

## The principle of competition in the conclusion of the agreement of delegation of the public service between freedom and restriction

-A comparative study-

مبدأ إبرام اتفاقية تفويض المرفق العام بين الحرية والتقييد -دراسة مقارنة-

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### **Abstract:**

The purpose of this study is to highlight the extension of the principle of freedom of competition in the field of public service delegation contracts, which is the general rule of the contract and the fundamental right of individuals to submit their offers without management, as agreed in most comparative legislation, in France, in Egypt or Algeria, which confirmed. By virtue of this principle stated in presidential Decree 15-247, which governs public procurement and the public service mandates of Executive Decree 18-199 on the delegation of the public service, this principle is not considered absolute in order not to not restrict management, its main purpose being to realize the public interest and preserve public money So that's done this principle has a set of exceptions in some cases

**Keywords:** competition principle, public service delegation contracts, contract operator, public transactions.

الملخص:

تهدف هذه الدراسة إلى إبراز امتداد مبدأ حرية المنافسة في مجال عقود تفويض المرفق العام، الذي يعتبر القاعدة العامة للتعاقد وحق أساسي للأفراد في تقديم عروضهم دون منع الإدارة لأحد منهم، هذا ما اتفقت عليه جل التشريعات المقارنة سواء في فرنسا أو مصر أو الجزائر التي أكدت على هذا المبدأ في المرسوم الرئاسي 15-247 المتضمن تنظيم الصفقات العمومية وتفويضات المرفق العام وألحقته بالمرسوم التنفيذي 18-

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## Brahmi Abderrazzak

199 المتعلق بتفويض المرفق العام، إلا أن هذا المبدأ لا يعتبر مطلقاً لكي لا يقيد الإدارة باعتبار أن هدفها الرئيسي تحقيق المصلحة العامة والحفاظ على المال العام لذلك جعلت لهذا المبدأ مجموعة من الاستثناءات في بعض الحالات.

الكلمات المفتاحية: عقود تفويض المرفق العام، المتعامل المتعاقد، الصفقات العمومية.

### Introduction:

Competition is firmly linked to a free economy; we can not imagine the creation of one without the other<sup>1</sup>. Free competition is one of the principles underlying the freedom of international trade, as the fight against monopolies at all levels is based on free competition in all markets. For example, referring to the French legislator, we have found this principle since the end of the 18th century, This principle was also enshrined in Algeria in the 1996 Constitution, which states that "freedom of trade and industry is guaranteed"<sup>2</sup>It is practiced within the framework of the law "even if the Algerian legislator has already consecrated the consequences of this principle of freedom of competition, price, etc., and the free competition within the framework of the mandate of the public service means to open the fair competition to those wishing to participate in the bidding and processing process. In view of the importance of competition, the GATT Contracting States issued a special decision in November 1960 at the end of the consultations to establish a link between competition policies and international trade and not recognizing the practices of impediment to free competition and the international trade<sup>3</sup>.The importance of our study in the effective role of the principle of freedom of competition in the conclusion of the delegation agreement of public services shows that free and real competition between contractors who meet the preconditions would lead to the exclusion of the incompetent investor and the inability to manage the public service and thus obtain the best investor, In the absence of the principle of free competition, the door opens to administrative corruption, hence the delegation of public service to a contractor or to inefficient undertakings, financial and technical capacity would cause serious prejudice to the latter and would therefore be prejudicial to all the beneficiaries, which is incompatible with the objectives of the administration, which is always in

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<sup>1</sup> Arzki Zoubeir, "Consumer Protection under Free Competition", Memorandum for Master of Private Law, Faculty of Law, University of Mouloud Mamri Tizi Ouzou, University Year 2010-2011, p. 07. Article 37 of the 1996 Constitution of 28 November 1996, JR of the Algerian Republic, No. 76 of 08 December 1996.

<sup>2</sup> Article 37 of the 1996 Constitution of 28 November 1996, JR of the Algerian Republic, No. 76 of 08 December 1996.

<sup>3</sup> Ibraheem El-Shahawy, "BOT Concession Contract, Comparative Study, Ph.D. Thesis, Faculty of Law, Ain Shams University, Egypt, 2003, p. 194

## **The principle of competition in the conclusion of the agreement of delegation of the public service between freedom and restriction**

### **-A comparative study-**

the public interest. All this leads us to ask the following question: to what extent does the administration adopt the principle of competition in the conclusion of delegation of the public service in the light of comparative legislation in Algeria, France and Egypt? What this principle is an absolute principle in their contracts? In order to answer this problem, we considered a comparative analytical study between the Algerian, French and Egyptian legislations. Presentation in the first topic on: the general framework of the principle of competition and the Convention on the delegation of the public service. The second subject we have devoted to: The extent of the freedom of choice of the contractor in the Convention on the delegation of the public service.

### **I- the general framework of the principle of competition and the public service agreement:**

Insert here the content of Title 1 in the same format indicated (font, size, Exposure to the principle of competition in the agreement for the conclusion of general service delegation contracts implies first and foremost exposure to the theoretical framework and the general concept of the principle of competition, as well as to the general concept of delegation of public service.

#### **I-1: the general concept of the principle of competition in the conclusion of public service delegation contracts:**

The general notion of competition in the framework of public service delegation contracts obliges us first of all to explain the term and its linguistic and legal meaning, then to define its concept in the field of public service delegation contracts in particular and to define the legal limits of this principle.

##### **1-1: Definition of the principle of competition:**

The definitions of competition vary from linguistic definition to idiosyncratic definitions. This is what we will discuss later:

##### **First: the linguistic definition:**

Competition is a language that involves the instinct of effort to mimic the older ones and catch up with them. It is said that people compete in all

## **Brahmi Abderrazzak**

competes and engages without injury. In other words, competition is a struggle between (economic agents) in order to receive benefits<sup>1</sup>.

### **Second: the idiosyncratic definition:**

Competition in this regard, according to a body of case law, "opens the door to fair competition for those wishing to participate in the bidding process, which means that all competitors are treated equally; is not allowed to give an advantage to one or more of them"<sup>2</sup>.

### **I-2: Definition of the principle of competition in the field of public service delegation contracts :**

In the field of public utility contracts, free competition means "the free entry into the public offer announced by the administration within the limits determined by law, and the principle of free competition in this sense is one of the procedures governing the public offer system"<sup>3</sup>.

This principle is defined in the texts on the mandate of the public service as follows:

1. In Executive Decree No. 18/199 on the delegation of the public service, competition is defined as: "a measure aimed at obtaining the best offer, by putting several operators in competition, in order to guarantee equal treatment and the objectivity of their selection criteria, transparency of operations and non-compliance." Bias in the decisions taken, thus granting the mandate of public equipment to the candidate who makes the best offer, which offers the best professional, technical and financial guarantees"<sup>4</sup>.

2. Presidential Decree 15-247 also addressed this term as "a procedure for obtaining bids from several competing contractors, awarding the transaction without negotiation to the bidder offering the best bid in terms of economic benefits, the basis of several objective selection criteria developed before the start of the procedure"<sup>5</sup>.

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<sup>1</sup> Shafar Nabila, "Crimes Related to Competition in Algerian and Comparative Law", Memorandum for Masters in Private Law: Economic / Consumer Relations, Faculty of Law and Political Science, University of Oran, University Year 2012-2013, p. 13.

<sup>2</sup> Muhannad Mukhtar Nouh, "Positive and Acceptable in the Administrative Contract", 2nd Edition, Al-Halabi Publications, Beirut, Lebanon, 2013, p.368.

<sup>3</sup> Quancard Miehchel, "The adjudication of the works and supplies contract, 1945, p52.

<sup>4</sup> Article 11 of Executive Decree 18-199 of 20 Dhu al-Qa'dah 1439 corresponding to August 2, 2018, concerning the delegation of the General Annex, JR to the Algerian Republic, Issue No. 48, issued on 23 Dhu al-Qa'da 1439 corresponding to 5 August 2018.

<sup>5</sup> Article 40 of Presidential Decree 15-247 of 2 Dhul Hijjah 1436 corresponding to 16 September 2015 containing the organization of public procurements and authorizations of the General Attachment, JR of the Algerian Republic, No. 50, issued on 6 Dhul Hijjah 1436 corresponding to 20 September 2015.

## **The principle of competition in the conclusion of the agreement of delegation of the public service between freedom and restriction**

### **-A comparative study-**

#### **I-3: Foundations of the idea of free competition in the field of public service delegation contracts :**

Competition is based on several considerations in the public service delegation agreement :

1 - The need to allow all contractors meeting the conditions stipulated in the law to participate in the offer announced by the Ministry.

2. The administration should respect the legal provisions governing the conditions of competition in the area of the public service delegation agreement and not infringe the principles that could affect the freedom of competition.

3. The administration must comply with the legal provisions on exclusion or deprivation and may only do so within the limits of the public interest.

The opportunity offered to a large number of candidates will ultimately lead to positive results for the project, then for the national economy and for the state in general, as it will revive economic life in general<sup>1</sup>.

#### **I-4: Limits of the freedom of competition in the public service delegation agreement :**

The application of the principle of free competition does not mean that the administration has no discretion to choose the contractor it deems appropriate or to exclude certain offers even if they comply with the stipulated conditions. For example, the exclusion of tenders submitted after the specified period, where, if the administration accepted the offers, it would violate the principle of equality and the principle of free competition itself.

The principle of competition does not prevent the administrative authority from imposing certain conditions on the awarding of public offers.

In one of its judgments, the Egyptian Court of Justice stated that "the freedom of competition is the right of individuals to submit to a public offer without the hindrance of the administration. By depriving it of its right to compete for the award of an offer, whether public or private, this natural principle limits the release of two constraints:

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<sup>1</sup> Malallah Jafar Abdul-Malik Al-Hammadi, "Guarantees of the Administrative Contract", New University Publishing House, 2009, pp. 128 and 129.

## **Brahmi Abderrazzak**

The first is related to the specific conditions imposed by the administration, which in its view should be fulfilled by the tenderer.

The second: with regard to the measures taken by the administration to regulate public offers, exclude certain persons who prove to them their technical or financial incapacity to perform this work, targeting only the right people and those who are in a position to do so. To do, thus saving a lot of time and effort.

On inspection and dissemination committees. The administration must establish the contractual conditions that the customer must satisfy in order to satisfy the requirements of the public interest and based on the public facility and on any defect that would be imputed to him as a result of a breach by the contractor of this which is stipulated in the special conditions related to its financial capacity or eligibility. The work in question inevitably entails an enormous loss of public utility, public finances and finally public interest.

As a result, management always ensures that unwanted resellers do not participate, whether for reasons of integrity and consideration, disqualification, bad reputation or conflict of interest<sup>1</sup>.

### **II-2: the general concept of public service delegation contracts :**

The general concept of public service delegation contracts first requires us to explain this term by setting out its idiosyncratic and legal definitions and then to determine the basis of the mandate. the delegation of the public service and the legal forms under which it is authorized.

#### **2-1: Definition of public service delegation contracts:**

There are many special concepts for public service mandate contracts

First: the idiosyncratic definition The French jurist (G.Drou) defined it as "a contract between a public person and a private person and based on a personal consideration, with the aim of achieving a public service that takes many judicial forms: franchise, indirect management , public service management "<sup>2</sup>. And defined by the French lawyer (Auby) that "the contract entrusted to another person called (delegate) to perform the task of public utility and make the

necessary exploitation, and can establish a direct relationship with the beneficiaries served in return tariffs and this delegation is limited to the

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<sup>1</sup> Mal Allah Jafar Abdul Malik al-Hammadi, *ibid.*, Pp. 131 and 132.

<sup>2</sup> Abu Bakr Ahmed Osman, "Contracts of General Facility Authorization - A Comparative Analytical Study", New University House, 2015, p. 80.

## **The principle of competition in the conclusion of the agreement of delegation of the public service between freedom and restriction -A comparative study-**

period specified in the contract reflecting the investments for which it is intended)<sup>1</sup>.

Professor S.Braconnier defined it as "a contract by which a legal person under public law, appointed as a commissioner for a specified period, operates a public service and is under the responsibility of another private law commissioner, to whom he is entitled to collect the price from the parties or to benefit from it together<sup>2</sup>.

Second: the legal definition The French legislator has defined the public service delegation mandate in article 3 of law n ° 1168-2001 of 11-12-2001, called the Murcef law, as "a contract under which a legal person entrusted by public law entrusts to a third party (public or private) the responsibility for carrying out a public service The product must be substantially related to the results of the investment for the public service and the authorized person may be responsible for the construction of installations or the acquisition of the necessary funds for the installation.

In Executive Decree 18-199, the Algerian legislator defined the public service delegation mandate as "the transfer of certain non-sovereign functions of public authorities for a specified period to the Commissioner, whether a person public or private subject to Algerian law appointed by the Commissioner pursuant to a delegation agreement and in the public interest "<sup>3</sup>. It is clear from these definitions that the Algerian legislator is influenced by French legislation, so that this concept includes the management of all public services by others, whether a public or private person.

### **2-2: BASIS OF THE CONDITIONS FOR ESTABLISHING A delegation of a public service :**

Most comparative legislation has agreed that the General Agreement on the Delegation of the Public Service should fulfill the following conditions:

**1- Existence of the public service:** to be in agreement with the delegation of a public service, the delegated activity must be exercised in a public service which can be delegated, because the activities undertaken by the administration or entrusted to others for to achieve them are not all public services.

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<sup>1</sup> Auby Jean François, «La délégation de service public», Guide pratique, Dalloz, Paris, 1997, P44.

<sup>2</sup> Braconnier Stéphane, «Droit des service publics», Bresse universitaire de France, Paris, 2004, P413.

<sup>3</sup> Article 02 of Executive Decree 18-199 Ibid.

## **Brahmi Abderrazzak**

**2 - The existence of a contractual relationship:** it is necessary that the contract of delegation of the public service has two parts and that the delegated person is at the heart of the subject and that it is a legal person endowed with the inherent competence to manage the legally defined service and the commissioner, who may be a natural or legal person, who must have a contractual relationship under which the parties to the contract are subject to the terms and conditions of this contract.

**3 - Exploitation of the public service:** The object of the contract of delegation is the operation of the public service, that is to say the administration and the operation of service in accordance with the purpose for which it was created by the commissioner and must be under the control of the authority granting the delegation<sup>1</sup>.

### **2-3: Forms of Public Service Delegation:**

The form of public service delegation is determined by the level of risk incurred by the commissioner, the level of control exercised over the delegated authority and the complexity of the public service. The public service delegation mandate can take four forms:

**1. Concession contract:** This is the form in which the delegating authority has delegated to the commissioner either the construction of facilities or the acquisition of goods necessary for the establishment and operation of the public service, or the commitment to exploit it only<sup>2</sup>.

**2. Lease Agreement:** This is the form in which the delegated authority of the Commissioner commits to managing and maintaining the public service in exchange for an annual fee paid by the Commissioner. The commissioner acts on his behalf with all the risks and under the partial control of the delegated authority<sup>3</sup>.

**3. The catalyst organization:** the form in which the delegating authority has engaged the Commissioner to manage, manage and maintain it<sup>4</sup>.

**4. Management Contract:** This is the form in which the delegating authority has committed to the Commissioner the management, management and maintenance of public services without any risk to the Commissioner<sup>5</sup>.

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<sup>1</sup> Abu Bakr Ahmed Osman, op. Cit., Pp. 83-99.

<sup>2</sup> Article 53 of Executive Decree 18-199 Ibid.

<sup>3</sup> Article 54 of Executive Decree 18-199 Ibid.

<sup>4</sup> Article 55 of Executive Decree 18-199 Ibid.

<sup>5</sup> Article 56 of Executive Decree 18-199 Ibid.

# **The principle of competition in the conclusion of the agreement of delegation of the public service between freedom and restriction**

## **-A comparative study-**

### **II: the extent to which the administration is free to choose the contractor in the public service delegation agreement:**

The public service delegation agreement is governed by the principle of competition in its conclusion, which constitutes the general basis of the contract in most comparable legislation. This does not mean, however, that the administration is bound by this principle in all its public service contracts, but there are exceptions in the cases provided by law. It is not always possible to restrict management, especially as it has a public authority and always aims to meet the needs of the users of the service and thus to realize the general interest.

#### **II-1 The principle of competition as a general principle in the General Annex Delegation Agreement:**

Demand for competition is the general rule in the conclusion of the agreement to authorize the public utility in Algeria, France or Egypt.

##### **1-1: The freedom of competition in the conclusion of the public service agreement in Algeria:**

In Algeria, the demand for competition is national, according to two stages:

1. The first step: in accordance with Executive Decree 18-199, this step "consists of the initial selection of candidates on the basis of application files. The documentation of this file, specified in the first part of the specifications, must appear under the title of the application file in the bulletin board.

2. The second step: the stage at which the candidates selected during the first stage are invited to withdraw the specifications containing the conditions relating to the delegation of the public service (regulatory and contractual clauses), which should explain the modalities of conclusion and execution of the public service<sup>1</sup>.

The application for competition must be published widely and by any legal means<sup>2</sup>, and must be published at least in two official daily newspapers in both national and foreign languages<sup>3</sup>.

Even before the issuance of Executive Decree 18-199, contracts of the General Facility Authorization Agreement were concluded in accordance

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<sup>1</sup> Article 12 of Executive Decree 18-199 Ibid.

<sup>2</sup> Article 25 of Executive Decree 18-199 Ibid.

<sup>3</sup> Article 28 of Executive Decree 18-199 Ibid.

## **Brahmi Abderrazzak**

with the requirements of competition regulated by the executive decrees relating to the granting of certain concession contracts:

1 - Privilege in the field of telecommunications, Executive Decree No. 01-124, containing the procedures relating to the principle of competition for telecommunications licenses, has been published<sup>1</sup>.

2- The concession in the field of electricity and gas distribution contracts Executive Decree No. 08-114 states that "the concession for the distribution of electricity and gas is granted by the State represented by the Minister of This concession is subject to the tender issued by the Commission for Control of Electricity and Gas "<sup>2</sup>.

3 - And the selection of the commissioner in the field of water has also been framed by the law n ° 05-12. The commissioner's selection is made through an offer of competition, which must be governed by certain conditions governed by this law<sup>3</sup>.

### **1-2: FREEDOM OF COMPETITION FOR THE CONCLUSION OF THE PUBLIC SERVICE AGREEMENT IN FRANCE:**

In its counterpart France, we note that the most recent legislation concerning the mandates of public services in France (mentioning the Sapin and Murcef law) is subsequent to modifications, which in turn determine the conditions of selection of the contractor with the administration according to the principle of competition and publicity of the latter, where Article 38 of the law (Sapin) However, public utility delegation contracts for legal persons are subject to public law and by delegation of power to advertising procedures leading to the submission of competitive bids under the conditions defined in the Conseil d'Etat decree). Subsequent provisions define the rules of competition and advertising to require the authorizing officer to publish twice the mandatory, the first mandatory publication in a periodical for the publication of legal declarations and the second publication in a trade journal of the related economic sector to the authorization contract. The administration publishes in the Official Journal of the European Communities because there is no provision in European

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<sup>1</sup> Executive Decree 01-124 of 09 May 2001 specifying the procedure for bidding for the announcement of competition for the granting of licenses in the field of telecommunications, JR to the Republic of Algeria, No. 27, issued in 2001.

<sup>2</sup> Article 06 of Executive Decree No. 08-114 of April 09, 2008, "Including the modalities for granting and withdrawing the electricity and gas distribution concession and the book of conditions relating to the rights and duties of the concessionaire", for the Republic of Algeria No. 20, issued in 2008.

<sup>3</sup> Article 105 of Law 05-12 of August 04, 2005, on Water, for the Republic of Algeria, No. 60, issued in 2005.

## **The principle of competition in the conclusion of the agreement of delegation of the public service between freedom and restriction**

### **-A comparative study-**

law<sup>1</sup>. As for the legal period set for the submission of the application, it should not be less than one month from the date of the last announcement. Presentations should include all documents relating to the technical, financial and administrative capabilities of each candidate. The basic characteristics and characteristics of the contract are indicated. After the deadline for submission of applications, the administration

draws up the list of candidates admitted to the competition with a view to awarding the authorization contract on the basis of their professional and financial guarantees and their ability to operate the service. public in good and good conditions. For performance as well as for rate service conditions, user performers for each candidate are acceptable if they are positive<sup>2</sup>. Finally, the administration will negotiate with the chosen candidate according to the results of the negotiations, the administration being free to choose the person to delegate the public service, the legislator having for objective to clarify the economic life and not to harm the selection principle<sup>3</sup>.

### **1-3: Freedom of Competition in the Conclusion of the Public Service Agreement in Egypt:**

In Egypt, the conclusion of the public service delegation agreement did not differ significantly from Algeria and France, because the legislator defined the terms of conclusion of this contract in the context of competition and advertising, and this principle is one of the general principles of the contract in Egypt.

This principle is considered one of the general principles of contracts in Egypt. The general annex concluded in accordance with the principle of competition must:

1-Law No. 100 of 1996 Amending Certain Provisions of Law No. 16 of 1972 on the Establishment of the Egyptian Electricity Authority, which provides that "public utilities may be required to compel local and foreign investors to establish, manage, operate and maintain the power plant .... The commissioner is chosen in a competitive and advertising framework. "

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<sup>1</sup> Mohamed Mohamed Abdellatif, "Authorization of the Public Facility", Arab Renaissance House, Egypt, 2000, p. 120.

<sup>2</sup> Walid Haidar Jaber, "Authorization in the Management and Investment of Public Utilities", Public Corporation and Privatization, Halabi Publications, Beirut, Lebanon, 2009, p. 163.

<sup>3</sup> Mohammed Mohammed Abdul Latif, *ibid.*, P. 122.

## **Brahmi Abderrazzak**

2- Law No. 03 of 1997 on the obligation of public services to establish, manage and operate airports and landings where it is indicated ... "Obligations of the public service may be imposed on Egyptians, foreigners and other legal persons.

within and outside the country for the establishment, preparation and maintenance and the operation of existing airports and landings ... to be selected, undertaken within the framework of the competition and advertising.

3- Law No. 146 of 2002 amending certain provisions of Law No. 152 of 1980 on the Establishment of a National Authority of Egyptian Railways stipulating that "the debtor must be selected in a competition and publicity framework"<sup>1</sup>. In this perspective, it is clear to us that the legislation concerning the mandates of the public services, be it in Algeria, France or Egypt, comes from a single opinion which explicitly states that the principle of competition and publicity is the general principle for concluding the agreement of the delegation of public services, even if there are some exceptions to this principle.

In some cases, however, the administration remains a necessary measure to fulfill the mandate of the public installation, but what we have instigated and what is wrong with the silence of the Algerian legislator as regards the duration of the bid submission. so that this only emphasized the need to take into account the preparation of tenders allowing the participation of as many competitors as possible. This may open the door Player Corruption and Administrative Corruption, while the French legislator has set the legal deadline for submitting the application for one month (30 days) At least as of the date of the last announcement, the Egyptian legislator will also put an end to the example of the French legislator as stipulated in Article 14 of the Law on auctions and auctions, specifying a period of at least 10 days for the submission of tenders in the call for tenders. Public offers from the date or announcement in the daily newspapers. Reduce this period so that it is not less than 5 days.

### **II-2: exceptions to the principle of competition in comparative legislation:**

Although all comparative legislation provides for the principle of competition as a general principle of contracts in the context of the public service delegation agreement, there are some exceptions to this principle in

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<sup>1</sup> Hamada Abdel-Razzaq Hamada, "The Legal System for the Concession Contract of the Public Facility", New University House, Alexandria Egypt, 2012, pp. 363-366.

## **The principle of competition in the conclusion of the agreement of delegation of the public service between freedom and restriction**

### **-A comparative study-**

order to free the administration from its obligations relating to competition. Application of the rules of publicity and competition, which means that the law has In this case, he may resort to direct negotiations with the contractor, in which he considers the availability of elements of personal consideration without being bound by the procedures of competition.

### **2-1: Exceptions to the freedom of competition in the agreement on the delegation of the public service in Algeria**

Consent is the exception to the conclusion of the agreement authorizing the public service in Algeria<sup>1</sup>, in two forms:

**First: simple consent:** simple consent can be defined as the procedure by which the delegated authority directly selects a qualified commissioner, to ensure the functioning of a public service, after ensuring it's financial, professional and techniques<sup>2</sup>, The delegated authority shall resort to it in the following cases :

- In the case of services that can only be delegated to one candidate in a monopolistic position<sup>3</sup>.
- Urgent cases are also used, namely:
  - In the event that a public service delegation agreement is in force, any subject of dissolution.
  - In cases where the public facilities can not be maintained by the Commissioner.
  - In cases where the Commissioner refuses to sign the schedule containing the extension of the term of the agreement<sup>4</sup>.

**Second; Consensual after consultation:** It can be defined as the procedure by which the delegated authority selects a delegate from at least three qualified candidates<sup>5</sup>, The delegated authority shall resort to it in the following cases :

- If the application for competition is declared unnecessary for the second time, the commissioner is then chosen from among the qualified candidates who participated in the application.

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<sup>1</sup> Article 08 of Executive Decree 18-199, op.

<sup>2</sup> Article 18 of Executive Decree 18-199 Ibid.

<sup>3</sup> Article 20 of Executive Decree 18-199 Ibid.

<sup>4</sup> Article 21 of Executive Decree 18-199 Ibid.

<sup>5</sup> Article 17 of Executive Decree 18-199 Ibid.

## **Brahmi Abderrazzak**

- In the case of the delegation of certain public services that do not require competition application procedures, which are determined by a joint decision of the Minister of Finance and the Minister responsible for regional groups, in which case the Commissioner is selected on a list prepared in advance by the delegating authority after confirmation of their financial capacity; The technical and professional facilities that allow them to manage the corresponding public services<sup>1</sup>.

### **2-2: Exceptions to the freedom of competition in the convention on the delegation of the public service in France:**

In France, Article 41 of the Sapin Law of 1993 defines these cases as follows:

1. In the cases provided for by law, a monopoly over a given service or activity for the benefit of a given enterprise.

2. The cases of delegation of management to a public institution, provided that it is part of its activities and that it complies with the legal rules governing it.

What should be noted is the appeal to the French Constitutional Council of exceptions in the case of monopoly and public institutions by a certain number of members of Parliament, because they violate the principle of equality, but the Council did not share their opinion on the criticism of the exemption of completed projects. Legal monopoly such as electricity and gas projects, By their nature, these projects are different from those that are competitive, because the authorization of monopolistic projects is imposed on the public, so that advertising allows competitive bids that have no reason to exist. The mandate is to provide a flexible form of direct administration<sup>2</sup>.

3. Cases in which the public service delegation contracts do not exceed the amount of 700 000 francs of the Commissariat throughout the duration of the contract.

- 4 - In cases where the delegation contract was awarded to the previous competition and no one has made offers or inappropriate offers.

5. Where the authorization is granted by a decision of the State authorities<sup>3</sup>.

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<sup>1</sup> Article 19 of the Executive Decree 18-199 Ibid.

<sup>2</sup> Abu Bakr Ahmad Othman, *ibid.*, D. 134.

<sup>3</sup> Hamada Abd al-Razzaq Hamada, *op.cit.*, P. 355.

## **The principle of competition in the conclusion of the agreement of delegation of the public service between freedom and restriction**

### **-A comparative study-**

#### **2-3: Exceptions to freedom of competition in the Egyptian public service delegation:**

For its part, Egypt, like France and Algeria, has included in its legislation certain exceptions that free the administration from restrictions and free competition procedures of all kinds, which take two forms:

First; to contract in a limited way

Monopolized objects manufactured or imported by entities or individuals themselves.

-The nature of which requires that it be obtained from their place of production.

-Cas that must be granted to men of art and to experts for their nature different from ordinary cases. Contracts requiring national security considerations must be passed with confidentiality<sup>1</sup>.

Secondly, direct market contract: Article 7 of the Auction and Auction Law No. 89 of 1998 in Egypt specified the licensing authority, whether for the President of Authority, for the president, the competent minister or even the prime minister. The law restricts the use of the direct agreement method whereby it is not permitted to repeat the contract by direct agreement more than once in the same fiscal year for the same process that is the subject of the contract, except in cases where the total value of the contract repeated for the same process can not be repeated. Maximum legally prescribed, however, the direct agreement method has not been ruled out, since the law regulating participation in Article 13 of the Executive Regulation stipulates that "the selection of advisors must be proposed by public invitation to tender or limited or by direct agreement in cases requiring public interest after the approval of the Minister of Finance ".

The Supreme Administrative Court of Egypt stated that "as an inherent principle, the management contract is a public call for tenders and the practice is practiced only in certain cases and to the strictest extent in accordance with the conditions defined by the law"<sup>2</sup>.

#### **Conclusion :**

Having concluded our study on the principle of competition in the conclusion of the agreement of delegation of the public service between

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<sup>1</sup> Article 05 of the Tenders and Auctions Law No. 89 of 1998.

<sup>2</sup> Hamada Abd al-Razzaq Hamada, *ibid*, Pp.361 and 362.

## **Brahmi Abderrazzak**

freedom and restriction, we note that we have tried to study the subject in all its aspects related to the general principle or exceptions which it is included in the comparison between Algerian, French and Egyptian legislation, as well as in terms of results and recommendations. We propose in this regard:

1 / **Results:** One of our main conclusions is that the principle of free competition is the general principle which makes it possible to conclude the agreement of the public service delegation on all the legislations studied, so as to give the administration the possibility to choose the best contractor with the technical and financial capacity to ensure the optimal functioning of the public service. Satisfy the needs of its users.

2 / **Recommendations:** What we have not learned from our study is that all comparative legislation has agreed on one thing by adopting the principle of competition as a general principle of contraction in the conclusion of the public service delegation agreement. and by annexing a series of exceptions, but what should be noted is the difference in procedures which led to the conclusion that the Algerian legislator did not specify the period specified for the submission of tenders. also entrusted the delegation of the public service with the exception of a legal person under Algerian law, unlike the French and Egyptian legislators who did not specify the status of the commissioner, whether local or foreign. This is because of their long sales in this area and the great success achieved.

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