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### **Cases of exemption from administrative warning (Comparative study)**

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#### **Abstract**

As the administration is exempt from issuing an administrative warning in cases, including what is in the text of the law or the contract itself, and some of which are based on certain circumstances, it is legal for the public authority to forget about the administrative warning and to impose the penalty directly without achieving this guarantee (administrative warning). The state does not view this as a legal infraction because it serves the public interest, which is what the warning was intended to achieve.

#### **Introduction**

Since the legal sanction is not an end in itself, but it is the means by which public authorities plead to achieve their goal, which is the public interest; therefore, there had to be guarantees for people (private moral persons, individuals) in the face of the competent authority to impose sanctions to prevent their arbitrariness, and one of the most important of these guarantees is an administrative warning as a procedural guarantee that precedes the imposition of punishment. This warning, as a warning to the violator within the scope of public law to correct his course and remedy his confusing situation, is not useful in all cases, and cannot be issued in all circumstances; therefore, although an administrative warning is a procedural guarantee that precedes the imposition of administrative sanctions under the law, but under the same law, the public administration can be exempted from it.

## **First/the definition of the warning and the conditions for its guidance**

An ultimatum is defined in the terminology according to the general rules as: "proving the case of the debtor's delay in fulfilling his obligations legally", and it is also defined as : "proving the case of the debtor's delay in fulfilling his obligations", and in fact such definitions are compatible with private law links and not commensurate with public law links, and therefore we cannot rely on the above and we can say that they are excluded from the subject of our research, as some jurisprudence has strived to define the ultimatum as: If we reflect on this definition, we find that it does not understand the true meaning of the administrative warning; it is too brief and it is not clear the purpose that we would like to elaborate in the context of the topic. Some jurists have gone to define it as: "an alert sent by the administration to its contractor explaining to him the shortcomings, or delays in the implementation of the administrative contract, and ordering him to comply with the contract in accordance with the applicable legal rules within a period determined by him under penalty of taking appropriate legal action against him, which in all cases takes the nature of an administrative penalty."

The advanced definition fits with the nature of contractual ties within the scope of administrative law, while some have argued that an administrative warning is: "The warning that the administration sends to its defaulting customer, indicating the shortcomings and shortcomings in the implementation of its obligations and urging him to implement according to the agreement, and within the specified period so as not to impose a fine on him," but the advanced definition is taken to be similar to the previous one; it shortens the meaning of the warning within the scope of the administrative contract and the observed legislation, and the daily behavior of the administration that it often resorts to issuing a warning to people who are not connected with it by a contractual bond, but extends even more to many cases outside the scope of the contract (as we will show in the next pages).

According to some academics, the administrative warning should: "an administrative measure in which the administration informs the violator of the punishment it intends to take against him as a result of his violation of legal rules to give him the opportunity to remedy the situation and correct his situation contrary to legal conditions".

If we go in an attempt to find a definition of the administrative warning from the position of the legislator, we find that the legislation that was subjected to the warning did not provide a definition of it, except for the decree approving the General Clauses of the French public projects management for the year 2021, where the word warning was mentioned under the name: "The legal procedure by which the administration draws the attention of the contracting party to the data of the decision (penalty) against him by any material or immaterial means through the buyer's profile, or any other means of electronic communication in a way that enables to know the date of receipt with certainty and, where possible, the time of

receipt" in fact, this definition cannot be relied upon; as it was limited to a warning in the case of the contract and in comparison with the law regulating contracts concluded by Egyptian public authorities No. 182 of 2018, amended by Law No. (188) for the year 2020, and instructions for the implementation of Iraqi government contracts No. 2 for the year 2014 we find them. They did not give any definition of a warning in this regard, which means that French law has advanced in this aspect. For example, Article (423-25) in its ten different paragraphs of the French Environmental Protection Act No. 95-101 of 1995 states that: "the French Bureau of Biological Diversity may issue a warning (warning) alerting fishermen who violate fishing conditions, and it has the right to cancel the fishing license in the first place, or suspend it", as explained in the rest of the articles provisions of that in detail. Some legislations have also mentioned it with a term other than the warning term, such as the Egyptian Environmental Affairs Law No. 4 of 1994, amended by Law No. 9 of 2009, which states: "the person responsible for managing the facility in accordance with the provisions of this law must keep a record of the impact of the facility's activity on the environment.

The authority shall notify the competent administrative authority of the assignment of the owner of the facility to correct the violation promptly, if he does not do so within sixty days from the date of his assignment, the authority shall notify the competent administrative authority... However, the Iraqi legislator had surpassed his Egyptian counterpart in this regard, as stated in the Iraqi Environmental Protection and improvement Law No. 27 of 2009 in Article (33) thereof: "first: the minister or whoever is authorized to alert any facility, laboratory or any entity or source polluting the environment to remove the influencing factor within 10 days from the date of notification of the warning and in case of non-compliance, the minister may stop the work... Until the violation is removed, "as is the case in the Iraqi Municipal Administration Law No. 165 of 1964, as amended, which states:" 3 - the director-general of the department, and the director of the municipality, is responsible for any construction, or use carried out without permission, or fundamentalist approvals... By a judicial decision that has acquired a peremptory degree, "and therefore the word warning was mentioned in them explicitly, and in proportion to its exact meaning, but the Iraqi legislator and other state legislators did not define the warning in their various legislations.

On the judicial side, there is a decision of the Iraqi court of Cassation in which the warning was defined as: "A legal Act issued unilaterally and does not have a special form unless the law provides for that form, or its issuance exclusively, pledges, guarantees based on the provisions of Article (9) of the notarial Law No. 33 of 1998 is not considered to prevent those ministries and departments from issuing warnings, and all notifications, including warnings addressed to contracting parties, such as companies, or persons" and noting this definition, we find that it was narrow in terms of understanding the capacity of the administrative warning in terms of some important details related to its subject, form and here we see the need for the Iraqi administrative judiciary, or the

comparative administrative warning, to take note of its interest, and develop a clear concept for it that constitutes.

This is a rule that can be used to judge the legality of the administration's actions related to the warning because the definition is primarily the responsibility of the judiciary, and to a greater extent, of jurists and commentators, especially because the administrative judiciary is established by nature, and the administrative judge, in turn, is an innovator of remedies and solutions to the issues presented to him in light of the governing general p

From the foregoing, it turns out that the warning is not a way to show the will of the administration to bring about new legal effects, but rather an action, or an Act paving the way for the will of the administration to apply legal sanctions, or the agreement; as it may be time to implement the obligation of any kind towards the administration, however, the administration deliberately keeps silent about the situation, it carries a burden of tolerance. But the administration may be affected and often is affected by any breach of obligations imposed on the customer, whether obligations stipulated by law, or referred to by agreement, especially since the damage we mean here is damage to the public good, which means in other words damage to public utilities, and disruption of their work.

In this case, in which the obligee must fully implement his obligation, the administration must warn him in accordance with the methods prescribed by law, and then he becomes obliged to immediately implement his obligation as stipulated by the legal rules, or the agreement, otherwise the penalty will be signed.

Therefore, the researcher is of the opinion that, whatever the warning's subject, it is essential to send it as a way of alerting those who have disregarded their obligations, whether in the context of a contract concluded by the administration with a natural or moral person who failed to implement what was agreed, or it was directed at one of the people and as a beneficiary and beneficiary of the services of the public facility and alerting him to his obligatory.

To state the safety of an administrative warning as a procedural guarantee preceding the imposition of general sanctions, a number of conditions must be met, as follows:

- 1-the warning must be issued by the competent administrative authority.
- 2-the warning should be clear.
- 3-the warning must be of a fixed duration.
- 4-the alarm should be feasible.

Based on the above and the two linguistic and terminological definitions, we can define the administrative warning as: an act issued by the sole will of the administration directed to the violator before it, whether it is a legal obligation, or an agreement warning him of the need to fulfill his obligation in accordance with the attached data that leads to taking into account to correct his wrong situation and within a certain period legally, or custom (reasonable period), otherwise the penalty is imposed on him.

## **Second / cases of exemption from administrative warning:**

1 - Exemption based on a text: the mandate of the administration to issue a warning is dropped in the event that its exemption is provided for in the law, or upon agreement.

### **(A) Exemption based on law**

When we say the text of the law, we mean the word of the law to launch it; it may be a provision in the legislation, in the instructions, in the books of conditions, or in any text applicable to the parties, and there are many examples of this, especially in the field of administrative contracts; the administrative entity is not obliged to warn the contractor when the law as soon as the delay occurs as a material fact, the administrative authority works to satisfy it when it is due This is indicated by Article (٤٨) of the Egyptian law regulating contracts, which states: "in case of non-compliance with the implementation for a reason due to the contractor, a payment for the delay is calculated from the beginning of the deadline without the need for an alert, warning, or taking any other action". The follower of the texts of the Egyptian law of tenders and auctions (canceled) finds that the general rule is that there should be no administrative warning before the imposition of sanctions, and the exception is the need for warning in some cases, such as the text of Article (84) of the executive regulations of the law of tenders and auctions (canceled), which stated that: "if the contractor violates any of the terms of the contract, neglects, or omits to perform one of his scheduled obligations and does not fix the effect of this within fifteen days from the date of his warning with a letter in carrying out this reform, the competent authority had the right to take one of the following measures as required by the public interest: 1- Termination of the contract.2-withdrawal of the work from the contractor, and execution at his expense with the same conditions and advertised specifications".

This means that the warning is obligatory on two conditions, the first of which is that the contract is a general contracting contract, and the second is that the penalty is either annulment, or withdrawal of work and execution at the expense of the contractor. Thus, the Egyptian legislator has required that a warning must be given in some cases, but in other cases it is not required before the contract is terminated, such as in the event that the accepted bidder does not perform the final insurance within the specified time limit, the administrative authority may, by notification of a letter of arrival - without the need for any other action - cancel the contract, or execute it by one of the bidders following his tender in the order of his priorities.

In Iraq, we find that the exemption of the administrative authority from the warning has been mentioned in many texts in its various laws, including what is stated in the property tax law in Article (22) of it: "1 - A - if the basic tax is not paid during the fiscal year, 10% of its amount for each year is added to it, or part of it is more than half of the year... 2 - the tax payable may be paid in monthly

installments agreed upon with the financial authority, and when the taxpayer is late in paying one of the installments due within a month from the due date, all installments become payable without the need for warning," as the exemption is stated in Article (46) of the Income Tax Law No. (113) FOR THE YEAR ٢٠٢٣ by saying: "1-the financial authority may pay the tax in installments upon a written request submitted by the taxpayer if it finds justified reasons for the installment, provided that it informs him of the amount of each installment and the due date. 2-if the tax is paid and the taxpayer does not pay one of the installments within 21 days from the due date, all installments shall be payable automatically and without the need for a warning, taking into account what is stated in Article forty – five of the law," as well as what is stated in the private higher education law in Article (38) thereof by stating: First-the minister may alert the University, College not affiliated with a university, or the institute through the notary department, or through a widely circulated newspaper in case of proven violation of the required conditions (C) the minister shall close the department or the scientific branch without warning in the event of a gross violation of the required conditions .

When it is established that a University, College, or institute has violated the necessary conditions, the minister may recommend to the Council of Ministers that the leave be terminated with a warning; alternatively, he may recommend that the leave be terminated immediately upon discovery of a serious flaw in the scientific or educational aspects of the leave or a failure to meet the purposes for which it was established.

### **B-exemption from the text of the contract**

The contract may come with an explicit provision granting the administration the right to use its authority to impose a penalty on the defaulting contractor without the need to issue an administrative warning to him. This exemption clearly shows respect for the will of the parties to the contract, and the application of the principle of consent in the scope of administrative contracts as in the case of civil contracts. The agreement through the contract to be exempted from the warning when the contractor violates the performance of its contractual obligations requires that it be clear without ambiguity or ambiguity; the text must be clear, and it must be explicit; as the ambiguity or doubt in the text is interpreted in favor of the contractor, being the weakest party in the contract, and the text of the warning it includes the listed conditions so that the judge takes it when a disagreement appears about its application, and it must be the contractor with the administration is often a submissive party that accepts any of its conditions, especially with regard to this condition, if the administration refuses to negotiate with him except when accepting this condition, which has the effect of considering the warning binding on the administration when the disagreement occurs, and doubt about the existence of this exemption or not, and then ruling nullity, and compensation in the event of a penalty without taking into account its direction, especially for serious sanctions, such as annulment.

## **2-Exemption based on certain circumstances**

In this case, the contract judge is competent to assess these circumstances taking into account certain things, including the nature of the contract, the terms in which the parties agreed on it, and other factors. This exemption from the administrative warning may be granted based on certain circumstances, which is known as a situational exemption. This exemption can be deduced depending on the circumstances and the surrounding circumstances specific to each case. Thus, one of the most notable instances in which the administration decides not to give an administrative warning is as follows:

### **(A) A declaration by the person concerned of the warning about his will not to implement**

This situation is realized in relation to the contract when there are reasons due to the will of the contractor himself, such as his violation of a fundamental and irreparable obligation, or his explicit declaration of his unwillingness to perform the contract and his desire without any pressure and then his final refusal to perform the obligations contained in the contract.

This situation is also achieved when the contractor is unable to continue carrying out the work in its final form, which consequently leads to the exemption of the administration from its well-known duty to send a warning to the contractor before the termination of the contract, as there is no benefit to be expected from it, and this applies naturally to anyone who violated the provisions of Warning him before the punishment is imposed on him whenever he explicitly declares his absolute desire not to implement what the rule of law obliges him to do, and then all the circumstances surrounding the implementation are cut off by the futility of the warning, or the usefulness of it, which proves as a result the lack of wisdom of directing him.

### **B-Fraud in the implementation of obligations**

The administration is exempted from issuing an administrative warning, and its necessity ceases whenever the person concerned commits acts of fraud and fraud in the implementation of his obligations... This is achieved whether for the contractor with the department, or any other individual who is committed to it by the rule of law, in accordance with the general rules that require not adhering to the rules of protection, which are guaranteed by the general principles of the law when there is bad faith, or fraud on the part of the addressee, where the general principle and the president in the law is to treat the parties honestly, sincerely, and honestly in front of each other, as required by the principle of (good faith in dealing). Thus, fraud is an illegal act in itself, as it represents a violation of a general legal obligation, as well as contradicting the rules of ethics, justice, and general principles of law.



In the field of the contract; and because of the seriousness of this matter, the Egyptian legislator may be alerted to the issue of fraud, and dealt with it by providing for the termination of the contract by the administration automatically for the person who contracted with it, and it was proven that he committed fraud during the implementation of his obligations, and even in obtaining the contract, whether the fraud was signed by him, or through one of his subordinates; Article (50) of the law regulating contracts provides for the termination of the contract in the following cases:

"1 - if it turns out that the contractor used fraud himself, or by others, or manipulated in his dealings with the contracting administrative entity, or in receiving the contract. 2 - if it turns out that there is collusion, fraudulent practices, corruption, corruption, monopoly. 3-if the contractor is bankrupt, or left-handed. Annulment in the indicated cases is carried out automatically". The same is the case with the Iraqi legislator, as he made the contractor's fraud a sufficient reason to confiscate his initial insurance, and the implementation at his expense in Article (10) of the instructions for the implementation of government contracts by stating: "First: - A - the winning minus is considered to be invalid when the following cases are verified: - ... 2 - when submitting untrue data, in illegal ways, and in violation of the terms of the tender".

### **C-The state of urgency and urgency is achieved**

This situation arises when the execution of the contract must be done immediately and as a penalty because it is urgent and absolutely necessary. This frequently occurs when the circumstances surrounding the violation or the mistake made by the violator necessitate the signing of the penalty because there is no point in claiming that the administration is required to direct it.

### **D-Assignment of the contract and subcontracting**

It is possible to talk about the occurrence of such a situation only for the contract, where the administration is exempted from notifying the contractor whenever the latter assigns his contract to another, or subcontracts on any of his obligations contained in the contract without taking the approval of the administration in advance; as doing these actions without the administration being aware, and without taking its consent is a serious mistake in his contractual obligations, and in violation of the principle of personal execution of administrative contracts; as if the original contractor has the obligation to perform his obligations from the subcontractor, this remains conditional on obtaining the approval of the administrative body the original contract, which was agreed with the management and not with The other contractor.

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