

EYDAP – Regulatory Framework  
24/11/2021

**Legal Opinion**

**Subject: The regulatory framework (a) for “settling” claims and debts of the Hellenic Republic and EYDAP up to 31.12.2020 and (b) for setting the price for raw water provided by the Hellenic Republic, in the context of negotiations on the new contract between the Hellenic Republic, EYDAP Assets and EYDAP.**

**I. Background**

1. EYDAP S.A. (hereinafter EYDAP) was established by Law 1068/1980 (Government Gazette 190/A) as a societe anonyme whose sole shareholder is the Hellenic Republic, and whose purpose is to supply water and sewerage services to the area of the Capital. Article 1 of Law 2744/1999 (Government Gazette 222/A) extended its objectives by allowing it to operate in other fields (telecommunications, energy) and make investments in associated companies. Article 2 of that Law granted it the exclusive right to provide water supply and sewerage services in the area of the Capital for a period of 20 years, which could be renewed in accordance with the terms of the contract which EYDAP would have concluded with the Hellenic Republic. Among other things, that contract would set out the price, quantity, quality and method for providing the raw water which the Hellenic Republic would undertake to make available to EYDAP so that it would *“be in a position to perform its obligations to provide water supply services”* (Article 6(1) of Law 2744/1999). Article 4 of Law 2744/1999 established a separate body governed by public law under the supervision of the Minister of the Environment, Planning and Public Works by the name of EYDAP Assets (hereinafter *EYDAP Assets*) to which ownership of the strategic assets (fixed assets) of EYDAP were transferred free of consideration. Article 6(1) of Law 2744/1999 stated that the price EYDAP would pay for the raw water provided by the Hellenic Republic would be paid to EYDAP Assets.

2. That contract was signed on 9.12.1999 (hereinafter the *1999 Agreement*). It entered into force on 25.10.1999, and expired on 25.10.2019. It was then extended three times, the first time until 25.04.2020, the second time until 31.12.2020 and the third time until 30.06.2021. In the context of the 1999 Agreement, EYDAP was obliged to pay EYDAP Assets the price for supplying the raw water and the Hellenic Republic was obliged to pay EYDAP the cost of maintaining the water supply system. More specifically, for the first five years, it was stipulated that the price of raw water would be offset against the cost of normal operation and maintenance services which EYDAP would provide for the operation and maintenance of the assets owned by EYDAP Assets. From the sixth year until the expiry of the agreement, the price of raw water which the Hellenic Republic would provide to EYDAP would be set by a (separate) *“written agreement between the parties, at the same time as the cost of maintaining and operating the fixed assets,*

*in conjunction with the pricing policy<sup>1</sup> and taking into account in all events the sale price of raw water to third parties by EYDAP” (Article 15 of the 1999 Agreement). Article 23 of the 1999 Agreement states that disputes arising from the 1999 Agreement, if relating to a technical issue, were to be resolved by an expert. If either the issue which arose was not of a technical nature, or at least one of the parties had reservations about the expert’s decision, or both parties agreed to refrain from the expert stage, recourse could be had to arbitration. The arbitration award had to be issued within 6 months from appointment of the presiding arbitrator, otherwise the parties could seek recourse to the ordinary courts.*

3. In 2013, since no agreement to set the price of raw water had been concluded, Joint Ministerial Decision No. Δ6/2476/3.12.2013 (Government Gazette 3065/B, hereinafter the 2013 Joint Ministerial Decision) was issued following legislative authorisation (Article 45 of Law 4179/2013 (Government Gazette 175/A) as supplemented by Article 131 of Law 4199/2013 (Government Gazette 216/A) which settled that outstanding financial issue by offsetting and extinguishing claims which had not been settled and were overdue as at 30.6.2013. The 2013 Joint Ministerial Decision was based on the Study entitled “Costing of raw water for water supply in Athens” prepared by the National Technical University of Athens in 2010 (hereinafter the 2010 NTUA Study)<sup>2</sup>. On 27.12.2013, following a recommendation from the Board of Directors, the General Meeting of EYDAP unreservedly approved the provisions of Joint Ministerial Decision 2013 and waived all other claims and judicial remedies.

4. In the meantime Directive 2000/60/EC establishing a framework for Community action in the field of water policy was adopted which was transposed into the Greek legal order by Law 3199/2003 (Government Gazette 280/A) and Presidential Decree 51/2007 (Government Gazette 54/A) and introduced the principle of adequate recovery of the cost of water services which had been provided. In implementation of that, decision No. 135275/2017 of the National Water Committee was issued approving the general rules for costing and billing water services. Method and procedures for recovering the cost of water services in its various uses” (Government Gazette 1751/B, hereinafter the “2017 Joint Ministerial Decision”), which brought about major changes in the costing and billing rules for water supply and sewerage services, including the supply of untreated water.

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<sup>1</sup> Under the current regime, EYDAP’s pricing policy was approved up to the end of June 2015 by decision of the Minister of Finance on a proposal from the Special Secretary for Water. On 1.7.2015 the Special Secretary for Water decided after consulting the Minister of Finance and other bodies involved (Article 33(1) of Law 4258/2014 (Government Gazette 94/A) to replace Article 5(3) of Law 4117/2013 (Government Gazette 29/A) as amended by Article 1(M)(9)(a) of Law 4254/2014 (Government Gazette 85/A). Article 9 of Presidential Decree 84/2019 (Government Gazette 123/A) established a General Secretariat for the Natural Environment and Water within the Ministry of the Environment and Energy, to which all competences, posts, staff and regulated agencies were transferred, including, inter alia, those which report to the Special Secretariat for Water.

<sup>2</sup> Following the Equivalent Annual Cost (EAC) method, the 2010 NTUA study set the unit cost of raw water at € 0.151/m<sup>3</sup>, which was reduced to € 0.084/m<sup>3</sup>, in order to take into account EYDAP’s expenses for operating and maintaining the Hellenic Republic’s fixed assets and pumping water at Viliza and Iliki.

5. To date, however, no agreement has been concluded to set the price of the raw water made available to EYDAP. In that context, on 5.12.2013 EYDAP announced to investors that, “from 1.7.2013 onwards, no price for the raw water received by EYDAP had been agreed with the Hellenic Republic,” a position adopted by all EYDAP management teams without exception since then, irrespective of their persistent efforts to reach agreement with the Hellenic Republic. In all Annual Financial Reports from 2013 to the present day, EYDAP informs investors that, in the absence of a written agreement with the Hellenic Republic, EYDAP continues to apply the provisions of Article 15 of the 1999 Agreement after 30.6.2013, according to which the price of raw water is set off against the cost of services EYDAP offers for the maintenance and operation of the fixed assets belonging to EYDAP Assets. On the other hand, on 4.8.2014 the Special Secretary for Water issued a decision recommending that the temporary price of raw water be set at € 0.084/m<sup>3</sup> for the period after 31.6.2013, namely the reference price in the 2013 Joint Ministerial Decision.

6. In 2018, in the context of negotiations to conclude a new 20-year contract before the 1999 Agreement expired, the Hellenic Republic once again raised the issue of settling EYDAP’s overdue debts to EYDAP Assets for the supply of raw water for the period 1.7.2013-31.12.2020, as a condition for concluding the new agreement. It insisted on costing the raw water based on the 2010 NTUA Study, which was updated in 2018 (hereinafter the *2018 NTUA Study*)<sup>3</sup>. On 6 June 2019 the Chairman of EYDAP Assets also sent a letter to EYDAP requesting payment of the price from making available raw water from 12.10.2013 to the present day.

7. On 19.6.2019 EYDAP’s Board of Directors issued unanimous decision No. 20339 stating its opposition to the said unilateral and personal action of the Chairman of EYDAP Assets, pointing out that in the absence of a specific written agreement on the matter, the cost of running and maintaining the External Water Supply System (hereinafter the EWSS) continued to be offset against the cost of supplying raw water and consequently there was no debt. That was also pointed out in press releases from that time and in briefings to investors. Moreover, it commissioned Jacobs<sup>4</sup> to assess the Regulatory Asset Base (hereinafter RAB) for the assets of EYDAP Assets and commissioned Centrus<sup>5</sup> to set the price of raw water.

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<sup>3</sup> The 2018 NTUA study used two scenarios, one financial scenario and one based on the guidelines in the 2017 Joint Ministerial Decision and based on the Equivalent Annual Cost (EAC) method. In the financial scenario, the unit cost of raw water was estimated at € 0.138/m<sup>3</sup> and € 0.142/m<sup>3</sup> while in the EAC scenario it was estimated at € 0.163/m<sup>3</sup> and € 0.167/m<sup>3</sup>.

<sup>4</sup>Following the Modern Equivalent Asset method, Jacobs taking into account the useful economic useful life of the assets of EYDAP Assets, set the estimated value of the RAB at € 887,000,000.

<sup>5</sup>Using the RAB method, Centrus set the annual financial cost of the raw water at € 32,100,000 based on the assets of EYDAP Assets of an estimated sum of € 847,000,000 which after excluding fixed financing from third parties (such as EU financing) was € 436,000,000. Based on this data, the unit cost of the raw water could range from € 0.077/m<sup>3</sup> to € 0.080/m<sup>3</sup> (as estimated by Ernst & Young).

In 2019 it also commissioned a similar study from Ernst & Young, which was updated in 2020<sup>6</sup>, and in 2020 it commissioned opinions on the legal aspect of the issue from the following legal advisors: the law firm Bahas - Grammatidis and Partners (11.05.2020), N. Farantouris - Professor of the Department of International and European Studies of the University of Piraeus, (21.05.2020), N.K. Alivizatos - Professor of Law at the National and Capodistrian University of Athens (3.12.2020), and the law firm Potamitis - Vekris (29.01.2021). For its part, in 2019 the Hellenic Republic commissioned Kantor to prepare a study calculating the price of raw water<sup>7</sup>. In the end, it formulated its proposal in the context of negotiating the new contract based on the 2010 and 2018 NTUA studies.

8. Article 114(1) of Law 4812/2021 (Government Gazette 110/A) renewed the exclusive right to provide water supply and sewerage services granted to EYDAP by Article 2(1) of Law 2744/1999 for 20 years to 31.12.2040. Paragraph 2 of that same Article provided for a contract to be concluded between EYDAP and the Hellenic Republic which would lay down the terms of renewal of that exclusive right, the price payable by EYDAP for the supply of raw water, the specific rights and obligations of the beneficiary, the method for checking and measuring the quality of services provided, the grounds for revoking the right, sanctions or other consequences for the beneficiary in the case of breach of the terms of the contract, the method for resolving disputes between the contracting parties and all other issues that may be considered necessary. Paragraph 3 states that the price paid for the supply of raw water was to be paid by EYDAP to EYDAP Assets and would be further made available by the Hellenic Republic to finance the operation, maintenance and upgrade of the EWSS in the wider area of the capital. Paragraph 4 states that under a contract signed by the Hellenic Republic, EYDAP and EYDAP Assets, the latter would be assigned the task of maintaining and operating the EWSS in the wider area of the Capital for a period of 3 years, which could be extended by agreement of the contracting parties. After the end of that contract, the EWSS for the wider area of the Capital would be assigned to a contractor by the Ministry of Infrastructure and Transport via a tender procedure in accordance with Law 3389/2005 (Government Gazette 232/A). Lastly, paragraph 6 granted authorisation to the Ministers of Finance, Development and Investments, the Environment and Energy and Infrastructure and Transport to issue a Joint Ministerial Decision which would settle the debts of the Hellenic Republic and EYDAP on both sides up to 31.12.2020.

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<sup>6</sup>Using the RAB method, and taking into account the guidelines in the 2017 Joint Ministerial Decision and best European practices, Ernst & Young calculated the estimated unit cost of raw water (after excluding asset financing from third parties, for example EU funding and consumer participation) between € 0.078/m<sup>3</sup> and € 0.081/m<sup>3</sup>.

<sup>7</sup> Using the RAB method, the guidelines in the 2017 Joint Ministerial Decision and taking into account the studies from the NTUA and Ernst & Young, Kantor applied two scenarios, one with a RAB of € 887,000,000 (based on the Jacobs study) and one with a RAB of € 486,000,000 (after excluding asset financing from third parties, for example EU funding). It estimated the unit cost of raw water between € 0.125/m<sup>3</sup> and € 0.167/m<sup>3</sup> in the first scenario and between € 0.098/m<sup>3</sup> and € 0.121/m<sup>3</sup> in the second scenario.

9. In the context of that legislative authorisation, the Joint Ministerial Decision received on 17.11.2021 and confirmed on 24.11.2021 (hereinafter the JMD), which was based on the 2010 and 2018 NTUA studies, set the price owed by EYDAP for the quantities of raw water provided by the Hellenic Republic in the period 12.10.2013 to 31.12.2020 at a total of € 346,707,891.90 and the Hellenic Republic's debts to EYDAP for that period for operating costs and for implementing projects for the EWSS at € 189,516,694.76. Moreover, it provided for offsetting the claims on both sides and for EYDAP to pay the balance after offsetting of € 157,191,197.14. Note too that no tax payable on the individual claims that are being offset has been calculated in the offset amounts.

**II. In light of that, the following questions are raised:**

**A. Under what regulatory framework will overdue and non-settled claims and debts of the Hellenic Republic and EYDAP up to 31.12.2020 be 'settled'? More specifically:**

1. Is the 2013 Joint Ministerial Decision still applicable *ratione temporis*?
2. How do Directive 2000/60/EC and the 2017 Joint Ministerial Decision apply *ratione temporis*?
3. Is unilateral setting of the price of raw water by virtue of a Joint Ministerial Decision lawful, even though Article 15 of the 1999 Agreement provides for it to be set on the basis of a written agreement between the Hellenic Republic and EYDAP?

**B.1. Under what regulatory framework will the price for the raw water provided by the Hellenic Republic be set in the context of the draft agreement sent on 17.11.2021 on the granting of an exclusive right to provide water supply and sewerage services in the Exclusive Area of the Capital between the Hellenic Republic, EYDAP Assets and EYDAP?**

**III. Answers to the questions posed**

**A. The regulatory framework for 'settling' overdue and non-settled claims and debts of the Hellenic Republic and EYDAP up to 31.12.2020**

**1. Ratione temporis application of the 2013 Joint Ministerial Decision**

10. The 2013 Joint Ministerial Decision<sup>8</sup> was expressly issued in order to settle the claims and debts of the Hellenic Republic and EYDAP up to 30.6.2013, and in particular: a) EYDAP's non-settled and booked non-tax debts of € 294,100,000 to the Hellenic Republic up to 30.6.2013 for the raw water provided to it, and a grant of 60% of the expenditure for the 2000-2010 Investment Plan worth € 293,774,088.01 to

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<sup>8</sup>See too the clear wording of Article 45 of Law 4179/2013 (Government Gazette 175/A) which granted legislative authorisation to issue the 2013 Joint Ministerial Decision. Consequently, for the period after 30.6.2013, legislative authorisation is now missing.

EYDAP. b) EYDAP's booked and settled claims from the Hellenic Republic up to 30.6.2013 for projects in favour of EYDAP Assets, for the cost of pumping from Viliza-Iliki, for construction and maintenance of flood protection works worth € 113,199,696.12, and for works invoiced to the Ministry of the Environment, Planning and Public Works worth € 1,935,021.25. c) EYDAP's booked and settled claims from the Hellenic Republic for flood protection projects from 1999 to 2007 worth € 33,771,328.80, pumping of water from Viliza and Iliki from 2001 to 2012 worth € 32,186,577.85, projects in favour of EYDAP Assets from 2001 to 2012 worth € 47,241,789.47, for works invoiced to the Ministry of the Environment, Planning and Public Works from 1978 to 2007 worth € 1,935,021.25. All other financial claims on both sides deriving from the 1999 Agreement until the enactment of Law 4199/2013, which is to say up to 1.10.2013, in accordance with the 2013 Joint Ministerial Decision are extinguished. **As is clear from the clear letter and spirit of the 2013 Joint Ministerial Decision and in particular from the frequent reference to 30.6.2013 as the expiry date of the time period critical for 'settlement' of the claims and debts on both sides, and from the citation of specific, numerical and time-defined debts which are 'settled', that Joint Ministerial Decision was issued *ad hoc* to settle only overdue claims and debts of the Hellenic Republic and EYDAP up to 30.6.2013, which specified in temporal and numerical terms, and was not intended to constitute the general regulatory framework for claims and debts deriving from the 1999 Contract after the passage of 30.6.2013.**

## **2. *Ratione temporis* application of Directive 2000/60/EC and the 2017 Joint Ministerial Decision**

**11.** Article 9 of **Directive 2000/60/EC** establishing a framework for Community action in the field of water policy<sup>9</sup> (hereinafter the *Water Framework Directive*) established the **principle of adequate recovery of the cost of water services provided, including environmental and natural resource costs, on the basis of economic analysis. As a requirement of Union law, that principle enjoys supremacy<sup>10</sup> over any national provision to the contrary<sup>11</sup>.** As far as the *ratione temporis* scope is concerned, the principle of

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<sup>9</sup>OJ L 327, 22.12.2000, p. 1-73. The Water Framework Directive was transposed into the Greek legal order by Law 3199/2003 (Government Gazette 280/A) as amended by Article 8 of Law 3621/2007 (Government Gazette 279/A), Article 5 of Law 4117/2013 (Government Gazette 29/A), Article 24 of Law 4315/2014 (Government Gazette 269/A) as replaced by Article 53 of Law 4423/2016 (Government Gazette 182/A) and Article 29 of Law 4519/2018 (Government Gazette 25/A) and by Presidential Decree 51/2007 (Government Gazette 54/A).

<sup>10</sup>Given that the Water Framework Directive was duly transposed into the Greek legal order, there is no reason to rely on its direct effect. It simply takes precedence over any national provision to the contrary, as a beneficiary of the supremacy of EU law. The practical difference between direct effect and the supremacy of EU law is that in the case of supremacy, EU law precludes the application of the contrary national provision (*exclusionary effects*) while in the case of direct effect, EU provisions, by replacing national law, can be directly cited by the citizen (*substitutionary effects*). See M. Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 *Common Market Law Review* 931.

<sup>11</sup>Case 6/64 Costa v ENEL [1964] ECR 585, Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, Case 106/77 Simmenthal [1978] ECR 629, Joined Cases C-715/17, C-718/17 and C-



recovering the cost of water services **applies to calculating the price of raw water from 9.12.2003, the date on which Law 3199/2003 entered into force, which transposed the Water Framework Directive in good time.** It is worth noting that Article 24 of the 1999 Agreement states that, *“the contract may be amended by means of a more recent written agreement and in particular (a) [for the purpose of complying with an EU Regulation or a law which transposes the EU Directive”*. That means that even if the Hellenic Republic and EYDAP had agreed the level of the price of raw water, as specified in Article 15 of the 1999 Agreement, even the contractual price determination would have to be amended to make it compatible with the principle of adequate recovery of the cost of the water services provided which was introduced in the meantime by the Water Framework Directive. All the more so, in the case at hand, where no agreement has been concluded on the price, the said principle regulates first and foremost the setting of the price of raw water (*argumentum a maiore ad minus*).

**12.** General costing and billing rules for water services for various uses<sup>12</sup>, rules and measures to improve them, and procedures and methods for recovering the cost of those services were laid down in the **2017 Joint Ministerial Decision**. More specifically, **it introduced general rules for determining the overall cost, which includes the financial cost, environmental and resource costs of water services (Article 3(2), (7) and (8) of the 2017 Joint Ministerial Decision) and stated that the pricing policy of water service providers must ensure adequate recovery of the overall cost and the long-term viability of investments (Articles 8 and 9 of the 2017 Joint Ministerial Decision).** Article 18 of the 2017 Joint Ministerial Decision states that it takes effect from its publication in the Government Gazette, namely from 22.5.2017, and in accordance with Article 16(1), especially for existing contracts between the Hellenic Republic and EYDAP such as the 1999 Agreement they would apply as they stood until their expiry date. From a combined reading of the above it is clear that in all events **the 2017 Joint Ministerial Decision cannot be applied retroactively, namely to calculate the price of raw water for the period before 22.5.2017, which is the date on which it entered into force. In the period after 22.5.2017, Article 15 of the 1999 Agreement which states that in order to calculate the price of raw water, “a written agreement between the parties, at the same time as the cost of maintaining and operating the fixed assets, in conjunction with the pricing policy, and taking into account in all events the sale price of raw water to third parties by EYDAP” continues to be the applicable law, as expressly specified in Article 16 of 2017 Joint Ministerial Decision. Of course, that does not preclude the general costing and billing rules for**

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719/17 European Commission v Republic of Poland and Others ECLI:EU:C:2020:257, Case C-619/18 European Commission v Republic of Poland ECLI:EU:C:2019:531.

<sup>12</sup>Water services for the purposes of the 2017 Joint Ministerial Decision mean the services in Annex I of Joint Ministerial Decision No. 146896/2014 on categories of permits for use and implementation of water development projects. Procedure and terms and conditions for issuing permits, their content and effective term and other related provisions” (Government Gazette 2878/B) provided to public, municipal and private networks of treated or **untreated water** (Article 2(1) of the 2017 Joint Ministerial Decision) by water service providers, including public and municipal bodies, public organisations, **EYDAP S.A.** and **EYDAP Assets** (Article 3(1) of the 2017 Joint Ministerial Decision).

water services introduced by the 2017 Joint Ministerial Decision from being taken into account, provided that they do not conflict with the parameters specified in Article 15 of the 1999 Agreement, namely the pricing policy and the sale price of raw water to third parties by EYDAP. On the contrary, the principle of adequate recovery of the cost of water services provided which is repeated in the 2017 Joint Ministerial Decision –which as stated above is a requirement of EU law – has become binding and in particular takes precedence over any national provisions to the contrary since 9.12.2003.

**3. Unilateral setting of the price of raw water pursuant to a Joint Ministerial Decision by way of derogation to Article 15 of the 1999 Agreement, which states that the price shall be set based on a written agreement between the Hellenic Republic and EYDAP.**

**13.** Article 114(6) of Law 4812/2021 (Government Gazette 110/A) authorises the Ministers of Finance, Development and Investments, the Environment and Energy and Infrastructure and Transport to issue a Joint Ministerial Decision which will regulate EYDAP's debts to the Hellenic Republic up to 31.12.2020 from the supply of raw water under the 1999 Agreement, taking into account the 2018 NTUA study and the impacts on consumer tariffs, and EYDAP's claims up to that date against the Hellenic Republic, taking into account the relevant data which has been approved by EYDAP's Ordinary General Meetings for the periods up to 31.12.2019 and the Board of Directors for the period from 1.1.2020 to 31.12.2020. Moreover, reference is made to the 2017 Joint Ministerial Decision and particular mention is made to the principle of recovering all costs of water services, a principle which is also taken into account in the Joint Ministerial Decision. **Consequently, to the extent that the authorising provisions and the Joint Ministerial Decision take into account the principle of recovering all costs of water services, they are compatible with EU law. Moreover, in order to be in line with Article 15 of the 1999 Agreement, which requires a written agreement to set the price of raw water, written acceptance of the Joint Ministerial Decision by EYDAP is required,** as was the case where the debts and claims of EYDAP and the Hellenic Republic up to 30.6.2013 were settled, with the 2013 Joint Ministerial Decision having been accepted by the General Meeting of Shareholders of EYDAP on 27.12.2013. **Otherwise, issuing a Joint Ministerial Decision would constitute an unlawful direct intervention by the Hellenic Republic in the contractual relationship<sup>13</sup>, which would unilaterally amend the material term of the 1999 Agreement to set the price of raw water, which provides for the contractual route and, in the case of disagreement, recourse to expert opinion and arbitration, as the exclusive routes for calculating the price of raw water.**

**14.** Moreover, it has been widely accepted that EYDAP, as a body governed by private law, enjoys economic and contractual freedom under Article 5(1) of the Greek Constitution<sup>14</sup>, at the core of which is

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<sup>13</sup>A. Karabatzos, *State Intervention in Contractual Relationship and Civil Law* (P.N. Sakkoulas Press, Athens, 2020), pp. 82-83.

<sup>14</sup>P. Pararas, *Economic Freedom: Article 5(1) of the Constitution* (Sakkoulas Press, Athens – Thessaloniki, 2019), pp. 259-260, 334, 364-366, F. Spyropoulos, X. Kontiadis, C. Anthopoulos and G. Gerapetridis, *The Constitution: Article-by-Article interpretation*



its ability to set its pricing policy. According to legal doctrine, unilateral amendment of a contractual term by the State is only permitted if required by public interest considerations, it complies with the principle of legitimacy (e.g. economic freedom, the principle of equality, proportionality and legitimate expectations, as a specific manifestation of the rule of law)<sup>15</sup>. In all events, such unilateral amendment cannot undermine the economic equilibrium of the contract or undermine the contractual purpose<sup>16</sup>. In this case, firstly, those strict conditions do not appear to be met and secondly, in the case where the price of raw water is unilaterally set, the economic equilibrium of the 1999 Agreement will be overturned.

15. In the same vein as legal doctrine, the case law of the courts<sup>17</sup> has accepted that restrictions on the exercise of the economic freedom enshrined in Article 5(1) of the Greek Constitution are constitutionally permissible only if they are generally defined in an objective manner, are justified on grounds of public or societal interest and are related to the scope and nature of the regulated activity<sup>18</sup>. In light of the constitutional principle of proportionality, the said restrictions must be suitable and necessary to achieve the public or social interest objective pursued by the legislator and must not be disproportionate in relation to that objective<sup>19</sup>. Those conditions do not appear to exist here either. Lastly, in the field of contracts in particular, it has been found that the State has unlawfully unilaterally amended a contractual term to the detriment of its counterparty, especially by enacting a legislative provision<sup>20</sup>, to the extent that the contract does not leave room for such unilateral amendment<sup>21</sup>.

▪ ***Executive summary of answer to the first question: The 2013 Joint Ministerial Decision does not apply for the purpose of settling the claims and debts of EYDAP and the Hellenic Republic up to 31.12.2020 because it was expressly issued ad hoc to settle their claims on both sides for the period up to 30.6.2013. As far as the 2017 Joint Ministerial Decision is concerned, it cannot be applied retroactively, namely for the time period before the entry into force date, which is 22.5.2017. Nor is it applicable for the period from 22.5.2017 to 31.12.2020 since it expressly states that the existing contracts between the Hellenic Republic and EYDAP, including the 1999 Agreement, continue to apply as they stand. Consequently, Article 15 of the 1999 Agreement which states that in order to cost raw water a written agreement of the parties is required, continues to be binding on the parties. However,***

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(Sakkoulas Press, Athens – Thessaloniki, 2017), pp. 96-97, A. Manitakis, *The subject of constitutional rights: Article 25(1) of the Greek Constitution* (A. N. Sakkoulas Press, Athens – Komotini, 1981) p. 115.

<sup>15</sup>A. Gerontas, S. Lytras, P. Pavlopoulos, G. Sioutis and S. Flogaitis, *Administrative Law* (4th ed., Sakkoulas Press, Athens – Thessaloniki, 2018), p. 408.

<sup>16</sup>Gerontas/Lytras/Pavlopoulos/Sioutis/Flogaitis, op. cit. p. 408, N. Kapellakis, “Direct interventions by the public administration in administrative contracts” (1994) *DiDik Law Review* 547, at 555.

<sup>17</sup>Council of State Judgments No. 215/2012 and 2227/2010.

<sup>18</sup>Council of State Plenary Session Judgments No. 2204/2010 and 1210/2010.

<sup>19</sup>Council of State Plenary Session Judgment No. 3031/2018 and Council of State Judgment No. 4171/2012.

<sup>20</sup> Council of State Judgment (in council) No. 1521/2013 See Council of State Judgments No. 1826/1989 and 497/1987.

<sup>21</sup>Athens Administrative Court of Appeal Judgment No. 2439/2000, affirmed by Council of State Judgment No. 1921/2008.

*this commitment does not go so far as to preclude the general rules on costing and billing of water services for various uses laid down in 2017 Joint Ministerial Decision. However, the costing rules in the 2017 Joint Ministerial Decision should not be contrary to the parameters for calculating the price of raw water specified in the 1999 Agreement, namely the pricing policy and the sale price of raw water to third parties by EYDAP. On the contrary, the principle of adequate recovery of the cost of water services introduced by the Water Framework Directive is not only applicable but also takes precedence over any national provisions to the contrary following its timely transposition into the Greek legal order on 9.12.2003. Lastly, in order not to infringe Article 15 of the 1999 Agreement which provides for the conclusion of a written agreement setting the price of raw water, the Hellenic Republic must either agree the level of that amount in writing with EYDAP in accordance with the points made above, or unilaterally set it at an early stage, such as by issuing the Joint Ministerial Decision, and at a later point in time EYDAP must accept in writing the points unilaterally decided.*

**B.1. Regulatory framework for setting the price of raw water provided by the State in the context of the draft agreement sent on 17.11.2021 on the granting of an exclusive right to provide water supply and sewerage services in the Exclusive Area of the Capital between the Hellenic Republic, EYDAP Assets and EYDAP.**

**16.** In order to set the price of the raw water in the context of the negotiated agreement granting an exclusive right to provide water supply and sewerage services, the **Water Framework Directive** is applicable first and foremost, recital 38 of the Preamble and Article 9(1) of which **lay down the general principle of adequate recovery of the cost of the water services provided, including the cost to the environment and natural resources, taking into account the economic analysis** carried out in accordance with Annex III<sup>22</sup> of the Water Framework Directive and in particular in accordance with the “polluter pays principle”.

**17.** In accordance with Article 12 of Law 3199/2003, which transposed the said provisions of the Water Framework Directive into the Greek legal order, the National Water Committee was to issue a decision laying down the procedures, method and levels for recovering the cost of water services for various uses taking into account: a) analysis of the characteristics of the catchment basins, b) review of the impact of human activities on the status of surface and ground waters, c) an economic analysis carried

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<sup>22</sup> According to the relevant Annex, this economic analysis should "contain enough information in sufficient detail (taking account of the costs associated with collection of the relevant data) in order to: (a) make the relevant calculations necessary for taking into account the principle of recovery of the costs of water services, taking account of long term forecasts of supply and demand for water in the river basin district and, where necessary: - estimates of the volume, prices and costs associated with water services, and - estimates of relevant investment including forecasts of such investments; (b) make judgements about the most cost-effective combination of measures in respect of water uses to be included in the programme of measures under Article 11 based on estimates of the potential costs of such measures”.

out in accordance with the provisions of Presidential Decree 51/2007, d) the polluter pays principle, e) the social, environmental and economic results of recovery, and the geographical and climate conditions in the relevant area.

**18.** In implementation of that, the National Water Committee issued the **2017 Joint Ministerial Decision** which laid down general rules on costing and billing of water services for various uses, rules and measures to improve those services, and the procedures and method for recovering their cost, including environmental costs and the cost of water resources, to achieve sustainable use and improve the condition of water, in accordance with the environmental objectives in Article 4 of Presidential Decree 51/2007, and to ensure the constitutionally enshrined public character of water as a social good which is absolutely necessary for man's survival. Its objective is to ensure: a) that the pricing policy for water provides adequate incentives to users to effectively use water resources and b) an adequate contribution of different uses of water to recover the cost of water supply services at a rate specified in the approved river basin management plans, taking into account, where necessary, the social, environmental and economic impacts of rehabilitation and the geographical and climate conditions (Article 1 of the 2017 Joint Ministerial Decision).

**19.** In general, **the total cost which must be adequately recovered includes**, in accordance with Article 3 of the 2017 Joint Ministerial Decision, **the sum of A) the financial cost, B) the environmental cost and C) the resource cost for water services.**

**20.** A) More specifically, the method for calculating the **financial cost** is outlined in Article 4 of the 2017 Joint Ministerial Decision according to which the financial cost must be calculated on an annual basis, taking into account the cost-plus data of the water service provider for the previous period, and must be done for all water services (such as water supply, irrigation, water supply for industrial use, watering of green areas, leisure uses, sewerage and waste water treatment, etc.). The following cost factors should be taken into account for its calculation: a) **the cost of capital (K)**, b) **the operating cost (Λ)**, c) **the cost of maintenance (Σ)**, d) **the cost of administration and other costs (Δ).**

**21.** B) The method for calculating the **environmental cost** is outlined in Article 5 of the 2017 Joint Ministerial Decision according to which the environmental cost must be determined at water system level (hereinafter the Water System) or per group of Water Systems on an annual basis and must be based on the cost of supplementary measures in the programme of measures in the current River Basin Management Plan (hereinafter the RBMP) in order to achieve the good status of the Water Systems.

**22.** The method for calculating the **resource costs** is outlined in Article 6 of the 2017 Joint Ministerial Decision according to which the resource costs are estimated at Water System level or per group of Water Systems on an annual basis and is based on the cost of supplementary measures in the Programme of

Measures under the current River Basin Management Plan, in order to save water resources and rationally manage them, by stopping ground water system over pumping practices.

**23.** Article 7(2.1) of the 2017 Joint Ministerial Decision places emphasis on the fact that in calculating tariffs water service providers must take into account not just financial costs but also environmental costs and resource costs. Article 8(1) of the 2017 Joint Ministerial Decision reiterates that the pricing policy must ensure **adequate cost recovery and long-term sustainability of investments in the urban cycle**.

**24.** At this point it should be clarified, however, that **contrary to the principle of adequate recovery of the cost of water services, including the cost to the environment and natural resources laid down in the Water Framework Directive and consequently enjoys supremacy, the individual rules, methods and procedures for costing and billing laid down in the 2017 Joint Ministerial Decision do not constitute *stricto sensu* transposition of the Water Framework Directive**. As the CJEU accepted in the *Vodoopskrba* case, *“provided that they fulfil the obligation to recover the costs of services connected with water use, including the environmental and resource costs, ..., the Member States may choose between various pricing methods best suited to their own situation as part of the discretion left to them under Directive 2000/60, since that directive does not require them to use any specific pricing method”*<sup>23</sup>. In all events, **the setting of rules/procedures/costing-pricing methodology in the 2017 Joint Ministerial Decision does not equate to setting the price of raw water. It simply sets out the general framework within which the price should be calculated. Moreover, neither the assignment to the National Water Committee of the task of laying down rules/procedures/methodology for costing-billing under Article 12 of Law 3199/2003, nor compliance with a specific organisational and/or structural form of any designated authority<sup>24</sup> responsible for costing-billing water, is an EU requirement given the principle of the Member States’ institutional autonomy<sup>25</sup>. Put differently, based on the *Vodoopskrba* case law, only the principle of cost recovery, including the cost to the environment and natural resources, which relates to EU law has superior effect. On the contrary, the individual rules, procedures and costing and billing methodology adopted in the 2017 Joint Ministerial Decision and the assignment of that competence to**

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<sup>23</sup>Case C-686/15 *Vodoopskrba i odvodnja d.o.o. v Željka Klafurić* ECLI:EU:C:2016:927, paragraph 23.

<sup>24</sup> Note that according to the Council of State Plenary Session Judgment No. 1906/2014, one of the reasons why the transfer of EYDAP shares to HRADF was not allowed was the lack of a water regulatory authority. Today, however, there are indications appearing in the news, that there is an intention either to set up such an authority in the near future or to extend the competences of the existing Regulatory Authority for Energy, without, however, this being required so far by EU law, as happens, for example, in the field of free competition, energy, etc. The model of expanded competences for Regulatory Authorities for Energy into the field of water has been chosen by several states (e.g. Ireland, Italy, Malta, Latvia, and Bulgaria). See European National Regulatory Authorities in the Energy Area Available at: <<https://eeueuropa.eu/national-regulatory-authorities-energy-europe/>> (last accessed: 31.08.2021).

<sup>25</sup> Case C-424/15 *Xabier Ormaetxea Garai, Bernardo Lorenzo Almendros v Administración del Estado* ECLI:EU:C:2016:503, Opinion of Advocate General Yves Bot, paragraph 29.

**the National Water Committee by Article 12 of Law 3199/2003 are not EU rules and do not enjoy supremacy.**

25. Since there is no issue of the hierarchy of rules of law<sup>26</sup>, and therefore the principle of *lex superior derogat legi inferiori* does not apply, any conflict between (a) Article 114(2) of Law 4812/2021 which states that the price of raw water will be set in a contract between the Hellenic Republic and EYDAP, and (b) Article 12 of Law 3199/2003 which authorises the National Water Committee to lay down rules, procedures, costing and billing methods for water services, and the 2017 Joint Ministerial Decision which lays down those rules, is to be resolved based on the principles of *lex specialis derogat legi generali* and *lex posterior derogat legi priori*<sup>27</sup>. More specifically, **Article 114(2) of Law 4812/2021, which is more specific, takes precedence over the more general and earlier Article 12 of Law 3199/2003. Moreover, Article 114(2) of Law 4812/2021 also takes precedence over the 2017 Joint Ministerial Decision**<sup>28</sup>. That is considered necessary because the repeal of the authorising provision (namely Article 12 of Law 3199/2003) alone would not automatically entail the repeal of the regulatory decisions issued on the basis thereof, namely the 2017 Joint Ministerial Decision, unless it is clear that the newer legislator intended to do so<sup>29</sup>, which is the case here. In support of this, it should be noted that when the **Agreement on the Exclusive Right to Provide Water Supply and Sewerage Services** is signed for the Hellenic Republic by the Minister of Development and Investments, the Minister of Energy and Environment and the Minister of Infrastructure and Transport, it could be argued that there is **consent to the method of calculating the price of raw water specified in the contract by way of derogation to the 2017 Joint Ministerial Decision** which had been issued in the past, among others, by the Minister of Economy and Development and the Minister of Infrastructure and Transport.

26. Article 10.1.1 of the draft agreement sent on 17.11.2021 on the granting of an exclusive right to provide water supply and sewerage services in the Exclusive Area of the Capital between the Hellenic

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<sup>26</sup>According to E. Prevedourou, regulatory decisions are of the same formal validity as formal laws. Only when the authorising provision expressly provides for such or it is clear from it that the delegated regulatory acts may expressly or tacitly amend or repeal legislative provisions do they take precedence over formal laws; a condition which is not met in this case. Ev. Prevedourou, Administrative regulatory decisions, available at: <https://www.prevedourou.gr/%CE%BF%CE%B9-%CE%BA%CE%B1%CE%BD%CE%BF%CE%BD%CE%B9%CF%83%CF%84%CE%B9%CE%BA%CE%AD%CF%82-%CF%80%CF%81%CE%AC%CE%BE%CE%B5%CE%B9%CF%82-%CF%84%CE%B7%CF%82-%CE%B4%CE%B9%CE%BF%CE%AF%CE%BA%CE%B7%CF%83%CE%B7> (last accessed: 1.9.2021).

<sup>27</sup>According to F. Spyropoulos, if the conflicting rules are equally valid, one must first examine how they relate as general rules to specific rules and then examine their priority. F. Spyropoulos, *Constitutional Law* (2nd ed., Sakkoulas Press, Athens-Thessaloniki, 2020), p. 148. In this case, whether one resolves the conflict on the basis that the more specific rule prevails over the more general rule or on the basis that the later rule prevails over the previous one, the result in each case is the same. Article 114(2) of Law 4812/2021 prevails.

<sup>28</sup>According to E. Spiliotopoulos, the regulatory acts may be amended or repealed, inter alia, by provisions of more recent legislative acts. Ep. Spiliotopoulos, *Administrative Law Handbook* (15th ed., Nomiki Vivliothiki Press, Athens, 2017) para. 173.

<sup>29</sup> Council of State Judgments Nos. 4595/2011, 2361/2011, 1965/2010, 3893/2007, 2260/2005, and 3881/2004, Legal opinion of the State Legal Council No. 141/2012.



Republic, EYDAP Assets and EYDAP sets the price of raw water per unit of measurement as follows: (i) A fixed price of € 0.0714/m<sup>3</sup> for the net quantity of raw water to be procured by the Beneficiary during the first three reference years from the effective date. This price is calculated based on the unit cost of fixed assets and operating costs of EYDAP Assets, totalling € 0.102/m<sup>3</sup>, according to the relevant NTUA study, to which a 70% recovery rate applies. (ii) The weighted average price of € 0.0806/m<sup>3</sup> for the net quantity of raw water to be supplied to the Beneficiary in the fourth year from the effective date and for each reference year thereafter until the expiry date. This price is calculated based on the unit cost of fixed assets and operating costs of EYDAP Assets, worth a total of € 0.102/m<sup>3</sup> in line with the relevant NTUA study, to which an average recovery rate of 79% applies. More specifically, the recovery rate in the fourth reference year from the effective date will be 71% and will increase gradually up to the last reference year, where it will be 87%.

<b>Year</b>	<b>Price of Raw Water (€ per m<sup>3</sup> Net quantity of raw water)</b>	<b>Recovery rate per year of the Agreement</b>
2021	0.0714	70%
2022	0.0714	70%
2023	0.0714	70%
2024	0.0724	71%
2025	0.0734	72%
2026	0.0745	73%
2027	0.0755	74%
2028	0.0765	75%
2029	0.0775	76%
2030	0.0785	77%

2031	0.0796	78%
2032	0.0806	79%
2033	0.0816	80%
2034	0.0826	81%
2035	0.0836	82%
2036	0.0847	83%
2037	0.0857	84%
2038	0.0867	85%
2039	0.0877	86%
2040	0.0887	87%

**27.** As far as the compatibility of Article 10.1.1 of the draft new agreement with the regulatory framework set out above is concerned, it should be noted that:

- To the extent that the agreement ensures the recovery of the cost of the services provided, including environmental and resource costs, it is compatible with the Water Framework Directive.
- If it is considered that it does not adopt all individual rules/procedures/methodology in the 2017 Joint Ministerial Decision based on the *Vodoopskrba* case law, that does not render it incompatible with EU law.
- Setting of the price of raw water by way of derogation to the 2017 Joint Ministerial Decision is permitted under Article 114(2) of Law 4812/2021, which takes precedence over Article 12 of Law 3199/2003 and the 2017 Joint Ministerial Decision, as a more specific and later provision.
- ***Executive summary of the answer to the second question: In order to calculate the price of the raw water provided by the Greek State in the context of the draft agreement sent on 17.11.2021 on the granting of an exclusive right to provide water supply and sewerage services in the Exclusive Area of the Capital between the Greek State, EYDAP Assets and EYDAP, and as required by Directive 2000/60/EC which was transposed into the national legal order by Law 3199/2003 and Presidential Decree 51/2007,***

*the principle of adequate recovery of the total cost of water services provided by EYDAP, including the environmental cost and resource cost –which is a principle of EU origin, and consequently takes precedence over any provision of national law to the contrary– must be complied with. The individual rules, procedures and methods for recovering the total cost of water services laid down in the 2017 Joint Ministerial Decision do not constitute stricto sensu transposition of the Water Framework Directive and consequently do not enjoy supremacy. In this context, insofar as the agreement ensures the recovery of the costs of the services provided and takes into account the environmental and resource costs, it is compatible with the Water Framework Directive. In all other respects, based on the Vodoopskrba case law, EU law does not require specific rules/procedures/methodologies to be adopted, such as those laid down in the 2017 Joint Ministerial Decision. Setting of the price of raw water by way of derogation to the 2017 Joint Ministerial Decision is permitted under Article 114(2) of Law 4812/2021, which takes precedence over Article 12 of Law 3199/2003 and the 2017 Joint Ministerial Decision, as a more specific and later provision.*

*In light of the above, and subject to compliance with the relevant procedures and decisions being taken, the signing of an agreement between the Hellenic Republic, EYDAP Assets and EYDAP in the context of the draft agreement sent on 17.11.2021 on the granting of an exclusive right to provide water supply and sewerage services in the Exclusive Area of the Capital will be lawful, valid and binding on the contracting parties.*