The procedural impact of the Greek debt crisis: The CJEU rules on the applicability of the Service Regulation

by Anastasia Gialeli

Anastasia Gialeli, LL.M. (Freiburg), is a doctoral candidate at the Albert-Ludwigs-University Freiburg (Germany) and a research assistant at the University's Institute for Comparative and Private International Law (Dept. III). She has kindly provided us with her thoughts on a seemingly technical, but actually very sensitive legal and political issue raised by the Greek debt crisis.

The Court of Justice of the European Union (CJEU) on 11 June 2015 delivered its judgment in the joined cases C-226/13, C-245/13, C-247/13 and C-578/13 regarding the concept of "civil and commercial matters", now for the first time within the meaning of the Service Regulation (No 1393/2007).

1. Background

In the main four proceedings before German courts (i.e. Landgericht Wiesbaden and Kiel), the claimants, all holders of Greek State bonds, had initiated legal actions against the Hellenic Republic based on German civil law. They were claiming compensation for disturbance of ownership and property rights, contractual performance of the bonds which have reached maturity or damages caused by the retroactive and unilateral change of the bonds by the Greek State in the framework of the Private Sector Involvement (PSI). The judgment is particularly important because it concerns numerous civil legal actions of German bondholders against Greece brought before German courts (cf. the identical request for a preliminary ruling made by Landgericht Aachen in case C-196/14 and the cited case law as follows).

In the decision made by the European Council regarding financial assistance for Greece at the summit of 21 July 2011 a "voluntary" PSI was included. It was regarded as an exceptional and unique solution for the sustainability of the Greek

debt (Euro Summit Statement of 26 October, 2011, page 4-5, Statement by the Eurogroup of 21 February, 2012). A successful PSI operation was therefore a requirement for Greece in order to achieve a second Economic Adjustment Programme with the EU, the IMF and the ECB (Statement by the Eurogroup of 21 February, 2012). In line with this, the Greek Parliament adopted the Law No 4050/2012 entitled „Rules relating to the adjustment of securities, their issue or guarantee by the Greek State with the agreement of the bond holders" (hereinafter: Greek Bondholder Act) on 23 February 2012.

In accordance with the Greek Bondholder Act, the Greek State in February 2012 submitted an exchange offer to the applicants which provided for the original bonds to be exchanged for new bonds with a considerably reduced nominal value (53,5%) and a longer period of validity, which the applicants, however, rejected. Nevertheless, the Greek State carried out the proposed exchange in March 2012, by means of the restructuring clause contained in the Greek Bondholder Act, also known in financial terms as a so-called "CAC" (Collective Action Clause) (see the detailed presentation by *Sandrock* RIW 2012, 429). Pursuant to this clause, the unilaterally proposed change of the initial conditions of the bonds could be accepted (or refused, but not renegotiated or modified) by a quorum representing 50% of the total outstanding bondholders concerned and with a decision by the qualified majority corresponding to two thirds of the participating capital. This decision then had to be approved by a resolution of the Greek Council of Ministers and executed by the Greek Central Bank. Article 1(9) of the Greek Law furthermore provides for an *erga omnes* effect of the decision adopted by the majority, which is also binding on the minority of the concerned bondholders and overrides any general or specific law and any contracts conflicting with it. Finally, it stipulates that these provisions protect the public interest and, thus, they constitute overriding mandatory rules, excluding any liability of the Greek State.

The exchange of the bonds was disadvantageous for the applicants, who obviously belong to the disagreeing minority (hold-out creditors, 5% pursuant to the Second Economic Adjustment Programme for Greece of March 2012, page 48). In order to serve the documents initiating the proceedings against the Greek State, the transmitting body (Bundesamt für Justiz, i.e. the German Federal Office for Judicial Administration and Cooperation) raised the question as to whether, for the purpose of Article 1 (1) of Regulation No 1393/2007, those actions concerned "civil or commercial matters" or acts or omissions in the exercise of State

authority, which are, pursuant to Article 1 (1, 2nd sentence), explicitly excluded from the scope of the Regulation (*acta iure imperii*). The crucial question is whether the interpretation of the concept of civil or commercial matters should be made by focusing on the civil law basis of the legal actions or on the subject matter of the dispute.

The Landgericht Wiesbaden (one of the referring courts) tended towards characterizing the claims based on the subject matter of the dispute, namely the intervention by law in a case originally of a civil nature – i.e. the purchase of the bonds – and its effects on the property or contract rights of the applicants. Thus, according to this court, the case at issue should be classified as falling under the explicit exclusion in Article 1 (1, 2nd sentence) concerning the liability of a State acting in the exercise of public authority (LG Wiesbaden, 18.4.2013 para. 14-15). This is in line with the case law of other German civil courts, which in similar cases involving German bondholders' actions have argued that the subject matter concerns the Greek State's public authority and that, accordingly, the Hellenic Republic should enjoy immunity in this regard (cf. LG Konstanz 19.11.2013, para. 27; OLG Schleswig-Holstein 04.12.2014, para. 48-72, pending before the BGH ref. number XI ZR 7/15). This line of reasoning also corresponds with the leading judgment of the plenum of the Greek Council of State No 1116/2014 of 21 March, 2014.

2. Judgment

The CJEU, however, holds that article 1 (1) of the Service Regulation *"must be interpreted as meaning that legal actions for compensation for disturbance of ownership and property rights, contractual performance and damages, such as those at issue in the main proceedings, brought by private persons who are holders of government bonds against the issuing State, fall within the scope of that regulation in so far as it does not appear that they are manifestly outside the concept of civil or commercial matters."*

Standard of evidence

First, the CJEU points out that it *"suffices that the court hearing the case concludes that it is* ***not manifest*** *that the action brought before it falls outside the scope definition of civil and commercial matters"* (para. 49). The Court adopts the Commission's opinion and argues that, because of the complexity of the

distinction between civil or commercial matters and *acta iure imperii*, the court usually has to decide on this question only after having heard all the parties and thus having all the necessary information. In the case of the Service Regulation however, this question arose in a very early phase, i.e. even before the defendant had been served with the initiating document. Moreover, the answer to this question determines the methods of service of that document. Thus, *"the court must limit itself to a preliminary review of the available evidence, which is inevitably incomplete, in order to decide"* about the application of the Service Regulation.

As far as the question of distinguishing between civil or commercial matters, on the one hand, and *acta iure imperii*, on the other, arises within the framework of the Service Regulation, the answer is restricted to the method of the service without prejudice to the international jurisdiction and the substance of the case at issue (para. 46). Thus, the Court reasonably takes into account that the court seised may not have the jurisdiction that is required to deliver its judgment in substance. As a consequence, the Court facilitates the initiation of the proceedings, one of the key aims of the Regulation.

However, the Court argues that its interpretation is also confirmed by the general scheme of the Service Regulation, as this results from recital 10, which states that *"the possibility of refusing service of documents should be confined to exceptional situations"*, in conjunction with Article 6 (3), which enables the receiving agency to return the documents to the transmitting agency if the concerned request for service is *"manifestly outside the scope of that regulation"*. This argument is not fully convincing as it should be noted that the cited provision is a special rule and is addressed to the receiving agency because of the non-judicial nature of those bodies in contrast to the seised court. The seised court, however, is the competent body to decide on the applicability of the Service Regulation. Thus, the systematic argument of the Court is rather doubtful (see also Advocate General *Bot* 9.12.2014, para 72 and footnote 73).

The CJEU further stipulates that, in conformity with its case law on the Brussels Convention and Brussels I, the concept of civil or commercial matters must be regarded as an independent concept within the framework of the Service Regulation as well, interpreted by referring to the objectives and the scheme of that Regulation. With regard to the main objectives of the Service Regulation, the Court points out that recitals 2, 6 and 7 provide for the improvement and the

expediency of the transmission of judicial and extrajudicial documents, in order to ensure the proper functioning of the internal market. In this context, it should be noted that – in contrast to the opinion of AG *Bot* (AG *Bot* 9.12.2014, para. 49) – the Court seems not willing to take into proper consideration the general objectives of legal certainty and coherence of law, but overestimates the objective of the effectivity of the Service Regulation. The service of a document should certainly be improved and facilitated, but only under the condition that the case at issue falls into the scope of the Regulation at all.

Decisive criterion for the distinction

The wording of the Court's ruling that *"legal actions (…) fall within the scope of that regulation* ***in so far as it does not appear*** *that they are manifestly outside the concept of civil or commercial matters"* is rather unfortunate and unusual – compared to, e.g., C-302/13 flyLAL, C-292/05 Lechouritou, C-645/11 Sapir, C-14/08 Roda Golf – and ends in a vicious circle, which does not provide a safe harbour for national courts having to determine whether the case at issue falls in or outside the scope of the Regulation.

In the reasoning of its judgment, the Court tries to define the crucial criterion for determining whether the case at issue falls in or outside the scope of the Service Regulation. In general terms, the disputed act of the state authority should lead directly and immediately to a change in the legal relationship involved and therefore should cause the alleged damage. The Court holds that *"it is not obvious that the adoption of the Law No 4050/2012 led* ***directly and immediately*** *to changes to the financial conditions of the securities in question and therefore* ***caused*** *the damage (…)"* (para. 57). Instead of the Greek Bondholder Act itself, the Court considers the decision of the majority of the bondholders accepting the exchange offer as the event giving rise to the damage. This is hard to square with the fact that it was exactly the Greek Bondholder Act which imposed the retroactive *erga omnes* effect of a majority decision upon the hold-out bondholders' contracts in order to safeguard public interests. The direct binding effect of the majority's decision on the contracts of the hold-out applicants does not, however, fall under the scope of ordinary legal rules applicable to relationships between private individuals. Further, it should be pointed out that, first, the bond exchange was executed by the Central Bank of Greece after a resolution of the Council of Ministers had approved the majority's decision, also by an administrative process, and secondly, that the content of the decision itself

was not negotiable by the majority but in fact unilaterally designated by the Greek Bondholders Act. Finally, this Act was adopted in order to deal with a severe financial crisis and especially to restructure the public debt and secure the stability in the Eurozone, objectives closely linked to state sovereignty. Those objectives are also noticed by the Court, but the judges do not consider them as decisive. Thus, the Court, similar to its earlier *Sapir* judgment (C-645/11 para. 35-37) concerning Brussels I, interprets the concept of civil or commercial matters widely in the framework of the Service Regulation as well.

In contrast, AG *Bot* had pleaded persuasively that the case at issue should be excluded from the scope of the Service Regulation because the present dispute was rooted in the adoption and the implementation of the Greek Bondholders Act, which constitutes an act in the exercise of public power (AG *Bot* para. 63-70). This opinion is in accordance with my reading of the earlier case law of the CJEU with regard to the unilateral and binding manner of acting by a public authority, which appears as inextricably linked to a State's public interest, in the case at issue to financial policy (cf. especially CJEU Lechouritou C-292/05 para. 37; Baten C-271/00, para. 36; Tiard C-266/01, para. 33; Sapir C-645/11, para. 33; flyLAL C-302/13, para. 31; cf. *Kropholler/von Hein* EuZPR, 9th ed., Art. 1 EuGVO para. 6; Stein/Jonas/*Wagner* ZPO, 22nd ed., Art. 1 EuGVO para. 11).

The initial purchase of the bonds is, in line with the Court's judgment, governed by the ordinary financial market and legal rules applying to individuals. However, the decision of the majority of the bondholders, which pursuant to the Court should be regarded as the decisive act, does constitute the implementation of the Greek Bondholders Act itself. It seems that the Court adopts an inconsistently technical view of the subject matter when it refuses to consider the form of the crucial act of the Greek State, i.e. the adoption of the Law in itself, as decisive, but at the same time characterizes the majority bondholders' acceptance as the decisive criterion, although that acceptance was in fact only motivated by a desire to avoid an absolute loss (cf. *Sandrock* RIW 2013, 12, 15: Bondholders had the choice between Scylla and Charybdis). Furthermore, the argument that the *intention* of the Greek State (para. 57) was to keep the handling of the bonds within a regulatory framework of a civil nature should be irrelevant to an autonomous definition in European civil procedure law.

3. Outlook

After the Court has paved the way for applying the Service Regulation in the cases of German bondholders, it must be awaited how the German courts will evaluate the parallel issue at the level of jurisdiction. As far as the courts accept the civil nature of the case, they must then determine which head of jurisdiction under Brussels Ia could apply. After the *Kolassa* judgment (C-375/13), the only available basis is found in Article 7 No 2, which in turn may be overruled by a choice of court agreement (Article 25). On a conflict of laws level, it is assumed that in the general terms of the exchange of the bonds at issue a choice of law clause in favour of Greek, English or Swiss law has been made (*Sandrock*, RIW 2012, 429 434). In case that the *lex causae* is not Greek law, the question arises as to whether the Greek Bondholder Act must be characterized as an overriding mandatory rule (cf. the request for a preliminary ruling of the BAG, 25.2.2015 in case C-135/15 Nikiforidis, concerning labour contracts with the Greek State, and the previous post by *Dr. Lisa Günther* on this issue).