THE PUBLIC CONTRACT FOR THE CONCESSION OF THE RIGHTS OF EXPLORATION AND EXPLOITATION OF HYDROCARBONS

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I hereby declare that the work submitted is mine and that where I have made use of another’s work, I have attributed the source(s) according to the Regulations set in the Student’s Handbook.
ABSTRACT

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law of the International Hellenic University.

The selection of this specific topic, as described in the title of the thesis, aims to highlight the ways of exercising the rights of exploration and exploitation of hydrocarbons and more specifically, how these rights are connected with the action of the Public.

Hydrocarbons constitute a public good and as such, they cannot be transferred or seized. Their ownership belongs to the State and is directly linked to the exercise of state sovereignty. They can be characterised as the key factor under economic and geopolitical views as well.

For these reasons, a thorough review of the legislative framework which is applicable in the hydrocarbon sector proves to be essential and necessary, so that the legal nature of the contracts for the rights of exploration and exploitation of hydrocarbons is clarified. The simultaneous study of European and Greek jurisprudence contributes to this result.

Vassiliki Spiliopoulou

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<thead>
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<tr>
<td>CC</td>
<td>Civil Code</td>
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<td>CdE</td>
<td>Conseil d’ Etat</td>
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<td>L.</td>
<td>Law</td>
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<td>PD</td>
<td>Presidential Decree</td>
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INTRODUCTION

The object of this dissertation is an in-depth study of the concession contracts of the rights of exploration and exploitation of hydrocarbons. However, before studying and analyzing this specific type of contracts, it is considered necessary to present the legal framework of the stipulation of the public contracts, the so-called contractual action of the Public in general, in order to highlight the specificity of the concession contracts in the oil sector in comparison to the classic way of Administration to conduct public contracts.

The exploration and exploitation of hydrocarbons constitute a crucial factor for the formulation of the political and economic life not only in national but also in international level. In addition, the use of hydrocarbons is directly linked to the development of new environmental conditions. The developed countries, on the one hand, and the developing countries, on the other hand, try to gain the control over the hydrocarbons in order, for the first, to acquire more and more economic and political power and for the second to become a factor of effect of the world affairs empowering in parallel their economic and geopolitical position. The modern countries are totally dependent on hydrocarbons, if we consider that the needs for electricity supply, the movement of vehicles etc are mostly fulfilled through the products of the hydrocarbons. The fulfillment of these needs in conjunction with the fact that the rights of exploration and exploitation of hydrocarbons constitute exercise of sovereignty power of a state creates the necessity for a factual and legal environment which will both ensure the satisfaction of the public interest and the attracting of investments.

The notion of the concession is directly connected to works and services of high budget and of high business and economic risk. The usual administrative action cannot meet these preconditions due to the economic flaws and the great bureaucracy of the state.

For this reason, the state is directed to the concession contracts as an alternative solution for the construction of public works and the organisation of public services. The notion of the concession contract is a “product” of French law which firstly introduced the concept of concession de travaux publics\(^1\).

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\(^1\) I. Venieris, Public-Private Partnerships (PPPs), Nomiki Vivliothiki 2007 (Gr), pp. 64.
The purpose of this thesis is to underline the specific nature of the concession contracts and more specifically in the hydrocarbon sector, by presenting and comparing the legal nature of the different kinds of public contracts. This presentation is reinforced by the parallel presentation of the jurisprudence of the European Court of Justice and the Greek Administrative Courts.

To summarize, the first Chapter of the dissertation refers to the contractual action of the Administration, including the traditional ways of conclusion of public contracts. In the second chapter, the notion of public service is analysed as directly serving and aiming at the satisfaction of the public interest through the conduction of public contracts and among them the concession contracts. Finally, in the third chapter the concept of the concession contract with the specific presentation of the concession contracts in the hydrocarbon sector is presented. The concession contract of the rights of exploration and exploitation of hydrocarbons is also analyzed under the EU law as well as under the Greek Law 2289/1995, as applied and the different kinds of concession contracts on this sector, their differences, the relationship between the grantor and the concessionaire are presented and finally, how the European Court of Justice and the competent Greek courts have treated these contracts as regards their legal nature. The ultimate goal, eventually, is to understand the ways and the rules applied on the concession of the rights of the State for prospecting, exploration and exploitation of hydrocarbons, especially under the light of the fact that the concession contracts constitute a complex and peculiar administrative system of financing and participation of private companies in the activities of Administration and in the exercise of public power.
CHAPTER 1

THE CONTRACTUAL ACTION OF PUBLIC

1. General

The modern Public Administration through multiannual historical phases has been transformed into an entity for the development of the country completely participating in the shaping of the economic and social life of it. Public Administration is a living body that should follow the technological and industrial evolutions. The modern administration presents intense action with the aim of raising the standards of living of the people. Nowadays, Public Administration, keeping its obligation for ensuring order and security, provides goods and services in social, economic and cultural level. It gradually eliminates the conservatism that characterized it the previous centuries acting rapidly and with flexibility. Alternatively, we would say that Public Administration tries to meet the needs of the modern economy by limiting its sovereign powers and making transactions as a private party. The latter is known as the transactional administration. Public Administration does not act issuing only administrative acts but it is increasingly connected with private natural and legal persons through contracts. Its intention is expressed not only unilaterally but also conventionally. In addition, Administration has gone further since it has included in its contractual action the concession contracts which do not belong to the traditional types of contracts.

2. Types of Public Contracts

The concept of public contracts refers to all contracts being concluded by the administration whether administrative or private contracts.

Under the law of the European Union, there are three types of public contracts: public procurement contracts, public works contracts and supply services contracts. The

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2 A. Tachos, Greek Administrative Law, Sakkoulas 2003 (Gr), pp. 22.
3 C. Remelis, The concept of the administrative authority and its procedural deformation, Administrative Trial (1989):766 (Gr).
sector of public contracts was initially regulated by the European directives 93/38/EC\(^6\), 92/50/EC\(^7\), 98/4/EC\(^8\), 97/52/EC\(^9\), which were amended by the directives 2004/18/EC\(^10\) and 2004/17/EC\(^11\), which were subsequently amended by the directives 2014/23/EC\(^12\), 2014/24/EC\(^13\) and 2014/25/EC\(^14\).

Pursuant to par. 1 (5) of article 2 of the new general directive 2014/24/EC, “public contracts mean contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services”. This definition becomes more precise by studying the recital 4 of the aforementioned general directive according to which it is necessary to define the notion of procurement due to the increasingly diverse form of public action without, however, broadening the scope of directive 2014/24/EC compared to that of directive 2004/18/EC.

Apart from contracts being concluded in writing, the notion of public contract requires the existence of an onerous transaction. The contract shall be burdensome in order to be included in this type of contracts. The existence of consideration which shall be paid, even if it is not monetary consideration, constitutes an essential element for the characterization of a contract as a public one\(^15\).

\(^6\) See directive 93/38/EC of the European Parliament and of the Council of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.
\(^15\) See the Opinion of Advocate General V. Trsteniak of 23.05.2012 in the case C-159/11 Azienda Sanitaria Locale di Lecce, par. 30.
In addition, the contracts of Administration are separated to private law contracts and public law contracts. This differentiation is crucial as regards the applicable law on the one hand and the jurisdiction limits on the other\textsuperscript{16}.

More specifically, the first type of contracts is concluded and operates under the provisions of private law. In these contracts, the state (or its legal persons) does not act as a public authority. In other words, the state does not exercise public power. On the contrary, the state is found on the same contractual level with the other contracting party which is the private one, since, in this case, the state acts as fiscus. For instance, the contracts for the management of the private fortune of the state and the labour contracts under private law belong to this kind of contracts. Furthermore, the aforementioned distinction leads to the distinction of the jurisdiction between the civil and administrative courts.

The concept of public contracts refers to any contract which is concluded by the state and/or its legal persons and which serves a public purpose under the public interest, i.e. a further criterion for the characterisation of a contract as a public contract is the functional criterion. What shall be assessed in this case is the purpose pursued by the state.

3. \textit{Types of public contracts based on their subject}

The State concludes contracts in order to fulfill its mission which is to ensure the public interest. It concludes contracts for the construction of public works in order to ensure the appropriate infrastructure in the country, contracts for supply of goods in order to meet the needs of the administration in consumables products and other goods as well as service contracts in order to obtain services which are necessary for the design, the modernization, the profitability and the improvement of these services to the citizens.

The legal characterisation of a contract, as described above, is based on the nature of the subject of the contract regardless of the title of the contract in the call of the tender

\textsuperscript{16} \textit{P. Dagtoğlou}, Administrative Procedural Law, Sakkoulas, 2004 (Gr).
by the state (the contracting authority). The legal characterisation of a contract is based on the provisions of EU law and not on the legislation of the member – states. This was the judgment of the Suspension Committee of the Conseil d’ Etat of Greece, according to which the tender for the selection of the contractor, who would undertake the collection of solid waste and their separation between dangerous and not, belongs to the service supply contracts.

### 3.1 Public Works Contracts

Pursuant to paragraph 2 of article 1 of the Greek Codified Legislation for the construction of public works, which was ratified by the Greek L. 3669/2008, Public Works are “infrastructure projects of the country that cover basic needs of the society, contribute to the development of the production, to the increase of the national product, to the safety of the country and in general, aim at improving the quality of life of the people. Public Works are within the overall framework for the social and economic development of the country implementing the options of a democratic planning”.

Furthermore, pursuant to paragraph 3 of the aforementioned article, Public Works, in technical terms, “are those which are carried out by public sector bodies and are connected in any way to the ground, to the subsoil, to the submarine area such as the floating sections of the technical projects. Under this meaning, Work can be any new construction or extension or repair or renovation or any research project which require technical knowledge and intervention”.

The Greek Courts based on the above definition of public works, pursuant to the Greek legislation, characterise as public work every new construction, repair, renovation carried out by public sector bodies requiring technical knowledge and intervention and the result of which is connected to the ground or subsoil in a permanent and constant way and cannot be separated from it without causing damage to the main thing. For this reason, when the result of the works does not become component of the

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17 See supra note 5, pp. 49.
19 Suspension Committee CdE 630/2006.
20 See L.3669/2008 “Ratification of the Codification of the legislation for the construction of public works” (OGG A’ 116).
21 This specific article remains in force, pursuant to article 199 par. 2 c of L. 4281/2014 (OGG A’ 160), until the adoption of the Decrees according to articles 182, 183 and 187 of the aforementioned law.
soil or, in other words, when the result of the works is not connected to the soil and subsoil in a permanent and constant way, it concerns the performance of works and not the execution of public works.

Additionally, pursuant to article 15 par. 2 (b) of the Greek L. 4281/201422 “Public Works Contracts are those, the subject of which is either the construction or both the planning and construction of works which are listed in the Annex I of the Appendix A and in the Annex XII of the Appendix B of the aforementioned law. The result of a total building work or civil engineering’s works met a technical or economic function is characterized as public work”. The same definition is included in the Presidential Decree 60/200723 “according to which “Public works contracts are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realization, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A ‘work’ means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfill an economic or technical function.”

The new general directive 2014/24/EC, which was entered into force on 18.04.2014, gives the definition of public works contracts in the article 2 par. 1.6 as follows: “public works contracts means public contracts having as their object one of the following: (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II; (b) the execution, or both the design and execution, of a work; (c) the realization, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work”.

In contrast to the national legislation, the definition of said directive 2014/24/EC does not include the repair, maintenance and extension of existing projects24. Such projects, not connected with the ground, are treated as service or supply contracts. The directive includes only the creation of a new construction not existing before and the completion of which puts an end to the contract.

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22 See L. 4281/2014, which amended the previous law 3669/2008 “Ratification of the Codification of the legislation on public works contracts” (OGG A’/2014)
As a consequence, the meaning of public works in the European legislation does not coincide with the one attributed by the Greek legislator. In any case where the conditions for the application of the relevant directives are met, the subject of the contract is determined on the basis of the European directives and not of the national legislation.

In general, the content of the concept of public work shall be broadened in order to be adjusted to the current needs and perceptions.

### 3.2 Public supply contracts

Pursuant to article 1 par. 2 of the Greek L. 2289/1995\(^{25}\), as amended by the L. 4281/2014, supplies of public sector are onerous contracts which “are conducted between institutions of the public sector and a supplier having as their object the purchase, financial leasing and hiring of goods. Moreover, the contracts for the execution of works or the transportation of such goods are deemed as public supply contracts in the case that the value of these goods exceeds that of work”.

More specifically, the private undertakes to provide consumables goods, modern accounting programs and computer applications to the institutions of public sector\(^{26}\).

The P.D. 60/2007 describes in its article 2 par. 2 the public supply contracts as the “public contracts other than those referred to in (b) having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products. A public contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations shall be considered to be a ‘public supply contract’. A public contract having as its object both products and services shall be considered to be a ‘public service contract’ if the value of the services in question exceeds that of the products covered by the contract”.

The same definition for the public supply contracts is given by the new general directive 2014/24/EC pursuant to articles 2 par. 8 and 3 par. 2.

Consequently, this type of public contracts is based on the products provided to the State under the condition that the value of the given products is higher than that of the services.


\(^{26}\) See supra note 24, pp. 55.
3.3 Public service contracts

Public service contracts are considered to be contracts conducted in writing in a burdensome manner between the institutions of public sector and the supplier of services, who has the obligation to execute the agreed works on behalf of the state or to offer to the State intangible goods or activities having the form of an integrated project, which activities belong to the tertiary sector (service supply).

Pursuant to article 15 par. 2 (d) of the Greek L. 4281/2014, “Public service contracts are those public contracts, other than public works or supply contracts, having as their object the provision of services referred to in Annex II of the Appendix A and in the Annex XVII of the Appendix B. Public contract having as its object in parallel goods and services referred to in Annex II of the Appendix A and the Annex XVII of the Appendix, is deemed as public service contract whether the value of these services exceeds that of the goods included in the contract”.

The same definition for the public service contracts is given by the directive 2004/18/EC, according to which ‘Public service contracts’ are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II. A public contract having as its object both products and services within the meaning of Annex II shall be considered to be a ‘public service contract’ if the value of the services in question exceeds that of the products covered by the contract. A public contract having as its object services within the meaning of Annex II and including activities within the meaning of Annex I that are only incidental to the principal object of the contract shall be considered to be a public service contract while pursuant to article 2 par. 9 of the new directive 24/2014/EC public service contracts “are those having as their object the provision of services other than those referred to in point 6”, i.e. the public works contracts.

As it seems, the object of the public supply contracts is determined in a negative way, i.e. whatever does not constitute a public work or supply contract, it is deemed to be a public service contract. In case that, elements of the both aforementioned types of contracts co-exist, the decisive criterion for the inclusion in a particular type of public contract is the value of the services.\textsuperscript{27}

\textsuperscript{27} The Decision in the Re Data Processing case, C-3/88, Commission v Italy, established the principle of separation of individual objects of the contract in order to determine the value of each and the opposite.
According to the European as well as the national legislation, the prerequisite for classifying a contract as a public service contract is the payment of the provider of services to be done directly by the contracting authority, without taking risks by the service provider as it was held by the ECJ in Parking Brixen GmbH case\textsuperscript{28}.

For instance, the contract between the state and the system controlled parking administrator does not constitute a public service contract since the consideration of the service provider is determined on the basis of a certain percentage of the revenue of the controlled parking. In other words, the provider takes the risk regarding the operation of the parking, which is also the main characteristic of the public service concession contract, as analyzed below.

\textsuperscript{28} See C-458/03 “Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG".
CHAPTER 2

THE NOTION OF PUBLIC SERVICE

1. Public Service: The concept

The examination of the notion of public service constitutes a necessary prerequisite in order to deepen in the concept of Public Contracts for the concession of the rights of exploration and exploitation of hydrocarbons.

The definition of public service is based either on the organized/structured criterion or on the essential/functional criterion\(^\text{29}\). More specifically, under the organized/structured criterion the public services include the organized, structured formation of the State and other public legal entities which are staffed by natural persons and own property and with which, the State as well as the public legal entities carry out their purposes exercising public powers. The organization and the function of the State and its legal entities under the Administrative Law are the characteristics of the organized/structured concept of the public service. Ministries, public hospitals, universities, tax authorities constitute public services pursuant to the aforementioned criterion. Under the essential/functional criterion the public services cover the activities of the public legal persons (or/and private natural or legal persons acting under concession), which (activities) are intended to provide goods or services to addressees for satisfying basic needs\(^\text{30}\) laid down by the legal order. By providing education, telecommunications, water supply, electricity, the State and its legal entities perform public services.

Inherent to the public service under the essential/functional concept is the satisfaction of public interest\(^\text{31}\). Public interest is a legal concept and it can be divided into the “general public interest” in case it refers to all the members of the society and into the “special public interest” in case it refers to specific members or parts of the society based on predetermined objective criteria (for instance, for residents in specific areas or for specific professionals).

\(^{29}\) Ep. Spiliotopoulos, Administrative Law, Nomiki Vivliothiki 2011 (Gr), pp. 16.

\(^{30}\) A. Tsoulaftis, Armenopoulos 1976, vol. A’ (Gr), pp. 726.

\(^{31}\) See supra note 2, pp. 92-93.
The purposes of public interest are identified by the legal order and are the purposes pursued by the public administration. The Constitution of Greece, first of all, establishes specific purposes in the objectives of the State. However, the main source of public interest purposes is the legislator, who, on the one hand, adopts rules governing the activities and the operation of the public administration in the light of serving the public interest and on the other hand, he assesses whether or not a specific activity is necessary for the satisfaction of the public interest. This means certainly that the legislator expresses the will of the respective government majority\(^\text{32}\).

Given that the treatment of the general interest, i.e. the satisfaction of the needs of individuals, constitutes the fundamental characteristic of the concept of public service, the exercise of public service under the essential/functional criterion belongs to the State\(^\text{33}\). The State estimates whether a collective need is substantial in order to characterize it as a need of public purpose ascertaining, also, that this specific need cannot be fully satisfied continuously and uniformly by private agencies. It would be extremely difficult for the private agencies to carry out public services due to the fact that the profit constitutes the primary purpose for the private parties, which means that their acts would be to the detriment of the public interest. And therefore, it would be possible that individuals conduct only the profitable parts of such services and refuse to exercise them in case they do not expect financial consideration. On the contrary, the public services (under the organized/structured criterion) pursue the fulfillment of the needs of the individuals not aiming to the profit. This does not imply that public services under the aforementioned criterion are free but that the profit can be a secondary pursuit or a possible consequence of the operation and the conduction of the public service.

The public service (under the essential/functional criterion) as owned by the State, has its own legal basis on article 14 of Treaty of Functioning of the European Union (TFEU), according to which “given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such


services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions”. This provision reflects the positive obligation of the European Union to ensure the operation of these services. The importance of the provision of public services by the State is also enshrined in article 93 TFEU “Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.”, in article 106 par. 2 TFEU “Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.” and in article 107 par. 2 and 3.

It appears necessary to distinguish the notion of public service (under the essential/functional criterion) from the concept of Public Service Obligations (PSOs) as provided in the TFEU. The PSOs belong to the services of general economic interest of article 106 (2) TFEU and constitute another expression of public service, as per the functional criterion and the new environment that has been formed after the liberalization of some markets. The public service has a wider meaning compared to the PSOs. Thus, PSOs are public services but it does not mean that any public service can be a PSO. The reason is that PSOs are assigned by the state to privates under the provisions of articles 106 and 107 TFEU. The aim of the European legislator, as revealed in the directives 2009/72/EC and 2009/73/EC is to ensure high standards of public service in compliance with market opening, to the protection of vulnerable customers, and to the full effectiveness of consumer protection measures. Similarly, the Greek L. 4001/2011, which incorporated the aforementioned directives into the national law, provides in article 3 par. 3 (c) that companies in the Electricity and Natural

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34 I. Gitsakis, Concession of Public Service and Public Work, Sakkoulas 2006 (Gr), pp.349.
35 See article 106 of TFEU.
Gas sector are required to operate and provide their services in order to promote healthy competition in the energy market, fulfilling the public service obligations entrusted to them. As a consequence, both the European legislator and the national one seek to ensure the continuous supply of services at a fair price for the consumers and simultaneously that the need of provision of public services will not be used as a means of obtaining illegal state aids. The fair price includes the real cost of the provision of the specific service plus a reasonable profit\(^{40}\), since these activities are not profitable in contrast to the public services not treated as PSOs and which can be object of a concession contract, as analyzed below. The inadequacy and the efficiency of the market is the key reason for the awarding of utilities. The Altmark case put the following criteria in order for a PSO not to be considered as a state aid: i) the recipient undertaking is obliged to discharge a PSO, which shall be clearly defined, ii) the way of the calculation of the compensation for the recipient undertaking shall be established in advance, in an objective and transparent manner to avoid unequal treatment against other undertakings, iii) the compensation shall be necessary in order to be covered all or part of the costs incurred in the discharge of the PSO including the relevant receipts and a reasonable profit for the provision of this obligation and iv) in case that a public procurement procedure is not chosen for the selection of the tenderer, the compensation for discharging a PSO must be determined on the basis of an analysis of the cost needed for the normal operation of an undertaking, which would discharge such an obligation, taking into account the relevant receipts and a reasonable profit\(^{41}\).

2. Organisation systems of public services

Historically, the first and most prevalent method for the organization of public services under the functional sense is the assignment of them by the State, by law or by regulatory acts after statutory authorization, to the public services under the structured criterion. In this case, the public service (as a public activity) is exercised en régie/ by direct labor\(^{42}\).

\(^{40}\) See supra note 36, pp. 95.

\(^{41}\) See C-280/00 “Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH ” and particularly the recitals 89, 90, 92 and 93.

\(^{42}\) See supra note 34, pp. 34.
This means that State using its own civil servants, bearing its own responsibility, based on its own resources from the state budget or the EU co-financing, organizes, operates and administers a public service which is not economically and administratively independent but it is embedded in the legal person of State.

The assignment of public services (under the functional criterion) to private companies constitutes the alternative way of the organization and operation of public services. The State chooses and accepts the direct and decisive participation of private natural or legal persons in the exercise of public power. This choice made by the State is based on different reasons.

First of all, taking up business and economic risk by the concessionaire constitutes an important motive for the State to assign public services to privates given that the concessionaire undertakes the management and the delivery of the public service on its own funds and responsibility. However, this is not a real reason for the assignment of public services due to the fact that the State, on the basis of the principle of the continuous dependence of the assigned public service by the grantor, cannot escape from the obligation to deliver a public service. Consequently, the risk comes back to the State since the state bears the obligation to ensure the continuous supply of public services pursuant to the relevant principle of Administrative Law.

The real reason for the concession is that the State lacks financial sources and know-how. Actually, through the concession contracts, the State does not burden the state budget creating new expenditure. On the contrary, it grants the exercise, the operation and the exploitation of public services or public works to private entities. In reality, the recourse of the State to the conduction of concession contracts is a one – way solution for the Administration in order to meet the real needs of people whose cost is estimated to be high.

Furthermore, another reason that makes the concession contracts the only choice for the State is the fact that some public activities present major technical and technological, research and scientific requirements that Public Administration cannot handle on its own. These activities are characterised by high quality and organization standards. It is characteristic that from the beginning of 20th century the specificity of these state activities was underlined, as according to a judgment of the Court of Appeal

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of Nafplio – Greece “the installation and operation of an plant for the production of electricity is not a common experience project but it requires special skills”\textsuperscript{44}. A similar comment was made by F.-P. Benoit “…l' Administration fait appel au concessionnaire avant tout pour ses qualités de technicien et de gestionnaire”\textsuperscript{45}.

As a consequence, we would say that the State has the obligation to resort to concession contracts under the condition that it has neither experience nor financial resources in order to effectively and efficiently meet people’s needs.

3. The Concession of Public Service (under the essential/functional criterion) in the Constitution of Greece

In the context of the recognition of the parliamentary incompatibilities, the Constitution of Greece explicitly recognizes the concession of public services to private natural or legal persons. More specifically, pursuant to article 57 par. 1 (d) “The duties of Member of Parliament are incompatible with the job or the capacity of owner or partner or shareholder or governor or administrator or member of the board of directors or general manager or a deputy thereof, of an enterprise that:……..(d) Exercises by concession a public service or a public enterprise or a public utility enterprise”.

The aforementioned provision belongs to that group of rules which establish the parliamentary incompatibilities, i.e. public functions, private projects and acts which are incompatible with the status of the Member of Parliament or the status of nominee representative.

The purpose of the constitutional legislator is to prevent the creation of economic relationship between the Members of the Parliament and economic factors which are dependent upon the State\textsuperscript{46}.

However, the provision of article 57 par. 1 of the Hellenic Constitution is not the only one on which can be based the concession of public service to private companies. In particular, an important number of constitutional rules have been adopted relating to the protection of individual and social rights, which, in conjunction with the general

\textsuperscript{44} Court of Appeal of Nafplio 32/1916, Themis 1916 (KZ’), pp. 457.
\textsuperscript{45} See supra note 34.
\textsuperscript{46} C. Mavrias, Constitutional Law, Sakkoulas 2004 (Gr), pp. 629.
constitutional provision of article 25 par. 1, creates the obligation of the State to ensure the effective exercise of these rights.

In other words, the protection of the individuals and social rights are of great importance for the State and as a consequence, in case that the State cannot fulfill this purpose, not only it can grant the exercise of public services to private parties but even more it is obliged to do so in order for the State to comply with the constitutional mandate. For this reason, policing services can be granted to private natural or legal persons according to articles 5 par. 2 and 17 par. 1 of Constitution of Greece regarding the protection of life and the protection of property respectively. Furthermore, the concession of public health services to companies can be established in article 21 par. 2 and 3 of the Constitution, which provides that “2…. persons suffering from incurable bodily or mental ailments are entitled to the special care of the State. 3. The State shall care for the health of citizens and shall adopt special measures for the protection of youth, old age, disability and for the relief of the needy”. Indeed, this latter provision entitles citizens to demand from the State that it fulfills its obligation by taking positive measures protecting their health. Similarly, the concession of a part of city and spatial planning public services to private agencies can be established in article 24 par. 2 of the Constitution of Greece due to the fact that pursuant to the above provision “The master plan of the country, and the arrangement, development, urbanization and expansion of towns and residential areas in general, shall be under the regulatory authority and the control of the State, in the aim of serving the functionality and the development of settlements and of securing the best possible living conditions”.

In the same way, articles 18 par. 1 and 2 and 106 par. 1 of the Constitution of Greece can be the legal basis for the concession of exploitation services of the sources of national wealth, such as the oil and mine deposits. According to the aforementioned provisions respectively “18.1 The ownership and disposal of mines, quarries, caves, archaeological sites and treasures, mineral, running and underground waters and underground resources in general, shall be regulated by special laws. 2. The ownership, exploitation and administration of lagoons and large lakes, as well as the general disposal of areas resulting from the draining of such, shall be regulated by law” and “106.1 In order to consolidate social peace and protect the general interest,

47 This provision constitutes the legal basis for the concession of public health services to private agencies.
the State shall plan and coordinate economic activity in the Country, aiming at safeguarding the economic development of all sectors of the national economy. The State shall take all measures necessary to develop sources of national wealth in the atmosphere, in underground and underwater deposits, and to promote regional development and to further especially the economy of mountainous, insular and frontier areas”.

Following all the above, the conclusion shall be that the State can or, even more, is obliged to exercise the public services (under the essential/functional criterion) through the concession of such services to private agencies. The crucial preconditions for the concession of public services are, on the one hand, the inability of the State to protect and sufficiently guarantee the constitutionally guaranteed human rights and on the other hand, the ability of the private agencies to ensure the effective and continuous exercise of these rights.
CHAPTER 3
CONCESSION CONTRACTS

SECTION 1
Concession Contracts in general

1. The concept of the concession contract

The concession contract is concluded between the state (or a public entity) and a private concessionaire, natural or legal person, by which the State either assigns to the concessionaire the management and development, on his own responsibility, of a public service in a functional sense or the manufacture and exploitation of a public work. The concessionaire undertakes, upon the so-called consideration, to keep in operation the public project or the public service throughout the period agreed in the concession contract. The consideration can be either the exclusive exploitation right of the public work or the public service or the aforementioned right in conjunction with a payment. The concessionaire undertakes the business risk as regards the exploitation of the public service or work.

More specifically, through the concession contracts, the public service, in functional meaning, is assigned to the concessionaire, namely a natural or legal person of private law according to the provisions of the concession contract. In other words, the public service or the public work is no longer performed by the state. The state or the public entity is substituted by the concessionaire with regard to the specific public service or work. The concessionaire bears the duty to perform the public service or the work for the user of that service or work. Such contracts constitute the concession contracts for the construction, exploitation, operation and exploitation of the motorways or the concession contracts for the management of parking services etc.

As a consequence, the concession of a public service or work does not entail only the concession of this service or work in a functional sense but it entails the concession in a formal sense. As mentioned above, the concessionaire is obliged to perform the public service or to execute the public work to the benefit of the people. This also differentiates
the administrative system of direct management of public service in functional terms from the concession contracts system since in the first case the state or its public entities are obliged to perform the public services in order to meet the public needs.

Through the concession contracts the state does not forgo the exclusive right of exercise of public power. On the contrary, the State assigns a part of the public power to the concessionaire, not unreservedly, in pursuit of vital objectives for the community.

2. Public works concession contracts and Public service concession contracts

The concession contracts by nature are related to the provision of services and not to the provision of products. In other words, their object is a specific activity which is assigned by the state to the concessionaire. They are divided into concession contracts of public works (e.g. the construction of a highway) and concession contracts of public services (e.g. the construction and operation of desalination system).

Pursuant to article 15 par. 3 and 4 of the Greek L. 4281/2014 “Concession Contract of Public Works is the contract which has the same characteristics with a public works contract except for the fact that the contracting exchange consists either solely in the right to exploit the work or in the aforementioned right together with the payment” and “Service concession Contract is a contract of the same characteristics of a public service contract except for the fact that the contracting exchange consists either solely in the right to exploit the service or in this right together with payment”.

As it is obvious, the main differentiation between the public works contracts and public service contracts on the one hand and the public works concession contracts and the public service concession contracts on the other hand lies in the nature of the contractual consideration.

The fact that the contract may provide that the grantor or the concessionaire collects revenues from the exploitation of the project cannot affect the qualification of the contract, provided that the revenues or part of them are paid ultimately to the contractor/concessionaire. Furthermore, taking up some business risk by the grantor does not affect the nature of the contract as a concession contract, provided that the

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48 D. Raikos, Law of Public Contracts, Sakkoulas 2014 (Gr), pp. 74.
49 See supra note 48, pp. 76.
business risk taken by the concessionaire is not nullified. This was the judgment of a series of decisions of the Greek Court of Audit which stated that the business risk has to exist even in a small rate or even if the State bears a part of the operating costs of the concession in various forms (e.g. guaranteed flat rate, fixed sum but which is paid on the basis of the number of users).

Similarly, the public services concession contracts have the same characteristics with the public services contracts except for the kind of the payment. In particular, the contracting exchange in the public services concession contracts is paid by the users/beneficiaries of the services provided. The consideration consists either solely in the right of exploitation of the service provided or in the exploitation right in conjunction with payment having as a result that the concessionaire undertakes the business risk associated with the exploitation of the project. As stated in a judgment of the Greek Court of Audit the public service concession contract differs from the public service contract only as far as the consideration which is not paid by the grantor but by third parties using the service in concerned.

3. **The concession contracts under the EU Law**

Pursuant to article 1 par. 2 (d) of the directive 2004/18/EC “Public service contracts are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II” while pursuant to par. 4 “Service concession is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment”. Further, article 17 of this directive provides that “without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4)”.

51 See the judgments of the Greek Court of Audit 420/2013, 421/2013 and 422/2013 and more specifically, the third recital of them.
53 See supra note 48, pp. 78.
54 See the judgment of Greek Court of Audit 2/2012.
55 See also the judgment of the GdE 282/2006, ECJ C-324/98 “Teleaustria and Telefonadress”, C-458/03 “Parking Brixen GmbH”, C-410/04 “ANAV”.
The directive 2004/17/EC provides in article 1 par. 3 (a) and (b) that “works concession is a contract of the same type as a works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in that right together with payment” and “a service concession is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment”. This is the first time that European Legislation adopts the aforementioned definition for the concession contracts as the previous directive 93/38/EC did not include such definition. Article 18 of the said directive provides also that “this directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities”.

Consequently, if a contract is characterised as a service concession for carrying out activities referred to in those articles, directives 2004/18/EC (art. 4) and 2004/17/EC (art. 18) are not applicable. Additionally, pursuant to article 7 of the new general directive 2014/24/EC, its provisions shall not apply to the contracts of the so-called excluded sectors, among of which is the hydrocarbon sector. In this case, the fundamental rules of TFEU are applicable as well as the principle of equal treatment, the principle of prohibition of discrimination based on nationality and the principle of transparency pursuant to articles 43 and 49 of TFEU.

A contract is a concession contract under the meaning of article 1 par. 4 of 2004/18/EC and of the article 5 par. 1 of the new directive 2014/23/EC if the agreed kind of payment is the concession of the right to exploit the relevant service to the concessionaire and if the concessionaire takes the risk exploiting the service provided. Therefore, passing of the business risk to the concessionaire constitutes a prerequisite for the characterization of a contract as a concession contract. The European Court of

56 See supra note 48, pp. 81-82.
57 See supra note 1, pp. 73 and par. 2.1.2 of the Green Paper of the Commission of European Communities on Public-Private Partnerships and Community Law on Public Contracts and Concessions, pp.11.
58 See C-274/09 “Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau”, C-234/03 “Contse SA, Vivisol Srl, Oxigen Salud SA v Instituto Nacional de Gestión Sanitaria (Ingesa), formerly Instituto Nacional de la Salud”.

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Justice in the Wasser case\textsuperscript{59} stated that the fact that the supplier does not receive consideration directly from the contracting authority, but he is entitled to collect payment under private law from third parties, is sufficient for the contract in question to be categorised as a ‘service concession’ within the meaning of directive 2004/17/EC where the supplier assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited taking into account the detailed rules of public law governing that service. The payment from third parties is one means of exercising the right, granted to the provider to exploit the service\textsuperscript{60}.

\textsuperscript{59} See C-206/08 “Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH”.

\textsuperscript{60} See also C-231/03 “Consorzio Aziende Metano (Coname) vComune di Cingia de’ Botti”, C-458/03 “Parking Brixen GmbH vGemeinde Brixen and Stadtwerke Brixen AG”, C-382/05 “Commission of the European Communities v Italian Republic”, C-196/08 “Acoset SpA”.

SECTION 2

Types of contracts for the rights of exploration and exploitation of hydrocarbons internationally

1. General

The international bibliography has categorized the contracts for the concession of the rights of exploration and exploitation of hydrocarbons in the following three types: i) the concession contracts/agreements, ii) the production sharing contracts/agreements and iii) the service contracts.

2. The concession contracts/agreements

This type of contract belongs to the royalty/tax system, according to which the State (the grantor) grants to the private oil company (the concessionaire) the rights of exclusive exploration and exploitation of hydrocarbons in a specific territory and for a specific time. The concessionaire performs the relevant contract with its own expense bearing the economic risk for the execution of the project. In addition, the concessionaire has the obligation to pay the agreed consideration to the State, which is royalties, either on cash or kind. Furthermore, obligation for more payments may be claimed, such as surfaces fees or production bonus. The hydrocarbons extracted belong to the concessionaire at the wellhead. USA provides the possibility of granting rights over the hydrocarbons over the deposit, i.e. before extracting.

3. The Production Sharing Contracts

In the framework of the contractual system, the internationally known as Production Sharing Contracts (PSCs) or Production Sharing Agreements (PSAs) or Exploration Production Sharing Agreements (EPSAs) or Exploration and Development Production

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61 T. Kosmidis, ENERGY: Networks and Infrastructure, Nomiki Vivliotheiki, 2014 (Gr), pp.425.
62 See supra note 61.
Sharing Agreements (EDPSAs) are embedded. This type of contract provides that the ownership over the extracted hydrocarbons belongs to the State and only a part of this quantity belongs to the concessionaire after the allocation of the production. As in the concession contracts, in the PSCs the concessionaire takes the economic and business risk of the project and he is obliged to pay taxes or other amounts\textsuperscript{63} to the State. The fact that the State owns the hydrocarbons extracted is the crucial factor which leads the host Governments to choose this type of contract aiming at the better satisfaction of the public interest.

4. The Service Contracts

The Service Contracts also belong to the contractual system as the Production Sharing Contracts but they differ from these as far as the consideration of the concessionaire in concerned, which consists in cash and not in a share of the production. They are divided into pure service contracts and risk service contracts depending on whether the agreed consideration is a flat fee, i.e. a fixed fee pursuant to the contract or it is based on profit, i.e. it depends on the profit of the project.

This type of contract is not preferable on an international level since the host State has to pay the contractor in cash and as a consequence, it does not want to bear such a high expense.

5. The Model Agreement

The energy sector as regards the exploration and exploitation of hydrocarbons belongs to the category of high risk investments that requires special treatment by the host state. Especially for the host states which seek to attract investors, it is necessary to ensure a stable legislative investment framework. The Model Agreement serves this purpose since it includes all those features that ensure legal certainty.

More specifically, the Model Agreement is a draft of the concession contract which is uploaded in the website of the competent ministry in order for the interested parties to

\textsuperscript{63} See supra note 61, pp. 426.
know in advance the context of the contract as well as the whole procedure to be applied.

The Model Agreement includes the provisions of law in force governing the contractual relationship between the parties, i.e. between the State and the contractor, all the economic, technical and legal prerequisites for the performance of the project. In addition, it includes the rights, the taxes, the public benefit, environmental issues and the legislative framework for the labor policy, health protection and security of employers. Its terms are divided into compulsory and not compulsory depending on whether they can be negotiated.

According to the rules of Good Practice in the hydrocarbons sector the Model Agreement takes the form of an administrative act and in particular, the form of a ministerial decision. By this way, the contract acquires regulatory force\(^6\).

\(^6\) Th. Panagos, Exploration and Exploitation of Hydrocarbons: The regulatory framework in Greece, Sakkoulas 2014 (Gr), pp. 76.
SECTION 3

Exploration and Exploitation of Hydrocarbons under Greek Legislation

1. The concession of the rights of exploration and exploitation of hydrocarbons under L. 2289/1995, as applied.

The discovery and the exploitation of hydrocarbons is a hazardous venture due to its pretentious and complicated requirements on a technical, economic and geostrategic level. For these reasons the exploration and exploitation of hydrocarbons are burdened with high national, international and finally worldwide importance, especially in Greece, which faces the financial crisis.

Pursuant to the Greek legal framework and more specifically the L. 2289/1995, as amended and applied, the hydrocarbons rights are divided into two categories. On the one hand, there is the right to prospect for hydrocarbons and on the other hand, the right of exploration and exploitation of the hydrocarbons.

a. The right of research

Pursuant to the aforementioned law (article 2 par. 1) the Hellenic Company for Hydrocarbon Management in the Greek territory, called “EDEY SA”, is competent to manage, on behalf of Greek Government, the research, exploration and exploitation rights of hydrocarbons.

More specifically, pursuant to par. 5 of article 2 of L. 2289/1995, “EDEY SA” launches a call for submission of applications of interest to prospect for hydrocarbons. The research right includes the localization of the hydrocarbons in a specific area by any means except drilling. The call must have been approved by the competent Minister and subsequently, it is published in the Greek Official Government Gazette as well as in the Official Journal of the European Union. The deadline for the submission of the applications cannot be less than 90 days. The call, which can be issued upon an interesting party’s request, shall include as a minimum content the specific area for research of hydrocarbons, the terms and obligations of licensee, the selection criteria,

the entry fee paid, the contract bond and the licensing duration and expiry. The license for the research is granted for 18 months and for a maximum of 4,000 km² for land and of 20,000 km² off shore.

It is possible the relevant call for submission of applications is not published in case that the specific area of research is available permanently and this has been known in the initial call or the area has been abandoned by the licensee or the administrative procedure has not resulted to research licensing.

The licensing procedure is a strict administrative procedure which leads to the obtaining of the license of research for hydrocarbons by the private company. The research license is an administrative act with which “EDEY SA” grants the research right of hydrocarbons to the contractor. Moreover, the research right can be granted to more than one applicant by “EDEY SA”66. The licensee is obliged to submit to “EDEY SA” a research program in stages while at the end of each stage the submission of copies of all technical and scientific data and findings arising during each search stage is required. Within three months from the expiry of the license, the grantor shall submit a detailed report with all the official data and information as regards the results of the research. Any violation or breach of these obligations by the licensee leads to the revocation of the license and forfeiture of the guarantee letter to the State (article 2 par. 8 of L. 2289/1995).

b. The right of exploration and exploitation of hydrocarbons

Paragraph 17 of article 2 of L. 2289/1995 provides that “EDEY SA” grants the exploration and exploitation rights of hydrocarbons as follows:

i) After a call for tender, approved by the Minister of Environment, Energy and Climate Change published in the Official Government Gazette and sent for publication in the Official Journal of the European Union. The deadline for tenders specified in the call may not be less than ninety (90) days after the last publication.

ii) After request submitted by a party interested, regarding an area not included in the call tender. In this case, if the party’s request is accepted, “EDEY SA”

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issues a call tender following the procedure described in the aforementioned case i) and

iii) After an open door procedure for expression of interest when a specific area for the concession is available on a permanent basis or it has been the subject of a previous procedure which did not result in the conclusion of a lease contract or a production sharing contract or it has been abandoned by the contractor, if he has withdrawn from the contract or he has denounced it. These areas are disclosed to the public through a notice of the Minister of Environment, Energy and Climate Change, published in the Official Government Gazette and in the Official Journal of the European Union including all the minimum basic requirements of the concessions as well as any relevant specific information, such as the selection criteria of the grantor, the amount of the lease (in case of a lease contract), the share of the produced hydrocarbons given to the State (in case of a production sharing contract). The parties interested may tender for concession in more than one area. Tenders are submitted until the last working day of the first and second half of each calendar year. Within thirty (30) days from the end of the semester for a specific area, the Minister of Environment, Energy and Climate Change announces that this area is excluded from the areas available as above, if a concession is in process. Tenders are evaluated and the most advantageous one for the state is selected, after negotiations with the interesting party based on the criteria of the call.

Despite the fact that “EDEY SA” represents the State and acts on behalf of it, the final approval of the concession contracts belongs to the Minister, since he can deny, in its discretion, the selection of the concessionaire if the submitted tenders are not considered to be advantageous for the State (article 2 par. 21 of L. 2289/1995). Furthermore, if the Minister does not approve the concession contracts signed between “EDEY SA” and the concessionaire, these contracts are absolutely null and void and they do not produce any legal result (article 2 par. 39 of L. 2289/1995).
2. **Contract models for the rights of exploration and exploitation of hydrocarbons under L. 2289/1995, as applied.**

The paragraph 10 of article 2 of L. 2289/1995, as applied, establishes the rule of numerus clausus of the conventional models for the rights of exploration and exploitation of hydrocarbons. More specifically, the aforementioned paragraph provides that “The right of exploration and exploitation of the State is granted through:

- a) the conclusion of a lease contract or
- b) the conclusion of a sharing production contract”.

As derived from the provision itself, the rights of exploration and exploitation of hydrocarbons belong to the State and they are not transferable. Instead, the use of those rights is granted to private companies on a fee for a specific period of time and after that period they come back to the State. It is a fact that these procedures for the concession of the rights of exploration and exploitation of hydrocarbons have important particularities, which, however, ensure the security of these long-term transactions, the proper functioning of the investment activities since they fall within the field of public law by creating still further a culture of security and reliability through the double checking of the procedures either in the level of public administration (internal control) or in the court level (external control).

2.1 **The lease contract under L. 2289/1995**

Through the lease contract the State grants to the contractor the exclusive use of the rights of exploration and exploitation of hydrocarbons in a specific area as described in the concession contract. The concessionaire, who is the lessee, undertakes to execute the aforementioned rights granted to him. After the conclusion of the lease contract the lessee’s rights and obligations are activated. The contractual model of the lease contract was used in the concession contracts in Ioannina (Greece), Katakolo (Greece) and Gulf of Patra /Patraikos (Greece) in 201267.

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67 The concession contracts in Katakolo (L. 4298/2014), in Gulf of Patra (L. 4299/2014) and in Ioannina (L. 4300/2014) constitute the 1st International Round of Concession of the rights of exploration and exploitation in these areas.
2.1.1 The legal nature of the lease contract

Despite the fact that the legal term of “lease contract” is used for the concession of exploration and exploitation rights of hydrocarbons, it shall not be confused with the common lease contract as described in the Greek Civil Code.

First of all, the reason is that, pursuant to article 574 of the Greek Civil Code “lease contract” refers only to leasing of things. As a consequence, given that the object of the concession is not a thing but the rights of exploration and exploitation of hydrocarbons, the aforementioned article does not apply.

This perspective is adopted by L. 2289/1995 as well as the P.D 127/1996, which was issued after delegation of the above law and specifies the leasing terms of the rights of exploration and exploitation of hydrocarbons. More specifically, paragraph 29 of article 2 of L. 2289/1995 and article 10 of the P.D. 127/1996 provide an explicit exclusion according to which the relevant provisions of the Greek Civil Code regarding the lease contract (articles 574 C.C. etc) are not applicable in the case of the concession contracts of the exploration and exploitation rights of hydrocarbons. These provisions of Civil Code apply only in the case of irregular evolution of the contractual relationship.

In addition, the fact that the application of the provisions of Greek Civil Code for the lease contract is excluded as regards the concession contracts of hydrocarbons leads to the conclusion that the special legislation of administrative law, i.e. L. 2289/1995, is applicable in hydrocarbons concession contracts, while in parallel, in case of legislative vacuum, the general provisions for public contracts are applicable.

The concession contracts under the form of the lease contract of the rights of exploration and exploitation of hydrocarbons are equivalent to the lease contract of revenue producing object as provided in article 638 of Greek Civil Code. More specifically, lease of revenue producing object is defined that, with which the use of another thing or the use of a right as well as the fructification of them is granted in return for lease. We would say that this specific provision places as “compensation” for the concession of the rights, the enjoyment of benefits stemming from the concession by the grantor. In the case of the concession contracts of the rights of exploration and

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69 Irregular evolution of the contractual relationship can be considered to be the concessionaire’s inability to provide, concessionaire’s default to meet with requirements, defective performance of the provision by the concessionaire.
exploitation of hydrocarbons, the benefit lies in the consideration received by the grantor and which can be either a percentage of the hydrocarbons produced in the contractual territory or surface fee or even a mixed system\(^{70}\).

Consequently, by examining the substance of the lease contract and mainly its functional purpose, which is the concession of right of exercise of petroleum activities, i.e. the exploration and exploitation of hydrocarbons and given that the State gains royalties, we conclude that the legal nature of the concession contracts under consideration is similar to that of article 638 of the Greek Civil Code. Besides, as characteristically referred in a judgment of the Conseil d'Etat\(^{71}\), article 970 of the Greek Civil Code sets the basic rule of Public Law according to which the concession of special rights of things of public use by any administrative authority to natural or legal persons is legal only if and so long as, after the assignment of these rights, the public use of those things continues to be served or at least it is not invalidated\(^{72}\).

### 2.1.2 Obligations of the lessee

Following the signing of the lease contract, the rights of exploration and exploitation of hydrocarbons are becoming simultaneously the basic obligations of the lessee. The lessee first of all undertakes the obligation to design and execute the exploration and exploitation of hydrocarbons in the contractual territory. Moreover, he shall bear the costs and the risk of the execution of the works throughout the duration of the contract\(^{73}\). All the relevant works are performed on the basis of programs and budget which have been submitted to the grantor and have been approved by the latter.

The lessee shall provide for all the technical means, material, personnel and funds required for the fulfillment of his obligations. In any case, he brings exclusively the financial risk and especially, in case that no commercially exploitable deposit has been discovered or in the case of insufficient production from a deposit\(^{74}\).

Pursuant to par. 25 of article 2 of L. 2289/1995, the lessee has the obligation to pay the agreed royalty to the lessor. In particular, the royalty is certainly due to the lessor

\(^{70}\) Th. Panagos, The Exploration and Exploitation of Hydrocarbons – The regulatory framework in Greece, Sakkoulas 2014 (Gr), pp. 73.

\(^{71}\) CdE 2795/2012.


\(^{73}\) See supra note 70, pp. 73.

\(^{74}\) See paragraphs 22, 23 and 24 of article 2 of L. 2289/1995.
regardless of the profit made or not by the lessee\textsuperscript{75}. It can be agreed either in kind or in cash, at the discretion of the lessor\textsuperscript{76}. In the first case, it is fixed in a percentage of the quantity of the hydrocarbons produced by the lessee and in the second one, it is fixed in a percentage of their value as provided in the lease contract. Under the notion of “quantity produced”, the quantity is considered which is ready to be marketed after the abstraction of the hydrocarbons consumed or lost, without fault, during the production procedure. The value of the hydrocarbons produced is calculated in accordance with article 7 of P.D. 27/1996\textsuperscript{77}. The royalty can be scaled taking into account, cumulatively or alternatively, the production level, the geographical and geological characteristics of the area as well as the co-efficient of income and expenses\textsuperscript{78}.

2.1.3 Ownership of the Hydrocarbons

Hydrocarbons constitute a source of national wealth and belong to the State assets\textsuperscript{79} as provided in articles 1 par. 2, 18 par. 1, 106 par. 1 (2) of the Greek Constitution and in article 2 par. 1 (1) of L. 2289/1995. Similarly, recital 4 of directive 94/22/EC clearly provides that member states have sovereignty and sovereign rights over hydrocarbon resources on their territories.

In the case of the concession contracts under the contractual model of the lease contract, the ownership on the hydrocarbons produced by the lessee is regulated pursuant to par. 12 of article 7 of L. 2289/1995 and par. 3 of article 2 of P.D. 127/1996. Particularly, if the agreed royalty shall be paid in cash, the lessee becomes the owner of the hydrocarbons produced upon obtaining their seizin. In other words, the ownership of the hydrocarbons belongs to the lessee when he acquires the possession of them and exercises power over them as reputed owner. If the agreed royalty shall be paid in kind, according to the lessor’s choice, the lessor becomes co-owner of the quantity of the extracted hydrocarbons which corresponds to the contractual royalty by the time of his choice, unless otherwise specified in the lease contract. The hydrocarbons belonging to

\textsuperscript{75} See paragraph 27 of article 2 of L. 2289/1995.
\textsuperscript{76} See supra note 70, pp.74.
\textsuperscript{78} See par. 26 of article 2 of L. 2289/1995.
\textsuperscript{79} Th. Fortsakis, Energy Law, Sakkoulas 2009 (Gr), pp. 275.
the state cannot be confiscated while those belonging to the lessee can be object of confiscation\textsuperscript{80}.

\textbf{2.2 The Production Sharing Contract under L. 2289/1995}

Paragraph 10 of article 2 of L. 2289/1995 provides the conclusion of production sharing contracts as a second way for the concession of the rights of exploration and exploitation of hydrocarbons by the State. The concessionaire, i.e. the International Oil Company undertakes as a contractor the feasibility and exercise of research and exploitation of hydrocarbons in the contractual areas obtaining simultaneously the corresponding exclusive right (concession right)\textsuperscript{81}.

\textbf{2.2.1 The legal nature of the Production Sharing Contract}

Given that the International Oil Company undertakes the feasibility and exercise of research and exploitation of hydrocarbons in the contractual areas and the income is divided as per the terms of the contract upon the discovery of the product, this type of contract is similar to the work contract and more specifically, it is characterized by law as a “works concession”\textsuperscript{82}. Indeed, pursuant to paragraph 5 of article 1 (a) of the new directive 2014/23/EC, which adopts the relevant definition of paragraph 3 (a) of article 1 of the directive 2004/17/EC, “a works concession is a contract of the same type as a works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in that right together with payment”. However, it shall not be confused with the works contract of the Greek Civil Code, since L. 2289/1995 states in its paragraph 38 of article 2 that the provisions of the Greek Civil Code on lease contracts and execution of public works are not applicable.

\textbf{2.2.2 Obligations of the concessionaire}

The concession right granted by the State to the International Oil Company constitutes simultaneously the basic obligation of the concessionaire, who has all the technical means, personnel, materials and funds required for the performance of his

\textsuperscript{80} See article 2, par. 15 (2) of L. 2289/1995.
\textsuperscript{81} Th. Panagos, Handbook of Energy Law, Thessaloniki 2015, pp. 52.
\textsuperscript{82} See supra note 70, pp. 78.
obligations. Moreover, the concessionaire bears exclusively the economic risk of the project, especially when no commercially exploitable deposit is discovered or when the production of a deposit is insufficient. He also manages the whole project according to the rules of science and art and the international standards for the exploration and exploitation of hydrocarbons on the basis of annual work program and budget approved by the employer – grantor, who shall control the progress of the execution of the work as well as its cost\(^{83}\).

### 2.2.3 The consideration

In the case of the works contract, the contractor has the obligation to execute a specific work and the employer undertakes to pay the contractor for the work delivered as agreed between them\(^{84}\). Within the framework of the Production Sharing Contract the consideration is fixed after the discovery of the product and it is a percentage of the extracted hydrocarbons, which is removed from the total quantity of the hydrocarbons produced. In other words, the consideration received is not in cash but in kind, resulting from the sharing of the production.

In particular, the distribution of the production is carried out in two stages. At first stage, from the whole production the part of it which is called “cost oil”\(^{85}\) is removed, i.e. the part of the production of the hydrocarbons extracted, which covers the concessionaire’s expenses. At second stage, the rest part of the production (after the removal of the cost oil), which is called “profit oil”, is shared between the employer and the concessionaire on the basis of agreed and pre-fixed percentage (sharing of the production). Consequently, the share of the contractor is equal to the part of the production remaining after the deduction of the cost oil and the share of the employer from the whole production, as described below:

\[
\text{Share of contractor} = \text{Whole production} - (\text{“cost oil”} + \text{employer’s share})
\]

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83 See par. 30 and 31 of article 2 of L. 2289/1995.
84 For the notion of works contract see article 681 of the Greek Civil Code.
Furthermore, the contractor may be required to sell the employer’s share on behalf of the latter. The way of the calculation of the employer’s share in cash is specified in the production sharing contract\(^\text{86}\).

### 2.3 Comparison between the two types of concession contracts: Lease Contracts and Production Sharing Contracts

By examining the aforementioned two types of contracts for the concession of the rights of exploration and exploitation of hydrocarbons it is found that the main difference between the lease contracts and production sharing contacts lies in the kind of the consideration received by the grantor.

As mentioned above, in case of the lease contracts the consideration consists in royalties, which can be either in cash or in kind or in a mixed system while in case of production sharing contracts the consideration consists exclusively in a percentage of the production.

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\(^{86}\) See par. 36 of article 2 of L. 2289/1995.
SECTION 4

The contracts of concession of the rights of exploration and exploitation of hydrocarbons from the perspective of Public Law, European Union legislation and the jurisprudence of European Court of Justice

1. General

A contract is characterized as a public one if the organic criterion and the functional criterion are cumulatively fulfilled\textsuperscript{87}. According to the organic criterion, a contract is considered to be public if, at least, one of the contracting parties is the State or a legal person of public law, while, according to the functional criterion, the public character of the contract lies on the fact that the State pursues to achieve purposes of public interest through contracts which are governed by special legal status by ensuring a leading position for the State or its legal persons in comparison with the other contracting party. The lease contract and the production sharing contract belong to the contracts of Public Law since they meet the requirements of the aforementioned criteria. More specifically, as regards the organic criterion, the one contracting party is the State represented by “EDEY SA”. As far as the functional criterion, these specific activities are integrated in the exercise of the sovereign power of the State\textsuperscript{88}, highlighting especially the fact that hydrocarbons belonging to the State cannot be seized because they constitute public goods.

In addition, on the external form of these contracts, they shall be concluded under a specific, strict, administrative procedure which underlines their public character.

Finally, the administrative courts are competent for the resolution of the disputes arising during the administrative procedures while the recourse to the arbitration is compulsory for the disputes arising during the execution of the contract\textsuperscript{89}.

\textsuperscript{87} D. Raikos, Law of Public Contracts, Sakkoulas 2014 (Gr), pp. 23.
\textsuperscript{88} Ep. Spiliotopoulos, Administrative Law, Sakkoulas 2002 (Gr), pp. 201.
\textsuperscript{89} See supra note 70, pp. 82.
2. Service contracts and public works contracts based on their object

The object of the lease contract is the exploration and exploitation of the hydrocarbons. More specifically, the State leases these specific rights to a private International Oil Company. As a consequence, it is not an object which is leased but the supply of a service, which is assigned to international oil companies, given that the State cannot provide them. The exploration includes the discovery of existing deposits of hydrocarbons by any method, including drilling ⁹⁰, while the exploitation includes the mining and processing of the hydrocarbons as well as their storage and transport having as final aim their sale. All the aforementioned activities fall into the meaning of service since the lessee, using his own technical and scientific means, aims at specific results which is the supply of specific services to the State/lessor. The Greek Conseil d’Etat stated that the water supply, energy and telecommunications are goods, vital for the society, the provision of which constitutes exercise of public service either provided exclusively by the State or its legal persons or by private entities through concession contracts ⁹¹. They cannot be considered as public works due to the fact that the public works refer to the building infrastructures of a State as far as the transport, communication and energy networks are concerned and which are connected to the soil, subsoil and submarine area. Those works are constructed in order to be used by the citizens improving their living conditions ⁹². Public works include by their nature technical features which are not compatible with the concept of public services. Through a wider interpretation, we would say that the public work constitutes the tangible result of a procedure starting with the initiative of the State in a broader context for supply of services by the State to the people. Both the State and the contractor focus on the outcome of this contract which is a specific work as a result of a sum of building works or civil engineering works having an economic or technical function.

In addition, Annex XII (class 45.12) of directive 2004/17/EC as well as Annex II (class 45.12) of the new directive 2014/24/EC expressly excludes from its scope the activities of drilling of production oil as well as oil and gas field exploration,

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⁹⁰ See supra note 81, pp. 52.
⁹¹ See the judgment of CdE 158/1992.
⁹² See par. 2 of article 1 of L. 3669/2008.
geophysical, geological and seismic surveying. Therefore, these activities do not fall within the meaning of public work.

Furthermore, directive 2004/17/EC gives the definition of the service contracts provided in Annex XVII all the activities which constitute services according to this definition. Among other activities, research and development services belong to the category of the service contracts. This means, at first sight, that the exploration and exploitation of hydrocarbons could be incorporated into the meaning of the service contracts as governed by directive 2004/17/EC. The same considerations are adopted by the directive 2014/24/EC, which defines the notion of service contracts in a negative way treating, pursuant to paragraph 9 of article 1, as service contracts all those contracts having as their object the provision of services other than of public works while in article 14 expressly refers to the services of research and development as object of this directive.

3. The element of competition

However, the aforementioned directive shall not apply in the case of the activities of exploration and exploitation of hydrocarbons due to the fact that article 30 of the directive 2004/17/EC as well as article 34 of the new directive 2014/25/EC, to which article 7 of directive 2014/24/EC refers, states that the activities of exploration and exploitation of hydrocarbons, which are directly exposed to competition on markets, where access is not restricted, shall not be subject of this directive. The fact that those activities are directly exposed to competition is proved by the fact that directive 1994/22/EC was transferred in the national (Greek) legislation. Furthermore, in recital 12 of this directive it is provided that aim of the directive is to strengthen the competition in the sector of exploration and exploitation of hydrocarbons by taking measures that ensure the non-discriminatory access to and reinforce the integration of the internal energy market. This was the basic aim of L. 4001/2011\textsuperscript{93}, the Explanatory Statement of which mentions that the purpose of said law is to attract experienced and financially strong investors in the hydrocarbons sector through mechanisms and


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procedures that guarantee transparency, equal treatment of the investors and the reduction of bureaucracy.

In order to consider that an activity is directly exposed to competition the criteria foreseen in the provisions of the Treaty of Functioning of European Union regarding competition apply. Such criteria can be the special characteristics of specific products or services, the availability of alternative products or services, their prices, the real or possible existence of more than one supplier of these products/providers of these services.

The access to the market shall not be considered limited when the relevant provisions of the European Union legislation are applicable as referred to in Annex XI of P.D. 59/2007. More specifically, paragraph Z of the aforementioned Annex specifies the directive 94/22/EC as applicable in the sector of exploration and exploitation of hydrocarbons.

When it is not possible to draw up the presumption that there is not limited access on a given market according to the provisions of the Treaty of Functioning of European Union, it shall be proven that the access to that market is free de facto and de jure.

4. Conclusion

As a consequence, the special applicable legislative framework regarding the exercise of exploration and exploitation rights of hydrocarbons dislodges the implementation of the new directive 2014/24/EC and the previous one 2004/17/EC in this energy sector since, on the one hand, these activities are services, and in particular concession service contracts due to the kind of the consideration paid, expressly excluded from the application of the directive 2004/17/EC and, on the other hand, they are not carried out in a restricted market not exposed in competition.

The Suspension Committee of the Conseil d’Etat of Greece adopted an opposite view as regards the legal nature of the contracts for the exercise of the rights of exploration and exploitation of hydrocarbons bringing these activities into the meaning of public works. The Court accepted that the activities of exploration and exploitation of hydrocarbons constitute infrastructure projects included in the concept of public works.

94 D. Raikos, Public Contracts Law, Sakkoulas 2014 (Gr), pp. 239.
as they contribute to the development of productivity of the country and to the growth of the national wealth and they are technically connected with the soil, the subsoil or submarine area and include the necessary works, constructions and the related research, which require technical knowledge and procedures\(^\text{95}\).

However, this judgment ignored the fact that the public contracts for the exploration and exploitation of hydrocarbons do not aim at the construction of oil platforms which are actually connected with the soil or subsoil or seabed. On the contrary, they are used for the exploration and exploitation of hydrocarbons. These are the means leading to the intended result and which (the result) constitutes the object of the concession contracts for the exploration and exploitation of hydrocarbons. As characteristically referred in the judgment of ECJ in the Gestion Hotelera case\(^\text{96}\), a contract can be regarded as a public works contract only if its purpose consists in the construction of a work, while if these works are executed complementarily and they are not the subject of the contract, this contract cannot be treated as a public works contract. The crucial element for the distinction of the contractual types and the law applicable should be the exploitation of the work constructed by the contractor\(^\text{97, 98}\).

Concluding, as mentioned in the interpretative notification of the Commission on directive 92/50/EC, the service concession contracts refer to activities which, by their nature, their object and the special legislation applied to them, are considered to be subject to the responsibility of the State\(^\text{99}\). In public services concessions which are tendered or awarded as from 18.04.2014, directive 2014/23/EC is applicable, the transposition period of which expires on 18.04.2016.

5. **The concession contracts under the light of case law of the European Court of Justice**

Given that directive 92/50/EC did not include a definition for the concession of public services while a relevant provision was adopted in directive 2004/17/EC, the ECJ

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\(^{95}\) See the judgment of CdE 195/2013.

\(^{96}\) See C-331/92 “Gestión Hotelera Internacional SA” (recital 27).

\(^{97}\) See supra note 18, pp. 567.


interpreted the notion of concession of public service through a series of decisions which assist us in identifying the legal nature of the concession contracts of the rights of exploration and exploitation of hydrocarbons.

More specifically, the ECJ in Gemeente case100, which referred to the legal nature of a contract for the removal and treatment of household refuse, stated that, due to the fact that ARA (the private company) was directly paid by the contracting municipality and not through a concession of the exploitation right of this service, this contract constituted a concession contract of public service and thus it did not apply the above directive. In other words, the court laid down as a crucial criterion for the legal characterization of the contract the kind of the consideration paid to the private undertaking. The same reasoning was adopted by the ECJ in RISAN. case101, according to which the solid urban waste collection service does not concern the award of a public service contract but the award of a public service concession.

In “Telaustria and Telefonadress” case102, which referred to the conclusion of a contract for the production and publication of printed and electronically accessible lists of telephone subscribers, the court held that that contract was a concession contract of public service due to the contractual consideration which was constituted in the right of exploitation of the service provided.

In 2003, the Court took a further step by adding to the meaning of the concession contract of public service the notion of the business risk taken by the provider of the service. In particular, in Parking Brixen case103, the court gave the judgment that the award to the Brixen AG of the management of two car parks within the municipality of Brixen is a public service concession since the provider of the service paid by third parties using the car parks in question takes the risk of operation of the service and thus, this is characteristic of the public service concession.

In addition, the ECJ in the case Commission v Italy104 characterized the award of licenses for horse-race betting operations in Italy as a public service concession referring to the judgment in the joined cases Placanica105, Palazzese106, Sorricchio107.

100 See C-360/96 “Gemeente Arnhem and Gemeente Rheden v BFI Holding BV”.
102 See C-328/98 “Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG”.
103 See C-458/03 “Parking Brixen GmbH v Gemeinde Brixen/ Staatbwerke Brixen AG”.
104 See C-260/04 “Commission of the European Community v Italian Republic”.
105 See C-338/04 Placanica.
and which held that the award of the service of managing of betting to private company without a new tender position infringes articles 49 and 56 TFEU.

To conclude, following the interpretation of the ECJ judgments, the concession contracts of the rights of exploration and exploitation of hydrocarbons constitute service concession contracts since the consideration consists either solely in the right to exploit the service or in that right together with payment bearing in mind that the concessionaire also takes the risk of operation of the project.

106 See C-359/04 Palazzese.
107 See C-360/04 Sorricchio.
CONCLUSIONS

As analyzed in the chapters of this dissertation, the Administration, aiming at the better and more effective satisfaction of public interest and collective needs, chooses the conclusion of concession contracts allowing, by this way, to private companies to participate in the exercise of public power. Through concession contracts the Administration “shares” the public power to private entities making them co-regulators and assistants of the administrative action. Therefore, economic development is achieved since the Administration cannot fulfill its goals on its own means and financial resources.

The public service, in the general concept of the concession contracts, is treated under the essential/functional criterion and not under the structured/organized criterion. The State, seeking to attract more and more investors, grants to private sector entities the exercise and the execution of public services under the aforementioned meaning.

The concession contract which combines the administrative control with the flexibility and the efficiency of private action was established as the most effective way for the exploration and exploitation of hydrocarbons. Hydrocarbons belong to the state property and constitute a key factor for the regulation of the economic and political life of a country, especially in the territory of which they exist. Their exploitation contributes to the rabid increase of the Gross National Product (GNP) strengthening simultaneously the development of regions where hydrocarbons detected.

For these reasons, the existence of a clear institutional and regulatory framework for the exploration and exploitation of hydrocarbons is necessary since this specific sector is of high risk, capital intensive and requires specialized technology and knowledge. This particularity of the oil sector could be a reason for its exclusion from the scope of the European directives 2004/17/EC and 2004/18/EC.

As mentioned in Chapter 3 of this thesis, article 7 of directive 2004/17/EC expressly excludes the implementation of this directive in the case of exploration and exploitation of hydrocarbons.

These activities are not treated as public works. We are led to this conclusion not only by interpreting the relevant provisions of the aforementioned directive but also by focusing on the concept of a public work. Public works have, by their nature, technical
and constructional characteristics. On the contrary, the public service is of intangible nature. The problem is born out of the fact that the provision of public services exists within the meaning of the notion of the concession contracts of public works. However, we should not confuse these concepts since the works concession contracts require the construction of a public work, something which is not necessary in the case of concession contracts of public services. In the concession of public services, the construction of a work by the concessionaire, if any, just constitutes the means that leads him to exploit the public service, which is eventually the contractual object of the concession contract.

The European directive 92/50/EC did not include the definition of the concession contracts of public services and thus, the European Court of Justice created the meaning of the concession of public service through its jurisprudence, which was finally and officially integrated in directive 2004/17/EC and 2014/24/EC. The new sectorial directive 2014/25/EC adopts the same legal framework as regards its implementation in the case of exploration and exploitation of hydrocarbons since article 34 of this directive excludes from its scope the concession contracts in the oil sector as it refers to activities which are directly exposed to competition on markets, where access is not restricted.

Hence, given that a contract for the concession of the rights of exploration and exploitation of hydrocarbons does not fall within the scope of this directive, the provisions of TFEU as well as the general principles of the public contracts are applicable, i.e. the principles of equal treatment, transparency, proportionality and mutual recognition.\(^\text{108}\)

Following the aforementioned comments, is underlined that the public contracts for the exploration and exploitation of hydrocarbons constitute concession contracts of public service since these activities are peculiar public services in the energy sector\(^\text{109}\) due to their significance for the national economy, the financial and industrial development of a country and the satisfaction of basic energy needs of people and it is a necessity the creation of an explicit and transparent legal framework on this sector, which will regulate this type of contracts in a positive way and not in a negative one as in the relevant directives.

\(^{108}\) See supra note 18, p. 568.

\(^{109}\) See supra note 34, p. 1208.
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97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively.


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