

# Limits of Contractual Freedom Under Competition Law

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Received  
19/12/2025

Accepted  
13/03/2026

Published  
31/10/2026

## Abstract:

This article addresses the limits of contractual freedom of economic agents under Competition Law; that is to say, it examines the relationship between the principle of freedom of contract and the principle of freedom of competition upon which the market economy in Algeria is based. Although the Competition Law has established the principle of contractual freedom, which grants market privileges to economic agents in the market, that freedom is not absolute, but bound with a set of restrictions in order not to hinder free competition. Therefore, the legislator intervened in the Competition Law and restricted economic agents by monitoring and prohibiting contractual practices that hinder freedom of competition.

Based on the above, the research question is as follows: **To what extent has the legislator allowed economic agents contractual freedom under Competition law?**

**Key words:** contractual freedom; Competition Law; contracts; economic system.

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## **Introduction:**

Thanks to the adoption of a new economic model under market economy, economic life improved, which resulted in the emergence of private legal persons, such as businesses and economic groupings. This outcome was driven by the establishment of economic freedoms, namely freedom of trade, industry and investment, in addition to freedom of competition and price.

These developments paved the way for new legislation containing new rules other than the ones regulating contractual relations under Civil Law which has established contractual freedom, the contract binding force and equality between the contracting parties.

Among the most prominent of these legislations is the Competition Law which attaches undue importance to contractual relationships arising from the market. The Competition law aims to counter anti-competition practices by protecting the market and prohibiting practices that harm competition and market participants. This has given rise to a number of issues, namely those related to the definition of the contract under Competition Law, particularly if the contract includes prohibited practices or other practices that create an imbalance in contractual relations, in light of the flagrant differences in the market due to the disparity between economic statuses of contracting parties.

Therefore, the Competition Law must be explored to assess its impact on obligations and contracts as the latter are based on the contractual freedom of parties which, in its turn, is based on the principle of free will, whereas the Competition Law rests on the principle of free competition which, in its turn, rests on the law of supply and demand.

Referring to the Law of Competition, the rules differ from the widely known rules of the general theory on obligations, namely the rules that prohibit all forms of anti-competitive practices. Accordingly, the Competition Law protects the national economy by limiting interest-driven individual freedom.

To study this subject, the study adopts the following research question: To what extent has the legislator allowed economic agents contractual freedom under Competition law?

To answer the above-mentioned research question, the study adopts the following study plan: the study is divided into two chapters, the first chapter addresses the privileges of contractual freedom under Competition Law and the second chapter reviews the restrictions on contractual freedom under Competition Law.

## **Chapter One: Privileges of Contractual Freedom Under Competition Law**

The Competition Law has provided a new insight into the concept of the contract which addresses many contractual practices that the Competition Law aims to protect.

### **Section One: The Concept of the Principle of Free Competition**

This section covers the definition of the principle of free competition in the first part, as well as the principle of freedom of competition and freedom of contract in the second part.

#### **Subsection One: Definition of the Principle of Free Competition**

The right of free competition is enshrined in the constitution. The meaning and consecration of free competition cannot be covered without reference to the principle of freedom of trade and investment which extends from the freedom of trade and industry after the Constitutional Amendment of 2016.

#### **1- Freedom of trade and Investment**

From the contents of Article 43 of the Algerian Constitution, we conclude that the principles of freedom of trade and investment are the foundation of free competition, because the former prevents monopoly and imposes compliance with market rules, namely freedom of competition.

We also note that by integrating the private sector in the development process and allowing it to compete with the public sector, the state's position shifts from intervention to regulation.

## 2- Definition of Free Competition

Freedom of competition refers to operating in a market in which many economic participants are engaged in the same activity and continue to compete without restrictions.<sup>1</sup>

In other words, in order to ensure freedom of competition, movement of persons and freedom of entrepreneurship, there should be no restrictions preventing entry to the market and free circulation of the elements of production. In addition, capital flow and the free circulation of goods should not be obstructed, neither the freedom of entrepreneurship.<sup>2</sup>

### **Subsection Two: The Principle of Freedom of Competition and the Principle of Freedom of Contract**

The relationship between freedom of competition and freedom of contract is based on the correlation between the principle of free will and competitive economic freedom. The principle of free will is merely a reflection of the competitive economic freedom policy under Private Law. The fundamental notion of economic freedom is to allow individuals to exchange goods and services and enter into contracts of their own free will, which is the correct way to ensure more equitable relationships.<sup>3</sup>

Competition Law is also considered an intersection between competitive economic freedoms and contractual freedom enshrined in Contract Law. Freedom of contract is one of the principles of Contract Law which asserts the individualist tendency of free will; therefore, both the Competition Law and Civil law are related to contractual freedom, whether in relation to the individual's freedom of contract or freedom to determine the contract contents.<sup>4</sup> Accordingly, we note a

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<sup>1</sup> Djamel Khoualed, The Scope of Freedom of Contract in Competition Law, Master's Thesis, Faculty of Law and Political Science, Kasdi Merbah University, Ouargla, p. 3.

<sup>2</sup> Mohamed Mohamed Abdel Latif, "The Constitution and Competition," Journal of

Legal and Economic Research, Faculty of Law, Mansoura University, Egypt, Issue 38, October 2005, p. 96.

<sup>3</sup> Competition and the Market Economy (Source: [www.droitdedeconcurrence.fr](http://www.droitdedeconcurrence.fr)).

<sup>4</sup> Djamel Khoualed, op. cit., p. 11.

convergence between the Competition Law and Contract Law, given the fact that the contract is a legal mechanism to enforce economic law. We also find that the provisions of Competition law have referred to the concept of the contract, whether explicitly or implicitly under the concept of agreement.

## **Section Two: Contractual Freedom, a Means to Promote Free Competition**

The state does not intervene in the economic sector, instead, it sets legal rules which allow economic agents to enter into contracts (Corporation Law, Labor Law, Contract Law, etc.). If all conditions are met, the state does not intervene in the market operation mode.<sup>1</sup>

In this respect, there are various sources of market rules, some are established by independent administrative bodies through regulations, while others are set by economic operators through contracts, according to the principle of *pacta sunt servanda*.

Therefore, the contract has two meanings: a means of being present in the market and/ or a means of commercial exchange in the market.

### **Subsection One: The Contract as a Means of Market Presence**

The contract is one of the main ways that allow economic institutions to access, take a position and conduct transactions in the market. Commercial projects are increasingly turning to agreements to keep up with market developments, whether through horizontal or vertical<sup>2</sup> integration or through agreements on projects to exchange values, in the form of franchise agreements or integrated distribution agreements, etc<sup>3</sup>

In Articles 6 and 7 of Ordinance No 03-03 regulating competition, the legislator prohibited agreements that hinder market transparency and functioning, otherwise known as “bad agreements”. Conversely, there is a set of “good agreements” which are not under legal prohibition. In

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<sup>1</sup> Ezzedine Issaoui, “The Contract as a Tool for Market Regulation,” *Al-Fikr Journal*, Mohamed Khider University, Biskra, Issue 3, February 2008, p. 206.

<sup>2</sup> Kada Shahida, “The Limits of the Contractual Orientation in the Field of Competition,” *Journal of Legal Studies*, Abou Bekr Belkaïd University, Tlemcen, 2007, p. 88.

<sup>3</sup> Djamel Khoualed, *op. cit.*, p. 13.

this respect, it is up to the Competition Council to determine which agreements are economically sound and which are not.

On the other hand, the legislator has approved institutional agreements, whether in the form of mergers or concentrations in Article 9 of Ordinance No 03-03, given that these forms of agreements aim to promote the national economy.<sup>1</sup>

### **Subsection Two: The Contract as a Means of Commercial Exchange in the Market**

The contract is a legal means by which commercial exchange takes place in a competitive market, that is to say that the contract is the correct way to enshrine the two dimensions of economic freedom:<sup>2</sup>

- Freedom of contract;
- Freedom of competition.

Hence, the contract is the key driver of the exchange of goods and services between economic operators under a market economy system which focuses on giving effect to the principle of free will. That is to say, implementing the principle of freedom of contract which does not contravene the competitive public order which Article 6 of Ordinance No 03-03 has seemingly addressed.

Based on the above, the contract has been playing an increasingly important role in the field of competition thanks to its specifications and characteristics which makes him a market position tool and a flexible means that can be adjusted to suit different circumstances and legal positions.

### **Chapter Two: Restrictions on Contractual Freedom Under Competition Law**

Competition law and Contract Law are complementary as they both share the basic common principles. Given the fact that Competition Law is private and the general rule indicates that the private law overrides the public law, the rules stipulated in Contract Law are general rules that cannot be overlooked in explaining private rules.<sup>3</sup>

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<sup>1</sup> Djamel Khoualed, op. cit., p.14

<sup>2</sup> Kada Shahida, op. cit., p. 90.

<sup>3</sup> Nadia Foudil, The Application of the Law of the Forum to the Form of the Legal Act, Dar Houma for Printing and Publishing, 1st Edition, 2006, p. 275.

Accordingly, we conclude that contractual freedom based on the principle of free will might contravene the rules and principles that are based on the notion of public interest.

### **Section One: The Competitive Economic System as a Restriction on Freedom of Contract**

This section covers the concept of competitive economic system and the characteristics of a competitive economic system

#### **Subsection One: The Concept of a Competitive Economic System**

Referring to most judicial orders and based on the legislator's position on this issue, the public order refers to "The higher system of a community which encompasses moral, social, economic and several other aspects..."<sup>1</sup>

Although there are various definitions of the concept of public order, they all commonly agree on the suitability of systems that are necessary for the community.

#### **Subsection Two: Characteristics of a Competitive Economic System**

A competitive economic system refers to the state's intervention to regulate economic sectors so as to ensure competitive freedom as stipulated in Competition Law. For instance, Article 6 of Ordinance No 03-03 prohibits certain practices that restrict competition.

##### **1- Prohibition of Competition Restricting Agreements**

Article 6 of Competition Law indicates that the legislator does not prohibit institutional cooperation and coordination of efforts with the aim of promoting production and productivity, whether in the form of joint studies or exchange of experiences. Instead, the legislator prohibits the explicit and/or implicit agreement between institutions operating in a certain market to organize efforts with the aim of regulating competition, which may hinder the natural functioning of the law of supply and demand.<sup>2</sup>

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<sup>1</sup> Tioursi Mohammed, *The Legal Controls of Competitive Freedom in Algeria*, Dar Houma for Printing and Publishing, Algeria, 2013, p. 293.

<sup>2</sup> Djamel Khoualed, *op. cit.*, p. 23.

## **2- Prohibition of the Abuse of the Dominant Position in the Market**

The Competition Law does not prohibit the dominant position or monopolistic position per se, both positions are permissible. However, the law prohibits the abuse of these positions which is why the legislator intervened to set regulations and restrictions to prevent abuse of dominant and monopolistic positions. Therefore, the legislator intervened to set constraints and restraints to prevent abuse in both positions.<sup>1</sup>

By reference to Ordinance No 03/03 related to competition, the legislator established conditions to avoid abuse in the positions of dominance or monopoly and to sanction involved institutions

## **3- Prohibition of the Abuse of Economic Dependency Position**

The prohibition of abuse of the position of economic dependency refers to the acts and practices carried out by certain economically powerful institutions towards other institutions by imposing arbitrary conditions and taking advantage of dependent institutions because they do not have sufficient or alternative options to refuse those conditions. Hence, the legislator prohibited these practices in Article 11 of Ordinance No 03-03.

## **4- Prohibition of Arbitrary Under-Market Value pricing**

In Ordinance No 03-03, the legislator introduced the practice of arbitrary under-market-value pricing that differs from the practice of selling at a loss stipulated in the repealed Ordinance No 95-65 in terms of content and conditions.

Under-market-value pricing refers to selling goods at a price lower than their production, processing or marketing cost, with the aim of restricting or hindering competition in a given market.<sup>2</sup>

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<sup>1</sup> Djamel Khoualed, op. cit., p. 24

<sup>2</sup> Mohamed Cherif Kettou, Competition Law and Commercial Practices according to Ordinance 03/03 and Law 04/02, Dar Baghdad for Printing, Publishing and Distribution, Algeria, p. 54.

## **Section Two: Contractual Freedom Restricting Mechanisms Under Competition Law**

This section covers both punitive and preventive mechanisms.

### **Subsection One: Punitive Mechanisms**

Among the punitive mechanisms that ensure the protection of free competition are nullity and financial fines.

#### **1- Nullity**

Nullity includes all competition restricting practices as stipulated in Article 13 of Ordinance No 03-03, according to which every contractual condition or agreement whose subject is to restrict competition is nullified, unless it falls under articles 8 and 9 of the same ordinance. In this case, the practice does not fall under the penalty of nullity. Conversely, even if the contracting parties are not involved or unaware of the conduct of these practices, they fall under the penalty of nullity, otherwise known as absolute nullity.

#### **2- Penalties**

Penalties issued by the Competition Council are considered administrative penalties. The Competition Council can also order the publication or publication in extract, distribution and suspension of the decision, according to Article 45 of Ordinance No 03-03. The content of these penalties is covered in articles 56 to 62 of the same order.

### **Subsection Two: Preventive Mechanisms**

Preventive mechanisms aim to avoid any infringement upon competitive freedom.

#### **Monitoring and Authorization of Groupings**

One of the preventive mechanisms is to monitor the groupings formed by economically strong institutions with a strong impact on competition, which the law considers that forming them would infringe upon competition. In this case, the grouping request should be presented to the Competition Council.

#### **1- Authorization of Agreements and the Position of Dominance**

Prohibiting competition restricting agreements and other practices, such as the abuse of the position of dominance is not an open-ended

principle. It includes several exceptions stipulated by the legislator; certain agreements may be exempted or authorized if they meet the legal requirements of Article 9 of Ordinance No 03-03.

### **Conclusion**

In light of the Competition Law, the contract has undergone a new conceptualization as a result of the flourishing of contractual freedom in the economic sector. In a market characterized by economically imbalanced contractual relations following economic dependence dynamics between the contracting parties, on the one hand, and the disparity between economic positions resulting from economic power dynamics which weaken the contracting party and lead to a contract imbalance, on the other, the contract has turned into a carrier and vehicle of arbitrary practices which emerge under anti-competition and restrictive practices due to the centrality of the contract in relation to market rules. Based on the above, the study underscores the importance of the Contract Law, its pivotal role in reference to the particular rules of the Competition Law and the impact of these rules on the rules that govern the contract under the Civil Law.

Although the Competition Law has created an enabling environment for the flourishing of the free will principle and contractual freedom following the consecration of free competition, it turned into one aspect of contractual relationships and a new environment in which contractual freedom arising from the market is restricted.

Therefore, the rules of competitive law, as particular laws, aim to adapt to the change in contractual relationships arising from the market in response to market and economic environment requirements which require taking into account the reality of contractual relationships and positions in the market.

Based on the above, the study concludes the following:

- Contracts that promote free competition and support economic development are pivotal in a competitive market;
- The abuse of freedom of contract may infringe upon freedom of competition;

- Freedom of competition is a constitutional value;
- The relative withdrawal of the state from the economic sector and reliance on the private sector in the investment process.

Accordingly, the study has the following recommendations:

- Avoiding excessive restrictions of contractual freedom between economic agents, as it may disrupt free competition and hinder market entry. In addition, the freedom to set prices and the state's approach to price regulation and capping should be reconsidered in a way that does not harm economic agents and also protects the consumers' purchasing power.
- In conclusion, to answer the research question, the study advances that:

The scope of freedom of economic agents within a competitive market may be absolute through entry and stay in the market in addition to agreements between economic agents as far as market rules allow. In other words, if the freedom of economic agents hinders freedom of competition within the market, their freedom should be limited under the Competition Law.

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