



## Unjustified Privileges in Public Contracts

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**Abstract:** Public contracts are among the most important tools that the Algerian legislator has placed in the hands of the administration to meet public needs and achieve public benefit. They constitute the main channel through which public funds circulate. Accordingly, Algerian legislation has attached great importance to them by regulating the contract award phase, subjecting them to specific oversight, and granting them a more effective and stringent form of protection than others, namely criminal protection of the rules governing public contracts within the framework of the law relating to the prevention and fight against corruption. This is intended to ensure the efficiency of public procurement and to strengthen the principles of transparency, integrity, and fair competition. However, despite the legislator's efforts to establish a preventive system aimed at safeguarding public funds and rationalizing public expenditure, violations may occur by those in charge of public contracts, through the granting of unjustified privileges either intentionally or as a result of error. This constitutes a breach of the legislative and regulatory provisions governing public contracts and an infringement of the principles of freedom of participation, equality, and procedural transparency.

**Keywords:** Public contracts, criminal protection, violations, unjustified privileges, corruption.

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### Introduction:

Public procurement holds great importance and constitutes a fundamental axis in the economic system, as they are among the most significant tools placed by the Algerian legislator in the hands of the administration to meet its needs and achieve public interest. They represent the primary channel through which public funds move and also a fertile ground for corruption, which is one of the most serious phenomena that has spread widely within the state due to political, economic, and social conditions.

The phenomenon of corruption has been associated with several factors that have contributed to its reinforcement and ease of spread, such as the lack of transparency and legal accountability, the weakness of oversight bodies, and the absence of administrative authorities' adherence to behavioral and legal standards that limit abuses and misuse of power, in addition to the lack of awareness among individuals and society of the dangers and effects of corruption.

On this basis, combating corruption has become a subject of significant attention and efforts at both the international and national levels, culminating in the adoption of the United Nations Convention against Corruption, which coordinated international efforts and strengthened national systems in combating corruption.

This is what the legislator sought to establish in Law No. 01/06 relating to the prevention and fight against corruption<sup>1</sup> after Algeria ratified the United Nations Convention. The legislator's policy is reflected in repressing all practices contrary to the ethics of public office in order to achieve personal interests, especially in the field of

public contracts. These contracts have wide scopes, multiple interventions, and varying functions, as they constitute the main channel through which public funds circulate and the sole instrument placed by Algerian legislation in the hands of the administration to implement, in practice, the objectives set within the general policy of the nation. Therefore, they are among the most important means that play an effective role in promoting the national economy and executing projects with high quality, at the lowest possible cost, and within the shortest timeframes.

On this basis, and given the specific and distinctive nature of public contracts on the one hand, and their connection to public funds and treasury rights on the other, Algerian legislation has surrounded them with legal controls aimed at rationalizing their use and ensuring the integrity of contractual transactions.

Among the most important of these controls is the requirement to comply with the provisions of Article 05 of Presidential Decree No. 247/15<sup>2</sup>, which establishes general principles governing public contracts of all types, namely transparency requiring, as a general rule, the announcement of competition equality among bidders, and freedom of access to public procurement.

These three general principles constitute essential means to ensure the efficiency of public procurement and the proper use of public funds, as they revolve around the principle of free competition in the field of public contracts, from the announcement of tenders to the final award of the contract.

Accordingly, a breach of competition occurs when a public official grants unjustified privileges to others with the intent of favoring them over other competitors, for the purpose of obtaining a material benefit.

Thus, the objective and importance of studying unjustified privileges in public contracts lie in identifying the legal provisions governing public procurement, through the recognition of various forms of breaches committed by public officials in violation of the legislative rules upon which public contracts are based, whether before the conclusion of the contract or during its execution. These are the grounds upon which the criminal judge relies to criminalize the act of granting or seeking unjustified privileges.

**This main objective can be achieved through the following sub-objectives:**

- Studying and analyzing the components of the subject of granting unjustified privileges in public contracts helps to identify and clarify the role of public procurement law in defining cases of violations.
- Clarifying the role of the law on the prevention and fight against corruption in criminalizing the offense of unjustified privileges.
- Identifying the main elements constituting the offense of granting unjustified privileges.
- Understanding the main penalties prescribed for this offense, whether principal or supplementary, applicable to both natural and legal persons.

From this perspective, a fundamental issue arises: how has Algerian legislation addressed the offense of granting unjustified privileges in public contracts?

To answer this issue and cover all its aspects, specific methodologies required by legal studies were adopted, namely the analytical method and the descriptive method.

The analytical method is used to analyze the components of the subject and the content of the legal provisions governing the offense of granting unjustified privileges, while the descriptive method is used to provide an accurate description of all information related to the subject and to link causes and results in order to interpret them and reach a solution to the issue raised.

In order to cover all aspects related to unjustified privileges in public contracts, the study is divided into two sections: the first section is devoted to the nature of the offense of granting unjustified privileges, by addressing the concept of granting unjustified privileges as a first requirement, and explaining the elements of this offense as a second requirement.

The second section addresses the repression of the offense of unjustified privileges, examining principal penalties in the first requirement and supplementary penalties in the second.

### **First Section: The Nature of the Offense of Granting Unjustified Privileges**

In order to ensure the efficiency of public procurement and the proper use of public funds, Algerian legislation has emphasized competition in the field of public contracts and opened the field to both natural and legal persons who meet the required legal conditions to submit their bids before legally competent authorities responsible for concluding public contracts, in accordance with pre-established conditions.

Accordingly, and to reinforce competition among bidders and enhance transparency in the conclusion of public contracts and the selection of the contracting party, the Algerian legislator has guaranteed participation for all candidates in tender procedures and the submission of their applications in accordance with the principle of free access to public procurement.

However, despite the fact that the Algerian legislator has obligated the contracting administration to ensure the efficiency of public demand and to achieve equality and transparency in contractual procedures, the spread of the phenomenon of corruption among operators and the administration has become one of the most important factors that undermine the general principles upon which public procurement is based. Among the most significant of these phenomena is the granting of unjustified advantages.

### **First Requirement: The Concept of Granting Unjustified Advantages**

By referring to legislation, we find that it has not defined the crime of granting unjustified advantages within the provisions of the Algerian Penal Code. However, by referring to Article 26 of Law 15/11<sup>3</sup>, we find that unjustified advantages have two aspects that constitute two corresponding offenses: on the one hand, the public official who breaches their functional obligations and grants an unjustified advantage, thereby committing the misdemeanor of granting unjustified advantages; and on the other hand, the economic operator who obtains the unjustified advantage, thus committing the misdemeanor of exploiting the influence of public officials in order to obtain unjustified advantages.

On this basis, the crime of granting unjustified advantages is synonymous with the term favoritism or preference, which in language means “a gift” without compensation, and “favoring” is derived from granting if you give.

Accordingly, it can be said that granting unjustified advantages is the violation of the legislation and regulations governing public procurement by the public official responsible for concluding, executing, or reviewing the contract, in order to grant one of the operators dealing with the state or one of the public bodies unjustified advantages<sup>4</sup>. That is, it is the preference of one competitor over another without any legitimate justification.

It has also been defined by some as favoring one party over another in the provision of a service without right, in order to obtain certain interests.

### **Second Requirement: The Elements of the Crime of Granting Unjustified Advantages**

Through an examination of Article 26 of the Anti-Corruption Law, the crime of granting unjustified advantages is based on three essential elements: the presumed element, represented by the status of the perpetrator, and the subject of the crime, which is the public contract; the material element, represented by granting an unjustified advantage to another, which constitutes a breach of the general principles upon which public procurement is based, namely freedom of access to public demand, equality between bidders, and transparency in contractual procedures, in addition to violating the legislative and regulatory provisions governing public procurement; and the moral element, which is represented by intentional intent, where the existence of general criminal intent is sufficient.

## Section One: The Status of the Perpetrator

It is represented in:

### First: The Public Official

Given that public procurement offenses are status-based crimes, as they cannot occur unless the perpetrator possesses the status required by law, namely that of a public official, this status is considered a legal description that must exist prior to the commission of the crime<sup>5</sup>. It also constitutes the fundamental element for its establishment, as the status of a public official is a concept that refers to a person entrusted with striving to achieve the interest of the entity for which they work, with integrity, not seeking for themselves or others any profit or benefit<sup>6</sup>.

A public official has been defined as a person appointed full-time to occupy a permanent position, established within a rank included in the administrative hierarchy of central state departments, their external services, or public state institutions<sup>7</sup>.

Thus, a public official is a person employed within the services of the state, the wilaya, the municipality, or one of the public administrative institutions, whether on a permanent or temporary basis, to perform one of its functions, and receives their salary from the state treasury<sup>8</sup>.

As for Ordinance No. 03/06 containing the General Statute of the Civil Service, it defined the public official under Article 04, which states: "any agent appointed to a permanent public position and confirmed in a rank within the administrative hierarchy."<sup>9</sup>

By referring to the Anti-Corruption Law, we find that the Algerian legislator has broadened the definition of a public official compared to that provided in administrative law, to include all those who possess the status of a public official, in addition to categories considered equivalent to public officials, even though they are not so according to administrative law, with the aim of protecting the public function and safeguarding it from exploitation on the one hand, and preserving public funds on the other.

By referring to Article 02 of Law 01/06, we find that it is comprehensive in terms that leave no room for excluding any employee engaged in the public function during the execution of a public contract at any stage thereof.

In general, the Algerian legislator defined the public official in Article 02 of Law 01/06 as follows:

- Any person occupying a legislative, executive, administrative, or judicial position, or a position in one of the elected local popular councils, whether appointed or elected, permanent or temporary, paid or unpaid, regardless of their rank or seniority.
- Any person who assumes, even temporarily, a function or mandate, with or without remuneration, and contributes in this capacity to the service of a public body, a public institution, or any other institution in which the state owns all or part of its capital, or any institution providing a public service.
- Any other person considered a public official or equivalent thereto according to the applicable legislation and regulations.

As for the concept of the public official in the context of public procurement, and according to Article 26 of the Anti-Corruption Law, the official whose role is limited to the following has been defined:

**1- The official responsible for concluding the contract:** this is any person legally qualified to sign the contract, approve the award decision officially, and initiate contractual procedures with the successful bidder. Accordingly, Algerian legislation, under Article 04 of Decree No. 247/15, requires that contracts are valid and final only if approved by the competent authority, represented by the head of the public body, the minister, the wali, the president of the municipal people's assembly, the director general, or the director of the public institution.

**2- The official endorsing the contract:** endorsement of the contract is the culmination of the external control process exercised by procurement committees, whether those of the contracting authority or sectoral procurement committees, which conclude by endorsing the specifications, rejecting them, or endorsing them with reservations, whether suspensive, relating to substantive aspects, or non-suspensive, relating to formal aspects<sup>10</sup>.

## **Second: The Economic Operator**

According to paragraph two of Article 26 of the Anti-Corruption Law, certain economic agents are identified, whether natural or legal persons, as follows:

### **1- Natural persons: as defined in Article 2/26 as follows:**

**a- The trader:** a person who carries out commercial activities and adopts them as a habitual profession.

**b- The industrialist:** a person who engages in productive activity using elements of production with the aim of producing new goods or making existing raw materials more useful.

**c- The artisan:** any natural person registered in the register of traditional crafts and industries who practices a traditional activity.

**d- The contractor:** the operator contracted in a public procurement contract related to construction works, i.e., the project site owner within the contracting authority's project.

**2- Legal persons:** the role of private legal persons as a party in the crime of granting unjustified advantages lies in exploiting the influence of public officials to obtain unjustified advantages, as the legal person constitutes the second party in the public contract, with whom the contracting authority concludes the contract that enters into force.

## **Section Two: The Material Element**

The material element is any criminal conduct issued by a rational human being that leads to a result affecting a right protected constitutionally and legally<sup>11</sup>.

Thus, the material element is a voluntary material activity, also called conduct, to which, in material crimes, a criminal result and a causal relationship linking the conduct and the result are added. Through it, the acts of execution of the crime occur; if it is complete and results in a consequence, the crime is complete, whereas if it stops at a certain stage or the intended result is not achieved, the crime is incomplete or in the attempt stage<sup>12</sup>.

### **First: Criminal Conduct**

Criminal conduct consists of material advantages granted by the public official to the economic operator with the aim of achieving profits.

On this basis, criminal conduct can be divided, according to Article 26 of the Anti-Corruption Law, as stated in its first and second paragraphs, into:

#### **1- Granting unjustified advantages as stipulated in the first category of Article 26:**

The first paragraph of Article 26 of the Anti-Corruption Law provides that: "Any public official who intentionally grants another person an unjustified advantage during the conclusion or endorsement of a contract, agreement, procurement contract, or addendum, in violation of legislative or regulatory provisions relating to freedom of participation, equality between candidates, and transparency of procedures."

From the above paragraph, it is clear that the material element of the crime of granting unjustified advantages consists of two elements:

- **The first element:** consists of granting advantages during the conclusion or endorsement of a contract, agreement, procurement contract, or addendum, with the aim of violating the legislative and regulatory provisions related to the principles of public procurement, namely freedom of access to public demand, equality between bidders, and transparency in procedures.

- **The second element:** consists of the intentional benefit of another party from an unjustified advantage.

Accordingly, it can be said that for the material element to be established, it is not sufficient for the public official to violate the legislative and regulatory provisions governing public procurement; rather, it is necessary that one of the competitors benefits from the advantage with the aim of favoring them over the other competitors.

## **2- Obtaining unjustified advantages as stipulated in the second paragraph of Article 26:**

By referring to the second paragraph of Article 26 of the Anti-Corruption Law, the material element consists of the economic operator exploiting their influence in order to obtain unjustified advantages.

On this basis, the material element will be addressed before the conclusion of the public contract and during the execution of the subject of the contract.

### **1- The material element before the conclusion of the public contract:**

The economic operator may seek, before the process of concluding the contract, to obtain an unjustified advantage with the aim of securing and winning the contract.

By referring to the Public Procurement Law, we find that the Algerian legislator has overlooked this crime before the conclusion stage; however, by referring to general provisions, depending on the conduct carried out by the economic operator, which may take several forms, including:

**a- Incitement:** according to Article 41 of the Algerian Penal Code<sup>13</sup>, which states: “Any person is considered a perpetrator who directly contributes to the execution of the crime or incites the commission of the act through gifts, promises, threats, abuse of authority or mandate, or through fraud or criminal deceit.”

From the above article, it can be said that incitement represents the creation of the idea of the crime or the intent to commit it, through reliance on gifts, promises, threats, abuse of authority, or manipulation of the public official responsible for the contract.

**b- Complicity:** Article 42 of the Algerian Penal Code provides that: “A person is considered an accomplice in a crime if they do not participate directly, but assist in any way the perpetrator or perpetrators in carrying out preparatory, facilitating, or executing acts, with knowledge thereof.”

According to the above article, the acts provided by the economic operator that may assist the public official in order to obtain an unjustified advantage, whether these acts are preparatory, facilitating, or executory.

**c- Concealment of proceeds obtained from the misdemeanor of granting unjustified advantages:** the Algerian legislator has provided for this offense under Article 43 of Law 01/06, which states: “Any person who intentionally conceals all or part of the proceeds obtained from one of the crimes provided for in this law shall be punished by imprisonment from two to ten years and a fine ranging from 200,000 DZD to 1,000,000 DZD.”

Thus, according to the above article, all proceeds obtained and intentionally concealed, whether wholly or partially, are considered unjustified advantages.

### **2- The material element during the execution of the subject of the public contract:**

The forms of granting unjustified advantages during the execution phase differ from those at the conclusion stage, as this advantage is only completed upon obtaining the financial benefit. This is because execution in accordance with the contract does not serve the illegitimate interests of the economic operator, since the purpose of submitting the best offer according to the conditions is merely a formality to avoid challenging the selection made. During execution, other advantages appear, which are the true objective behind the contract, as they not only achieve financial profit for the economic operator<sup>14</sup>, Rather, profit may lie in increasing prices, modifying the quality of the materials used, services, or delivery deadlines, etc.

#### **Second: The purpose of the criminal activity:**

The crime of granting unjustified advantages is not established merely by the public official’s violation of the legislative and regulatory provisions governing public procurement, nor by breaching the principle of free access to public orders, equality, and transparency in procedures. Rather, the objective of this violation must be to grant an unjustified advantage to others.

#### **Third: The causal relationship:**

The causal relationship in the misdemeanor of granting unjustified advantages lies in the public official’s violation of legislative and regulatory provisions, as well as the principles of freedom to bid, equality, and transparency, and

not in the contracting process itself. It is not possible to grant advantages to others without manipulation and intentional violation of procedures in order to reach a result, namely granting unjustified advantages to others<sup>15</sup>.

### **Third Section: The moral element**

The crime of granting unjustified advantages is an intentional crime, requiring the perpetrator to possess general intent, which includes knowledge and will. This means that the perpetrator knows that the law prohibits granting unjustified advantages to others because it violates the legislative and regulatory provisions governing public procurement, yet deliberately commits the act to achieve personal purposes. This is what is known as specific intent, which constitutes an additional condition in some crimes where general intent alone is not sufficient<sup>16</sup>.

Thus, the general criminal intent in the misdemeanor of granting unjustified advantages, in accordance with Article 1/26 of the Anti-Corruption Law, is represented by the public official's will to violate the applicable legislative and regulatory provisions in the field of public procurement, while knowing that the act is criminalized by law. In addition, the official's intention is directed toward breaching the general principles of public procurement, namely free access to public orders, equality among bidders, and transparency in contractual procedures, with the aim of granting an unjustified advantage to others.

As for the specific criminal intent, it consists of granting others an unjustified advantage while knowing that the committed act constitutes a crime, with the aim of favoring one bidder over others, thereby violating the legislative and regulatory provisions governing public procurement.

Furthermore, by referring to the second paragraph of Article 26 of the Anti-Corruption Law, we find that criminal intent for the economic operator who exploits their influence to obtain an unjustified advantage intentionally is established through the direction of their will and intention to exploit such influence to obtain advantages, whether in the form of incitement, participation, or concealment of an unjustified advantage resulting from the granting of such advantages, while being aware that they are unjustified and unlawful.

Accordingly, the material element of the crime of granting unjustified advantages constitutes the external material act represented in the granting by the perpetrator, namely the public official, of unjustified advantages to others.

### **Second Section: Suppression of the crime of unjustified advantages**

To ensure the effectiveness of public procurement and to strengthen the rules of transparency, integrity, and fair competition, the Algerian legislator has established several penalties for any person who violates legislative and regulatory provisions. At the same time, it seeks to restrict illegal practices in the field of public procurement, as stipulated by the provisions of Law 01/06 and the Penal Code, which include primary and supplementary penalties imposed on both natural and legal persons.

#### **Section One: Principal Penalties**

The Algerian legislator has defined the principal penalties prescribed for public procurement offenses in the Law on the Prevention and Combating of Corruption. Principal penalties are those that may be imposed without being accompanied by any other penalty.

In general, the Algerian legislator did not limit principal penalties to the natural person who commits the offense, but also applied them to the legal person.

#### **Subsection One: Principal Penalties Prescribed for the Natural Person**

The Algerian legislator has stipulated principal penalties for the perpetrator of the offense of granting undue advantages in the field of public procurement, pursuant to Article 26 of the Anti-Corruption Law, which provides for imprisonment from two (2) years to ten (10) years, and a fine ranging from 200,000 DZD to 1,000,000 DZD, for any public official who commits this offense when concluding or approving a contract, or reviewing a contract, agreement, or amendment, in violation of the legislative and regulatory provisions governing public procurement.

The Algerian legislator has also aggravated this penalty to imprisonment from ten (10) years to twenty (20) years if the perpetrator is a judge, a public official holding a high position in the State, a public officer, a member of a

body, a judicial police officer or agent, or any person exercising certain powers of the judicial police, or a court clerk<sup>17</sup>.

In addition, the Algerian legislator, according to paragraph two of Article 26 of Law 01/06, punishes anyone who launders the proceeds of the offense of granting undue advantages with the same penalties prescribed for the public official. In the case of concealing all or part of these proceeds, the penalty is imprisonment from two (2) years to ten (10) years and a fine ranging from 200,000 DZD to 1,000,000 DZD.

### **Subsection Two: Principal Penalties Prescribed for the Legal Person**

The role of the legal person has developed remarkably in modern times due to the significant responsibilities entrusted to it, which the natural person cannot accomplish alone even with the cooperation of others.

However, at the same time, the legal person may constitute a source or an instrument for committing crimes that affect the security and safety of society, through the advantages and substantial capacities it possesses that facilitate such acts.

On this basis, the Algerian legislator had to intervene, following comparative legislations, by establishing the necessity of holding the legal person criminally liable when it constitutes the source of the offense, thus not limiting liability to the natural person representing it.

Given that the legal person is an intangible entity, its criminal liability differs from that of the natural person. Accordingly, Algerian legislation, pursuant to Article 53 of the Anti-Corruption Law, has recognized its liability for offenses in the field of public procurement, stating: "The legal person shall be criminally liable for the offenses provided for in the Penal Code in accordance with the rules established therein." Referring to the provisions of Law No. 23/06, it establishes this liability for the legal person while excluding public legal persons, as provided in Article 51 bis, which states: "Except for the State, local authorities, and legal persons governed by public law, the legal person shall be criminally liable for offenses committed on its behalf by its organs or legal representatives when the law so provides."

Algerian legislation has also provided for the principal penalties applicable to the legal person under Article 18 bis of Law 23/06, which states: "The penalties applicable to the legal person in matters of felonies and misdemeanors are fines equal to one (1) to five (5) times the maximum fine applicable to the natural person under the law punishing the offense..."

Referring to Article 53 of Law 01/06, it limits the penalty of the legal person, when it is proven before the judicial authority that its legal representative has committed one of the corruption offenses such as granting undue advantages, to a financial fine ranging from 1,000,000 DZD to 5,000,000 DZD.

Accordingly, it should be noted from the above provisions that the Algerian legislator has increased and multiplied the amount of the fine imposed on the legal person compared to the natural person. This is due, on the one hand, to the impossibility of applying a custodial sentence to a legal person, and on the other hand, because most corruption offenses are committed out of greed and the pursuit of quick profit through unlawful conduct. It is therefore natural that the penalty should affect the financial assets of the offender, making it proportionate to the criminal act committed, which makes it more effective and more beneficial for the State as it provides significant financial resources<sup>18</sup>.

### **Section Two: Complementary Penalties**

These are penalties that may not be imposed by the judge alone or independently of the principal penalties, as they are dependent on them in both existence and absence. They may be mandatory or optional, and the judicial authority may, in the event of conviction for one or more offenses provided for in the Penal Code, impose one or more of the complementary penalties stipulated therein.

This and by referring to Algerian legislation, it has established complementary penalties for the natural person and complementary penalties for the legal person.

### **Subsection One: Complementary Penalties Prescribed for the Natural Person**

The Algerian legislator has provided for complementary penalties pursuant to Article 50 of Law 01/06, which stipulates that, in the event of conviction for the misdemeanor of granting undue advantages, the offender shall be punished by one of the complementary penalties specified in the Penal Code.

Thus, the complementary penalties prescribed for the natural person are provided for in the Penal Code on the one hand, and in the Law on the Prevention and Combating of Corruption on the other hand.

**First – Complementary penalties provided for in the Penal Code:** The Algerian legislator, pursuant to Article 09 of Law No. 23/06 containing the Penal Code<sup>19</sup>, has stipulated a set of penalties consisting of:

**1 – Legal incapacitation:** it is the deprivation of the convicted person from exercising his financial rights throughout the duration of the execution of the principal custodial penalty<sup>20</sup>.

**2 – Deprivation from exercising national, civil, and family rights:** it consists of dismissal and exclusion from functions and positions related to the offense, in addition to depriving him of exercising his political rights such as the right to run for office or to vote.

In addition, the above-mentioned article provides for the deprivation of the offender from his civil and family rights, such as being deprived of acting as a guardian or custodian, etc.

**3 – Residence restriction:** it is the obligation imposed on the convicted person to reside within a territorial scope determined by the judgment, for a period not exceeding 5 years starting from the day of the expiration of the principal penalty or release, as provided for in Article 11 of Law 23/06.

**4 – Prohibition of residence:** it means prohibiting the convicted person from being present in certain places that were the cause of the commission of the offense, for a period not exceeding 5 years. If the prohibition is coupled with a custodial penalty, it shall apply from the date of expiration of the penalty or release of the convicted person in accordance with paragraph two of Article 12 of Law 23/06.

**5 – Partial confiscation of property:** provided for by the Algerian legislator pursuant to Article 15 of Law 23/06.

**6 – Temporary prohibition from exercising a profession or activity:** this prohibition applies when the offense is related to the activity practiced by the offender, for a period not exceeding 5 years, as provided for in Article 16 bis of Law 23/06.

**7 – Closure of the establishment:** this closure may be permanent or for a period not exceeding 5 years in accordance with Article 16 bis 1 of Law 23/06.

**8 – Exclusion from public procurement:** it consists of depriving the offender from participating in the conclusion of public procurement contracts, whether temporarily or permanently, as provided for by the Algerian legislator pursuant to Article 16 bis 2 of Law 23/06.

**9 – Prohibition from issuing checks or using payment cards:** it is carried out by returning the checkbooks and cards in the possession of the convicted person or held by his agents to the issuing institution, for a period not exceeding 5 years in accordance with Article 16 bis 3 of Law 23/06.

**10 – Withdrawal of passport:** for a period of 5 years from the date of pronouncement of the judgment as provided for in Article 16 bis 5 of Law 23/06.

**11 – Publication and posting of the judgment or conviction decision:** it is an optional complementary penalty intended to publicly expose the convicted person and warn others, as provided for in Article 18 of Law 23/06.

**12 – Suspension, withdrawal, or cancellation of the driving license with prohibition from obtaining a new one:** the judicial authority may order the suspension, withdrawal, or cancellation of the driving license with prohibition from obtaining a new one for a period not exceeding 5 years from the date of conviction, with notification of the judgment to the competent administrative authority in accordance with Article 16 bis 5 of Law 23/06.

## **Second: Complementary penalties provided for in the Law on the Prevention of Corruption**

In addition to the Penal Code, the legislator has provided for complementary penalties for the natural person in the Law on the Prevention of Corruption pursuant to Article 51 thereof as follows:

**1 – Freezing or seizure of illicit funds and proceeds:** the proceeds and illicit funds resulting from the commission of one or more offenses provided for in the law may be frozen or seized by a judicial decision or by order of a competent authority.

**2 – Confiscation of illicit proceeds and funds:** in the event of conviction for the offenses provided for in this law, the judicial authority shall order the confiscation of illicit proceeds and funds, taking into account cases of asset recovery or the rights of bona fide third parties.

**3 – Restitution of funds and proceeds obtained from the offense:** the judicial authority shall order the return of what has been embezzled or the value of the benefit or profit obtained, even if it has been transferred to the assets of the convicted person or his ascendants, descendants, siblings, spouse, or in-laws, whether such funds remain in their original form or have been converted into other assets.

**4 – Annulment of the granting of unlawful advantages:** as provided for in Article 55 of Law 01/06, the judicial authority may declare the nullity and absence of legal effects of what was obtained through the commission of the offense of granting undue advantages in any contract, transaction, concession, or license, while taking into account the rights of bona fide third parties.

### **Subsection Two: Complementary Penalties Prescribed for the Legal Person**

In addition to the principal penalties, the Algerian legislator has been keen to establish complementary penalties. From their designation, it is understood that they complement the principal penalties, and they are explicitly provided for in the provisions of the Algerian Penal Code.

From the reading of Article 18 bis, it is concluded that the complementary penalties established by the Algerian legislator for the legal person consist of:

**1 – Dissolution of the legal person:** it is a penalty affecting the existence of the legal person, consisting in its dissolution and liquidation, meaning the termination of its life and its complete disappearance from economic, social, and political life.

The penalty of dissolution is considered a principal penalty; some tend to consider it equivalent to the death penalty for the natural person, and due to its seriousness, the Algerian legislator has made it a complementary penalty.

**2 – Closure of the establishment or one of its branches for a period not exceeding five years:** meaning that the legal person proven to have committed the offense of granting undue advantages in the course of its activity, whether such activity is direct or indirect in the commission of the offense, is temporarily prohibited from carrying out this activity for a period not exceeding 5 years.

**3 – Exclusion from public procurement:** although freedom of competition is the general principle for participation in public procurement, this does not mean that it is always applied absolutely. Sometimes, there are situations that require the administrative authority to depart from the requirements of the rule of competition, without this constituting a violation, but rather an application of a legal provision requiring the exclusion of economic operators from participating in public procurement due to their violation of the rules governing such contracts.

**4 – Prohibition from exercising a professional or social activity:** in addition to the penalty of dissolution, the Algerian legislator has introduced another complementary penalty consisting of prohibiting the convicted legal person from exercising a professional or social activity for a period not exceeding five (05) years.

It is understood from the provisions of the article that the prohibition from exercising a professional or social activity, whether directly or indirectly, may be permanent or for a period not exceeding five (05) years.

This prohibition is considered a personal penalty rather than a real one, and the legal person must comply with it throughout the duration prescribed in the judgment.

**5 – Confiscation of the object used in the commission of the offense or resulting from it:** modern legislation in combating corruption offenses in the field of public procurement relies on depriving offenders of the benefit derived from such offenses by confiscating the object used in the commission of the offense or resulting from it.

Confiscation is the final transfer to the State of specific property or a set of assets, and it is one of the most important sanctions provided for in the Penal Code.

**6 – Publication and posting of the conviction judgment:** this is intended to publicly expose the legal person and warn others against dealing with it.

**7 – Placement under judicial supervision for a period not exceeding five years:** Article 18 bis of Law No. 23/06 grants the judge discretionary power to impose another complementary penalty on the legal person, consisting of placing the activity carried out by the legal person, in connection with which the offense was committed, under judicial supervision.

### **Conclusion:**

Despite the Algerian legislator's adoption of a repressive policy in the field of public procurement, and the enactment of a comprehensive law capable of achieving the national strategy for the prevention and combating of corruption, protecting public funds, and rationalizing public expenditures, reality has confirmed the expansion of corruption and the occurrence of violations in the field of public procurement, particularly through the public official favoring one competitor and discriminating against others in order to grant undue advantages. This has compelled the Algerian legislator to protect competition by enacting several legal provisions, whether in the Public Procurement Law or the Law on the Prevention and Combating of Corruption, criminalizing any act committed by the public official or the economic operator.

On this basis, the main findings reached through this research can be summarized as follows:

- The offense of granting undue advantages is an intentional offense committed by a public official.
- The offense of granting undue advantages is established by the availability of three elements: the status of a public official in the perpetrator, the material element, and the moral element.
- The Algerian legislator has recognized the liability of the legal person when committing this offense.
- Algerian legislation provides for principal penalties and complementary penalties for both the natural person and the legal person.

As for the recommendations, they are as follows:

- The necessity of establishing strict rules governing the selection and appointment of public officials.
- The promotion and development of the management of contracting authorities through the training of public officials and agents specialized in public procurement.
- Accelerating the establishment of a regulatory body for public procurement in order to ensure strict oversight of compliance with the principles and procedures governing the conclusion of public contracts.
- Giving priority to the public official and taking care of them from a psychological and social perspective, improving their living standards, and enhancing their performance through training and internships.
- Reconsidering Law 01/06 and incorporating provisions of criminalization and deterrence within it in order to combat corruption, rather than limiting it only to preventive mechanisms.
- The necessity of expanding asset declaration procedures to include all categories provided for in Article 02 of Law 01/06.

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