

The Legal System for Economic Real Estate in Algeria in Light of Law No. 23-17

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Abstract

Among the major concerns raised by investors in Algeria, whether Algerian or foreign, is the difficulty of obtaining suitable real estate for their projects, regardless of the type. The Algerian legislator has repeatedly attempted to solve this problem by establishing a specific legal framework for it. The latest of these attempts was the issuance of Law No. 23-17, which sets the conditions and procedures for granting state-owned economic real estate for investment projects. This law aims to address issues that previous regulations could not solve. This article will highlight the most significant new features introduced by this law and the extent to which they contribute to establishing a legal framework that meets investors' hopes and aspirations to obtain economic real estate. It also aims to fulfill the requirements of legal security when exploiting such real estate, and, conversely, achieve the Algerian legislator's aspirations to promote investment and boost the economy.

Keywords: legal system; economic real estate; investment; Algeria; legal security.

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Introduction

In an effort by the Algerian legislator to improve the investment climate and attract national and foreign capital, as well as to embody the digitization of the investment sector and achieve the principles of legal security, especially after the political changes following the 2019 popular movement and the 2020 constitutional amendment, Law No. 23-17 was issued (1). This law, related to the granting of economic real estate, represents a significant step towards changing and developing the overall legal system for investment, initiated by the issuance of Law No. 22-18 related to investment, and followed by the renewal of the legal system for real estate aimed at investment in particular (2). This is based on the legislator's belief that political will alone is insufficient for building the national economy unless it is followed by a good and comprehensive legal system that reflects the legislator's will, in stills confidence in investors, and achieves legal security, known as an investment-friendly environment.

Will the new provisions related to economic real estate solve the difficult equation posed by investors in Algeria, which is the difficulty of obtaining real estate for their projects, in addition to the lack of legal security for the beneficiaries of such real estate, due to the inadequacy of the legal texts regulating it? Thus, are the new measures taken by the legislator in this context, through delegating the authority to grant economic real estate to the Algerian Agency for Investment Promotion (APII) as the competent authority overseeing the entire investment

process including the granting of real estate to investors, and what this entails in terms of smooth procedures and coherent decisions, especially after adopting digitization as a mechanism that facilitates the granting process and ensures its speed and transparency, in addition to APII's management with a flexible economic model, and the introduction of a new-old formula for granting state-owned real estate to investors, represented in the concession based on mutual consent that can be converted to transfer, lead us to theoretically overcoming the problem of the legal system for granting and exploiting economic real estate in Algeria? Especially with all previous legal systems failing to achieve the desired goals due to several factors and circumstances despite the good intentions.

This is what we will try to answer by focusing on the most significant new features introduced by Law No. 23-17 and its regulatory texts related to economic real estate in terms of defining the concept and components of this type of real estate, and outlining the new procedures adopted in granting it to investors, compared to previous legal texts, especially the repealed Order No. 08-04 (3).

First: The Concept of Economic Real Estate

The first notable feature derived from examining Law No. 23-17 mentioned above relates to the new terminology the legislator has adopted for real estate properties aimed at investment in general, and industrial investment in particular, by using a new term: economic real estate. Previously, the phrase used was "lands belonging to the state's private properties aimed at carrying out investment projects" in earlier texts. The legislator defines economic real estate as: any real estate property belonging to the state's private properties and/or any other private property acquired by the Algerian Agency for Investment Promotion (APII) on behalf of the state, suitable for hosting an investment project as defined by the investment law (4).

It is noticeable that the legislator did not just introduce the term economic real estate for the sake of change, but rather aimed to define it precisely because it encompasses not only state-owned real estate, as was the case in previous texts, but also privately owned properties. Moreover, the term economic real estate is broader and more accurate linguistically, considering that the legislator previously referred to this type of property as lands, which implies undeveloped, unconstructed land, whereas in reality, it applies to constructed properties such as real estate assets of local public institutions, which were mostly built-up properties. Therefore, the term economic real estate is more comprehensive and accurate.

Furthermore, through the new text, the legislator stipulated that the economic real estate granted to an investor must be prepared, a provision not previously specified. This requirement had been a barrier for many investors who were granted unprepared properties far from various networks and were asked to commence investment, negatively impacting the launch of many promising industrial projects, especially in isolated areas. This made the benefiting investors seen as negligent by the law for not starting operations within the specified timeframe (5).

The legislator defines prepared real estate as any real estate property belonging to the state's private properties equipped with roads and various necessary networks to allow its use. The responsibility for preparing economic real estate has been assigned to three public agencies specialized in industrial (6), tourism (7), and urban real estate (8), which also oversee the preparation and management of real estate properties within their area of expertise on behalf of the state (9).

Among the new features, the legislator required the formation of a data bank at the Agency (APII) to include all economic real estate properties available for concession grants. These properties form the available real estate reserves that must undergo verification of their legal status before nomination. They must have documents proving their affiliation with the state's private properties and their status regarding planning and urban development instruments like plans, permits, and others. If these properties were previously granted to investors and then reclaimed by the state in a final regularization process, they must possess all documents clarifying their current status and their dispute-free condition. These are then placed at the disposal of the agency (APII) through a direct handover protocol between the state property director and the regional director of APII's one-stop shop for subsequent granting (10).

Secondly: Types of Economic Real Estate

One of the innovations contained in Law No. 23-17 is the precise definition of the types it applies to. Therefore, the executive decree No. 23-486 was issued (11), which defined the components of state-owned economic real estate aimed for concession grants, dividing it by ownership origin into three sections:

1. *Economic real estate originally belonging to the state's private properties:*

These types were specified by Article 02 of Law No. 23-17 and were redefined by Article 02 of the executive decree No. 23-486, which underwent no significant changes from what was stipulated in the previous system, especially the repealed Order No. 08-04. These include prepared lands belonging to industrial areas and state-owned activity zones, as well as prepared lands within the boundaries of new cities, prepared lands belonging to tourist expansion areas and tourist sites, and prepared lands belonging to technology parks, designated for hosting business incubators, startups, and any enterprise dealing in information technology, communication, and digitization. Another type of economic real estate is the remaining real estate assets (12), which are the available properties belonging to public institutions dissolved in the 1990s and early third millennium due to the economic crisis and their inability to self-finance and pay off their debts. Additionally, surplus real estate assets (13), which are properties not necessary for the activity of economic public institutions, including properties within industrial areas that are unutilized as of the date this law was published, are considered types of economic real estate.

Referring to Law No. 23-17, we find that it has added a new category: lands designated for commercial real estate development. This type of property, aimed at investment, must be granted under a transferable concession formula. Given that Order No. 08-04, now repealed, provided economic real estate in a non-transferable concession format, this category was exempted from the application of the repealed text. The new law operates under a transferable concession format, so it logically includes this category, applying the new text's provisions to it. However, the conditions and procedures for benefiting from this category remain subject to a specific text (14), Articles 82 and 83 of the 2024 Finance Law (15), which defers to regulations for detailing its application.

2. *Economic real estate owned by private individuals*

which the Algerian Agency for Investment Promotion can acquire on behalf of the state, is a new formula introduced by the Algerian legislator in this law to include private properties that

can be utilized in granting concessions. Article 13 of Executive Decree No. 23-486 stipulates that this acquisition formula should only be used when state-owned economic real estate is unavailable. According to Article 08 of Law No. 23-17, the agency can acquire any privately owned property that can host an investment project on behalf of the state. This acquisition cannot be classified under any previously legally adopted term or formula, as it does not constitute expropriation for public utility, which has its own specific conditions and procedures regulated by special law and is based on achieving public benefit. Instead, this acquisition method ultimately transfers the property to private investors since the concession is inherently transferable to a concession.

This acquisition method is not considered confiscation, as confiscation is a form of punishment, while Article 14 of Executive Decree No. 23-486 specifies that acquisition is made in exchange for a price equivalent to the commercial value of the property. It is not nationalization, as the legislator has long abandoned this approach. Moreover, it is not seizure, which is only temporary, whereas the acquisition outlined in Law No. 23-17 is permanent due to the transfer of ownership from private individuals to the state. This is confirmed by Article 15 of Executive Decree No. 23-486, stating that the acquisition process is formalized by an administrative contract prepared by state property services, integrating this property into the state's private assets to be subsequently granted to private investors.

This acquisition is considered a form of compulsory sale introduced by the legislator, where the owner is forced to sell their property to the state. Describing the acquisition document as a contract is inaccurate due to the imbalance in the essential element of consent. A document with only one party, the administration, cannot accurately be described as a contract. Indeed, this formula impacts the principle of private property protection enshrined in the 2020 Algerian Constitution (16), particularly in its Article 60, and the provisions of Article 28 of the Real Estate Orientation Law (17), which guarantee private real estate property and real rights as constitutionally protected. This impacts an important principle of property rights, permanence, and indefiniteness, putting at risk the characteristic of permanence where private ownership of industrial property becomes temporary and can be expropriated at any time for the mere need to grant it to another private investor without requiring the original owner's non-utilization.

Thus, this formula devised by the legislator to expand the economic real estate portfolio significantly impacts the principle of legal security, especially since the legislator did not link the acquisition process to a necessary condition that should have been specified: that the private real estate property intended for acquisition is not utilized. In such cases, the reason for acquisition - the necessity of utilizing economic and especially industrial real estate when located in prepared areas, and that its non-utilization constitutes an abuse of rights - can be understood, legitimizing the legislator's intervention to expropriate ownership due to the social and economic role played by private real estate property in achieving development and economic progress, and failing to fulfill this role constitutes a pretext for legislative intervention.

3. Economic Real Estate Acquired through Preemption

For the first time, the legislator explicitly allowed the Algerian Agency for Investment Promotion to exercise preemption rights on behalf of the state to acquire privately owned economic real estate offered for transfer. This formula aims to provide more suitable real estate

offerings for the establishment of new industrial projects, especially given the scarcity of real estate designated for industrial investment promotion, particularly in Northern Algeria. The legislator used the term "transfer" to denote the state's right to exercise preemption regardless of the transfer method, even if by donation, to prevent owners from circumventing the preemption provisions specified in the Civil Law, which stipulate that this right can only be exercised in case of property sale (18). Preemption applies to any transfer of economic real estate, regardless of its origin, whether previously granted by the state or originally privately owned, as long as it is suitable for hosting an investment project and located within designated areas and zones, and is owned by a private individual or entity (19).

Article 18 of Executive Decree No. 23-486 precisely defines the real estate properties eligible for preemption rights, including any property previously granted by the state, regardless of its location. If the property was not originally state-owned, it must be located within industrial areas, activity zones, tourist expansion areas, tourist sites, technology parks, or the perimeters of new cities for the state to exercise preemption rights (20). However, the legislator's failure to precisely define the procedures for exercising preemption and the deadlines for the Algerian Agency for Investment Promotion to exercise this right is criticized. Article 19 of the same decree states that notaries periodically inform the agency of every property transfer process, but without a mandatory format for these notaries. It does not specify whether the notary's role ends upon notifying the agency or if they wait for a response or permit from the agency to proceed with the transfer. If so, what is the deadline after which the agency's non-response is considered a refusal to exercise preemption rights, allowing the notary to proceed with the transfer? The lack of clarity on these details inevitably leads to obstacles in the transfer processes conducted by notaries, especially in the face of obstinate property registrars who do not publicize transfer contracts until an explicit refusal from the agency to exercise preemption rights is obtained, due to the lack of a maximum deadline for the agency to express interest, considering the lapse of the deadline as an explicit refusal to exercise this right. All this fundamentally affects an essential right of the owner, the right to dispose of their property. If the agency decides to exercise the preemption right, this process is formalized by an administrative contract prepared by state property services to integrate the property into the state's private assets for re-granting to new investors. However, the issue that may arise in such cases is the preemption price, especially if the subject transfer contract is a donation rather than a sale, or if the sale price is inflated to prevent any preemption and hinder the transfer process. These deficiencies should be addressed by the legislator in the future to reassure owners willing to transfer, reduce legal disputes, and enhance the quality of legal texts and principles of legal security, thus improving the business environment and providing necessary guarantees.

Thirdly: Categories of Real Estate Not Covered by Law No. 23-17

The Algerian legislator has explicitly excluded certain types of properties from the application of this law due to their regulation under specific texts. Notably, most of these were also exempted in the repealed Order No. 08-04, including (21):

- Agricultural lands and those intended for agricultural use belonging to the state's private properties. It's curious that only state-owned agricultural lands are exempted, whereas the previous text exempted all agricultural lands regardless of their ownership regime. Although this exemption doesn't significantly impact, given that Law No. 23-17 pertains only to state-owned economic real estate and doesn't involve private properties or Waqf system, excluding

all agricultural lands would have provided them with the necessary legal protection against repurposing for non-agricultural uses. Other exempted categories also include lands within mining areas, lands within hydrocarbons exploration and exploitation zones and areas protecting electrical and gas installations, lands within the perimeters of archaeological sites and historical landmarks, and lands designated for real estate development benefiting from state aid.

Two new categories not exempted in previous texts have been added: lands belonging to the state's private properties intended to accommodate aquaculture activity zones, as well as lands designated for public investment projects (22). The latter category was previously subject to the provisions of the repealed Order No. 08-04, with the change attributed to the grantor's change and the non-applicability of this new law to public law entities, including public economic institutions establishing public investment projects, which, in their acquisition of economic real estate, are governed by the National Property Law, financial laws, and other specific texts.

Fourthly: Digitalization of the Benefit Procedures

Under the provisions of Law No. 23-17, every natural or legal person, Algerian or foreign, residing in Algeria or abroad, recognized as an investor according to the Investment Law (23) and wishing to acquire economic real estate for their project (24), can submit an electronic application through the digital platform managed by the Algerian Agency for Investment Promotion (25). This enables them to benefit from a concession contract based on mutual consent for a period of 33 years, renewable and transferable to a concession after the project's completion and commencement of operation, subject to a specification document, and in return for an annual royalty paid to the state, the owner of the property.

The Algerian legislator has granted the Algerian Agency for Investment Promotion, through its one-stop shop, the authority to grant economic real estate defined in Law No. 23-17 (26) to investors through a decision issued by it, known as the Concession Grant Decision (27). This decision serves as a permit for the State Property Administration to prepare a transferable concession contract. Consequently, the Algerian Agency is obliged to direct the economic real estate, which has been delegated to it for management, exclusively for investment projects. It is also required to return any property whose purpose has been changed under urban planning rules or for any other reason and is no longer suitable for concession in the context of investment to the competent regional State Property Services (28).

The agency initially processes the information submitted by the applicant, after which the investor can determine whether their project has been accepted. If accepted, the investor confirms their choice and formalizes their request in exchange for a preliminary registration certificate issued by the digital platform (29). Since the grant method is based on mutual consent and more than one candidate can apply for the same real estate unit, applications are differentiated through a project evaluation grid, a model of which is included in Executive Decree No. 23-487 (30). The application of the evaluation grid results in the selection of the project with the best scores according to the same grid, with the remaining candidates being informed of their rejection and given the right to appeal. For the selected investor, a temporary benefit decision is prepared, the model of which is specified in Annex II of Executive Decree No. 23-487. This temporary decision cannot be used to obtain the concession contract until it

becomes final, which only happens after the appeal period has ended or if the appeals are definitively rejected (31). At that point, the Algerian Agency for Investment Promotion issues the final grant decision, the model of which is specified in Annex III of Executive Decree No. 23-487, authorizing the concession grant to the accepted investor (32).

In cases where an application is rejected or a grant is not approved due to the evaluation grid, investors have the right to appeal to the Algerian Agency for Investment Promotion through any means within one month from the notification date of the decision (33). The General Director of the agency is required to resolve the preliminary appeal within no more than 15 days from its receipt (34). If the preliminary appeal is rejected by the agency, the investor can then resort to the National Supreme Appeals Committee for Investment-related (35) issues by submitting an appeal within 15 days from the agency's rejection of the preliminary appeal (36). This appeal must be individual, signed, and include a written brief sent directly to the committee or through the investor's digital platform, accompanied by all supporting documents and evidence (37).

Two outcomes are possible: the National Supreme Committee may not accept the appeal, in which case the agency, through its one-stop shop, notifies the decision and issues the final grant decision to the investor with the highest evaluation score (38).

Alternatively, if another candidate's appeal on the same property, who did not receive the highest evaluation score, is accepted, the previously temporarily granted candidate is notified of the appeal's acceptance, resulting in the annulment of their temporary benefit decision, and the final grant decision is awarded to the investor whose appeal was accepted, qualifying them for the concession right (39).

After the Algerian Agency for Investment Promotion issues the concession grant decision, the file is transferred to the State Property Administration to prepare the concession contract, after which the investor can commence the project execution and operation. The preparation of the concession contract entails a set of consequences reflecting the rights and obligations of the contract parties, namely the state, the property owner, and the investor, the concession holder, as also defined by Law No. 23-17.

Conclusion

In summary, the new legal framework for granting and exploiting economic real estate in Algeria marks a progressive step by providing additional guarantees for investors and significantly advancing legal security in most aspects. This leads us to conclude that the Algerian legislator is on the right legal path regarding managing the economic real estate portfolio. For its success, alongside legislative efforts, there must be a genuine will to advance in establishing a sound and realistic legal construction that reflects investors' aspirations, balancing the need to provide a fertile business environment with protecting the state's interests, ensuring a balanced relationship without excess or neglect.

The new text on economic real estate contains more provisions than the repealed Order No. 08-04, which included only 16 articles compared to 27 articles in Law No. 23-17. It precisely defines the categories of economic real estate covered by the application and adopts digitization as the sole mechanism for granting, giving exclusive authority to a single body, the Algerian

Agency for Investment Promotion, ensuring decision unity, ease of granting processes, transparency, and prompt handling of applications.

It also allows for the transfer of economic real estate ownership to investors upon project establishment and commencement of operation, with the transfer price determined according to the property's commercial value at the time of concession granting, after deducting the annual royalties paid, and specifies a fixed period for completing transfer procedures. This includes properties granted under previous texts, which did not permit transfer, providing a significant guarantee and incentive for investors.

Additionally, it permits the state to exercise preemption rights to acquire privately owned economic real estate offered for transfer, ensuring state ownership of an economic real estate portfolio and legal retrieval of granted portfolios based on fair mechanisms.

However, despite the advancements mentioned, there are areas of regression that may negatively impact legal security and the necessary guarantees to protect investors' rights. Notably, the issue of terminating concession contracts due to investors' legal and contractual breaches, which is now administratively resolved without recourse to competent judiciary, contrasts with the previous approach. Also, the unilateral will of the state to acquire private properties without offering them for sale or transfer and without at least requiring their non-utilization is problematic. Law No. 23-17 does not precisely define the procedures, deadlines, and conditions for the Algerian Agency for Investment Promotion to exercise preemption rights, reflecting a retreat in legal guarantees. Therefore, the following suggestions are offered:

- Necessity to judicially, not administratively, terminate concessions to ensure more guarantees and attract investors.
- Addition of a condition for the state's acquisition of privately owned properties suitable for investment projects that these properties are not utilized by their owners.
- Precise clarification of the conditions, procedures, and deadlines for the state to exercise preemption rights in the economic real estate sector, to avoid obstructing real estate transactions and thereby hindering investment processes.

References

1. Law No. 23-17, dated November 15, 2023, defines the conditions and methods for granting economic real estate belonging to the state's private properties for investment projects, Official Gazette No. 73, dated November 16, 2023.
2. Law No. 22-18, dated July 24, 2022, concerning investment, Official Gazette No. 50, dated July 28, 2022.
3. Order No. 08-04, dated September 1, 2008, defines the conditions and methods for granting concessions on lands belonging to the state's private properties designated for investment projects (repealed), Official Gazette No. 49, dated September 3, 2008.
4. Article 04 of Law No. 23-17.
5. Paragraph 02 of Article 04 of Law No. 23-17.

6. Established by Executive Decree No. 23-488, dated December 28, 2023, which includes the creation of the National Agency for Industrial Real Estate, its organization and operation, Official Gazette No. 85, dated December 30, 2023.
7. Established by Executive Decree No. 23-489, dated December 28, 2023, which includes the creation of the National Agency for Tourism Real Estate, its organization and operation, Official Gazette No. 85, dated December 30, 2023.
8. Established by Executive Decree No. 23-490, dated December 28, 2023, which includes the creation of the National Agency for Urban Real Estate, its organization and operation, Official Gazette No. 85, dated December 30, 2023.
9. Article 07 of Law No. 23-17.
10. Article 03 of Executive Decree No. 23-486.
11. Executive Decree No. 23-486, dated December 28, 2023, defines the components of economic real estate belonging to the state's private properties designated for investment projects and eligible for concession grants, Official Gazette No. 85, dated December 30, 2023.
12. Paragraph 03 of Article 04 of Law No. 23-17, and Article 04 of Executive Decree No. 23-486.
13. Paragraph 04 of Article 04 of Law No. 23-17, and Article 05 of Executive Decree No. 23-486.
14. Paragraph 03 of Article 14 of Law No. 23-17.
15. Law No. 23-22, dated December 24, 2023, contains the Finance Law for the year 2024, Official Gazette No. 86, dated December 31, 2023.
16. The Constitution of the People's Democratic Republic of Algeria, published in Official Gazette No. 82, dated December 30, 2020.
17. Article 28 of Law No. 90-25, dated November 18, 1990, containing the amended and supplemented Real Estate Guidance Law, Official Gazette No. 49, dated November 18, 1990.
18. This format is stipulated in Article 17 of Executive Decree No. 23-486.
19. Article 17 of Executive Decree No. 23-486.
20. Article 18 of Executive Decree No. 23-486.
21. Article 02 of Order No. 08-04 (repealed).
22. Article 03 of Law No. 23-17.
23. Article 05, Paragraph 01 of Law No. 22-18 concerning investment, defines an investor as any natural or legal person, national or foreign, resident or non-resident according to the specific foreign exchange regulations, who undertakes an investment in accordance with the provisions of this law.

24. Article 12 of Law No. 23-17.
25. This is the website for the investor platform: <https://invest.gov.dz/>
26. Article 08 of Law No. 23-17.
27. Paragraph 02 of Article 14 of Law No. 23-17, and Article 02 of Executive Decree No. 23-487, where the legislator has provided two models for this decision as an annex to this decree, named Temporary Grant Decision, which becomes a Final Decision after the appeal period ends.
28. Article 11 of Law No. 23-17, and Article 23 of Executive Decree No. 23-468.
29. Article 06 of Executive Decree No. 23-487.
30. Article 07 of Executive Decree No. 23-487.
31. Article 07 of Executive Decree No. 23-487.
32. Article 09 of Executive Decree No. 23-487.
33. Article 08 of Executive Decree No. 23-487.
34. Article 07 of Presidential Decree No. 22-296, dated September 4, 2022, defines the composition and operation of the National Supreme Appeals Committee related to investment, Official Gazette No. 60, dated September 18, 2022.
35. Article 09 of Executive Decree No. 23-487.
36. Article 06 of Presidential Decree No. 22-296.
37. Article 08 of Presidential Decree No. 22-296.
38. Article 09 of Executive Decree No. 23-487.
39. Article 09 of Executive Decree No. 23-487.