Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

6 March 2025 *

(Failure of a Member State to fulfil obligations – Article 260(2) TFEU – Waste treatment – Directive 2008/98/EC – Stone aggregate deposited in the Biljane Donje (Croatia) landfill site – Article 5(1) – Concept of 'by-product' – Article 13 – Obligation of Member States to ensure the protection of human health and of the environment – Article 15(1) – Obligation to have waste treated by the holder or by other designated persons – Judgment of the Court establishing a failure to fulfil obligations – Failure to comply – Financial penalties – Lump sum payment – Penalty payment)

In Case C-315/23,

ACTION for failure to fulfil obligations under Article 260(2) TFEU, brought on 23 May 2023,

European Commission, represented by M. Escobar Gómez, M. Mataija and P. Ondrůšek, acting as Agents,

applicant,

v

Republic of Croatia, represented by G. Vidović Mesarek, acting as Agent,

defendant,

THE COURT (Seventh Chamber),

composed of F. Biltgen (Rapporteur), President of the First Chamber, acting as President of the Seventh Chamber, M.L. Arastey Sahún, President of the Fifth Chamber, and J. Passer, Judge,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Croatian.

Judgment

1 By its application, the European Commission claims that the Court should:

– declare that, by failing to take the measures necessary to comply with the judgment of 2 May 2019, *Commission* v *Croatia (Biljane Donje landfill)* (C-250/18, EU:C:2019:343; 'the judgment in *Commission* v *Croatia*'), the Republic of Croatia has failed to fulfil its obligations under Article 260(1) TFEU;

– order the Republic of Croatia, pursuant to Article 260(2) TFEU, to pay the Commission a lump sum corresponding to the daily amount of EUR 840 multiplied by the number of days between the date of delivery of the judgment establishing the failure to fulfil obligations and the date on which that Member State complies with that judgment, or, failing that, the date of delivery of the Court's judgment in the present case, the minimum lump sum payment being set at EUR 392 000;

– order the Republic of Croatia to pay the Commission a daily penalty payment of EUR 7 560 for each day of delay in complying with the judgment establishing the failure to fulfil obligations, from the date of delivery of the judgment in the present proceedings until the date of full compliance with the judgment in *Commission* v *Croatia*; and

– order the Republic of Croatia to pay the costs.

Legal context

Directive 2008/98/EC

2 Article 1 of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3), entitled 'Subject matter and scope', provides:

'This Directive lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use.'

3 Article 3(1) of that directive defines the concept of 'waste' as being 'any substance or object which the holder discards or intends or is required to discard'.

4 Article 5 of that directive, entitled 'By-products', provides, in paragraph 1:

'A substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as not being waste referred to in point (1) of Article 3 but as being a by-product only if the following conditions are met:

(a) further use of the substance or object is certain;

(b) the substance or object can be used directly without any further processing other than normal industrial practice;

(c) the substance or object is produced as an integral part of a production process; and

(d) further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.'

5 According to Article 13 of that directive, entitled 'Protection of human health and the environment':

'Member States shall take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular:

(a) without risk to water, air, soil, plants or animals;

(b) without causing a nuisance through noise or odours; and

(c) without adversely affecting the countryside or places of special interest.'

6 Article 15 of Directive 2008/98, entitled 'Responsibility for waste management', provides, in paragraph 1:

'Member States shall take the necessary measures to ensure that any original waste producer or other holder carries out the treatment of waste himself or has the treatment handled by a dealer or an establishment or undertaking which carries out waste treatment operations or arranged by a private or public waste collector in accordance with Articles 4 and 13.'

The 2023 Communication

7 Communication 2023/C 2/01 from the Commission, entitled 'Financial sanctions in infringement proceedings' (OJ 2023 C 2, p. 1) ('the 2023 Communication'), sets out, in sections 3 and 4 thereof, the rules relating to, respectively, 'penalty payments' and 'lump sum payments'.

8 Section 3.2 of that communication, entitled 'Application of the coefficient for seriousness (factor between 1 and 20)', is worded as follows:

'An infringement concerning a Member State's non-compliance with a judgment … is always considered serious. To adapt the amount of the penalty to the specific circumstances of the case, the Commission determines the coefficient for seriousness on the basis of two parameters: the importance of the Union rules breached or not transposed and the effects of the infringement on general and particular interests.

… the seriousness of the infringement is determined by a coefficient fixed by the Commission of between a minimum of 1 and a maximum of 20.'

9 Under section 3.3 of that communication, entitled 'Application of the coefficient for duration':

'…

The coefficient for duration is expressed as a multiplier of between 1 and 3. It is calculated at a rate of 0.10 per month from the date of the first judgment …

…’

10 Section 3.4 of that communication, entitled ‘Member State’s capacity to pay’, provides:

‘…

The level of sanction required to serve as a deterrent will vary according to Member States’ capacity to pay. This deterrent effect is reflected in the n factor. It is defined as a weighted geometric average of the gross domestic product (GDP) … of the Member State concerned compared to the average of the Member States’ GDPs, with a weight of two, and of the population of the Member State concerned, compared to the average of Member States’ populations, with a weight of one. This represents the capacity to pay of the Member State concerned in relation to the other Member States’ capacity to pay:

$$\text{n factor} = \left(\frac{\text{GDP}_\text{n}}{\text{GDP}_\text{avg}}\right)^{2/3} \times \left(\frac{\text{Pop}_\text{n}}{\text{Pop}_\text{avg}}\right)^{1/3}$$

…

The Commission has … decided to revise its method for calculating the n factor, which now predominantly relies on Member States’ GDP and secondarily on their population as a demographic criterion allowing a reasonable deviation between the various Member States to be maintained. Taking into account Member States’ population for one third of the calculation of the n factor reduces to a reasonable degree the variation of Member States’ n factors, as compared to a calculation based solely on Member States’ GDP. It also adds an element of stability in the calculation of the n factor, since population is unlikely to vary significantly on an annual basis. In contrast, a Member State’s GDP might experience higher annual fluctuations, in particular in periods of economic crisis. At the same time, since the Member State’s GDP still accounts for two thirds of the calculation, it remains the predominant factor for the purposes of assessing its capacity to pay.

…’

11 Section 4.2 of the 2023 Communication sets out the method for calculating the lump sum payment, as follows:

‘The lump sum is calculated in a manner broadly similar to the method for calculating the penalty payment, that is:

– multiplying a flat-rate amount by a coefficient for seriousness,

– multiplying the result by the n factor,

– multiplying the result by the number of days the infringement persists …

…’

12 Section 4.2.1 of that communication provides:

‘To calculate the lump sum, the daily amount is to be multiplied by the number of days the infringement persists. The latter is defined as follows:

– for actions brought under Article 260(2) TFEU, this is the number of days between the date of the delivery of the first judgment and the date the infringement comes to an end, or, failing compliance, the date of the delivery of the judgment under Article 260 TFEU,

…’

13 According to section 4.2.2 of that communication:

‘For the calculation of the lump sum, the Commission applies the same coefficient for seriousness and the same fixed n factor as for the calculation of the penalty payment …

The flat-rate amount for the lump sum is lower than for penalty payments. …

The flat-rate amount applicable for the lump sum is set out in point 2 of the Annex I.

…’

14 Annex I to the 2023 Communication, entitled ‘Data used for determining financial sanctions proposed to the Court’, provides, in point 1 of that annex, that the flat-rate amount for the penalty payment mentioned in section 3.1 of that communication is fixed at EUR 3 000 per day, in point 2 of that annex, that the flat-rate amount for the lump sum mentioned in section 4.2.2 of that communication is fixed at EUR 1 000 per day, and, in point 3 of that annex, that the ‘n’ factor for the Republic of Croatia is 0.14. Point 5 of Annex I states that the minimum lump sum set for the Republic of Croatia amounts to EUR 392 000.

The judgment in Commission v Croatia

15 In its judgment in *Commission* v *Croatia*, the Court held that:

– by failing to consider that the stone aggregate deposited in Biljane Donje (Croatia) is waste, rather than a by-product, and must be treated as waste, the Republic of Croatia has failed to fulfil its obligations under Article 5(1) of Directive 2008/98;

– by failing to take all the measures necessary to ensure that management of the waste deposited in Biljane Donje is carried out without endangering human health or harming the environment, the Republic of Croatia has failed to fulfil its obligations under Article 13 of Directive 2008/98;

– by failing to take the measures necessary to ensure that the holder of the waste deposited in Biljane Donje treats the waste himself or has the treatment handled by a dealer or an establishment or undertaking that carries out waste treatment operations or by a private or public waste collector, the Republic of Croatia has failed to fulfil its obligations under Article 15(1) of Directive 2008/98.

Pre-litigation procedure and procedure before the Court

16 By letter of 28 May 2019, the Commission requested the Republic of Croatia to inform it of the measures taken or planned, together with a detailed timetable, in order to comply with the judgment in *Commission* v *Croatia*.

17 In its response of 17 October 2019, the Republic of Croatia stated that the stone aggregate deposited in the Biljane Donje site was intended for the renovation of Zadar airport (Croatia) and for the rehabilitation of open-cast mines at abandoned bauxite extraction sites. That Member State referred to a certain number of measures to be taken for that purpose, without, however, providing a timetable for the implementation of the planned measures.

18 Taking the view, following the meetings held between the Commission and the Croatian authorities on 5 and 6 November 2019 and on 16 June 2021, that the Republic of Croatia had not taken all the measures necessary to comply with the judgment in *Commission* v *Croatia*, since the Croatian authorities had not explained which specific measures they were planning to adopt in order to comply with that judgment and within which timeframe they would implement those measures, the Commission, on 23 September 2021, sent that Member State a letter of formal notice, requesting it to submit its observations within two months of receipt of that letter.

19 On 23 November 2021, the Republic of Croatia replied to that letter of formal notice, stating that an analysis of the properties of the rock slag, which makes up the substance deposited at the Biljane Donje site and which is in the form of aggregates ('the rock slag at issue'), in order to determine its potential for use as construction materials, was still ongoing and that, for the purposes of that analysis, an expert had been selected in a public procurement procedure, who was to submit his expert report by 21 March 2022 at the latest. That Member State stated that compliance with the judgment in *Commission* v *Croatia* would depend on the conclusions of that report.

20 According to the Republic of Croatia, if that expert report reveals that the rock slag at issue may be used as construction materials, three options are open to it. In essence, first, for the purposes of carrying out projects in the public interest, the stone aggregate could, free of charge, be made available to local and regional authorities, which would first have to be invited to express their interest. Second, in the event of there being no interest in the first option, or where there is insufficient interest in all of the aggregate, it could be handed over, at a charge, to local or regional authorities or to legal persons owned or established by the Croatian State for the completion of commercial projects or projects which are not in the public interest, with no call for tenders. Third, the stone aggregate could be sold through a public tender procedure. The Republic of Croatia also observed that the rock slag at issue might have to be processed before being used in construction, which would require, as regards the first two options, the initiation of a new public procurement procedure which could, in the event of an appeal, be extended. Moreover, the foreseeable duration of the processing of the rock slag at issue depends on various factors and, even after that processing, the Republic of Croatia could dispose of the rock slag at issue based on those three options, which would require compliance with additional steps in the procedure.

21 In the event that the conclusions of the expert report show that the deposited rock slag at issue could not be used as construction materials, the Republic of Croatia stated that it would comply with the zakon o gospodarenju otpadom (Law on waste management) of 15 July 2021 (*Narodne novine*, br. 84/2021; 'the Law on waste management'). In that case, the Croatian authorities

would hand over the rock slag at issue, for treatment, to an authorised person or would deliver it outside Croatia, in accordance with Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1).

22 In the two situations referred to in paragraphs 20 and 21 of the present judgment, those authorities would first have to organise a public procurement procedure and, subsequently, carry out the rehabilitation of the Biljane Donje site in accordance with the Law on waste management.

23 The Republic of Croatia also stated that it would include the Biljane Donje site in the waste management plan before the end of 2021.

24 Taking the view that that Member State had not taken the measures necessary to comply with the judgment in *Commission* v *Croatia*, the Commission brought the present action on 23 May 2023.

25 By decision of the President of the Court of 4 March 2024, the proceedings in the present case were stayed pending delivery of the judgment in Case C-147/23. Following the delivery of the judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers Directive)* (C-147/23, EU:C:2024:346), the President of the Court ordered, on the same day, that the proceedings in the present case be resumed.

The action

The failure to fulfil obligations

Arguments of the parties

26 The Commission's action is based on three complaints, alleging infringement of Article 5(1), Article 13 and Article 15(1) of Directive 2008/98, respectively.

27 By its first complaint, the Commission complains that the Republic of Croatia has failed to take the measures necessary to comply with the judgment in *Commission* v *Croatia* in order to put an end to the infringement of Article 5(1) of Directive 2008/98, in so far as that Member State had not found that the stone aggregate deposited at the Biljane Donje site was waste.

28 The Commission submits that, notwithstanding the delivery of that judgment, that Member State's approach to the rock slag at issue has remained essentially the same as it was before that judgment. The Commission argues that it is apparent from the observations submitted by the Republic of Croatia during the pre-litigation procedure, referred to in paragraphs 19 to 23 of the present judgment, that the Croatian authorities continued to examine whether it was possible to use that rock slag in construction, which shows that that rock slag is always treated as a by-product the subsequent use of which has to be dealt with, and is not treated as waste.

29 As regards the considerations put forward by the Republic of Croatia during that pre-litigation procedure concerning the possible future uses of the rock slag at issue deposited at the Biljane Donje site, the Commission observes that the use of that rock slag as construction materials was only contemplated by that Member State.

30 Moreover, the fact that, in its response to the letter of formal notice, the Republic of Croatia described, in the event of it proving impossible to use that rock slag for construction purposes, the additional measures required by its waste management legislation, including the inclusion of the Biljane Donje site in the waste management plan, does not in any way invalidate the uncertain nature of the use of the rock slag at issue for construction purposes. The argument that that rock slag might constitute waste is mere speculation which is insufficient to put an end to the infringement of Article 5(1) of Directive 2008/98 established in the judgment in *Commission* v *Croatia*. Similarly, that Member State's announcement of certain preparatory works, such as amendments to the waste management plan, is insufficient for that purpose.

31 The Commission concludes that the infringement of Article 5(1) of Directive 2008/98 persists.

32 By its second complaint, the Commission complains that the Republic of Croatia has failed to take the measures necessary to comply with the judgment in *Commission* v *Croatia* in order to put an end to the infringement of Article 13 of that directive, as established by the Court in that judgment, in so far as that Member State had not taken the necessary measures to ensure that the management of the waste deposited at the Biljane Donje site was carried out without endangering human health or harming the environment.

33 The Commission submits that it is not disputed that that waste is always deposited irregularly, in the same place and in the same way. It follows that the Republic of Croatia had not ensured the correct disposal of the waste deposited at the Biljane Donje site on the reference date for assessing whether the failure to fulfil obligations persisted, namely 23 November 2021.

34 That institution adds that it also cannot be inferred from the measures taken by that Member State after that date that effective measures were adopted in order to dispose of the waste in accordance with Directive 2008/98.

35 The Commission concludes that the infringement of Article 13 of Directive 2008/98 persists.

36 By its third complaint, the Commission complains that the Republic of Croatia has failed to take the measures necessary to comply with the judgment in *Commission* v *Croatia* in order to put an end to the infringement of Article 15(1) of Directive 2008/98, as established by the Court in that judgment, in so far as that Member State had not taken the necessary measures to ensure that the holder of the waste deposited at the Biljane Donje site treated the waste or had the treatment handled by a dealer or an establishment or undertaking which carries out waste treatment operations or arranged by a public or private waste collector.

37 The Commission states, in that regard, that, in accordance with the case-law relating to Article 8 of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), which preceded Directive 2008/98, the Member States are under an obligation to clean up illegal landfills.

38 However, on the reference date for assessing whether the failure to fulfil obligations persisted, namely 23 November 2021, the rock slag at issue was still unduly deposited at the Biljane Donje site and had not been treated, in so far as the Republic of Croatia had still not taken the measures necessary to ensure compliance with its obligations under Article 15(1) of Directive 2008/98.

39 Consequently, the Commission considers that the infringement of Article 15(1) of Directive 2008/98 persists.

40 The Republic of Croatia contends that the Court should dismiss the action as unfounded.

41 As regards, in the first place, the complaint alleging infringement of Article 5(1) of Directive 2008/98, that Member State submits that it was found, in the course of the proceedings before the Court in the case which gave rise to the judgment in *Commission* v *Croatia*, that the rock slag at issue constituted mineral resources belonging to the Republic of Croatia and that, consequently, the national authorities had to comply with the zakon o upravljanju državnom imovinom (Law on the administration of public property) of 25 May 2018 (*Narodne novine, br.* 52/18), and, more specifically, with Article 9 of that law. In accordance with that article, which requires the rational, transparent and public management of public property, with a view to the sustainable development of the Republic of Croatia, and, in particular, the performance of all acts relating to public property in accordance with sound management and the principles of the administration of public property, the Croatian authorities were required to find, at the outset, that it was not possible to use the rock slag at issue in the construction sector as the most advantageous and fastest option for the clean-up of the landfill at Biljane Donje.

42 At the same time, the Ministry of Economy and Sustainable Development (Croatia) initiated, with a view to complying with the judgment in *Commission* v *Croatia*, a procedure for the inclusion of that landfill in the list of clean-up projects, in accordance with the Law on waste management, specifically in the event that it should prove, after a detailed examination of the properties of the deposited rock slag at issue, that its subsequent use as construction materials would not be possible. In that case, according to the Republic of Croatia, provision was made for the rock slag at issue to be managed safely, in accordance with the Law on waste management.

43 The Republic of Croatia states that, in the light of the results of several expert reports which had referred to restrictions on the re-use of the rock slag at issue as construction materials and had indicated that it was not possible to use that rock slag to close inactive opencast mines, its authorities concluded that all possibilities of using the rock slag at issue as a by-product had been exhausted and that, consequently, the landfill in Biljane Donje would be cleaned up in accordance with the Law on waste management. That Member State submits that it therefore concluded that the rock slag at issue deposited at the Biljane Donje site was waste and not a by-product and that it had to be treated as such, with the result that the Republic of Croatia fulfilled its obligations under Article 5(1) of Directive 2008/98.

44 As regards, in the second place, the complaint alleging infringement of Article 13 of that directive, the Republic of Croatia submits that it was precisely in order to protect human health and the environment, in accordance with the purpose of the provisions in question of that directive, that its authorities acted to ensure the preconditions for a more effective clean-up of the landfill in Biljane Donje, so as to ensure the re-use of the rock slag at issue in the construction sector. To that end, it was necessary to have a number of expert reports which, in view of the measures restricting and suspending public life in Croatia due to the COVID-19 pandemic, were delayed.

45 The Republic of Croatia thus disputes the Commission's allegation that it did not take any significant steps to comply with the judgment in *Commission* v *Croatia*. The authorities of that Member State claim that they have consistently taken action to find the best solution in order to dispose of the rock slag at issue in a way that complies with health and environmental requirements. On the basis of the conclusions of a report by the Croatian Institute of Geology of June 2018 on the analysis of the quality of soil, air, groundwater and rainwater collected in household containers in the Biljane Donje region and its wider region, from which it is apparent that the situation was acceptable in the light of the potentially toxic organic and inorganic

parameters that were analysed, the Croatian authorities decided to have other expert reports carried out, referred to in paragraph 43 of the present judgment, in order to ensure the re-use of the rock slag at issue and to dispose of it effectively. However, in the light of the conclusions of those other expert reports, it was concluded that the landfill in question would be cleaned up, in accordance with the Law on waste management.

46 The Republic of Croatia states, in that context, that a detailed timetable was set for the implementation of the activities for the disposal of the waste at issue at the Biljane Donje site, which were to be carried out during the period of August 2023 to August 2025.

47 As regards, in the third place, the complaint alleging infringement of Article 15(1) of Directive 2008/98, the Republic of Croatia states that it had already included, by the date of expiry of the period prescribed in the letter of formal notice and by the date on which the present action was brought, the planned clean-up of the landfill at Biljane Donje in the waste management plan for the period 2017-2022, which was amended in January 2022. In addition, that Member State claims that it drew up, in the new waste management plan for the period 2023-2028, a plan to clean up that landfill and identified all the other stages which would be implemented during the period of August 2023 to August 2025 in order to complete the clean-up of that landfill.

48 In its rejoinder, the Republic of Croatia also states, as regards that complaint, that the approach followed by its authorities, consisting of verifying the possibility of re-using the rock slag at issue, in accordance with the national legislation on the administration of public property, is justified in the light of the waste hierarchy established by Directive 2008/98, according to which preparation for re-use, recycling or other recovery takes precedence over the disposal of waste.

Findings of the Court

49 Under Article 260(2) TFEU, if the Commission considers that the Member State concerned has not taken the necessary measures to comply with a judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations, specifying the amount of the lump sum or penalty payment to be paid by that Member State which it considers appropriate in the circumstances.

50 In that regard, the reference date for assessing whether there has been a failure to fulfil obligations under Article 260(2) TFEU is the date of expiry of the period prescribed in the letter of formal notice issued under that provision (judgment of 13 June 2024, *Commission* v *Hungary (Reception of applicants for international protection II)*, C-123/22, EU:C:2024:493, paragraph 56 and the case-law cited).

51 In the present case, since the Commission issued the letter of formal notice on 23 September 2021, the reference date for assessing whether there has been a failure to fulfil obligations referred to in the preceding paragraph of the present judgment is the date of expiry of the period prescribed in that letter, namely 23 November 2021.

52 It must also be borne in mind that the operative part of a judgment establishing a failure to fulfil obligations, which describes the failure to fulfil obligations established by the Court, is of particular importance for the determination of the measures which that Member State is required to adopt in order to comply fully with that judgment. The operative part of that

judgment is to be understood in the light of the grounds of that judgment (judgment of 13 June 2024, *Commission* v *Hungary (Reception of applicants for international protection II)*, C-123/22, EU:C:2024:493, paragraph 58 and the case-law cited).

– *The complaint alleging infringement of Article 5(1) of Directive 2008/98*

53 Under Article 5(1) of Directive 2008/98, a substance or object resulting from a production process, the primary aim of which is not the production of that substance or object may be considered not to be 'waste' within the meaning of Article 3(1) of that directive, but as a 'by-product', only if the cumulative conditions set out in Article 5(1)(a) to (d) are met. Those conditions include the condition referred to in point (a), according to which 'further use of the substance or object is certain'.

54 In the first paragraph of point 1 of the operative part of the judgment in *Commission* v *Croatia*, the Court held that the Republic of Croatia had failed to fulfil its obligations under Article 5(1) of Directive 2008/98 by failing to find that the stone aggregate deposited at the Biljane Donje site was waste, and not a by-product, and that it should be managed as waste.

55 The first paragraph of point 1 of the operative part of the judgment in *Commission* v *Croatia* was based on the finding made in paragraphs 37, 38, 42 and 43 of that judgment that the rock slag at issue could not be regarded as a 'by-product' within the meaning of Article 5(1) of Directive 2008/98, but constituted 'waste', within the meaning of Article 3(1) of that directive, in so far as the subsequent use of that rock slag by its holder was uncertain and was foreseeable only in the medium to long term.

56 In the present case, it is apparent both from the Republic of Croatia's response of 23 November 2021 to the letter of formal notice, which is the same date as that of the expiry of the time limit set in that letter, and from its defence, that an analysis in order to determine the possible use of the rock slag at issue as construction materials was ongoing on the date of expiry of the time limit set in that letter and that the conclusions of the expert responsible for carrying out that analysis were expected by 21 March 2022 at the latest. In that response, that Member State first of all stated that compliance with the judgment in *Commission* v *Croatia* would depend on the conclusions of the expert's report concerning the properties of the rock slag at issue. It then referred to various options open to it in the event that that expert's report were to conclude that that rock slag could be used as construction materials and, lastly, it stated that, if that expert's report were to find that such re-use was not possible, that rock slag would be managed in a safe manner, in accordance with the Law on waste management.

57 It follows that, on the reference date for assessing the persistence of the failure to fulfil obligations at issue, namely 23 November 2021, the Republic of Croatia had still not found that the rock slag at issue constituted 'waste', within the meaning of Article 3(1) of Directive 2008/98, and that it had to be managed as waste, but continued to consider the possible subsequent use of that rock slag, without, however, having been able to demonstrate certain use.

58 That finding cannot be invalidated, first, by that Member State's argument that it was required to comply with the Law on the administration of public property referred to in paragraph 41 of the present judgment, which requires compliance with the sound management of public property. According to settled case-law, a Member State cannot plead provisions, practices or situations

prevailing in its domestic legal order to justify failure to observe obligations arising under EU law (judgment of 20 June 2024, *Commission* v *Bulgaria (Protection of special areas of conservation)*, C-85/22, EU:C:2024:535, paragraph 74 and the case-law cited).

59 Second, the measures taken or envisaged on which the Republic of Croatia relies in order to demonstrate that it has complied with the judgment in *Commission* v *Croatia*, as regards the finding that the rock slag at issue deposited at the Biljane Donje site is waste and not a by-product, are subsequent to the date of expiry of the time limit set in the letter of formal notice, namely 23 November 2021, and, therefore, are irrelevant for the purposes of assessing whether the failure to fulfil obligations at issue persists. In particular, the decision of the Croatian Government amending the waste management plan for the period 2017-2022, by which the landfill at Biljane Donje was entered on the list of clean-up projects, the Croatian Government Resolution on the clean-up of that landfill and the decision of the Minister for Economic Affairs and Sustainable Development ordering the clean-up of that site were adopted on 30 December 2021, 24 August 2023 and 30 August 2023 respectively, that is, after the reference date for assessing the persistence of the failure to fulfil obligations at issue.

60 Third, the Republic of Croatia's argument that its approach of verifying the possibility of re-using the rock slag at issue was justified in the light of the waste hierarchy established by Directive 2008/98 also cannot succeed. Such an argument would be tantamount to circumventing the obligation on Member States, under Article 260(1) TFEU, to take the necessary measures to comply with a judgment of the Court establishing a failure to fulfil obligations.

61 In those circumstances, the Commission's complaint alleging infringement of Article 5(1) of Directive 2008/98 must be upheld.

– *The complaint alleging infringement of Article 13 of Directive 2008/98*

62 According to Article 13 of Directive 2008/98, 'Member States shall take the necessary measures to ensure that waste management is carried out without endangering human health [and] without harming the environment'.

63 In the second paragraph of point 1 of the operative part of the judgment in *Commission* v *Croatia*, the Court held that the Republic of Croatia had failed to fulfil its obligations under Article 13 of Directive 2008/98 by failing to take all the necessary measures to ensure that the waste deposited at the Biljane Donje site was managed without endangering human health or harming the environment.

64 In that regard, it is apparent from paragraphs 59 and 60 of the judgment in *Commission* v *Croatia* that the competent Croatian authorities had failed to take the necessary measures to ensure that that waste was disposed of without endangering human health and without harming the environment, for almost seven years, which was 'a considerable period of time'.

65 In reaching that finding, the Court, in paragraphs 55 and 56 of the judgment in *Commission* v *Croatia*, recalled its case-law from which it follows that a significant deterioration in the environment over a protracted period without any action being taken by the competent authorities is inherent in the presence of waste in a landfill, whatever the nature of that waste. Where such a significant deterioration in the environment persists for a protracted period

without any action being taken by the competent authorities, this may be an indication that the Member State concerned has exceeded the discretion conferred on it by Article 13 of Directive 2008/98.

66 In the Republic of Croatia's response of 23 November 2021 to the letter of formal notice and in its defence, that Member State does not dispute that the rock slag at issue was still deposited at the Biljane Donje site on the date of expiry of the time limit set in the letter of formal notice, namely 23 November 2021, and that the clean-up of that landfill had not yet started.

67 That finding cannot be invalidated by the Republic of Croatia's arguments.

68 First, that Member State's argument, namely that it was precisely in order to protect human health and the environment, in accordance with the purpose of the relevant provisions of Directive 2008/98, that the Croatian authorities acted to ensure the preconditions for a more effective clean-up of the landfill at Biljane Donje, so as to ensure the re-use of the rock slag at issue in construction, cannot succeed. In the light of the case-law set out in paragraph 65 of the present judgment, that argument supports the Commission's complaint alleging infringement of Article 13 of that directive, rather than refutes it.

69 Second, according to the information provided by the Republic of Croatia in its defence, the conclusions of the expert's report which revealed that the rock slag at issue deposited at the Biljane Donje site could not be used as construction materials were delivered on 5 July 2022. It is also apparent from that Member State's pleadings that it was only after the conclusions of that report had been delivered that that Member State concluded that, since all possibilities for re-use of the rock slag at issue had been exhausted, the landfill at issue would be cleaned up. Thus, both the conclusions in that expert report and, a fortiori, the measures adopted or envisaged after the exhaustion of all those possibilities of re-using the rock slag at issue are subsequent to the date of expiry of the time limit set in the letter of formal notice, namely 23 November 2021. They are therefore irrelevant for the purposes of assessing whether the failure to fulfil obligations at issue persists.

70 Moreover, as regards the report by the Croatian Institute of Geology of June 2018, referred to in paragraph 45 of the present judgment, which, it is said, established that the situation at issue was acceptable in the light of the potentially toxic organic and inorganic parameters that were analysed, it is sufficient to note that that report is, at most, merely a preparatory measure for the purpose of verifying whether the rock slag at issue could be used in construction as a by-product. It is therefore, as such, insufficient to ensure compliance with Article 13 of Directive 2008/98.

71 In those circumstances, the Commission's complaint alleging infringement of Article 13 of Directive 2008/98 must be upheld.

– *The complaint alleging infringement of Article 15(1) of Directive 2008/98*

72 According to Article 15(1) of Directive 2008/98, 'Member States shall take the necessary measures to ensure that any original waste producer or other holder carries out the treatment of waste himself or has the treatment handled by a dealer or an establishment or undertaking which carries out waste treatment operations or arranged by a private or public waste collector'.

73 In the third paragraph of point 1 of the operative part of the judgment in *Commission* v *Croatia*, the Court held that the Republic of Croatia had failed to fulfil its obligations under Article 15(1) of Directive 2008/98 by failing to take the necessary measures to ensure that the holder of the waste deposited at the Biljane Donje site treated the waste or had the treatment handled by a dealer or an establishment or undertaking which carries out waste treatment operations or arranged by a public or private waste collector.

74 In that regard, it is apparent from paragraphs 68 and 69 of the judgment in *Commission* v *Croatia* that a situation in which the rock slag at issue, which constitutes 'waste' within the meaning of Article 3(1) of Directive 2008/98, was not, between it being deposited at the Biljane Donje site in May 2010 and up to the expiry of the time limit laid down in the Commission's reasoned opinion of 18 November 2016, treated in such a way as to reduce its adverse impact on the environment could have occurred only because of the Republic of Croatia's failure to adopt and implement binding measures aimed at inducing the original producer or holder of that waste to treat it or to call on, for the purposes of that treatment, one of the other persons referred to in Article 15(1) of Directive 2008/98.

75 In addition, in paragraph 70 of the judgment in *Commission* v *Croatia*, the Court recalled the case-law according to which, first, municipalities must comply with the rules laid down in Article 15(1) of Directive 2008/98 and may be required either themselves to treat waste from landfills situated on their territory, or to have it treated by a dealer, establishment or undertaking which carries out waste treatment operations or arranged by a private or public waste collector and, second, the Member State concerned is required to adopt the necessary measures to ensure that the municipalities comply with their obligations.

76 In the present case, as follows from paragraph 66 of the present judgment, it is not disputed that the rock slag at issue was still deposited at the Biljane Donje site on the reference date for assessing the persistence of the failure to fulfil obligations at issue, namely 23 November 2021, and that, on the date of the closure of the written part of the procedure before the Court, the clean-up work in respect of that landfill was only in a preparatory phase. It must be inferred from this that the factual situation which led the Court to find that there was an infringement of Article 15(1) of Directive 2008/98 persisted until 23 November 2021.

77 Given that the arguments put forward by the Republic of Croatia to refute the Commission's complaint alleging infringement of Article 15(1) of Directive 2008/98 overlap with the arguments relied on in support of the complaint alleging infringement of Article 13 of that directive, they must be rejected for the same reasons as those set out in paragraphs 69 and 70 of the present judgment.

78 In those circumstances, the Commission's complaint alleging infringement of Article 15(1) of Directive 2008/98 must be upheld.

79 In the light of all of the foregoing considerations, it must be held that, by failing to take all the measures necessary to comply with the judgment in *Commission* v *Croatia*, the Republic of Croatia has failed to fulfil its obligations under Article 260(1) TFEU.

The financial penalties

Arguments of the parties

80 The Commission's position is that the Republic of Croatia has not taken the measures necessary to comply with the judgment in *Commission* v *Croatia* and proposes, on the basis of Article 260(2) TFEU, that that Member State be ordered to pay both a lump sum and a daily penalty payment.

81 For the purpose of setting the amounts of those financial penalties, the Commission relies on the 2023 Communication. In particular, that institution states that those penalties must be determined on the basis of the following fundamental criteria: the seriousness of the infringement, its duration and the need to ensure that the penalty has a deterrent effect in order to prevent repeat infringements.

82 As regards, first, the seriousness of the infringement, the Commission proposes that the coefficient for seriousness be set at 6, on a scale of 1 to 20, taking into account, on the one hand, the importance of the rules of EU law which have been infringed and, on the other hand, the consequences of the infringement on general or particular interests.

83 As regards, on the one hand, the importance of the rules of EU law which have been the subject of the infringement in question, the Commission states that Directive 2008/98 seeks to protect the environment and human health by means of appropriate techniques for the management, recovery and recycling of waste, in order to reduce pressure on resources and improve their use. In that regard, first, Article 5(1) of that directive sets out the conditions which must be satisfied in order for a substance or object, resulting from a production process, the primary aim of which is not the production of that substance or object, to be regarded not as waste, but as a by-product. Second, Article 13 of that directive imposes a positive obligation on the Member States to take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment, without risk to water, air, soil, plants or animals and without adversely affecting the countryside. Third, Article 15(1) of that directive requires Member States to ensure that original waste producers or holders of waste treat the waste themselves or entrust the treatment of that waste to a dealer, establishment or undertaking which carries out waste treatment operations or arranged by a private or public waste collector.

84 As regards, on the other hand, the effects of the infringement in question on general or particular interests, the Commission submits that the infringement in question is serious in that the Republic of Croatia has failed to fulfil a number of fundamental obligations under Directive 2008/98, compliance with which is a prerequisite for preventing environmental damage and endangerment of human health, and for achieving the objectives of circular economy policy.

85 According to the Commission, the judgment in *Commission* v *Croatia* forms part of settled case-law relating to the fundamental obligations laid down by Directive 2008/98, which must be regarded as an aggravating circumstance when assessing the seriousness of the infringement.

86 In addition, the Commission states that the landfill in question is situated in the village of Biljane Donje, which is administratively attached to the town of Benkovac, the latter having approximately 10 000 inhabitants, and where approximately 140 000 tonnes of milk processing residues from ferromanganese and silico-manganese have been deposited directly on soil since 2010, less than 50 metres from homes. Since that judgment found that the depositing of the waste at issue infringed the obligation to ensure the depositing of waste without endangering

human health and without harming the environment, failure to comply with that judgment is liable to cause serious and irreparable harm to human health and the environment. The Commission also states, relying on the case-law of the Court, that the accumulation of waste, even before it becomes hazardous to health, constitutes, having regard in particular to the limited capacity of the regions or sites to receive it, a danger to the environment, with the result that failure to comply with that judgment renders the conduct complained of even more serious. Moreover, the existence of an illegal landfill could also cause economic and other damage to individuals and economic operators.

87 The Commission considers that, although this is a particular case of a misapplication of Directive 2008/98, account must be taken of the fact that the infringements of that directive, and therefore their negative effects, have persisted over a long period.

88 Furthermore, the Commission argues that it is necessary to take into account the nature of the infringement and, more specifically, the fact that the Republic of Croatia, rather than complying with the obligations arising from Directive 2008/98, as required by the judgment in *Commission* v *Croatia*, continues to apply incorrectly EU law up to four years after the delivery of that judgment and up to more than ten years after the depositing of the waste at issue.

89 As regards, second, the duration of the infringement, the Commission observes that, in accordance with section 3.3 of the 2023 Communication, the coefficient for duration is expressed as a multiplier of between 1 and 3 and is calculated at a rate of 0.10 per month from the date of the first judgment of the Court establishing the infringement. In the present case, 45 months elapsed between 2 May 2019, namely the date of delivery of the judgment in *Commission* v *Croatia*, and 15 February 2023, namely the date on which the Commission decided to refer the matter to the Court. The Commission therefore proposes that the coefficient for the duration of the infringement in question be set at 3.

90 As regards, third, the need to ensure the deterrent effect of the penalty taking into account the relevant Member State's capacity to pay, the Commission states that, in accordance with section 3.4 of the 2023 Communication, that deterrent effect is reflected in the 'n' factor, which, for the Republic of Croatia, is set at 0.14.

91 Consequently, first, the Commission proposes that the daily amount, for the calculation of the lump sum payment, should be EUR 840, obtained by multiplying the flat-rate amount for the lump sum payment, set at EUR 1 000 in point 2 of Annex I to the 2023 Communication, by the coefficient for seriousness of 6 and the 'n' factor of 0.14. In accordance with section 4.2.1 of that communication, that daily amount is to be multiplied by the number of days during which the infringement persisted. The Commission states that payment of the lump sum thus obtained must be imposed provided that that sum exceeds EUR 392 000, which corresponds to the amount of the minimum lump sum payment set for the Republic of Croatia in point 5 of Annex I.

92 Second, the Commission proposes that the amount of the penalty payment be set at EUR 7 560 per day, which is obtained by multiplying the flat-rate amount for the penalty payment set in point 1 of Annex I to the 2023 Communication, amounting to EUR 3 000 per day, by the coefficient for seriousness of 6, by the coefficient for duration of 3 and by the 'n' factor of 0.14.

93 The Republic of Croatia disputes the Commission's proposed method of calculating the lump sum payment and, should the Court decide to impose a single lump sum payment, it asks the Court to take as the starting point for the calculation of that sum not the date of delivery of the judgment in

Commission v *Croatia*, but a later date taking into account a reasonable period for compliance with that judgment. In any event, it argues that the amount of the lump sum payment should be set at an amount significantly lower than that proposed.

94 As regards, first, the coefficient for seriousness of the infringement in question, the Republic of Croatia considers that it should be set at a level significantly lower than the proposed coefficient for seriousness of 6.

95 That Member State submits that, since it is aware of the objectives of the European Union's environmental policy, it is constantly advocating solutions which have the best overall impact on the environment, in accordance with the objectives of Directive 2008/98, and that it has fully transposed that directive into its national legislation.

96 As regards, more specifically, the effects of the failure to comply with the judgment in *Commission* v *Croatia* on general or specific interests, the Republic of Croatia submits that the analyses carried out at the Biljane Donje site have not revealed any direct danger to human life and health or to the environment within and near the location where the rock slag at issue was deposited, and adds that the Commission's assertions relating to the risk of economic damage and other damage to individuals and to economic operators are general in nature and unsupported by evidence.

97 Furthermore, the Republic of Croatia asks the Court to take account of the fact that the infringement in question concerns only the Biljane Donje landfill, that the judgment in *Commission* v *Croatia* is the first and only judgment delivered by the Court against the Republic of Croatia for breach of its obligations under EU law and that this is the first set of proceedings brought against that Member State under Article 260(2) TFEU.

98 As regards, second, the coefficient for the duration of the infringement in question, the Republic of Croatia considers that it should be set at its lowest level.

99 That Member State refers to unforeseeable circumstances which occurred when the conditions that were necessary for the disposal of the waste at the Biljane Donje site and for compliance with the judgment in *Commission* v *Croatia* were put in place. First, because of the restrictive measures adopted during the period between 2020 and 2022 in connection with the COVID-19 pandemic, it was impossible to carry out the planned activities within the prescribed periods. Second, that Member State submits that its territory was affected by several devastating earthquakes in March and December 2020 and that the Ministry of Regional Planning, Construction and Public Property (Croatia), which was responsible for carrying out the research activities regarding the possible re-use of the rock slag at issue, had to reallocate the majority of its capacities rapidly to priority reconstruction and housing programmes, which made it difficult to carry out the actions to comply with the judgment in *Commission* v *Croatia*.

100 In addition, the Republic of Croatia considers that account should be taken of the fact that, throughout the period of the infringement, its authorities kept themselves available to the Commission services in order to provide all the information relating to compliance with the judgment in *Commission* v *Croatia* and, therefore, acted in good faith and in full compliance with the principle of sincere cooperation.

101 As regards, third, its capacity to pay, the Republic of Croatia submits that the exceptional circumstances referred to in paragraph 99 of the present judgment had a negative impact on the economic indicators concerning that Member State and, more specifically, on its GDP growth. Furthermore, the inflation rate observed in that Member State has increased considerably since the end of 2021.

102 As regards the request for the imposition of a penalty payment, the Republic of Croatia submits that it has taken the necessary measures to comply with the judgment in *Commission* v *Croatia*. It argues that it clearly confirmed, at the latest with the adoption of the waste management plan for the period from 2023 to 2028 and the Croatian Government Resolution of 24 August 2023 on the clean-up of the landfill at the Biljane Donje site, its intention to clean up that landfill. That Member State adds that it has annexed to its defence the measures which it will continue to implement until the waste in question is finally disposed of.

103 Consequently, the Republic of Croatia considers that the determination of a penalty payment is not necessary in the present case. In the alternative, should the Court decide to impose a penalty payment, that Member State asks the Court to set it at an amount significantly lower than that proposed by the Commission.

104 As regards, more specifically, the frequency of the penalty payment, the Republic of Croatia asks the Court to set a penalty payment calculated for six-month periods by reducing the total amount relating to each of those periods based on the progress made in implementing the clean-up of the landfill.

Findings of the Court

105 As a preliminary point, it must be recalled that the procedure laid down in Article 260(2) TFEU is aimed at inducing a defaulting Member State to comply with a judgment establishing a failure to fulfil obligations, thereby ensuring that EU law is in fact applied, and the measures provided for by that provision, namely a lump sum and a penalty payment, are both intended to achieve that objective (judgment of 13 June 2024, *Commission* v *Hungary (Reception of applicants for international protection II)*, C-123/22, EU:C:2024:493, paragraph 96 and the case-law cited).

106 According to settled case-law, the application of a penalty payment and a lump sum depends on their respective ability to meet the objective pursued according to the circumstances of the case and, that being so, recourse to both types of penalty provided for is not precluded (judgment of 17 September 2015, *Commission* v *Italy*, C-367/14, EU:C:2015:611, paragraph 114 and the case-law cited).

107 While the imposition of a penalty payment seems particularly suitable for the purpose of inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on the assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment initially establishing it was delivered (judgment of 17 September 2015, *Commission* v *Italy*, C-367/14, EU:C:2015:611, paragraph 115 and the case-law cited).

108 Therefore, the Court is empowered, in exercising the discretion conferred on it in the field in question, to impose a penalty payment and a lump sum payment cumulatively (judgment of 17 September 2015, *Commission* v *Italy*, C-367/14, EU:C:2015:611, paragraph 116 and the case-law cited).

109 It is for the Court to determine, in the light of the circumstances of the case before it and according to the degree of persuasion and deterrence which appears to it to be required, the financial penalties appropriate, in particular, for preventing the recurrence of similar infringements of EU law (judgment of 13 June 2024, *Commission* v *Hungary (Reception of applicants for international protection II)*, C-123/22, EU:C:2024:493, paragraph 97 and the case-law cited).

110 Accordingly, the Commission's suggestions cannot bind the Court and merely constitute a useful point of reference. Similarly, guidelines such as those contained in the communications of the Commission are not binding on the Court but contribute to ensuring that the action brought by that institution is transparent, foreseeable and consistent with legal certainty (judgment of 12 March 2020, *Commission* v *Italy (Unlawful aid granted to the hotel industry in Sardinia)*, C-576/18, EU:C:2020:202, paragraph 136 and the case-law cited).

– *The lump sum payment*

111 In accordance with settled case-law, the imposition of a lump sum payment and the fixing of that sum must depend in each individual case on all the relevant factors relating both to the characteristics of the failure to fulfil obligations that was established and to the conduct of the Member State involved in the procedure initiated under Article 260 TFEU. That provision confers a wide discretion on the Court in deciding whether to impose such a penalty and, if it decides to do so, in determining the amount (judgment of 13 June 2024, *Commission* v *Hungary*, *(Reception of applicants for international protection II)*, C-123/22, EU:C:2024:493, paragraph 98 and the case-law cited).

112 In the present case, in view of the legal and factual elements that led to the finding of a failure to fulfil obligations, the Court considers that, if the future repetition of similar infringements of EU law is to be effectively prevented, a dissuasive measure must be adopted, such as the imposition of a lump sum payment.

113 In that regard, it is necessary, more specifically, to take account of the fact that the Republic of Croatia made no significant progress either during the pre-litigation procedure or, moreover, during the proceedings before the Court, to ensure full compliance with the judgment in *Commission* v *Croatia* and that, as follows from paragraph 59 of the present judgment, it was only after the present action was brought that the Croatian Government took the decision to clean up the Biljane Donje landfill. Furthermore, that Member State has not disputed that, on the date on which the written part of the procedure before the Court was closed, the waste at issue was still deposited in the same way and on the same site and that, on that date, the clean-up works were only in a preparatory phase.

114 In those circumstances, it is for the Court, in the exercise of its discretion, to fix the lump sum in an amount appropriate to the circumstances and proportionate to the declared failure to fulfil obligations, and to the ability of the Member State concerned to pay. Relevant factors in that regard include the seriousness of the established infringement, its duration since the delivery of

the judgment establishing the infringement and the Member State's ability to pay (judgment of 28 September 2023, *Commission* v *United Kingdom (Fiscal marking of gasoil)*, C-692/20, EU:C:2023:707, paragraph 96).

115 As regards, in the first place, the duration of the failure to fulfil obligations forming the subject matter of the present action, it should be borne in mind that that duration must be assessed having regard to the date on which the Court assesses the facts and not to the date on which proceedings are brought before it by the Commission (see, to that effect, judgment of 12 November 2019, *Commission* v *Ireland (Derrybrien wind farm)*, C-261/18, EU:C:2019:955, paragraph 122).

116 In the present case, as follows from paragraph 113 of the present judgment, the failure to fulfil obligations had not yet come to an end on the date of the Court's examination of the facts. It must therefore be held that that failure to fulfil obligations has persisted since 2 May 2019, the date of delivery of the judgment in *Commission* v *Croatia*, that is, for almost six years, which is a considerable period of time (see, by analogy, judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)*, C-51/20, EU:C:2022:36, paragraph 106).

117 As regards, in the second place, the seriousness of the infringement, it must be noted that the obligation to dispose of waste without endangering human health and without harming the environment forms part of the very objectives of EU environmental policy, as set out in Article 191 TFEU (judgment of 16 July 2015, *Commission* v *Italy*, C-653/13, EU:C:2015:478, paragraph 36 and the case-law cited). As regards, more specifically, Articles 5, 13 and 15 of Directive 2008/98, they lay down, as the Commission observed in its pleadings, fundamental obligations in order to achieve the objective of that directive, which is to ensure the protection of the environment and human health, inter alia, by preventing or reducing the adverse effects of the production and management of waste.

118 It also follows from the case-law of the Court that the degradation of the environment is inherent in the presence of waste at a landfill, whatever the nature of that waste, regardless of whether it is either hazardous or toxic, and that the accumulation of waste, even before it becomes a danger to health, constitutes a danger to the environment (judgment in *Commission* v *Croatia*, paragraph 62 and the case-law cited). The Court has also held that, where an infringement and, in particular, a failure to comply with a judgment of the Court are likely to harm the environment and endanger human health, such an infringement must be regarded as particularly serious (judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 61).

119 In the present case, the established failure to fulfil obligations must, therefore, be regarded as particularly serious.

120 The seriousness of that failure to fulfil obligations is accentuated by the fact that the judgment in *Commission* v *Croatia* concerns fundamental obligations laid down in Directive 2008/98 and that, in breach of the Member States' obligations under Article 260(1) TFEU, in order to take the measures necessary to comply with the relevant judgment of the Court, the Republic of Croatia made compliance with the judgment in *Commission* v *Croatia* dependent on the results of the findings of the expert's report concerning the properties of the rock slag at issue, contrary to the conclusions of that judgment. In addition, it is necessary to take into account, as an aggravating circumstance, the fact that that rock slag, weighing approximately 140 000 tonnes and with a total volume of more than 76 000 m^3, had still been unduly deposited for a protracted period in

the village of Biljane Donje, near homes, without significant intervention by the competent national authorities, and the fact that the expert reports referred to by that Member State demonstrated that the rock slag at issue posed a risk of discharge of harmful substances, contained dangerous substances and was radioactive, all of which exceeded the permitted levels. It is also necessary to take into consideration, as regards the seriousness of the failure to fulfil obligations at issue, the fact that that Member State did not anticipate that it would fully comply with the requirements of Directive 2008/98 before August 2025, that is, approximately twelve years after the date on which the obligations arising from that directive became applicable to that Member State following its accession to the European Union, which is a particularly long period of time (see, by analogy, judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 64 and the case-law cited).

121 As regards the Republic of Croatia's arguments in support of its request for a reduction of the coefficient for seriousness in respect of the infringement at issue, first, the fact that that Member State states that it has fully transposed Directive 2008/98 into its legal order cannot be taken into account as a mitigating circumstance, since the subject matter of the present proceedings is not a failure to transpose that directive, but the failure to comply with a judgment of the Court finding that there was a failure to comply with the obligations arising from that directive.

122 Second, in view of the risks which, in the light of the case-law referred to in paragraphs 117 and 118 of the present judgment, the infringement in question entails for the important public interests in question, relating to the protection of the environment and human health, neither the fact that the analyses which the Croatian authorities obtained did not, in their view, reveal any direct danger to human life and health or to the environment in and near the landfill situated in Biljane Donje, nor the fact that no economic or other damage was caused to individuals and to economic operators can lead to a less severe assessment of the seriousness of the infringement in question.

123 Third, it is indeed true that the infringement in question, relating to the failure to comply with the judgment in *Commission* v *Croatia*, concerns only the Biljane Donje landfill. However, that fact must be balanced, on the one hand, with the fact that no significant progress was made by that Member State to comply with that judgment in respect of that site from when the first proceedings for failure to fulfil obligations were brought before the Court up until the date on which the Court examined the facts. Therefore, the damage which continues to be inflicted on human health and the environment because of the infringement is as extensive as the damage caused by the initial failure to fulfil obligations that was established in the judgment in *Commission* v *Croatia* (see, by analogy, judgment of 2 December 2014, *Commission* v *Greece*, C-378/13, EU:C:2014:2405, paragraph 56). On the other hand, it follows from the Republic of Croatia's pleadings that, notwithstanding the delivery of the judgment in *Commission* v *Croatia*, that Member State continued to ignore the fact that the rock slag at issue constituted waste, and not a by-product, in disregard of the Court's classification in that judgment.

124 Fourth, while it cannot be ruled out that the circumstances relied on by the Republic of Croatia, linked to the COVID-19 pandemic and the earthquakes in March and December 2020, referred to in paragraph 99 of the present judgment, may have caused certain delays in complying with the judgment in *Commission* v *Croatia*, the fact remains that the measures taken or envisaged at the time of those events and even subsequently, until August 2023, had been taken with the aim of examining the possibility of re-using the rock slag at issue, leading to the continued failure to fulfil obligations established in that judgment. Accordingly, those particular circumstances cannot influence the assessment of the seriousness of the infringement in question.

125 Fifth, it must be noted, in the light of the various measures taken since the delivery of the judgment in *Commission* v *Croatia*, that the Republic of Croatia has persisted with the same conduct as that which gave rise to that judgment, by tolerating for a long period the deposit of a very large quantity of the rock slag at issue at the Biljane Donje site, on account of the possible use of that rock slag as construction materials, even though such use was uncertain. In those circumstances, the fact that that Member State cooperated with the Commission's services in the present proceedings cannot be held to be a mitigating circumstance.

126 That said, it is necessary to take into consideration, as a mitigating circumstance, the fact that the judgment in *Commission* v *Croatia* is the first judgment delivered by the Court against the Republic of Croatia under Article 258 TFEU and that the present proceedings are also the first set of proceedings brought under Article 260(2) TFEU against that Member State, even though that Member State's accession to the European Union was relatively recent (see, to that effect, judgments of 30 May 2013, *Commission* v *Sweden*, C-270/11, EU:C:2013:339, paragraph 55, and of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 63).

127 As regards, in the third place, the Republic of Croatia's capacity to pay, the Commission proposed that account be taken of that Member State's GDP compared to the average GDP of the Member States, as regards two thirds of the calculation, and its population compared to the average population of the Member States as a demographic criterion, for one third of the calculation, in accordance with sections 3.4 and 4.2 of the 2023 Communication.

128 In that regard, it follows from the Court's recent case-law that, when determining the capacity to pay of the Member State concerned, a demographic criterion cannot be taken into account in accordance with the detailed rules laid down in sections 3.4 and 4.2 of the 2023 Communication as part of the method of calculating the 'n' factor, representing the capacity to pay of the Member State concerned in relation to other Member States' capacity to pay (judgment of 25 April 2024, *Commission* v *Poland* (*Whistleblowers Directive*), C-147/23, EU:C:2024:346, paragraph 86).

129 Thus, in order to determine the capacity of the Republic of Croatia to pay, its GDP should be taken as the predominant factor, without taking account of the size of that Member State's population. It is also necessary to take into consideration the Republic of Croatia's arguments based on the unfavourable development of the relevant economic indicators that was experienced by that Member State during the period of the infringement in question. Consequently, it is also necessary to take account of recent trends in that Member State's GDP at the time of the Court's examination of the facts (judgment of 13 June 2024, *Commission* v *Hungary (Reception of applicants for international protection II)*, C-123/22, EU:C:2024:493, paragraph 131 and the case-law cited).

130 In the light of the foregoing considerations, the Court considers it appropriate to impose a lump sum payment in the amount of EUR 1 000 000.

– *The penalty payment*

131 According to the settled case-law of the Court, the imposition of a penalty payment is, in principle, justified only in so far as the failure to comply with an earlier judgment of the Court continues up to the time of the Court's examination of the facts (judgment of 13 June 2024, *Commission* v *Hungary (Reception of applicants for international protection II)*, C-123/22, EU:C:2024:493, paragraph 135 and the case-law cited).

132 In the present case, as established in paragraph 116 of the present judgment, the established failure to fulfil obligations has continued up to the time of the Court's examination of the facts of the case.

133 In those circumstances, the imposition of a penalty payment on the Republic of Croatia is an appropriate financial means by which to induce that Member State to take the measures necessary to put an end to the established infringement and to ensure full compliance with the judgment in *Commission* v *Croatia*.

134 In that regard, it is settled case-law that that penalty payment must be decided upon according to the degree of persuasion needed in order for the Member State in question to alter its conduct and bring to an end the impugned conduct (judgment of 13 June 2024, *Commission* v *Hungary (Reception of applicants for international protection II)*, C-123/22, EU:C:2024:493, paragraph 138 and the case-law cited).

135 In exercising its discretion in the matter, it is for the Court to set that penalty payment so that it is both appropriate to the circumstances and proportionate to the infringement established and the ability to pay of the Member State concerned (judgment of 13 June 2024, *Commission* v *Hungary (Reception of applicants for international protection II)*, C-123/22, EU:C:2024:493, paragraph 139 and the case-law cited).

136 For the purposes of determining the amount of a penalty payment, the basic criteria which must be taken into consideration in order to ensure that that payment has coercive effect and that EU law is applied uniformly and effectively are, in principle, the seriousness of the infringements, their duration and the capacity of the Member State in question to pay. In applying those criteria, regard must be had in particular to the effects of the relevant Member State's failure to comply with its obligations on private and public interests, and to the urgency of inducing the Member State concerned to fulfil its obligations (judgment of 13 June 2024, *Commission* v *Hungary (Reception of applicants for international protection II)*, C-123/22, EU:C:2024:493, paragraph 141 and the case-law cited).

137 The circumstances of the present case which must be taken into account follow, in particular, from the grounds set out in paragraphs 116 to 122 and 124 to 129 of the present judgment, regarding the seriousness and the duration of the infringement in question and the Republic of Croatia's capacity to pay. Furthermore, account must be taken of the fact that, according to that Member State's forecasts, the waste at issue will not be completely disposed of before August 2025, that is, approximately fifteen years after the waste was deposited at the Biljane Donje site.

138 Lastly, the Republic of Croatia's request for the imposition of a degressive penalty payment, calculated on a six-monthly basis, cannot be accepted. Since the established failure to fulfil obligations concerns a single landfill, less significant damage to the environment and to human health could be established only after that Member State has fully complied with the judgment in *Commission* v *Croatia*.

139 In the light of the foregoing, the Republic of Croatia must be ordered to pay the Commission a penalty payment of EUR 6 500 for each day of delay in implementing the measures necessary to comply with the judgment in *Commission* v *Croatia*, from the date of delivery of the present judgment until the date of full compliance with that judgment.

Costs

140 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Croatia has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Seventh Chamber) hereby:

1. **Declares that, by failing to take all the measures necessary to comply with the judgment of 2 May 2019, *Commission* v *Croatia (Biljane Donje landfill)* (C-250/18, EU:C:2019:343), the Republic of Croatia has failed to fulfil its obligations under Article 260(1) TFEU;**

2. **Orders the Republic of Croatia to pay the European Commission a lump sum in the amount of EUR 1 000 000;**

3. **Orders the Republic of Croatia to pay the European Commission, from the date of delivery of the present judgment until compliance with the judgment of 2 May 2019, *Commission* v *Croatia (Biljane Donje landfill)* (C-250/18, EU:C:2019:343), in the event that the failure to fulfil obligations established in point 1 of the operative part of the present judgment continues until that day, a penalty payment of EUR 6 500 per day of delay in implementing the measures necessary to comply with the judgment of 2 May 2019, *Commission* v *Croatia (Biljane Donje landfill)* (C-250/18, EU:C:2019:343);**

4. **Orders the Republic of Croatia to pay the costs.**

[Signatures]