional services unrelated to the subject matter of the contract. Furthermore, it prohibits the award of public contracts to beneficiaries of such practices.

The prohibition or control of these practices constitutes the cornerstone of preserving free competition. It is at the core of competition law, whose primary aim is to prevent agreements between undertakings that may hinder competition. Agreements generally result from the convergence of will, implying that the parties concerned enjoy decision-making autonomy. An anti-competitive agreement, however, is one that is concluded between two or more undertakings in the absence of relations of dependence or hierarchy. Agreements targeted for their restrictive effect on competition are identified on the basis of two concepts:

- **The concept of an anticompetitive object**, which makes it possible to identify agreement behaviours that pose risks to everyday competitive practices in the market. An agreement revealed immediately after its conclusion, even before its implementation, is regarded in many legal systems as equivalent to an act of intent. This concept also involves examining the clauses of the agreement and analysing them to ensure that they do not undermine the legitimate protection of commercial, industrial, and intellectual property.
- **The concept of the anti-competitive effect**, which entails a precise analysis of each case of the actual and potential effects of practices carried out by undertakings in the market. All legal systems impose severe sanctions once the existence of a practice that infringes on and undermines competition has been established.[56]

Competition legislation has focused on condemning agreements between undertakings on the basis of their effects, even when their object is not anticompetitive. Notably, the two concepts—object and effect—may be applied jointly or separately. Anti-competitive agreements are characterised by their

[55] Mohamed El-Marghadi, *op. cit.*, 327.
[56] Ibid., 327.

diversity and the difficulty of defining and exhaustively listing them. Consequently, most legal systems have confined themselves to providing a general definition, distinguishing such agreements according to their intended objectives, namely:
– the sharing of markets, contracts, or sources of supply;
– the limitation or control of production, outlets, investments, or technological progress;
– the restriction of access to the market or the limitation of competitive freedom for other undertakings;
– interference with price formation through market mechanisms.[57]

Notably, the Algerian legislature has likewise adopted these classifications in the legal formulation of the prohibition of practices that restrict competition about agreements and arrangements pursuing such objectives, as set out in Article 6 of Order No. 03/03, as amended and supplemented.
In addition to prohibiting anti-competitive agreements, competition law prohibits abusive exploitation by undertaking a dominant position in the market, as provided in Article 7 of Order No. 03/03, as amended and supplemented: "Any abuse resulting from a dominant position in the market, or from the monopolisation of the whole or part thereof, is prohibited...".
A dominant or controlling position is not, in itself, unlawful. An undertaking that has attained such a position has generally done so as a result of the effectiveness of its economic and investment policy. Responsibility therefore arises in a specific context through the assessment of the undertaking's conduct to determine whether it constitutes excessive behaviour by virtue of its dominance or an abuse of its market position.

The exploitation of a dominant position may occur within a given market or across other markets by the same undertaking. Accordingly, various legal systems have sought to establish a list of behaviours that fall within the scope of abuse of a dominant position. European legislation, for example, has set out such a list, including the direct or indirect imposition of selling or purchasing prices or unfair trading conditions; the limitation of production, outlets, or technical development; discriminatory treatment of trading partners; and the conclusion of contracts conditional upon the acceptance of additional services unrelated to the subject matter of the contract or to established commercial practices.

These approaches have been adopted in the Algerian competition law under Article 7 referred to above. It may therefore be stated that abuse of a dominant position may be classified into three principal forms: exploitation through price setting; exploitation aimed at extracting an unjustified advantage; and exploitation intended to eliminate a competitor from the market, prevent entry thereto, or exclude its products therefrom.[58]

The abuse of a position of economic dependence on another undertaking is likewise prohibited, as provided for in Article 11 of Order No. 03/03, as amended and supplemented. Economic dependence refers to the purchasing power in the relationship between suppliers and distributors. The dependence of a supplier on a distributor is assessed in light of the significance of the turnover generated by the supplier with that distributor, the importance of the distributor in marketing the product concerned, and the factors that have led the supplier to concentrate its sales with that distributor.[59]
Pursuant to Article 11 cited above, the forms of abuse arising from the exploitation of a position of economic dependence may be summarised as follows:
– refusal to sell without legitimate justification;
– tied selling or discriminatory selling;
– selling subject to the purchase of a minimum quantity;
– imposing an obligation to resell at a lower price;

[57] Ibid., 328.
[58] El-Marghadi, *op. cit.*, 345.
[59] Ibid., 351.

– termination of a commercial relationship solely because the operator refuses to submit to unjustified commercial conditions;
– any other act likely to reduce or eliminate the benefits of competition within the market.

Second, imposing limits on Price Freedom

Article 3 of Order No. 03/03, as amended and supplemented, provides that prices should be determined freely in accordance with the rules of free and fair competition. Given the impossibility of achieving perfect competition in the market, the State has nevertheless retained the right to intervene in price determination. The legislature expressly adopted this approach in the initial codification of competition law,[60] as reflected in the wording of Article 5, which states: "In application of the provisions of Article 4 above, margins and prices of goods and services, or homogeneous categories of goods and services, may be determined, capped, or approved by regulation.

Measures relating to the determination of profit margins and prices of goods and services, their capping, or approval should be adopted on the basis of proposals submitted by the sectors concerned for the following principal reasons:

– Ensuring the stability of the levels and prices of essential goods and services or those of widespread consumption in the event of a noticeable market disturbance;
– combating speculation in all its forms and preserving the purchasing power of consumers.

Temporary measures may also be adopted to determine profit margins and prices of goods and services or to cap them in the same forms, in cases of excessive and unjustified price increases, particularly as a result of severe market disruption, disaster, chronic supply difficulties within a given sector of activity or a specific geographical area, or in situations of natural monopoly."

From the wording of this provision, it is apparent that price fixing constitutes merely an exceptional phenomenon within a market economy system founded upon price freedom. In this context, the State's authority to intervene and ensure its presence arises from several considerations, foremost the preservation of the country's public interest.[61] as well as considerations relating to economic public order.

In legal terminology, a mandatory price is defined as "the price imposed by law such that it may not be exceeded." It constitutes the monetary consideration fixed for a good offered for sale through direct state intervention by setting a maximum price, with the primary aim of protecting consumers.

Pricing is defined as "the act whereby the Ministry of Trade, chambers of commerce, or any authority designated by the State determines the prices of goods or of a specific good, obliging traders to sell at those prices and prohibiting any excess thereof, failing which they are exposed to liability and the imposition of sanctions."

Returning to the wording of Article 5 cited above, it is clear that the goods falling within the scope of compulsory pricing, or price determination by regulation, are those characterised by their importance and necessity, particularly goods of widespread consumption. The list of such goods expands or contracts depending on economic circumstances, the degree of their abundance or scarcity, and the level of need for them. Consequently, recourse by the State to pricing as a restriction on competitive freedom is underpinned by specific justifications and motivations,[62] As will be examined later in the second section of the second chapter of this part, the issue of State intervention in price determination by regulation will be addressed.

Third: Imposition of Control over Economic Concentrations

Economic concentration operates at several economic levels. Horizontal concentration occurs at the same economic level, such as among producers, distributors, or service providers. In contrast, vertical

[60] Tioursi, *Legal Controls of Competitive Freedom in Algeria*, 244.
[61] Ibid., 245.
[62] Ibid., 251.

concentration takes place between undertakings engaged in different activities, as is typically the case between producers and distributors. Another form of concentration arises between undertakings engaged in different economic activities, namely, conglomerate concentration.
Undertakings resort to economic concentration to avoid the adverse effects of competition and strengthen their market position through the use of their economic power. Such conduct is not, in itself, unlawful. What necessitates monitoring prior to market entry is the possibility that such concentration may enable control over the relevant markets.
The legislator has specified, in Article 15 of Order No. 03/03, as amended and supplemented, the forms and situations in which economic concentration occurs, namely:
– the merger of two or more undertakings that were previously independent;
– the acquisition, by one or more natural persons exercising control over at least one undertaking, or by one or more undertakings, of control over one or more undertakings or parts thereof, directly or indirectly, through the acquisition of shares in the capital, the purchase of elements of the undertaking's assets, by contract, or by any other means;
– the creation of a joint undertaking that permanently performs all the functions of an independent economic undertaking.

Control over economic concentrations constitutes a fundamental objective of competition law, as stated in its first article. The system of control imposed thereon is established within the framework of the state's general economic policy objectives. The primary objective is the protection of competition, given that concentrations are among the most significant mechanisms shaping the orientation of the national economy. They contribute to reshaping economic relations among undertakings, as their economic power enables them to control both domestic and foreign markets through concentration and market acquisitions.[63]

A market economy based on competitiveness in both domestic and foreign markets requires rational state intervention in the market. The imposition of control over economic concentrations constitutes one of the most important forms of state policy in the economic sector. Undertakings operate in accordance with objectives deemed necessary by the State and approved through the undertakings' commitment to implementing a policy set out in a specific project. Economic concentration thus constitutes an important instrument for guiding free competition in the market in accordance with the requirements of national economic policy.[64]

The legislature has vested the power of supervising economic concentrations in the Competition Council whenever such concentrations pose a threat to or restrict competition. This applies to all undertakings, regardless of the sector of economic activity in which they operate. Moreover, all concentration operations must be notified to the Competition Council, particularly where they are likely to affect competition or to strengthen the dominant position of an undertaking in a given market.[65] Alternatively, where they aim to exceed the threshold set out in Order No. 03/03, as amended and supplemented, namely, the attainment of a share exceeding 40 per cent of sales or purchases carried out in a specific market.[66]

Conclusion

Allowing competition to operate freely within a competitive market governed by the principle of freedom may lead to numerous excesses in the pursuit of private individual interests. This represents a conflict with the public interest, which the State seeks to safeguard under all circumstances. Consequently, various regulatory and punitive rules emerge through which public authorities endeavour

[63] Mekhanché, *Mechanisms for Activating the Principle of Free Competition*, 129.
[64] Ibid., 201.
[65] Rachid Zouainia, *Le droit de la concurrence*, *op. cit.*, 179.
[66] Algeria, *Article 18 of Order No. 03-03 Relating to Competition*, as amended and supplemented.

to impose economic public order. All practices contrary to free competition and market ethics constitute conduct that threatens the proper functioning of competitive activity, potentially leading to the collapse of undertakings or to harm to consumers.

Accordingly, the various interests present in the market require protection, whether through regulatory rules and controls or through punitive and deterrent legal provisions. This has been enshrined by the Algerian legislature through Competition Law No. 03/03, as amended and supplemented, which prohibits anticompetitive practices and provides for sanctions with respect to these practices, as well as imposing limits on price freedom and subjecting economic concentrations to control. To strengthen these functions, the Competition Council was established as the administrative authority with general jurisdiction in competition matters. The question that arises in this context, however, is as follows: what role does the Competition Council play in enforcing the rules of free competition in the market?

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