"Water wars": exploring the limits of privatization in Greece's Supreme Administrative Court case-law

"Guerras del agua": exploración de los límites de la privatización en la jurisprudencia del Tribunal Supremo Administrativo de Grecia

Styliani **Christoforidou**

https://orcid.org/0000-0002-6576-0284

Hellenic Open University. Greece
E-mail: christoforidoustyliani@yahoo.gr

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Abstract: The following focuses on the jurisprudence of the Council of State (hereinafter CoS) regarding the privatization of water that has been attempted over the last decade in view of the international obligations that the country has undertaken to repay its public debt obligations. The judicial activism adopted by the CoS in the context of these cases is not necessarily reprehensible. This resistance is based on the interpretation of Articles 5 para 5 (on the individual right to health) and Article 21 para 3 of the Constitution (public health). As the comment aims to highlight the limits and conditions of the privatization of the water must be sought to another, more solid, interpretative ground.
Keywords: privatization of water; Council of State; international obligations; public debt; public health; right to health.

Resumen: A continuación me centraré en la jurisprudencia del Consejo de Estado (en adelante, CdE) relativa a la privatización del agua que se ha intentado llevar a cabo durante la última década en vista de las obligaciones internacionales que el país ha contraído para pagar sus obligaciones de deuda pública. El activismo judicial adoptado por el CdS en el contexto de estos casos no es necesariamente censurable. Esta resistencia se basa en la interpretación de los artículos 5.5 (sobre el derecho individual a la salud) y 21.3 de la Constitución (salud pública). El comentario tiene por objeto poner de relieve los límites y condiciones de la privatización del agua debe buscarse otro terreno interpretativo más sólido.
Palabras clave: privatización del agua; Consejo de Estado; obligaciones internacionales; deuda pública; salud pública; derecho a la salud.

Summary: I. *Introduction*. II. *The background of water privatisation*. III. *CoS [GC] 1906/2014 and the alienation of the Greek public sector*. IV. *The legislator's response to CoS [GC] 1906/2014*. V. *CoS [GC] 190/2022 and the prohibition of the pursuit of profit*. VI. *The (non) compliance of the legislator with CoS [GC] 190/2022*. VII. *Critical evaluation*.

I. Introduction

The following focuses on the jurisprudence of the Council of State (hereinafter CoS) regarding the privatisation of water that has been attempted over the last decade in view of the international obligations that the country has undertaken to repay its public debt obligations. The wave of privatisation has been going on for several decades but has intensified since the outbreak of the economic crisis. Throughout this period, the Council of State, as the Supreme Administrative Court, has only a few times put obstacles in several attempts of privatization (Iliadou, 2014, p. 529). For example, in the case of the establishment of a municipal police force, it was considered that a security service could not be privatised, even if it is established as a public legal entity. According to the Court, police services belong to the hard core of the State and are inseparable from it. Such kind of case-law is only exceptional[1]. The CoS has in general a positive attitude towards privatisation. In fact, even in the case of the establishment of private universities in the country, in order to harmonise domestic law with EU law, the CoS finally accepted the legislative solution which allowed the operation of private Colleges, a legislative initiative that adopted in order to circumvent de facto the Article 16 of the Constitution, which explicitly prohibits the establishment of universities that do not belong to the State[2] . It should be noted, however, that the Greek constitutional text does not provide for explicit limits on privatisation other than the above constitutional provision. It does, however, set explicit limits on private economic initiative in Article 106, which, as provided, must not be to the detriment of human dignity.[3]

In this context, it is noteworthy that the Court has shown resistance in its judgments regarding the privatisation of water in some regions of the country. Over the last ten years, the Court and the Government have engaged in a

[1] For pre-crisis privatisations, Vlahopoulos (1999).

[2] See in this perspective Alivizatos (2018).

[3] See Kaidatzis (2009, pp. 79-96).

systematic institutional debate. Despite that, in Greece, the judicial review of the constitutionality has a weak form.[4] It is a system where the control exercised is diffuse and incidental and there is no institutionalised constitutional court.[5] However, in order to carry out this review over the privatisation of the water, the Court seems to alter the system of judicial review of the constitutionality implicitly while it is becoming a quasi-constitutional court itself.

Moreover, although Greece does not have the system of stare decisis,[6] the Court, in its second decision (CoS [GC] 190/2022), repeats the first decision issued on the matter (CoS [GC] 1906/2014). What is more, it checks whether the legislator complied with the last one. As part of the mechanism for monitoring the administration's compliance with the judgments of the Council of State, which a Three-Member Chamber as Council of the Court carries out, the Court addresses the "Administration", i.e. the Government, and in essence, the legislator,[7] with instructions as to the steps it should take to comply with the decision of CoS [GC] 190/2022.

The judicial activism adopted by the CoS[8] in the context of these cases is not necessarily reprehensible, especially if one considers that, from a moral and political point of view, it is carried out in order to protect a good of the utmost importance. The problem is that this resistance is based on the interpretation of Articles 5 para 5 (on the individual right to health and genetic identity) and Article 21 para 3 of the Constitution (which provides for the obligation of the State to take care of public health). This interpretative direction is not sufficient and as the comment aims to highlight the limits and conditions of the privatization of the water must be sought to another, more solid, interpretative ground.

4 Skouris, V. (1989, p. 179).

5 Vlachopoulos, Sp. (2019), Venizelos, E. (2022, p. 143).

6 See contra Vlachopoulos (2019, p. 69).

7 It must be noted that Greece has a parliamentary system, Government must have the confidence of the Parliament, so, between the political party that has the majority in the Parliament and the Government there is party homogeneity.

8 As argued, Tsiliotis, Ch. (2014, pp. 521-527).

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II. The background of water privatisation

1. *Privatisations as a means of addressing the economic crisis in the country*

In 2010, the Greek Government adopted an economic policy programme in close consultation with the European Commission and the International Monetary Fund (IMF) to address the economic crisis. Part of this economic programme was the "Memorandum of Understanding" ["Memorandum I"], signed on 3.5.2010, which was consisted of three separate memoranda, two of which were published as annexes by the Law 3845/2010 (Government Gazette A' 65). Among them, the most important was the "Memorandum of Economic and Financial Policy", which was subject to judicial review in the decision of the Plenary Session of the Council of State 668/2012.

The implementation of this economic programme was a precondition for the financing of the Hellenic Republic by the Member States of the euro area through bilateral loans centrally managed by the Commission within a lending framework that includes financing from the International Monetary Fund and, in particular, it was a precondition for the quarterly release of the loan installments. Subsequently, the Greek Government requested additional financing from the other euro area Member States and the IMF. To this end, a draft of a new Memorandum of Understanding ("Memorandum II") was prepared, which was approved by the Law 4046/2012 ["Approval of the Draft Financial Facility Agreements between the European Financial Stability Fund, the Hellenic Republic and the Bank of Greece, the Draft Memorandum of Understanding between the Hellenic Republic, the European Commission and the Bank of Greece and other urgent provisions for the reduction of public debt and the rescue of the national economy"] (Government Gazette A´ 28).

With Article one of the Law 4063/2012 (Government Gazette A' 71) the Amendment of Article 136 TFEU was ratified with which a European Stability Mechanism (ESM) established. On 8.7.2015, the Greece submitted an application to the ESM.[9] As stated in the Euro Summit statement of 12.7.2015, the Greek authorities committed to adopt a package of measures as a precondition for a future agreement on a new ESM programme.

[9] See the Convention as ratified by Article 3 para B of Law 4336/2015 draft "Financial Facility Agreement".

The same statement further states that the Greek authorities should develop a significantly enhanced privatisation programme with improved governance. Further, Greek assets of high value will be transferred to an independent fund (HCAP, see below at 2.2), which will liquidate them through privatisation and other means. The asset liquidation will provide a source for realising the planned repayment of the new ESM loan. It will yield a total target of €50 billion over the life of the new loan, of which €25 billion will be used to repay the recapitalisation of banks and other assets and 50% of each remaining euro (i.e. 50% of the €25 billion) will be used for investment. This fund will be set up in Greece under the Greek authorities' management and the European institutions' supervision. In agreement with the institutions and based on international best practices, a legislative framework should be put in place to ensure transparent procedures and appropriate pricing for the sale of assets, in line with OECD principles and standards for the management of state-owned enterprises.

Subsequently, with the Article 3 Law 4336/2015 (Government Gazette A' 94) were ratified:

> (a) the draft Financial Facility Agreement between the European Stability Mechanism, on the one hand, and the Hellenic Republic [as beneficiary Member State], the Bank of Greece [as Central Bank] and the Hellenic Financial Stability Fund [as recapitalisation fund], on the other hand, and
> (b) the draft Agreement on Fiscal Targets and Structural Reforms, which constitutes the "Memorandum of Understanding on a three-year ESM programme" [Article 3(C)] ["Memorandum III"].

Paragraph B of Article 3 of the law above states that the financial assistance provided to the beneficiary Member State is conditional on its compliance with the measures set out in the Memorandum of Understanding. Among other things, the beneficiary Member State must establish a Privatisation Fund, i.e. an independent fund to hold important Greek assets and which will liquidate these assets through privatisations and other means.[10]

[10] For a full account of the financial crisis history in Greece, Pagoulatos (2018).

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2. *The privatisation programme and process during the period 2012-2015*

The Medium-Term Fiscal Strategy Framework 2012-2015 (Law 3985/2011, Government Gazette A' 151) established and included the Privatisation Programme 2011-2015 in Chapter B to strengthen public revenues. According to the explanatory memorandum of the above law, the evolution of the country's public debt is linked to this programme, from which the Government aspires to save EUR 50 billion. These revenues are estimated to reduce the debt by up to 20 % of GDP.

In short, the 2011-2015 privatisation programme includes transactions in the banking sector, energy, gambling, telecommunications, ports, airports, motorways, railways, mining, water and waste management, defense and real estate. To implement the programme, the Government has established a legal entity (a joint stock company under the name of "Public Private Property Development Fund (TAIPED) SA") entrusted with the task of rapid, efficient and transparent implementation of the programme for the management and utilisation of the State's assets, to which shares and related rights of the assets intended for privatisation were to be transferred, without consideration and the possibility of re-transfer to the State, so that their realisation could take place based on prevailing market conditions.[11] Under Article 5 Law 3986/2011, the realization proceeds are used exclusively for the repayment of the country's public debt. Furthermore, TAIPED, as provided, does not belong to the category of organizations and enterprises of the wider public sector and the provisions governing companies owned directly or indirectly by the State do not apply to it, unless expressly provided otherwise.[12] The same applies to companies whose share capital is wholly owned, directly or indirectly, by the TAIPED.

Additionally, the law states that the realisation of the Fund's assets shall be carried out by any appropriate means and, preferably, by: a) Sale; etc. For the transfer of the assets to the Fund, a special procedure is established by the same law (Article 2) according to which the Interministerial Committee for Restructuring and Privatisation decides upon the transferable assets and its decisions are published in the Government Gazette. It must be not-

[11] Vlachogiannis, A. (2019, p. 78).

[12] See and CoS [GC] 1906/2014, para 9.

ed that during the first phase of the privatisation of the water (CoS [GC] 1906/2014) the above legal framework was in force.

With the law 4389/2016, a joint stock company was established under the name "Hellenic Corporation of Assets and Participations" (HCAP). According to the explanatory memorandum of the law, the main objective is to *bring together the* State's assets under a single roof and manage them as a whole in order to utilize them better, reduce deficits, and increase revenues from their more efficient management. The HCAP aims to contribute resources for the implementation of the country's investment policy and for the realisation of investments that contribute to the strengthening of the development of the Greek economy and the reduction of the financial liabilities of the Hellenic Republic.

The central axis of the HCAP's operation is the pursuit of socially sustainable management of Public Assets, which will be ensured through continuous consultation with all stakeholders, leading to an environment of increased accountability and transparency and ever-decreasing introversion. At the same time, the HCAP will ensure the provision of services of general interest, including through the performance of public service obligations by European legislation and the common values contained therein. The HCAP will own a heterogeneous portfolio, which will require specialised management or for which different strategies will have to be developed for each part of the portfolio. The law allows for reorganising the HCAP's portfolio to achieve operational optimisation, as well as the possibility of spinning off functions and transferring them to the State, with the State's agreement.

As defined in the above law, the HCAP is governed by the provisions of Law 4389/2016 and the provisions of the law for private companies. It does not belong to the public or the wider public sector, and its duration is set at 99 years and may be extended by decision of the General Assembly (Articles 184 and 186 Law 4389/2016). The Greek State fully covers its share capital, which may be increased by a decision of the General Assembly upon the proposal of the Board of Directors, which the Supervisory Board countersigns. Furthermore, its shares are non-transferable and constitute non-transactional assets within the meaning of Article 966 of the Civil Code [article 187 of Law 4389/2016]. It operates with the rules of the private economy to serve a specific public interest.

In particular, according to Article 185 of the same law:

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i. In the context of its purpose, the HCAP holds public shareholdings in companies under Law 3429/2005, which it manages professionally, enhances their value and exploits them in accordance with international best practices and OECD guidelines.
ii. in order to fulfil its purpose, the HCAP shall act in an independent, professional and entrepreneurial manner with a long-term perspective in achieving its results following its Internal Regulations.

The instruments of HCAP are the General Assembly, the Supervisory Board, the Board of Directors and the Auditors [article 190 Law 4389/2016]. The distribution of the profits of HCAP is regulated in Article 199 Law 4389/2016, according to which the distribution of the HCAP's profits is carried out by the dividend policy, which is part of the Internal Regulations and ensures the following distribution: (aa) A part shall be paid as a dividend to the Greek State and used by the Greek State for investments, and (bb) A part shall be used by the HCAP for investments.

Article 201 concerning the methods and procedure for the use of its assets provides that the HCAP may apply all methods deemed appropriate to manage, maintain, increase the value of and use its assets professionally and to achieve its purpose, for example, by selling them, transferring any rights or obligations in them, contributing them to public limited companies (SAs) or private limited companies (PSCs), and subsequently selling the shares concerned to third parties.

3. *The legal status of water services until CoS [GC] 1906/2014*

Among the assets to be transferred to the TAIPED, in the first phase, and then to HCAP, the list included the shares of the municipal water supply companies of Athens (EYDAP) and Thessaloniki (EYATH). EYDAP has the exclusive right to provide water supply and sewerage services in the broader area of Attica. This right is exclusive and non-transferable. The duration of this right, as well as its renewal, is provided for in the relevant contract signed between the Greek State and EYDAP, which has a duration of 20 years, with the possibility of extension. According to the said contract, which was concluded on 9 December 1999, the assets of EYDAP SA include the networks and related works and installations, which constitute the water supply and sewerage systems and are collectively referred to as 'the system'. The operation, maintenance, renovation, renovation, and extension of the

system are contractual obligations of the company. The Greek State, in order to exercise supervision, has access to any part of the system and has the right to terminate the contract in the event of: (a) abandonment of the system or (b) repeated or continuing culpable failure to comply with the standards of operation, safety and maintenance of the system, resulting in widespread deregulation of the system. Other grounds for termination of the contract are: (a) repeated or persistent culpable breach of the essential obligations of the company towards all or a large number of consumers and (b) the insolvency of the company (Articles 5, 17 and 19 of the contract).

More specifically, EYDAP S.A. was established by Law 1068/1980 (Government Gazette A' 190) as the exclusive provider of water supply and sewerage services to the cities of Athens - Piraeus and the surrounding municipalities and communities, with the legal form of a joint stock company operating under the complete control of the Greek State:[13]

> a) as the owner of the share capital [with the possibility of transferring up to one third (1/3) of the shares to the Local Authorities of the region],
> b) as the competent authority, through the adoption of joint decisions of the Ministers of Coordination, Interior and Public Works, for the appointment of the company's management bodies, namely the members of the nine-member board of directors (three of whom were nominated by the Local Union of Municipalities and Communities of the prefecture of Attica) and General Manager and his deputies,
> (c) as a government policymaker by fixing the tariffs for water and sewerage services,
> (d) establishing the regulatory framework for the operation of water supply and sewerage networks; and
> e) as supervisor of the company's activities, through the Ministers of Interior and Public Works, to ensure the provision of its services in accordance with the legislation.[14]

Under the above legal and ownership status, EYDAP SA was exclusively responsible for the design, execution, maintenance, extension and renewal of all the necessary works for the water supply and sewerage of the cities of Athens - Piraeus and the surrounding municipalities and communi-

[13] For public enterprises, Anthopoulos & Akribopoulou (2015).

[14] See Articles 1, 2, 5, 8, 19, 19, 22 para. 1 and 2, 29 Law 1068/1980.

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ties, including water collection works, such as the Mornos, water desalination, pumping stations, dams, reservoirs and aqueducts, sewage treatment works and sewage products, which constituted its fixed assets, as well as for the operation, management and exploitation of the water supply and sewerage networks.[15]

Subsequently, with article 4 of Law 2744/1999 (Government Gazette A' 222), a public law entity was established under the name "EYDAP Assets Company", to which the dams and reservoirs of Mornos, Marathon and Evinos, the works and facilities of Yliki, as well as other real estate assets of EYDAP SA were transferred.

By other provisions of the same law:

> A) It was established that the purpose of EYDAP SA is the provision of water supply and sewerage services, the design, construction, installation, operation, exploitation, management, expansion and renewal of water supply and sewerage systems. These activities and projects include the pumping, desalination, treatment, storage, transport, distribution and management of all types of water discharged for these purposes, as well as projects and activities for the collection, transport, treatment, storage and management of all types of wastewaters (except toxic wastewater) and the distribution, disposal and management of the products of sewerage networks (Article 1 Law 2744/1999).
> B) State subsidies were provided for the investment programme of EYDAP SA, either from Community funds or from the Public Investment Programme, concerning the above contract for the specific definition of the investment programme, the percentage and the maximum amount of the subsidy (Article 7 Law 2744/1999).

Further, the Law 2744/1999, apart from the provisions which (mainly) limited the scope of activity and the fixed assets of EYDAP SA, also provided for the following regarding its legal and ownership status:

> A) That EYDAP SA is henceforth governed by the provisions of law for private companies, law 2414/1996 on the modernization of Public Enterprises and Organizations (A' 135) and additionally by the provisions of its founding law (1068/1980). It is under the supervision of the Minister of Environment, Town and Country Planning and Public Works, has a duration of one

[15] See Articles 1 and 10 Law 1068/1980.

hundred (100) years and is prohibited to sell, lease or grant for use or constitute any lien on its real estate assets used for the exercise of its activities related to the provision of water supply and sewerage services (Article 1(1), (2) and (8) Law 2744/1999).
B) That the share capital of EYDAP SA is set at 20,000,000,000,000,000 drachmas, and the Greek State may allocate up to 49% of the share capital to investors (article 1 para 9 and 10 Law 2744/1999).
C) That by joint decision of the Ministers of National Economy, Finance and Environment, Town and Country Planning and Public Works the statutes of EYDAP SA are drawn up, which regulates matters concerning the share capital, the number of shares, the name, the purpose, the increase and decrease of the share capital, the issue of shares and other securities, the rights of shareholders, the appointment of the members of the Board of Directors, the convening, operation and powers of the General Meeting and the Board of Directors, the auditors, the corporate year, the distribution of profits, the annual financial statements, the dissolution and liquidation and any other matter, subject to the provisions of the above laws.[16]

On the basis of these provisions, by which EYDAP SA was organized as a joint stock company under commercial law, it was decided at the General Meeting of the shareholders of the company on 29.11.1999, inter alia, to list all its shares on the Athens Stock Exchange and to increase its share capital. In this way, a minority share of 38.67% of the share capital was allocated to private persons and a majority share of 61.33% was retained in the ownership of the Greek State. Subsequently, EYDAP SA was also subject to the provisions of Chapter B (Articles 15 - 17) of Law 3429/2005 "Public Enterprises and Organizations (DEKOs)" (Government Gazette A' 314) due to the listing of its shares on the Athens Stock Exchange and the non-foreclosure of the Greek State from its share capital (Article 1(5) Law 3429/2005), placing it outside the broader public sector (Article 15 of the same law) and adapting its statutes accordingly. Following the aforementioned legislative changes, the Codified Articles of Association of EYDAP SA were drawn up and approved at the 24th Ordinary General Meeting of Shareholders on 30.6.2006. The provisions of these Articles of Association stipulate that the company is under the supervision of the Minister of Environment, Spatial Planning and Public Works and operates according to the rules of the

[16] See and CoS [GC] 1906/2014, para 18.

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private economy without changing its character as a company carrying out public utility activities (Article 1).

As regards the company's share capital, it is further specified that it already amounts to EUR 63,900,000 (divided into 106,500,000 shares of EUR 0.60 each) and is subject to further increase or decrease and amortization in accordance with the provisions of Law 2190/1920. For the period that is examined here in this case law, the State holds 61% of the shares of EYDAP, while the Agricultural Bank holds 10%. The Government, as part of its privatisation programme, planned to transfer a minority stake of 27.3% of the company's shares in the second quarter of 2012 while committing to the establishment of a water regulator.[17]

As regards the corporate organization, the above law defines, inter alia, the following:

> A) the General Meeting of Shareholders shall determine the number of members of the Board of Directors, which shall be redundant and may be at most thirteen members or no less than seven (Article 11(1)).
> B) That the Board of Directors consists of a) two employee representatives, b) two minority shareholder representatives and c) the other members (3 to 9) elected by the General Meeting of Shareholders, without the participation of the shareholders who elect the minority representatives (Articles 11(2) and 36).
> C) That the Board of Directors is constituted by electing a Chairman and a Managing Director, and is the highest administrative body, which primarily formulates the strategy and policy of the company's development and controls the management of its assets (Articles 12(1) and 18(1)).
> D) That the General Meeting of Shareholders responsible for the election of the members of the Board of Directors is exclusively competent, inter alia, for: a) any amendment of the Articles of Association and b) the merger, division, transformation, transformation, revival, extension of the duration and dissolution of the company (article 25 paragraph 2, subparagraphs a and g). The General Meeting of Shareholders, with an increased quorum and a two-thirds (2/3) majority of the share capital, may decide, inter alia, on: a) the change of the company's nationality, b) the change of the company's object of business and c) the merger, division, transformation, revival, extension of the duration or dissolution of the company (Article 31).

[17] See and CoS [GC] 1906/2014, paras 7-10.

III. CoS [GC] 1906/2014 and the alienation of the Greek public sector

The decision of the Plenary Session of the Council of State 1906/2014 considered the application for annulment of the decision of the Interministerial Committee for Restructuring and Privatization number 206 / 25.4.2012 (published in Government Gazette B' 1363 / 26.4.4.2012) in so far as, inter alia, it transfers without consideration from the Greek State to the TAIPED SA (a) 36.245.240 shares of the EYDAP corresponding to 34,033 % of the share capital.

In examining the merits of the case, the Court took into account that EYDAP has the exclusive right to provide water supply and sewerage services in the greater Attica area and accepted that the continuous and satisfactory provision of these services in all respects is, quite literally, of vital importance to natural persons and not merely a provision of utilities to them. Furthermore, it took into account that, prior to the adoption of the contested decision [206/25.4.2012], the Greek State had already lost the majority of the shares of EYDAP SA through the transfer to the TAIPED, by decision 195/27.10.2011 of the Interministerial Committee (Government Gazette B' 2501/4.11.2011), of 29,075,500 shares and held 36,245,240 shares, corresponding to 34.033 % of the share capital. With the transfer of those shares, through the contested decision, the Greek State, as the CoS emphasised, is wholly alienated from the share capital of EYDAP SA.[18]

The main problem on which the court's reasoning is focused is that the above transfers were made without the parallel establishment of a "water regulatory authority" and the separation of the network "from the service to be transferred" by the "Privatisation Programme 2011 - 2015", but also without the removal of the obligation provided for in article 1 Law 2744/1999 as regards the percentage of the shares of EYDAP SA that can be allocated to private investors (up to 49% of the share capital) (see above at 2). It is noted, however, that this restriction was removed after a new amendment of the Law (Article 1 Law 4092/2012 (Government Gazette A' 220/8.11.2012)). According to the same provision, transfers of shares of EYDAP SA to the TAIPED shall be valid even if they were made before the entry into force of this Law.

[18] CoS [GC] 1906/2014, para 21.

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Subsequently, the Court accepted that the provision of public utilities is not an activity that is inseparable from the core of state power[19] . This is also true about water and sewerage services, which may be provided by a public undertaking operating under private law as a public limited company.

However, the public character is negated in the case of the alienation of the Greek State from the control of the public company through the share capital, i.e. its alienation from that percentage of shares (more than 50% according to the provisions of the above law) which ensures the ownership rights and the possibility of electing, by the General Meeting of Shareholders, the majority of the members of the Board of Directors, which is the supreme administrative body of the company that shapes the structure of the company. In this case, the public undertaking is privatised not only in form, by being subject to the provisions of private law governing public limited companies, but also in substance, by becoming a private undertaking, because private investors are given the legal possibility of accumulating a percentage of the share capital which ensures ownership control and the election of the majority of the members of the company's board of directors. In essence, the transformation of the public undertaking into a private company operating for profit makes it uncertain whether it will be able to continue to provide affordable, high-quality public services, which is not fully guaranteed by State supervision.

Moreover, the services provided by EYDAP SA are provided on a monopoly basis to a large population living under unfavourable housing conditions in the area of Attica by networks that are unique to the region and belong to the company's fixed assets. Those services consist of water supply and sewerage, which are necessary for healthy living and, in particular, the supply of drinking water, a natural resource essential for survival, which is becoming scarcer over time. Uncertainty as to the continuity of the provision of affordable public utility services with this degree of necessity is not condoned by Article 5 of the Constitution, in particular by the provision of paragraph 5, which guarantees the right to health protection, and by Article 21 para 3, which stipulates that the State shall provide for the health of its citizens.

Taking the above into account, the Court concluded that the alienation of the Greek State from the majority of the share capital of EYDAP SA, the maintenance of which is necessary - under the given legal regime - in or-

[19] CoS [GC] 1906/2014, para 22.

der to avoid the transformation of the public undertaking into a private one, constitutes an infringement of Articles 5 para 5 and 21 para 3 of the Constitution, and for this reason, which is the main reason put forward, the application in the present case must be partially granted, and the contested decision of the Hellenic Public Authorities must be annulled in so far as it transfers the last shares of the company owned by the Greek State (36,245,240 shares corresponding to 34.033% of the share capital) to the TAIPED.[20] In the concurring opinion of one judge, uncertainty about the continuity of the provision of water and sewerage services, in breach of Articles 5 para 5 and 21(3) of the Constitution does not entail the loss of the Greek State's ability to elect the governing bodies of EYDAP SA, but the complete deprivation of its property rights over the water supply and sewerage networks and related works and installations.

According to the opposing minority view expressed in the plenary, the above constitutional provisions, in conjunction with Article 24 for the protection of the environment, have the meaning that the State and the local authorities must ensure that those who live or reside in the country have a continuous supply of drinking water sufficient for their personal and family needs, which meets the necessary hygiene requirements and is available at an affordable price. The fulfilment of this obligation of the State and local authorities under the above conditions may be pursued, in so far as the Constitution makes no distinction in this respect, either by services which are organically owned by the State and the local authorities or by legal persons governed by private law in which the State or the local authorities participate, irrespective of the proportion of their participation, or by legal persons governed by private law in which the State or the local authorities do not participate. Therefore, the transfer in this case of the percentage of shares in EYDAP held by the State, which results in the complete privatisation of that public undertaking, is not contrary to the Constitution, bearing in mind, in addition, that (a) the objectives and duration of the company are defined in a binding manner by the relevant legislative provisions (Article 1(7) Law 1068/1980, Article 1(2) and (4) Law 2744/1999), and (b) in accordance with Article 1(1a) Law 2744/1999).

[20] CoS [GC] 1906/2014, para 22.

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IV. The legislator's response to CoS [GC] 1906/2014

Under Article 197 Law 4389/2016, as this Article was replaced by Article 380 para 9 Law 4512/2018, all shares of the EYDAP SA were transferred, as of 1.1.2018, to the HCAP. It was determined that all actions required for the completion of the *registrations of* this transfer are being carried out. Based on this law, the decision of the Inter-ministerial Committee for Restructuring and Privatization (Government Gazette B 614/22.2.2018), number 262/21.2.2018, was issued, revoking from 1.1.2018 the decision of the Inter-ministerial Committee number 195/2011, in the part whereby 17,004,761 shares of EYDAP (15.97% of the share capital) are transferred from the Greek State to the TAIPED.

This decision does not entirely revoke the 195/2011 decision of the Interministerial Committee regarding the part of the transfer from the Greek State to the TAIPED of the shares held by the State in EYDAP SA. However, it revokes it in part, so as a result, following the annulment by the Council of State of the 206/2012 decision of the same Commission as regards the transfer to the TAIPED of EYDAP shares, the State's shares transferred, under the provision of Article 380 Law 4512/2018, to HCAP, amounts to 50.003% of the share capital of EYDAP SA.

The application of 20.3.2018 followed, signed by the Minister of Finance, as representative of the transferring Greek State, and co-signed by a representative of the transferring HCAP SA, for the registration in the Intangible Securities System of the above transfer of 53.250.001 shares of EYDAP SA from the State to HCAP. By the act (MADKAES 0000692 EX 2018/20.3.2018) of the Head of the Privatization, the above application was forwarded to the "National Bank of Greece SA" [ETE SA] and notified to the legal entities "Hellenic Stock Exchanges SA", HCAP SA and TAIPED. Subsequently, ETE SA submitted the relevant application to execute transactions in the Intangible Securities System of the Central Securities Depository. Furthermore, by the act (MADKES 0000689 EX 2018/20.3.2018) of the Head of the same service of the Ministry of Finance, the act of the Head of the Ministry of Finance, transmitted to the Capital Market Commission and EYDAP SA and notified to the legal entities HCAP SA and TAIPED SA, that the above transfer of shares owned by the Greek State to HCAP.

V. CoS [GC] 190/2022 and the prohibition of the pursuit of profit

By the application for annulment, which was decided by the Plenary Session of the Council of State (CoE) 190/2022, the applicants seek to annul, inter alia, the provision (Article 197 Law 4389/2016) that transfers to the HCAP the shares owned by the Greek State in the public enterprise EYDAP SA, the relevant implicit administrative act of the Interministerial Committee for Restructuring and Privatization on the transfer of the above shares, as well as the relevant decisions of the Governmental Council for Economic Policy and the Minister of Finance, in accordance with article 197, paragraph 1, of the above Law, the act of 20.3.2018 of the Minister of Finance, which completed the transfer, through an OTC transaction, of the shares of EYDAP SA, owned by the Greek State, to HCAP, as well as the subsequent registration of the above change in the Intangible Securities System, the 262/21.2.2018 decision of the Interministerial Committee for Restructuring and Privatization (B 614/22.2.2018, error correction B 697/1.3.2018).[21]

1. *Admissibility of the exercise of the remedy of application for annulment*

By Articles 95 of the Constitution and 45 para 1 of Legislative Decree 18/1989, the application for annulment is directed against the acts of the administrative authorities and legal persons governed by public law (Skouris, 1989). The Constitution, by providing in the abovementioned provision for the review of acts of the administrative authorities by means of the legal remedy of an application for annulment, precludes an application for annulment of acts of the legislative function (Vegleris, 1961, p. 597).

The exclusion of the review of the acts of the legislative function also applies in the case of formal law, i.e., even where the individual regulation of a legal relationship or situation by statute is exhaustive, and the executive function is not left with the power to issue enforceable administrative acts, the court hearing the action for annulment, in compliance with the rule laid down in the abovementioned Article of the Constitution, is unable to review the individual regulation in the form of a formal law directly.

However, in this case, in view of the provisions of Article 20 para 1 of the Constitution, which enshrines the individual right to judicial protection,

[21] CoS [GC] 190/2022, para. 3.

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the manifestation of which is the right to judicial protection under Article 95 para 1(a) of the Constitution, the court accepted that must exercise judicial control considering as administrative act any act that follows the implementation of the legal provision, in order to safeguard the right to access to the court. Otherwise, the person affected by the individual regulation of the law, unable to apply directly for its annulment, would be deprived of the right to judicial protection, in breach of Article 20 para 1 of the Constitution[22] . The power of the legislature under the Constitution to enact individual regulations is not granted irrespective of the consequences it may have for the realisation of constitutional requirements and, therefore, cannot result in the deprivation of the right to judicial protection[23] .

Given the above, the court took into account that the transfer of the shares of the EYDAP SA, which are held by the Greek State, to the HCAP, was carried out pursuant to Law 4389/2016. Hence, no room has been left for judicial review. The transfer of these shares to HCAP is effected under Article 197 para 1 of the above law, automatically as of 1.1.1.2018, without the issuance of an administrative act as a prerequisite for the transfer, although it is expressly stated in paragraph 2 of the same Article that "all actions required for the completion of the transfer registrations" must be carried out. The required actions include, for companies listed on the Athens Stock Exchange, such as EYDAP SA, "the registration of the relevant transfer in the book-entry securities system" by the Regulation on the Operation of the System, as well as the notification of the issuer of the changes in the percentage of share capital and voting rights held, under Law 3556/2007.

Consequently, the application for annulment of MADKAS 0000692 EX 2018/20.3.2018 and MADKAS 0000689 EX 2018/20.3.2018 acts of the Head of the Privatisation, Securities Management and Business Planning Unit of the Ministry of Finance, by which, respectively, the necessary steps were taken for the registration in the SAT of the transfer of the shares of EYDAP to HCAP and for compliance with the obligation to notify that change to the shareholder of that company, must be considered admissible in order to be safeguarded the exercise of judicial review. Besides, regarding the decision of the Inter-ministerial Committee for Restructuring and Privatization 262/21.2.2018, which is also challenged before the court, the court assessed that is partially revoked from 1.1.2018, i.e. from the entry into force of article

[22] See and Venizelos (2021, p. 207).

[23] CoS [GC] 870-73/2018, 704/2018, 215/2016, 3976/2009.

380 para 9 law 4512/2018, which automatically transfers to HCAP the shares of the Greek State's ownership in public enterprises, so, admissibly is challenged before the court.

2. *Examination of the merits of the case*

The court, after taking into account the previous decision of the Council of State (CoS) [GC] 1906/2014, stressed that according to the Constitution [Articles 5(5) and 21(3)], the provision of water supply and sewerage services to the population of Attica does not constitute an activity inseparable from the core of state power and, therefore, may be entrusted to a public undertaking in the form of a public limited company, such as EYDAP SA. However, in the present circumstances, that is to say, in circumstances in which those services are provided monopolistically, by networks unique to the region and owned by EYDAP SA, that is to say, by the body which provides the services under a concession contract, it is constitutionally imperative that the Greek State should control EYDAP SA, not only by exercising supervision over it, but also through its share capital. Only if the Greek State essentially retains the majority of the share capital of that public undertaking, which, in the circumstances described above, provides services of general interest of absolutely vital importance to the population of Attica, are the State's ownership rights over EYDAP SA guaranteed, as well as the election of the majority of the members of the Board of Directors of that undertaking by the State, which holds the majority of its share capital. Through the possession by the State of the majority of the share capital of the public undertaking EYDAP SA, it is presumed, in principle, that its management is ensured in accordance with the obligations arising from the Constitution as regards the provision of the specific service.

As is further inferred from the same constitutional provisions, regardless of whether the participation of the State in the share capital of EYDAP may be indirect, through the intervention of another legal person, in any case, the State, by holding the share capital of EYDAP SA and managing this public undertaking, is *not allowed to pursue, predominantly or in parallel, economic or other objectives, even if dictated by the broader public interest, when these objectives compete with or jeopardise the uninterrupted and*

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high-quality provision of the above water supply and sewerage services of vital importance to society as a whole.[24]

More specifically, the court held that the disputed transfer of a percentage of more than 50% of the share capital of EYDAP SA is contrary to the provisions of Articles 5 para 5 and 21 para 3 of the Constitution, since, the State, although it is the sole shareholder of HCAP SA, which is the shareholder of EYDAP SA, does not exercise control over the Board of Directors of HCAP and is not fulfilled, therefore, the constitutional requirement that the Greek State must control EYDAP SA, not only by exercising supervision over it but also through its share capital[25] .

The HCAP, a legal entity under private law intervening between the State and EYDAP SA, pursues, primarily, profit purposes, with a way of organization and operation suitable to serve these purposes, as is implied by the provisions of the above laws 4336/2015, 4389/2016 and 4549/2018, which constitute a single and indivisible whole. HCAP SA was created to achieve a specific public purpose, which consists of the management and utilization, in a manner profitable for the Company and with methods suitable for this purpose, of the public assets transferred to it. Moreover, it is clear from the same legal framework that HCAP is organised as a specific legal entity with an object similar to that of acquisition and disposal companies, to which the State, acting as a fiscus, transfers its assets, assuming them to be part of its private property so that the 'corporation of assets and participations' can manage them professionally and commercially in order to obtain the maximum economic result from their exploitation in various ways.

HCAP SA shall also manage, by law, the public undertaking EYDAP SA transferred to it in the framework of the objectives as mentioned above and related arrangements in the most appropriate manner for the achievement of the statutory objectives of HCAP, at risk, accepted by the legislator, that the management may, in certain circumstances, be to the detriment of the quality, universality or affordability of the water supply and sewerage services provided by EYDAP SA. Since, as is apparent from the combination of the above provisions, it follows from the above provisions that, as a party to the Financial Facility Agreement and as a guarantor to the ESM for the timely and proper repayment of its financial contribution, with the subsequent commitments, HCAP must take into account, in the management

[24] CoS [GC] 190/2022, paras 38-39.

[25] CoS [GC] 190/2022, para 40.

and exploitation of its subsidiary EYDAP SA, the obligations linked to the provision of services which are vital to society as a whole. However, those obligations are served to the extent that they are in line with the general statutory purposes of the HCAP, which are the reason for the establishment of the legal person interposed between the State and EYDAP and concern all the assets included in it. In other words, the court assessed that in case of conflict between the different aims that must be served by the HCAP the obligations regarding the safeguarding of water security for the community will not prevail.

EYDAP SA, operating as a subsidiary of HCAP in the abovementioned framework of rules, continues to have the same object of activity. However, on the one hand, it transfers its profits to HCAP [and its sole shareholder] in order to be further distributed, together with the revenues from the management of the other assets of HCAP, for the specific purposes mentioned above, and on the other hand, in the provision of its services, it is now only under the supervision of the Greek State and not under its control, through the holding of a majority of the share capital, as required by the Constitution. The law does not reserve to the Greek State even the indirect control of EYDAP SA since the above provisions [Articles 190, 191 and 192 Law 4389/2016] do not ensure the complete control of the Greek State over the Board of Directors of the "parent" company HCAP, which holds 50.003% of the share capital of the subsidiary of EYDAP. This is because the Board of Directors of HCAP, which, on the one hand, has the presumption of competence for all matters related to the management of the Company and, on the other hand, exercises the voting rights of HCAP in its subsidiaries, appointing, inter alia, the management bodies of EYDAP SA, is not appointed by the General Assembly of HCAP, i.e. by the Greek State, but by a special collective body, the Supervisory Board of EESYP. The State does not appoint the members of the Supervisory Board, but by co-decision of the Greek State, on the one hand, and the European Commission and the European Stability Mechanism, acting jointly, on the other hand. The consent of the Minister of Finance required by law for the two members selected by the European Commission and the ESM does not invalidate the decisive authority granted to the European Commission and the ESM for the election of all members of the Supervisory Board since, moreover, even for the three members elected by the Greek State, the consent of the European Commission and the ESM is required.

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Besides, given the purpose mentioned above of HCAP, the achievement of which is pursued through private economic means, Law 4389/2016 does not establish any administrative procedure, establishing the competence of the Greek State to intervene in a preventive or repressive manner, by issuing enforceable administrative acts, in matters of administration and management by HCAP SA of the assets of its subsidiary EYDAP SA or the formulation by HCAP of EYDAP's policy, so that the State may be regarded as ensuring, in the exercise of public authority, the safeguarding of the constitutional guarantees which, according to the case-law, surround the vital service of water supply, if those guarantees are put at risk in order to fulfil the statutory objectives of HCAP. Therefore, Law 4389/2016, insofar as it provides for the transfer to HCAP of 50.003% of the share capital of the public undertaking EYDAP SA, is contrary to Articles 5 para 5 and 21 para 3 of the Constitution, as it is argued in the main proceedings, and this even under the assumption that the percentage held by the HCAP [50.003%] cannot be transferred to private individuals, being bound in this respect by the decision of the Plenary Council of State 1906/2014.

VI. The (non) compliance of the legislator with CoS [GC] 190/2022

On 28.6.2022, a petition was filed to the three-part Compliance Council of the Council of State by which the parties to the proceedings of the Council of State's case [GC] 190/2022 complain about the non-compliance of the Administration with the decision 190/2022 of the Plenary of the Council of State, which was published on 4.2.2022[26] . After the said petition was filed, Law 4964/2022 (A' 150/30.7.2022) was published. Article 114 of this law, which contains "Special regulations for the companies EYDAP SA and EYATH SA", added to the law 4389/2016, the following Article 197A:

> 1. The shares of EYDAP SA and EYATH SA transferred to HCAP Act shall be non-transferable and unseizable.
> 2. Any decision to change the share capital of the companies EYDAP and EYATH cannot lead to a reduction of the percentage of participation of HCAP in these companies and the loss of the absolute majority of the share capital

[26] CoS (Three-Member Compliance Chamber as Council) 7/2023.

of these companies. Any decision with consequences referred to in the previous subparagraph shall be null and void and have no legal effect.
3. voting rights in the general meetings of the companies EYDAP SA and EYATH SA for the shares transferred under para 1 of Article 197 subject to the prior approval of the general meeting of the sole shareholder of HCAP, i.e. the Greek State.
HCAP proposes to the General Assembly of the shareholders of the companies EYDAP SA and EYATH SA, the members of their Board of Directors, to be elected as majority shareholders after prior approval by the General Assembly of the sole shareholder of the Greek State. The members of the Boards of Directors of the two aforementioned companies who acquire this status following a proposal by the HCAP based on the above procedure, shall act within the framework set out in para 5 of Article 5 and paragraph 3 of Article 21 of the Constitution in order to ensure the continuous provision of high-quality water supply and sewerage services to society as a whole.
The general meeting of the sole shareholder of the company, the Hellenic State, may, also address to the company binding written instructions or recommendations on issues related to the management of the public shareholdings in the companies EYDAP SA and EYATH SA.
HCAP has an obligation, in managing its shareholdings in the companies EYDAP SA and EYATH SA, to contribute substantially to the fulfilment of the constitutional obligation of the State to provide uninterrupted and high-quality water supply and sewerage services to society as a whole.

Article 115 of the same law, stipulated that the transfer to HCAP SA of the shares of the companies EYDAP SA and EYATH SA, owned by the Greek public sector, according to Article 197 Law 4389/2016 (A' 94) shall be deemed legal and valid from the entry into force of the present law in all its consequences. Repetition of the actions and procedures provided for by law that precede or follow the transfer of the above shares to HCAP is not required. The recognition of the valid and lawful, concerns disputes of acts and decisions of the companies HCAP SA, EYDAP SA, and EYATH SA that are related exclusively to the legality of the holding by HCAP SA of the majority of the shares of the companies EYDAP and EYATH, as well as the exercise of the rights belonging to HCAP as a shareholder holding the majority of the share capital of these companies.

According to the legislator's assessment, the above provisions aim to bring the Greek State into compliance with the decision of the Plenary of the

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Council of State 190/2022. The requirement of control by the State of the companies [EYDAP SA and EYATH SA], with the direct holding by the State of the majority of their share capital, according to the reasoning of the above decisions, constitutes an effective way of controlling those companies in order to enable them to offer water supply and sewerage services with the [necessary] characteristics to society as a whole, which is not achieved by the transfer to HCAP of the majority of the share capital of those companies. By this method of control of the companies EYDAP SA and EYATH SA adopted by the decisions in question, the Council of State seeks to ensure that the State fulfils its constitutional obligation, as it follows from Articles 5 para 5 and 21 para 3 of the Constitution, to provide to society as a whole services of general interest of absolutely vital importance and, in this case, water supply and sewerage services to the inhabitants of Attica and Thessaloniki, respectively.

The adoption by the abovementioned judgments of the specific method of control by the State of the abovementioned companies could not prevent the legislature from choosing a different method of control by the State of the companies in question, provided that that method of control ensures to the same extent as that adopted by those judgments, the provision to society as a whole of water supply and sewerage services with the same qualitative and quantitative characteristics required by the abovementioned constitutional provisions. Any other option would be contrary to the principle of the separation of functions since the legislature would be deprived of the possibility of making a substantive choice of legislative solutions, the legality of which, of course, is ultimately for the judiciary to decide. This also applies in the cases of the companies EYDAP SA and EYATH SA, where the establishment of the HCAP and the transfer to it by the State of the majority of the shares of the companies it owned with a view to their privatisation constitutes an international obligation of the country, established by law and cannot be unilaterally withdrawn.

The governance of HCAP has hybrid characteristics mainly due to the composition and powers of the Supervisory Board, which limits the powers of the General Assembly and constitutes a deviation from the legislation on joint stock companies and corporate governance. With the proposed provisions, in compliance with the decisions mentioned above of the Council of State, this divergence is removed about the companies EYDAP SA and EYATH SA, which belong to the portfolio of HCAP as its subsidiaries due to their specific scope consisting in the provision of water supply and sewerage

services. Therefore, the general rules of operation of public limited companies, which define the powers of the General Assembly, apply to the relationship of these two subsidiaries with EESYP.

The administration and management of the companies EYDAP SA and EYATH SA after the majority of their share capital was transferred to HCAP and until today has not diverted nor diversified the social role of these companies. Furthermore, the constitutional obligation of the State to provide citizens, through the companies EYDAP and EYATH, with water supply and sewerage services of the qualitative and quantitative characteristics prescribed by the above-mentioned decisions of the Council of State is, institutionally, fully fulfilled by the provisions introduced.

Adittionally, in the article-by-article analysis of the introduced regulations, the following is mentioned for Articles 114 and 115 of Law 4964/2022: "[T]he non-transferability and inalienability of the shares of the companies [EYDAP and EYATH] is ensured, and the role of the General Assembly of HCAP is strengthened in the sense that it acquires decisive control (acquires approval power) in the exercise of voting rights in the General Assemblies of EYDAP and EYATH. Moreover, the proposal of HCAP to the General Assembly of the shareholders of the companies EYDAP and EYATH is also subject to the approval of the sole shareholder of HCAP, i.In addition, the Greek State, as the sole shareholder of HCAP, is explicitly recognised as having the right to issue binding written instructions or recommendations to HCAP regarding the management of its shareholdings in the above companies. It is further expressly provided that the members of the Boards of Directors of the companies EYDAP and EYATH must act within the framework of Articles 5 para 5 and 21 para 3 of the Constitution. The same obligation is also established for HCAP.

Considering the decision of the Council of State (CoS GC 190/2022), the Three-Member Chamber as Council came to a different assessment. In formulating instructions to the Administration, the Council, in particular, considered that, in principle, the following actions of the legislative and executive bodies would constitute compliance with the above decision:[27]

> consider as annulled the transfer under Law 4389/2016 to HCAP SA of 50,003% of the share capital of EYDAP SA;

[27] CoS (Compliance Chamber of three members) 7/2023, p. 11.

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amend, in this regard, the Law 4389/2016 in order to exclude EYDAP SA from the public undertakings transferred to HCAP SA;
take all necessary steps and procedures in order to carry out, retroactively:
The re-transfer from HCAP SA to the Greek State of more than 50% of the share capital of EYDAP SA, in compliance with the decisions of CoS 1906/2014 and CoS 190/2022,
-the deletion of the registration in the Intangible Securities System of the unlawful transfer of the shares of EYDAP SA to HCAP SA under Law 4389/2016 and also the registration of the State as the owner of these shares, both in this System and in the successor system of the Central Securities Depository of the Law 4569/2018 (A' 179).

Therefore, the new Article 197A 4389/2016 does not constitute compliance but a contradiction to the judgments.[28]

VII. Critical evaluation

The CoS has consolidated its position that water cannot be a commercial product under any circumstances and in any way.[29] Taking a closer look to the above history of the debate between the legislature and the judge, it appears that it is the legislature that has tried to show more flexibility in order to achieve the purpose of privatisation, while the judge has remained steadfast regarding the terms he has set to ensure that the privatisation of water is carried out on terms following the Constitution. This is not unobjectionable if one considers that the legislator tried to seek creative methods to achieve its purpose, —which is to alienate the majority shareholding

[28] CoS (Compliance Chamber of three members) 7/2023, para 13.

[29] See and CoS 2219/2022, para 8: 'It follows from the above provisions of Directive [2000/60/EC] and, in particular, from its stated purpose, which is to ensure the quality of water and to manage it not as a commercial product but as a public good, that national policy on the provision of water services, including the pricing of such services, is designed by the Member States as a policy for the provision of services of general interest, the main criterion being the achievement of the environmental objectives of that directive for the protection of inland, surface and coastal waters and the protection of the environment. In particular, pricing policies for these services shall be designed by Member States taking into account the specific characteristics (geographical, climatic, etc.) and the specific conditions of each area (i.e. in principle at the river basin level), taking into account the social, environmental and economic effects of cost recovery'.

in EYDAP—, through legislation that is controversial in terms of the rule of law and the quality of democracy. For example, the transfer of shares utilizing a formal law that leaves no room for judicial control is a controversial practice. This is true even though the law, unlike a judicial decision, as is widely accepted, is the product of democratic legitimacy (Manitakis, 1988). Even the establishment of the HCAP, a company that mediates between the state and private parties, constitutes a peculiar project on the part of the legislator to avoid the mediation of judicial control in the field of privatization (Vlachogiannis, 2019, P. 77).

Nevertheless, in the clash between legislator and judge, the judge, although he managed to impose the conditions for water privatization that are considered constitutionally critical, does not seem to have emerged unscathed from the battle. Indeed, in Greek constitutional theory, he was accused of "agoraphobia" and retrogression (Karavokyris, 2015; Vlachou-Vlachopoulou, 2022). This was because, as argued in this commentary, he failed to justify his reasoning in a constitutional interpretation convincing regarding the set of guarantees he sought in order for water privatization to be deemed constitutional.

More specifically, the court based on a constitutional provision introducing the obligation of the state to provide for public health (article 21(3)) and on an even less relevant provision of the right to genetic self-determination (article 5(5)) the obligation of the state to establish an independent regulatory authority in order to proceed with the privatisation of water, otherwise, the only privatisation that is possible is the formal one, i.e. the establishment of a legal entity under private law whose majority of its shares belong to the state and thus, to be free from any formality of ownership. In the second decision, it also added that the legal entity to which the water supply obligations would be assigned should not serve profit-making purposes. This last condition seems to impose an absolute prohibition on the privatisation of water, since the effect of privatisation is to open up the free market economy, so that the purpose of making a profit is somehow inextricably linked to it.

The question that arises in light of all the above is whether the right to health, as enshrined in the above constitutional provisions in general, is sufficient to establish such a framework through constitutional interpretation regarding the privatization of water. The content of the judicial reasoning seems to imply the recognition of a right of access to good quality water[30]

[30] As accepted in theory, the right to water includes both access to clean drinking water

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. On the other hand, however, there is no explicit reference to a right to water, but only to water services that should be provided without hindrance, providing water suitable for health and at affordable prices. But even the recognition of a right to water would not be sufficient to justify an absolute prohibition of full and substantial privatisation of water.

The court maintained a conservative approach to the issue, even though, on the basis of the data it took into account, it could have convincingly grounded its argument if it had chosen to open its interpretation to newer approaches. The court was not confronted for the first time, nor did it discover on the occasion of water privatisation, the way in which the free market operates. All this was known in most of the privatisation cases that came before it, which it never prevented. In the present case, the facts he took into account and which relate to the way the free market operates are the following: the monopolistic nature, the absence of an appropriate legislative framework through which to exercise state control, the commodity product itself, which is a good of absolutely vital importance directly intertwined with the life and value as a human being[31] , the scarcity of this good, which even diminishes over time. All of the above creates an appropriate ground for the markets for making a profit which can lead to an increase in prices and thus to the exclusion of large parts of the population from access to good quality water[32] . The absence of state control further implies that even if prices remain affordable, there is no guarantee that water quality will remain at the levels it should be.

However, one could argue that the above risks can be prevented and, in any case, countered and therefore, the de facto prohibition of water privatisation remains unjustified and based on a maximalist interpretation of the Constitution. Indeed, simply showing distrust of private economic initiative cannot be a convincing argument.[33] But these dangers take on a different dimension if placed in a different context, which the court avoided addressing. This context relates to climate change and the emergency situation it creates.

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and its use for sanitation purposes, Kalen (2016, p. 2).

[31] Note that the problem of "commercialization" has been raised in other cases, such as the privatization of prisons, Medina (2010, p. 702).

[32] There are, after all, historical examples of this in the case of water privatization, Kapoor (2015, p. 164).

[33] More generally, however, it is the privatization of water that has historically met with the greatest opposition, Murthy (2013, p. 123).

In other words, it is the climate conditions that should be taken into account and which, ultimately, change the way the Constitution is interpreted.

Water is not just a commodity subject to natural scarcity over time. It is a commodity that is directly threatened by climate change (Kalen, 2016, p. 5). Its importance is such that even wars can be fought to obtain it in the face of climate conditions. The court's traditional assumption therefore that water services do not belong to the hard core of the state will have to be reconsidered in light of this new consideration, as water storage facilities may in the future need to be protected by the armed forces or even defended in the event of war. The constitutional obligations of the state to ensure continuous and uninterrupted access to water for all may in the future, which is not unlikely, prove to be a much more complicated process than it seems today, for example in the event of a prolonged water shortage, even if the water is publicly owned, -let alone privatized-. In the last case, it is highly possible the state, in order to meet its constitutional obligations or even to calm social unrest, to be forced to re-nationalise the water.

In this context, even the establishment of an independent regulatory authority, which the court is calling for in order to allow water privatisation, may not be enough[34] . Right now, in the country, there is water security both in practice and institutionally. In practice, because there is water sufficiency that allows water supply to all; institutionally, because there is an appropriate legislative framework to ensure that in case of water scarcity, the democratically legitimized legislature can intervene to distribute water in a socially just manner (O'Neill & White, 2019, p. 23). This water security by transferring the exploitation of water to private economic initiative is put at risk in the absence of a regulatory framework that determines what happens in the event of a water crisis, which is far from unlikely in the light of climate change[35] . This framework must be put in place before the Greek public sector is alienated from the water services, something that not only ensures access to water for all, but even the sovereignty of the state itself, which may be affected by internal disturbances or external threats in the case of prolonged water scarcity.[36]

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[34] Finally, an independent water regulator was established by Law 5032/2023.

[35] As argued in the theory, the protection of human rights may be economically neutral and thus, not opposed to privatization, in this case of water, however, a clear framework of protection should be put in place in these cases to ensure their effective protection, Murthy (2013, p. 130).

[36] For related cases of social unrest, Kapoor (2015, pp. 163-173).

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