Enforcement Actions against Member States and their Impact on National Court Procedures

Dr. Rajko Knez
rajko.knez@um.si
The structure of the lecture

- **Part I.** Introduction, infringement actions as public law remedy, statistics
- **Part II.** Who is affected by the enforcement actions and what shall these subjects do?
  - Legal effects of ECJ judgements
  - How is the legislator affected?
  - How are the administrative authorities affected?
  - How are the courts affected?
  - How are the individuals affected?
  - Cases...
  - Issues of retroactive effects
- **Part III.** Conclusions
Introduction to the topic

- summary version of introduction to the infringement actions
- how can the enforcement actions influence the national procedures?
  - ongoing proceedings
  - ex post - closed proceedings (finality, res judicata)
  - ex ante – future proceedings
- what kind of procedures?
  - administrative procedures
  - court‘s procedures
About infringement actions and statistics

- Why infringement actions (TFEU, Arts. 258)...
  - legal remedies in public interest v. legal remedies in private interest
  - the supervisory role of the EU Commission is not the same in all areas of law and EU politics
  - EU Commission acts – using discretion and principle of opportunity
  - around 90% of cases is settled before being formally referred to the court
  - infringement actions as „a pressure“ tool for individuals
Number of cases shall not be ignored…
NB: it is not:

- the number of cases that is relevant
- the number of cases of each state, that is relevant
- it is the legal consequences of each case that are relevant
  - one case can influence thousand's of national cases ... (or none)
The most infringed areas of rules

The four most infringement-prone areas in 2012

- Environment: 38%
- Transport: 20%
- Taxation: 15%
- Internal Market: 14%
- Rest of policies: 13%

Numbers of infringements; LTI vs others infringements

How do we know that there is a procedure?

- infringement actions are not transparent in the administrative phase
- publication in the OJ... indeed effective?
- medias...
- search in the e-databases... the main point is how to search
- the defendant is not important (exemption are LTI cases)
What shall do

- the courts?
- the legislator?
- the administrative authorities?
- individuals?

... when there is a case at the ECJ and they are faced with the same (alike) issue/question?
To answer these questions...

- we have to know, what are the legal effects of the judgements in the enforcement proceedings
  - declaratory effects
  - objective, not subjective dispute
  - ex ante or ex post (retroactive effect)
  - inter partes (not erga omnes), however – the message is strong
    - individuals are left with the direct effect of the EU provision or with the state liability
Courts: LTIs vs. other types of infringements

- The difference is in the legal base(s)
  - LTI – might be no app. rule in the national law → direct effect, but no consistent interpretation
  - LTI – might there be an app. rule in the national law → direct effect & consistent interpretation
  - other types of infringement
    - wrong implementation → direct effect & consistent interpretation
    - wrong application in practice → direct effect & consistent interpretation
  - In all cases Preliminary ruling procedure is possible (private law remedies)
Case 1

- Imagine that EU Commission starts action against certain MS, maintaining that dir. on services on the IM is not properly implemented... that MS demands for foreign companies which performs services (on a continuous basis, for indefinite period), to be deemed as established and that it is obligatory to register a branch office.
- In your MS the same provision applies...
- and your are faced with an action for annulment of a decision, issued by the competent inspector, demanding from the foreign company to pay penalties for performing activities (of services), without any legal form (also without the branch).
- How to proceed...?
Case 2

- not long ago the ECJ ruled that Dir. 2006/24 (data retention directive) is not in line with the TFEU (C-293/12, C-594/12).
- imagine that you had been faced (a year before that ruling) with the question, that the national law is incompatible with the Constitution...
- ... because the national law, which implemented that directive, of the opinion the plaintiff, violates right to privacy...
- at the same time the Commission had also started an infringement case that dir. is not properly implemented (in your country)...
  - how to proceed?
Issue of retroactive effect

- Imagine that there is a decision (applying EU law) issued by the national adm. authorities... it looked OK at that time...
- however, after a year, there is a judgement of the ECJ, in unrelated case, interpreting EU law (the same rule as used for the mentioned decision) differently ...
- that one year old decision is not in line with the ECJ interpretation
  - what to do?
  - can we reopen the case?
ECJ views on reopening

**Final Administrative decisions**
- Case C-158/80 Rewe… basic principles of equivalence and effectiveness)
- Case C-453/00 Kühne & Heitz
- Joined Cases C-392/04 & C-422/04 i-21 & Arcor
- C-2/06 Willy Kempter
- C-249/11 Hristo Byankov

**Final Judicial decisions**
- C-224/01 Köbler
- C-234/04 Kaferer
- Case 2/08 Olimpiclub (dif. C-119/05 Lucchini)
An administrative body responsible for the adoption of an administrative decision is, in accordance with the principle of cooperation arising from Article 10 EC, under an obligation to review and possibly to reopen that decision if four conditions are fulfilled.

First, the administrative body must, under national law, have the power to reopen that decision.

Secondly, the administrative decision in question must have become final as a result of a judgment of a national court ruling at final instance.

Thirdly, that judgment must, in the light of a decision given by the Court subsequent to it, be based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling in the circumstances set out in the third paragraph of Article 234 EC.

Fourthly, the person concerned must have complained to the administrative body immediately after becoming aware of that decision of the Court. The undertaking is thus required to have exhausted all legal remedies available to it.
Res judicata issue

- not so uncommon
- requires Grand Chamber
- res judicata seems not to be an absolute principle
- higher standards from judicial res judicata
- flagrant violation is a special standard
Conclusions

- different infringement cases (LTI, improper transposition, improper applications) → different effects on national courts

- Toolbox:
  - consistent interpretation (up to the contra legem);
  - direct effect;
  - state liability ... ?!;
  - stay of the proceeding;
  - reopening...
  - res judicata