

Should Brussels I Have Been Applied in “Land Berlin”? Some Thoughts on the Judgment of the ECJ from April 11th, As. C- 645/11

Many thanks to Polina Pavlova for sharing her comments on this recent ECJ ruling, first in our (MPI) weekly Referentenrunde and now here. Paulina Pavlova is research fellow of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law.

On April 11th, the ECJ rendered what at first sight appears to be a non-controversial judgment on the scope of application of the Brussels I Regulation. Whether the decision in the case C-645/11, *Land Berlin v. Ellen Mirjam Sapir and Others* is indeed as consistent as it might seem, is, however, highly questionable.

Mr. Busse owned a plot of land in East Berlin. During the Third Reich he was persecuted under the NS regime and was forced to sell the land to a third party in 1938. Later on, the plot was expropriated by the German Democratic Republic and became part of a larger, State-owned, parcel of land. After the German reunification, the ownership of this land transferred to the Land Berlin and the Federal Republic of Germany.

In 1990, the *Vermögensgesetz* (Law on Property) provided for the possibility that such expropriated land be returned to the original owner. Ten successors of Mr. Busse domiciled in four different States then applied for a return of the land which once belonged to Mr. Busse. However, in 1997, fulfilling this request became impossible since the Land Berlin and the Federal Republic of Germany sold the whole parcel to an investor. This was allowed by the *Investitionsvorranggesetz* – a Law on priority for investments in the case of claims for return under the Law on Property. As compensation, the successors were entitled to receive the corresponding proceeds of the sale or the market value of the property.

The competent authority ordered the Land Berlin to pay the respective share of the proceeds to Mr. Busse's successors. However, the Land Berlin unintentionally transferred the entire amount of the sell price to their lawyer instead of paying only the amount corresponding to the share of Mr. Busse in the big parcel of land. The Land Berlin then brought an action before the *Landgericht Berlin* against the successors of Mr. Busse and their lawyer in order to recover the overpayment. The claim was based on unjust enrichment against the successors and on tort against the lawyer.

As far as the merits are concerned, the defendants claim to be entitled to the whole amount they received alleging that the parcel had been sold under value anyway. More important for us is whether the *Landgericht Berlin* has jurisdiction over the defendants who are not domiciled in Germany but in the UK, Spain and Israel. This question concerns the application of the Brussels I Regulation and more specifically its Article 6 (1). The case went through all instances and finally to the *Bundesgerichtshof* which referred three questions to the ECJ on: (1) the notion of "civil matters" in the sense of Article 1 of the Brussels I Regulation, (2) the criteria of a close connection as required in Article 6 (1) and (3) the applicability of the latter provision to defendants not domiciled in a Member State. With regard to the specific case the ECJ basically gave a "Yes-Yes-No" answer.

Let me briefly comment the Court's interpretation in a reversed order, starting from the third question.

Third State defendants and Article 6 (1)? To the question of applicability of Article 6 (1) to defendants not domiciled in a Member State the Court answered with a clear "No", thus confirming not only the unambiguous wording but also the prevailing view in legal literature.

A close connection? As far as the second question is concerned, the ECJ basically ruled the *Land Berlin* case fulfills the criterion of the close connection as required in Article 6 (1). Although the Court always lays emphasis on the need of a strict interpretation of this rule, recent case-law has shown the opposite trend. With this in mind, the new decision can hardly be qualified as groundbreaking. This, however, cannot be said for the interpretation of the notion of civil matters in *Land Berlin*.

A civil matter? With regard to the (preliminary) question of whether a case as the one described falls under the concept of “civil and commercial matters” in the sense of Article 1 (1) of the Brussels I Regulation, the ECJ recalled its relevant judgments stating that the regulation is not applicable only when a public authority is acting in the exercise of its public powers. In the Court’s view, the Land Berlin did not act in the exercise of such powers. The main argument in the reasoning seems to be that the Law on Property and the Law on Investment that are governing the compensation process apply equally to both private persons and public authorities. What is more, the court explains, in order to recover the overpayment, the Land Berlin has to bring an action before a civil court on the basis of a provision of the German Civil Code (Paragraph 812, unjust enrichment). All these circumstances lead the ECJ to the conclusion that we have a civil matter within the meaning of the Regulation despite the involvement of a public authority and the administrative proceedings preceding the compensation.

As convincing as it may seem, this reasoning is far from solid.

To start with, the Court’s view on the scope and purpose of the two laws governing the compensation process, the Law on Property and the Law on Investment, seems questionable. While the scope of the laws is not limited to cases involving the ownership of State entities – they can indeed apply when both the previous and the actual owners are private persons, what is completely left aside by the Court is the *purpose* these legislative acts actually seek to achieve and the *nature* of their subject matter. The provisions ensure the compensation for the expropriation of the lawful owner taken place in the circumstances of a totalitarian regime. Even where the State has not (directly) acquired the property, the loss of ownership can still be considered as equal to such an expropriation since it was facilitated by the rules of the regime. What is more, both acts envisage special administrative proceedings preceding the claim for compensation, and even the establishment of special public bodies competent to deal with the multiplicity of restitution cases. And finally, and most importantly, restitution and compensation for expropriation connected with the specificity of a political regime are *per se* matters deeply rooted in the relationship between the private individual and the State.

Furthermore, the Court brings the argument that the restitution of the overpayment is not a part of the administrative procedure foreseen in the

above-mentioned laws. It is not entirely clear whether the ECJ aims at a distinction between the overpayment and the sum which the Land Berlin actually wanted to transfer or between the (over)payment and its restitution. As to the first assumption (which seems less probable), it has to be pointed out that a mistake in an administrative procedure cannot result into the transformation of a public administrative matter into a civil one. With regard to the second interpretation, whether the restitution of a payment is a civil matter or not, is a question necessarily linked to the nature of the payment itself. In a nutshell: Payment, *overpayment* and recovery of overpaid amount necessarily share the same legal nature when it comes to ascribing them to the public or the private domain.

The rather supplementary argument of the ECJ concerning the jurisdiction of the Civil courts on the overpayment recovery claims in the aforementioned context is also misleading as it clearly contradicts to established case-law. As the Court rightfully noted in *Lechouritou and others* (paragraph 41), the civil nature of the proceedings previewed in national law is entirely irrelevant when it comes to qualifying a claim for the purpose of Article 1 of the Regulation. From *Lechouritou* (paragraphs 36 f.) we can conclude that it is the nature of the claim, the context it derives from and the acts at the origin of the damage pleaded that are decisive for the qualification of the claim as falling in or outside of the scope. While it is beyond doubt that the questions in the main proceedings of *Lechouritou* – State immunity in the context of armed forces activities during the Second World War – demonstrate a much stronger link to a State related matter, the reasoning of this judgment nonetheless offers clear criteria that can be (or rather should have been) applied to the *Land Berlin* case.

The last point in the reasoning of *Land Berlin* that merits examination is the question of the legal basis of the claim – a factor to which the Court itself seems to ascribe a significant importance. The action for recovery of the overpayment is based on Paragraph 812 (1) of the German Civil Code: a rule governing restitution in cases of unjust enrichment which applies to both private persons and public authorities. However, it seems arbitrary to consider a claim as a civil matter simply because a national legislator has anchored the general provision on unjust enrichment in the Civil Code without distinguishing between public and private cases. This rather technical

approach adopted in *Land Berlin* promotes another, very controversial consequence: It results in the general inclusion of claims based on unjust enrichment into the scope of the Regulation irrespective of their true nature. Unjust enrichment as such, however, cannot exist outside of a context, whether it is a contractual one, a tortious one or – for the sake of this debate – an administrative one.

As a conclusion, a critical view on this note seems appropriate: Is the position stated here one too deeply rooted in the German understanding of a civil matter that disregards the need of an independent, autonomous definition of the Regulation's scope? While the compensation for expropriations during the NS regime is in Germany indeed framed in an administrative procedure and strongly differs from the civil context, might the European legislator still consider it as a civil matter?

I would argue that this is not the case. The core elements that deserve attention from a EU perspective are: the subject matter of the action and the legal relationships between the parties (*LTU*, paragraph 4; *Lechouritou*, paragraph 30; *Henkel*, paragraph 29). There is no rule under which restitution claims necessarily constitute a civil issue, nor is every action brought before a civil court by all means subject to the Regulation's jurisdiction rules. Therefore, with regard to the aforementioned specifics of the *Land Berlin* case, the judgment sets an alarming trend: Following *Land Berlin*, the Brussels I Regulation risks to eventually apply to subject matters it never meant to govern.