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CAUGHT ON THE RADAR OF THE EUROPEAN COMMISSION: CROATIAN EXPERIENCES WITH THE INFRINGEMENT PROCEDURE

Melita Carević*

Abstract: This paper is devoted to infringement cases which the European Commission opened in relation to the Republic of Croatia while exercising its role as a “guardian of the Treaties”. During the first eight years of its membership in the European Union, the Republic of Croatia has gained valuable experience regarding this instrument of enforcement of European Union law, without paying a steep price in the process. The proceedings under Article 258 TFEU have so far resulted in one judgment against Croatia (Case C-250/18 Commission v Croatia). The volume, timing, duration and outcome of infringement cases against Croatia provide valuable insights into potential litigation risks for future cases and point to lessons which can be drawn for those risks to be mitigated.

Keywords: infringement procedure, Commission v Croatia, enforcement of EU law, Article 258 TFEU, Article 260 TFEU, waste management

1 Introduction

The infringement procedure is the main legal instrument at the European Commission's disposal to ensure that Member States comply with their obligations under European Union law. As a ‘guardian of the Treaties’, the Commission has been making good use of this tool. In 2016, it announced a strategic turn towards being ‘bigger and more ambitious on big things, and smaller and more modest on small things’, meaning that it will ‘focus and prioritise its enforcement efforts on the most important breaches of EU law affecting the interests of its citizens and business’.¹ Infringement proceedings have thus recently addressed important and complex legal and policy issues.² At the same time, the Commission has also rigorously and systematically pursued relatively

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¹ Communication from the Commission, EU law: Better results through better application [2017] C 18/10, 14.

² Luca Prete and Ben Smulders, ‘The Age of Maturity of Infringement Proceedings’ (2021) 58 CMLR 285, 287.

straightforward cases dealing with the non-implementation of directives (so-called non-communication cases).

The Von der Leyen Commission has continued along the same strategic path, making several changes along the way with the aim of further improving this enforcement mechanism. One of them is the increased and targeted use of the EU Pilot, a system which facilitates the exchange of information between the Commission and Member States in the pre-infringement phase and which is aimed at the quick and voluntary problem-solving of potential infringement cases.³ Further measures include systematic periodic package meetings with individual Member States, setting a two month deadline for the preliminary assessment of complaints, and closer cooperation with SOLVIT on handling individual complaints.⁴

Given that the Commission has at its disposal limited resources for supervising the application of European Union law in Member States, and that this is only one of the tasks entrusted to the Commission, it is only logical that the Commission should set priorities and carefully choose its battles.⁵ The Commission enjoys broad discretion in deciding whether to open and continue pursuing an infringement in a particular case.⁶ As will be seen in the remaining part of this paper, this discretion might sometimes be used in favour of Member States, even when they are clearly in breach of their obligation under the Treaties, and on other occasions it might result in swift and decisive action by the Commission, with little tolerance for postponing compliance.

This paper aims to explore to what extent the Commission has so far employed the infringement procedure in relation to the Union's newest Member State, Croatia, and which conclusions can be drawn from Croatia's experiences for future cases it might face. The paper will first generally look into the volume and the timeline of infringement cases opened against Croatia in order to assess whether Croatia enjoyed any form of a grace period when it first joined the Union. It will subsequently pay closer attention to cases which have led to the Commission deciding to refer Croatia to the Court of Justice of the European Union and analyse the outcome of those cases. Finally, the last part of the paper will be

³ Commission, 'Long term action plan for better implementation and enforcement of single market rules' (Communication) COM(2020) 94 final, 15. The use of the EU Pilot was previously reduced by the Junker Commission, with the aim of reducing the time for handling infringement cases.

⁴ *ibid.*, 15-16; Prete and Smulders (n 2) 299-300.

⁵ Luca Prete and Ben Smulders, 'The Coming of Age of Infringement Proceedings' (2010) 47 CMLR 9, 17.

⁶ Prete and Smulders (n 2) 296.

devoted to a study of the only case which has so far resulted in a ruling on the basis of Article 258 TFEU in which the Court established that Croatia violated its obligations under Union law.

2 Croatian experiences with the infringement procedure: general observations

During the first seven years of Croatia's membership in the European Union, the Commission has opened 203 infringement cases against Croatia.⁷ The majority of cases, even 131 of them, concerned non-communication of measures for the implementation of directives. In 57 of all the opened cases, Croatia has received reasoned opinions. On ten occasions, the Commission decided to refer the case to the Court of Justice, but the proceedings before the Court were opened in only four instances.⁸ One of those cases resulted in a judgment against Croatia, and in three of them the Commission decided to revoke its action which resulted in the termination of the procedure before the Court. At the time of writing this paper, no active cases against Croatia under Article 258 TFEU were open before the Court.⁹ However, in 64 active cases, the Commission had issued a letter of formal notice to Croatia, and 15 of those cases reached the stage of a reasoned opinion, but none have resulted in the Commission's decision to refer the case to the Court.¹⁰ Thirty-seven out of the 64 aforementioned active cases are non-communication cases.

It seems that as a new Member State, Croatia has not enjoyed a long grace period in regard to infringement proceedings. According to the publicly available data, the first three letters of formal notice directed to Croatia were dated 27 September 2013, not even three full months after Croatia joined the Union. All of these cases concerned the non-commu-

⁷ All data on the number and type of infringement cases have been obtained through the European Commission's search engine at <https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en> accessed 18 October 2021. This information includes all decisions up to the September 2021 infringements package.

⁸ *ibid*; data on proceedings before the Court have been obtained through the search engine of the Court of Justice <<https://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&jge=&td=%3BALL&jur=C%2CT%2CF&page=1&dates=&pcs=Oor&lg=&parties=croatia&pro=CONS%252C&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=33985940>> accessed 18 October 2021. This information does not include Case C-457/18 initiated by Slovenia.

⁹ Based on data obtained through the search engine of the Court of Justice <<https://curia.europa.eu/juris/recherche.jsf?language=en>> accessed 18 October 2021.

¹⁰ These data do not include the infringement case INFR(2015)4023, in which the Court issued a judgment against Croatia on the basis of Article 258 TFEU (Case C-250/18 *Commission v Croatia* ECLI:EU:C:2019:343).

nication of implementation measures for directives in the area of environment. All of them were closed quite quickly – two already in December 2013, and the third by the end of March 2014. In November 2013, one additional letter of formal notice was sent, regarding the non-transposition of Directive 2011/70/EURATOM on responsible and safe management of spent fuel and radioactive waste. This case proved to be more complex and was closed two years later. Finally, in 2013 the Commission opened 18 EU Pilot files concerning Croatia, five of which were closed in the same year.¹¹

When it comes to reasoned opinions, the first one regarding Croatia was issued on 29 April 2015 and it concerned non-communication of the implementation measures regarding Directive 2012/27/EU on energy efficiency.¹² The implementation deadline for this directive was set on 5 June 2014, but was exceeded by all Member States except Malta.¹³ The Commission sent letters of formal notice to 27 Member States and subsequently reasoned opinions to several of them, including Croatia. Looking at the timeline of this infringement case in respect of Croatia, the Commission issued a letter of formal notice a month and a half after the expiry of the implementation deadline, and the reasoned opinion was issued nine months after the letter of formal notice. This case was closed on 25 February 2016.

In the first few years of Croatia's membership in the EU, the number of open infringement cases grew steadily, from 10 cases in 2014 up to 56 by the end of 2017.¹⁴ In 2018 and 2019 there was a slight drop in the number of open cases, but they returned to the 2017 levels (equalling a total of 56 open cases) in 2020.¹⁵ During this entire period, non-communication cases continued having a high share in the total number of cases, reaching as high as two-thirds in 2017 (34 out of 56 open cases).¹⁶ The number of new non-communication cases dropped significantly in

¹¹ Commission, Monitoring the Application of EU Law in Member States, SWD(2014) 358 final, 25 <https://ec.europa.eu/info/sites/default/files/file_import/Commission_report_eupcountries_2013_%5BSWD%282014%29358%5D_en_0.pdf> accessed 18 October 2021.

¹² INFR(2014)0342.

¹³ Commission, Memo 29 April 2015, April infringements package: main decisions <https://ec.europa.eu/commission/presscorner/detail/EN/MEMO_15_4871> accessed 18 October 2021.

¹⁴ Commission, Monitoring the Application of European Union Law, Annual Report 2017 – Croatia 1 <https://ec.europa.eu/info/sites/default/files/national-factsheet-croatia-2017_en.pdf> accessed 18 October 2021.

¹⁵ Commission, Monitoring the Application of European Union Law, Annual Report 2020 – Croatia 1 <https://ec.europa.eu/info/sites/default/files/factsheet-eulaw-croatia-ar-2020_en.pdf> accessed 18 October 2021.

¹⁶ Commission (n 14) 1.

2018 and 2019 (only eight and nine new cases respectively), but those numbers doubled in 2020.¹⁷

When it comes to handling cases via the EU Pilot, a system used by the Commission and Member States for voluntarily addressing certain violations of EU law before the opening of an infringement procedure, Croatia has recently seen an improvement in its track record. Its rate of resolution of EU pilot cases in 2018 reached an impressive 85% (the EU average in that year was 73%), a significant improvement on its average resolution rate of 67% in the period from 2014 until 2018.¹⁸ In 2015, Croatia's average response time to EU pilots was 66 days (the envisaged benchmark being 70 days), an impressive result for a relatively new Member State at the time.¹⁹ In 2019, Croatia's average response time increased to 71 days.²⁰

Looking at the subject-matter of infringement cases against Croatia, it can be seen that they come from a variety of areas, ranging from the internal market, industry, entrepreneurship and SMEs, mobility and transport, environment, energy, employment, social affairs and inclusion, migration and home affairs, financial stability, financial services and capital markets union, and many others. However, it seems that the individual area which generates most of the cases is environmental law.²¹ Out of 180 formal notices addressed to Croatia, 39 of them concerned the environment.²² The Commission's annual reports on infringement cases concerning Croatia from 2013 until 2020 are consistent in pointing to environmental law as either the area from which most new cases come, or as the area which has one of the highest number of cases (with

¹⁷ *ibid.*, 2.

¹⁸ European Data Journalism Network, 'Everything You Ever Wanted to Know about EU Infringement Procedures' <<https://www.europeandatajournalism.eu/eng/News/In-depth/Everything-you-ever-wanted-to-know-about-EU-infringement-procedures>> accessed 18 October 2021.

¹⁹ Commission, Single Market Scoreboard – Performance per governance tool: EU Pilot, Reporting period: 01/2015 – 12/2015, 4 <https://ec.europa.eu/internal_market/scoreboard/_docs/2016/eu-pilot/2016-scoreboard-eu-pilot_en.pdf> accessed 18 October 2021.

²⁰ Commission, Single Market Scoreboard – Performance per governance tool: EU Pilot, Reporting period: 01/2019 – 12/2019 <https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm> accessed 18 October 2021.

²¹ Dunja Duić, Tunjica Petrašević, 'Pet godina primjene prava Europske unije – analiza postupaka zbog povrede prava Europske unije pokrenutih protiv Republike Hrvatske i prethodnih pitanja hrvatskih sudova' (2019) *X Godišnjak Akademije pravnih znanosti Hrvatske* 65, 79.

²² Data provided by the infringement decision search engine <https://ec.europa.eu/at-work/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en> accessed 18 October 2021.

the exception of 2018 regarding new non-communication cases).²³ This is hardly surprising, given the scope of environmental regulation in the European Union and the complexity and costs of implementing certain environmental standards into domestic legal orders. In 2020, the second most represented area in new infringement cases was mobility and transport, and the third was energy.²⁴ In 2019, out of 26 new infringement cases, eight concerned the environment, and four were from the category of the internal market, industry, entrepreneurship and SMEs.²⁵

As mentioned above, there are currently 37 active infringement cases which are non-communication cases. Most of these cases are relatively new, with the exception of two cases which were opened in 2018 and another two which commenced in 2019. Seven of those 37 cases have reached the stage of a reasoned opinion and six of those reasoned opinions were issued relatively recently.²⁶ Those cases currently represent a major litigation risk for Croatia in regard to infringement proceedings. Generally speaking, non-communication cases are particularly dangerous types of cases for Member States. Following the entry into force of the Lisbon Treaty, pursuant to Article 260(3) TFEU, in cases which

²³ Commission (n 11) 25; Commission, Monitoring the Application of European Union Law, Annual Report 2014 – Croatia <https://ec.europa.eu/info/sites/default/files/file_import/National_factsheet_2014_Croatia_en_0.pdf> accessed 18 October 2021; Commission, Monitoring the Application of European Union Law, Annual Report 2015 – Croatia <https://ec.europa.eu/info/sites/default/files/file_import/National_factsheet2015_Croatia_en_0.pdf> accessed 18 October 2021; Commission, Monitoring the Application of European Union Law, Annual Report 2016 – Croatia <https://ec.europa.eu/info/sites/default/files/file_import/national_factsheet_croatia_2016_en_0.pdf> accessed 18 October 2021; Commission (n 14); Commission, Monitoring the Application of European Union Law, Annual Report 2018 – Croatia <https://ec.europa.eu/info/sites/default/files/national-factsheet-croatia-2018_en.pdf> accessed 18 October 2021; Commission, Monitoring the Application of European Union Law, Annual Report 2019 – Croatia <https://ec.europa.eu/info/sites/default/files/file_import/report-commission-2019-national-factsheet-croatia_en.pdf> accessed 18 October 2021; Commission, Croatia – 2020 Annual Report on monitoring the application of EU law, <https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure/2020-annual-report-monitoring-application-eu-law/croatia_en> accessed 18 October 2021.

²⁴ Commission, Croatia – 2020 Annual Report on monitoring the application of EU law <https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure/2020-annual-report-monitoring-application-eu-law/croatia_en> accessed 18 October 2021.

²⁵ Commission, Monitoring the Application of European Union Law, Annual Report 2018 – Croatia <https://ec.europa.eu/info/sites/default/files/file_import/report-commission-2019-national-factsheet-croatia_en.pdf> accessed 18 October 2021.

²⁶ In cases INFR(2021)0049 and INFR(2020)0528, reasoned opinions were issued on 23 September 2021, and in cases INFR(2020)0437, INFR(2020)0436, INFR(2020)0435 and INFR(2020)0434 which all concern environmental law reasoned opinions were issued on 9 June 2021. The only other active case with a reasoned opinion is case INFR(2018)0113. The fact that this is a non-communication case which has been active from May 2018 is an exception which only confirms that the Commission enjoys broad discretion in making a strategic choice as to when to initiate court proceedings against a Member State.

concern Member States' failure to notify transposition measures for a particular directive, the Commission is entitled to specify the amount of financial sanctions when it first brings the matter to the Court under Article 258 TFEU.²⁷ This significantly shortens the time for sanctioning the violations of Member States, since two separate judicial proceedings no longer have to be conducted. In its recent judgment in *Commission v Belgium*, the Court clarified that in order to comply with the notification obligation, Member States must 'provide sufficiently clear and precise information on the measures transposing a directive' and 'state, for each provision of the directive, the national provision or provisions ensuring its transposition'.²⁸ If the notified 'transposing measures are clearly lacking or do not cover all of the territory of the Member State in question', the Commission is also entitled to seek the imposition of financial penalties.²⁹ In other words, the notification obligation does not encompass only a formal obligation for a Member State to submit the list of transposing measures, but requires them to adopt legislation which transposes the directive in question and to notify that legislation to the Commission in a clear, precise and timely manner.³⁰ The practice of only stating at the beginning of a certain piece of legislation that it serves as a transposition measure of a particular directive, which is often employed by the Croatian legislator, runs contrary to this requirement. It is still to be seen how stringently the Commission will be in policing it. The second reason why non-communication cases pose a special risk for Member States is the scope of financial sanctions they can face under Article 260(3) TFEU. The Court indicated in *Commission v Romania* that the imposition of both a penalty payment and a lump sum might be appropriate in the same case, since the two sanctions serve different objectives.³¹ While the penalty payment aims to motivate a Member State to terminate the infringement which still persists at the time of the adoption of the Court's ruling, a lump sum is aimed at sanctioning the failure of a Member State to implement a directive by the implementation deadline.

Having briefly described the volume and the type of infringement cases which Croatia has faced so far, the focus of the paper will now turn to cases in which the Commission decided to refer Croatia to the Court.

²⁷ For an analysis of the types of directives which can trigger the application of Article 260(3) TFEU, see Steve Peers, 'Sanctions for Infringement of EU Law after the Treaty of Lisbon' (2012) 18(1) *European Public Law* 33, 40-42.

²⁸ Case C-543/17 *European Commission v Kingdom of Belgium* ECLI:EU:C:2019:573, 59.

²⁹ *ibid.*

³⁰ Prete and Smulders (n 2) 329.

³¹ Case C-549/18 *European Commission v Romania* ECLI:EU:C:2020:563, 65-66.

3 *Commission v Croatia: infringement cases against Croatia before the Court of Justice of the European Union*

As previously mentioned, at the time of writing this paper the Commission had initiated four cases against Croatia before the Court, one of which resulted in a judgment against Croatia, and three of which were terminated due to the Commission revoking its action. These cases will be analysed in more detail, with special emphasis on Case C-250/18 (Waste management in Biljane Donje),³² the only one so far in which Croatia was found in breach of its obligations under Union law. In the analysis of these cases, additional attention will be paid to the timeline of the Commission's actions during the infringement procedure, as it can serve as an indication of the level of the Commission's stringency.

The first infringement case against Croatia before the Court was Case C-381/17.³³ The Commission opened the infringement procedure in this case on 26 May 2016 under infringement number INFR(2016)0341 and six months later, on 17 November 2016, sent a reasoned opinion to Croatia, along with eight other Member States.³⁴ Since Croatia had not complied with the reasoned opinion, the Commission decided to refer Croatia and three other Member States to the Court on 17 April 2017.³⁵ In its action brought on 26 June 2017, the Commission claimed that Croatia violated its obligations under Article 42(1) of the Mortgage Credit Directive (Directive 2014/17/EU), since its transposition had not been completed by 21 March 2016. Furthermore, the Commission proposed a daily penalty payment of EUR 9,865.40 on the basis of Article 260(2) TFEU. Croatia complied with its obligation by adopting the Act on Credit Agreements for Consumers relating to Residential Immovable Property in October 2017,³⁶ due to which the Commission decided to withdraw its action in March 2018. Croatia was ordered to pay the costs of the procedure before the Court. It is interesting to note that France intervened in the case in support of Croatia, but unfortunately no further information is publicly available.

³² Case C-250/18 *European Commission v Republic of Croatia* ECLI:EU:C:2019:343.

³³ Case C-381/17 *European Commission v Republic of Croatia* ECLI:EU:C:2018:260.

³⁴ Commission, Press room – November infringements package: key decisions, 17 November 2016 <https://ec.europa.eu/commission/presscorner/detail/EN/MEMO_16_3644> accessed 18 October 2021.

³⁵ Commission, Press release 27 April 2017, Commission refers Croatia, Cyprus, Portugal and Spain to the Court of Justice for failing to fully enact EU rules on mortgage credit <https://ec.europa.eu/commission/presscorner/detail/EN/IP_17_1049> accessed 18 October 2021.

³⁶ Act on Credit Agreements for Consumers relating to Residential Immovable Property, Official Gazette 101/2017.

The second case against Croatia that reached the Court was Case C-415/17,³⁷ initiated due to Croatia's failure to fulfil its obligations under Article 2 of Directive 2014/56/EU on statutory audits of annual accounts and consolidated accounts. The implementation deadline for this directive expired on 17 June 2016. The Commission sent Croatia a letter of formal notice a month later, on 27 July 2016, and opened infringement case INFR(2016)0531. The reasoned opinion, addressed to five more Member States besides Croatia, followed on 15 February 2017, and the decision to refer Croatia to the Court on 14 June 2017.³⁸ In its action dated 10 July 2017, the Commission asked for the imposition of a daily penalty payment of EUR 9,275.20 on the basis of Article 260(2) TFEU. At the beginning of December 2017, Croatia adopted a new Audit Act, by which it fulfilled its implementation duties regarding this directive.³⁹ The Commission withdrew its action on 5 April 2018, which led to the termination of the proceedings before the Court. France also intervened in this case and sided with Croatia. Croatia was ordered to cover the costs of the procedure before the Court because its conduct had led to litigation and it fulfilled its implementation obligations only after the lodging of the Commission's action against it.⁴⁰

A third case so far which shared the same storyline and the same outcome as the two previous ones is Case C-391/18.⁴¹ It concerned Croatia's violation of its obligation under Article 13(1) of Council Directive 2011/70/Euratom to adopt a national programme for the management of spent fuel and radioactive waste, which was due on 23 August 2015. The case was handled by the Commission under number INFR(2016)2024 and was initiated on 28 April 2016, eight months after the expiry of the implementation deadline. The reasoned opinion followed more than a year later, on 13 July 2017, against Croatia and four other Member States.⁴² The Commission decided to refer Croatia to the Court, along with Italy and Austria, on 17 May 2018,⁴³ and officially started the Court proceedings on 13 June 2018. Due to the adoption of the required nation-

³⁷ Case C-415/17 *European Commission v Republic of Croatia* ECLI:EU:C:2018:319.

³⁸ Commission, Press release 14 June 2017, Commission refers Croatia to the Court of Justice for failing to fully enact EU rules on audit <https://ec.europa.eu/commission/presscorner/detail/EN/IP_17_1579> accessed 18 October 2021.

³⁹ Audit Act, Official Gazette 127/17.

⁴⁰ Case C-415/17 *European Commission v Republic of Croatia* (n 37) paras 4-5.

⁴¹ Case C-391/18 *European Commission v Republic of Croatia* ECLI:EU:C:2019:366.

⁴² Commission, Memo 13 July 2017, July infringements package – Part 1: key decisions <https://ec.europa.eu/commission/presscorner/detail/EN/MEMO_17_1935> accessed 18 October.

⁴³ Commission, Press release 17 May 2018, Infringements: Nuclear waste: Commission refers Austria, Croatia and Italy to Court for failing to notify national programmes <https://ec.europa.eu/commission/presscorner/detail/EN/IP_18_3448> accessed 18 October.

al strategy on 9 November 2018 by Croatia,⁴⁴ the Commission withdrew its action on 8 March 2019. Croatia was ordered to cover the costs of the proceedings.⁴⁵

Apart from these three cases and Case C-250/18 (Waste management in Biljane Donje) which led to the opening of infringement procedures against Croatia before the Court, in six other instances the Commission also announced that it would commence judicial proceedings against Croatia, but for different reasons those cases were never officially opened at Kirchberg and there are no data on them on the Court's search engine. The timeline of these cases is presented in the following table.

Table 1 Infringement cases against Croatia in which the Commission decided to refer the case to the Court, but never officially initiated judicial proceedings.⁴⁶

Infringement number	Compliance deadline	Non-communication case	letter of formal notice	reasoned opinion	decision to refer to the Court	case closed
infr(2014) 4235	(01/07/2013?)	no	26/11/2014	8/12/2016	13/07/2017	11/04/2019
infr(2015) 2060	(01/07/2013?)	no	18/06/2015	28/04/2016	17/11/2016	27/04/2017
infr(2015) 2107	19/01/2013	no	22/10/2015	16/06/2016	15/02/2017	17/05/2017
infr(2016) 0199	01/01/2016	yes	23/03/2016	29/09/2016	13/07/2017	7/12/2017
infr(2016) 0636	18/07/2016	yes	22/09/2016	15/02/2017	13/07/2017	7/12/2017
infr(2017) 2038	regular update, due date unknown	no	27/04/2017	4/10/2017	8/03/2018	19/07/2018

The aforementioned data point to several conclusions, which are, however, of limited value – due to the fact that the information exchanged by the European Commission and Member States during infringement proceedings is mostly kept confidential and available to the public only

⁴⁴ Odluka o donošenju Nacionalnog programa provedbe Strategije zbrinjavanja radioaktivnog otpada, iskorištenih izvora i istrošenog nuklearnog goriva (Program za razdoblje do 2025. godine s pogledom do 2060. godine) Official Gazette 100/2018.

⁴⁵ Case C-391/18 *European Commission v Republic of Croatia* ECLI:EU:C:2019:366.

⁴⁶ Data for this table were obtained through the European Commission's Infringement Decisions search engine <https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en> accessed 18 October.

to a limited extent.⁴⁷ All the aforementioned cases in which the Commission decided to refer Croatia to the Court on the basis of Article 258 TFEU which were non-communication cases have in common a similar timeframe. The Commission initiated the infringement procedure approximately two months after the expiry of the implementation deadline. Reasoned opinions followed four to six months after the letters of formal notice, and the decision to refer the case to the Court took place in approximately the same time span after the reasoned opinion was issued. This shows that the Commission was relatively quick to act and that it handled those cases decisively. One factor which has most likely contributed to such a swift response by the Commission is that Croatia's violation of its transposition obligations was most likely obvious. In addition, it should be noted that in all the aforementioned non-communication cases the Commission at the same time also took action against several other Member States which committed the same violation, meaning that it was part of a systematic and routine response to Member States' failure to implement a particular directive on time.⁴⁸ Furthermore, in all the cases Croatia was relatively quick to remedy its breach once the Commission reached a decision to refer the case to the Court. Since the drafting and the adoption of legislature usually takes time, it is very likely that Croatia was making progress towards full implementation even before the Commission decided to commence judicial proceedings. This can be seen in the example of infringement number INFR(2016)0199 which concerned a failure to implement the Broadband Cost Reduction Directive (Directive 2014/61/EU). It seems that the main legislative act for the transposition of this directive in the Croatian legal order was adopted in December 2016, almost a full year after the transposition deadline.⁴⁹ However, after its adoption the transposition of the directive was still incomplete. On 11 July 2017, Croatia informed the Commission that the adoption of the missing transposition legislation in the Parliament was scheduled to take place on 14 July 2017, but on 13 July 2017 the Commission nevertheless decided to refer the case to the Court.⁵⁰ This shows that in cases of clear-cut violations of Union law, such as a failure to implement a directive, the Commission is not prepared to show consideration towards Member States' postponement of implementation measures and requires strict compliance with the deadlines set in the

⁴⁷ Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (OUP 2014) 186.

⁴⁸ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (OUP 2015) 439.

⁴⁹ Act on Measures for the Reduction of Costs for the Installation of High-speed Electronic Communication Networks, Official Gazette 121/2016.

⁵⁰ Commission, Press release 13 July 2017, Broadband cost reduction: Commission decides to refer 3 Member States to the Court of Justice <https://ec.europa.eu/commission/presscorner/detail/EN/IP_17_1937> accessed 18 October.

reasoned opinion. Moreover, in 2016 the Commission confirmed that it aims to bring such cases before the Court within 12 months, should non-implementation of a directive persist during the infringement procedure.⁵¹ Coming back to the aforementioned case, Croatia indeed adopted the required act on 14 July 2017,⁵² and the infringement case was closed in December 2017 without having reached the Court's registry.

Any of the cases above could have easily resulted in a judgment against Croatia had the Commission decided to pursue the case further. It is well established in the Court's case law that for the purpose of the infringement procedure 'the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes'.⁵³ In other words, even if a Member State remedies its breach after the expiry of the deadline set by the reasoned opinion, or even later, once the Commission decides to refer the case to the Court, the Commission is nevertheless at liberty to pursue the case further and the Court may still find that the Member State violated its obligations under Union law.⁵⁴ Such a judgment might be of relevance for establishing the liability of a Member State for damages caused by its breach of Union law.⁵⁵ It can therefore be concluded that in the cases above the Commission showed benevolence towards Croatia when it decided to close the infringement procedures once Croatia had complied with its duties. However, such a decision lies at the discretion of the Commission and cannot be relied on as a rule in future cases. By not remedying the situation within the deadline set by the reasoned opinion, a Member State risks obtaining a judicial finding that it violated its obligations under Union law, which can facilitate private litigation for damages caused by that violation. In addition, by postponing the fulfilment of its obligations under Union law, such as the implementation of directives, a Member State creates additional costs for its budget, since it will be ordered to cover the cost of judicial proceedings if its actions lead to unnecessary litigation, or if it is declared to be in violation of Union law. Furthermore, if a Member State regularly oversteps deadlines for fulfilling its obliga-

⁵¹ Commission (n 1) 6.

⁵² The Act on Changes and Amendments to the Electronic Communications Act, Official Gazette 72/2017.

⁵³ Case C-200/88 Commission of the European Communities v Hellenic Republic ECLI:EU:C:1990:422, para 13.

⁵⁴ Laurence W Gormley, 'Infringement Proceedings' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) 69.

⁵⁵ *ibid.*

tions under Union law, it creates pressure on its administration engaged in infringement procedures and uses up its manpower for fending off cases which are very difficult to win, instead of focusing on strategic litigation before the Court and intervening in cases which might result in legal rules which are highly relevant for that Member State's interests. Admittedly, buying time for compliance with its obligations under Union law might bring the Member State in question political benefits at the domestic level. However, should a Member State persist in its breach of Union law, it risks the imposition of financial sanctions under Article 260 TFEU.

Finally, it should be emphasised that the two non-communication cases in which judicial proceedings were initiated against Croatia and which ended due to the Commission withdrawing its action (Cases C-381/17 and C-415/17) represented a particularly fortunate turn of events for Croatia. In those cases, the Commission demanded only the imposition of a penalty payment on the basis of Article 260(3) TFEU, even though the Commission decided to refer Croatia to the Court after it had announced a strategic decision that in this type of case it would be asking for both financial sanctions envisaged by Article 260(3) – a lump sum and a penalty payment.⁵⁶ By this strategic decision the Commission seeks to prevent Member States from waiting until the final stages of judicial proceedings to fully comply with their transposition obligations and has announced it will no longer withdraw its action in the event of belated compliance by Member States.⁵⁷ Furthermore, the Court recently confirmed in *Commission v Romania* that even when a Member State puts an end to its failure to implement a directive during the judicial proceedings under Article 258 TFEU, a lump sum may still be imposed upon that Member State.⁵⁸ By postponing the implementation of a directive until the final stages of the infringement procedure, a Member State therefore risks the imposition of financial sanctions.

After this brief analysis of infringement cases against Croatia which have so far come close to having their subject-matter examined by the Court, the following part of the paper will focus on analysing the first case which led to a judicial decision establishing that Croatia violated its obligations under Union law.

⁵⁶ Commission (n 1) 6.

⁵⁷ *ibid.*, 6-7.

⁵⁸ *European Commission v Romania* (n 31) para 67.

3.1 Case C-250/18 Commission v Croatia (Waste disposal in Biljane Donje)

The first case decided against the Republic of Croatia on the basis of Article 258 TFEU concerned environmental law, which is not surprising given that the majority of infringement procedures which have been initiated against Croatia dealt with this area. In its judgement of 2 May 2019, the Court declared that Croatia had violated its obligations under Directive 2008/98/EC on waste⁵⁹ (hereinafter: the Waste Framework Directive) by failing to classify stone aggregate deposited in Biljane Donje as waste, by failing to ensure that it was disposed of in line with environmental standards and without representing a health hazard, and by failing to ensure proper management of that waste by its possessor or a third party.⁶⁰

3.1.1 Pre-litigation phase of the case: speeding towards Luxembourg

In September 2013, the Commission first found out about a high quantity of an unknown substance, allegedly dangerous to human health, which had been deposited in Biljane Donje, through a complaint it had received.⁶¹ The substance at issue was identified as 140,000 tonnes of stone aggregate originating from a closed factory of electrodes and ferroalloy in Šibenik and was deposited in Biljane Donje between May 2010 and February 2011. After initial informal communication, on 27 March 2015 the Commission issued a letter of formal notice in which it warned Croatia about two violations of the Waste Framework Directive. The first ground for the Commission's action was that the substance at issue could not be considered a by-product within the meaning of Article 5 of the Waste Framework Directive. The second one related to the non-execution of the order of Croatian authorities which prescribed that the substance at issue had to be covered, with the aim of preventing its further spread into the environment. The Commission warned that Croatia had therefore not complied with its obligations under Articles 4, 5, 13 and 15(1) of the Waste Framework Directive. Croatia was given two months to reply. In its initial response, Croatia acknowledged that the substance at issue could not be considered a by-product. Croatia also submitted records on the inspection of the site which was carried out in March 2015 and which declared that the substance at issue constituted waste. According to the Order of the Croatian Ministry, that waste was deposited on an area which had

⁵⁹ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives [2008] OJ L312/3.

⁶⁰ *European Commission v Republic of Croatia* (n 32).

⁶¹ *ibid*, para 11. The summary of all the facts of the case in this subsection are based on the information provided in the Court's judgment in this case, paras 11-16.

not been prepared for waste disposal and no measures were undertaken for ensuring the protection of underground waters and the spread of the substance into the environment. The possessor of the waste was ordered to commence the removal of the waste within 60 days and to remove all the waste by 31 December 2015 at the latest.

At a meeting between the representatives of the Republic of Croatia and the European Commission held in April 2016, Croatia informed the Commission that the waste had not been removed by the aforementioned deadline, that it planned to entrust the removal of the waste to a third party and announced that due to the length of the procurement process, the removal of waste would commence only in one year at the earliest. Croatia committed itself to submit a waste management plan for Biljane Donje by the end of June 2016. Since no such plan was delivered, the Commission issued a reasoned opinion on 18 November 2016 and gave Croatia two months to comply with it.

The reasoned opinion listed three separate infringement grounds – breach of Article 5(1), Article 13 and Article 15(1) of the Waste Framework Directive.

Croatia replied to the reasoned opinion on 12 January 2017 and submitted further information on 24 February 2017. In its reply, Croatia submitted that the possessor of waste applied for the removal of the status of waste of 851.74 tonnes of the substance in question on 1 September 2016, considering the planned use of that substance as one of the materials in asphalt production. The national authorities conditionally approved the removal of the status of waste on 10 October 2016, provided that the possessor of waste delivered evidence that the substance in question complied with the applicable standards and that during its use for asphalt production polluting emissions would not surpass the legally prescribed limits. By 12 January 2017, no such evidence had been submitted. Furthermore, at a subsequent meeting held in April 2017, Croatia stated that it had undertaken measures to implement the order of 31 March 2015 on the removal of waste and that on 14 April 2017 it had published a call for tenders for the implementation of that order, with the fulfilment deadline of 90 days from the conclusion of a contract. The call for tenders was open until 15 May 2017 and Croatia undertook to inform the Commission on all relevant developments concerning the substance in question deposited at Biljane Donje. However, no further information was provided, which led the European Commission to submit an action against Croatia on the basis of Article 258 TFEU to the Court of Justice of the European Union on 11 April 2018.⁶²

⁶² Commission, Press Release -Industrial waste: Commission refers Croatia to Court over its failure to protect citizens from industrial waste in Biljane Donje landfill <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_1448> accessed 18 October.

3.1.2 *The litigation phase of the proceedings: fighting a losing battle*

As mentioned in the previous subsection, the Commission's action against Croatia was based on three grounds – breaches of Article 5(1), Article 13 and Article 15(1) of Directive 2008/98. Each ground will be analysed separately in the following text.

a) Breach of Article 5(1)

Article 5(1) of the Waste Framework Directive lays down four cumulative conditions which are to be fulfilled if a substance which is an outcome of a production process is not to be classified as waste. In the present case it was questionable whether the substance deposited in Biljane Donje fulfilled the first condition, prescribed under Article 5(1) a), which requires that 'further use of the substance or object is certain'.

During the pre-litigation procedure and even during the proceedings before the Court, Croatia put itself in a rather difficult position because it submitted two opposing views regarding the legal classification of the substance at issue. Croatia first stated that the substance constituted waste and even submitted as evidence the report of the Ministry for the Protection of the Environment and Nature which classified it as waste. Croatia subsequently argued that the substance constituted a by-product, since its further use had later been secured, given that the relevant national authorities approved its usage for the reconstruction and extension of the runway at Zemunik on 14 June 2018. This was possible due to the findings of two national studies, which established that the substance at issue constituted a mineral raw material, which, pursuant to national law, was owned by the state, and that it could be used for construction purposes, especially for fillings and asphalt layers during runway reconstruction.

The Commission argued that the substance deposited in Biljane Donje could not be classified as a by-product since its further use had not been secured. This view was ultimately shared by the Court.

In its assessment of the main arguments put forward by the Commission and Croatia, the Court referred to its well-established case law which confirms that the relevant moment for assessing whether a Member State has violated its obligations under Union law for the purposes of the procedure under Article 258 TFEU is the period before the deadline for compliance set by the Commission in its reasoned opinion.⁶³ In the present case, the compliance deadline was set for 18 January 2017.⁶⁴

⁶³ *European Commission v Republic of Croatia* (n 32) para 36.

⁶⁴ *ibid*, para 59.

A closer look at the facts of the case which were summarised in the previous subsection reveals that by that date Croatia had not secured further use of the substance at issue. By 18 January 2017, Croatia had only informed the Commission that the possessor of the waste had applied for removal of the status of waste of 851.74 tonnes of stone aggregate deposited in Biljane Donje and at another location and that national authorities had issued a conditioned approval of the request, provided that further evidence for the safe use of that material for construction purposes was provided, which had not occurred. Given the inadequacy of such argumentation for compliance purposes, the Court did not even find it necessary to point out that the aforementioned application for the removal of the status of waste concerned only a part of the quantity of the stone aggregate deposited in Biljane Donje. Instead, the Court emphasised that for the six years during which the stone aggregate had been deposited in Biljane Donje Croatia had not even once proved that its further use had been secured.⁶⁵ The Court only briefly addressed Croatia's line of argumentation regarding the possible use of the stone aggregate for runway reconstruction in Zemunik. It stated that such use was only 'envisaged' and not secured. However, even if the stone aggregate were to be used for this purpose, such usage would require it to be deposited, perhaps even permanently, which could lead to environmental degradation, which is precisely what Directive 2008/98 aims to reduce.⁶⁶ In support of this conclusion, the Court referred to its earlier judgment in *Palin Granit*, which had a similar factual background – the management of leftover stone from a granite quarry and its classification as waste under Directive 75/442.⁶⁷ In this case, the Court, relying on its previous jurisprudence,⁶⁸ stated that the notion of waste 'cannot be interpreted restrictively', due to the goals of the Directive and the Treaty provisions which aim at a high level of environmental protection and the application of the precautionary principle and preventive action.⁶⁹ It thus follows that the notion of 'by-product', which constitutes an exception to the status of waste, should be given a narrow meaning, and that its scope '[...]' should be confined to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty [...].⁷⁰ The Court

⁶⁵ *ibid*, para 42.

⁶⁶ *ibid*, para 43.

⁶⁷ Case C-9/00 *Palin Granit Oy and Vehmassalon kansanterveysystön kuntayhtymän hallitus* ECLI:EU:C:2002:232.

⁶⁸ Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (C-418/97) and *Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt+ and Vereniging Stedelijk Leefmilieu Nijmegen v Directeur van de dienst Milieu en Water van de provincie Gelderland* (C-419/97) ECLI:EU:C:2000:318.

⁶⁹ *Palin Granit* (n 67) para 23.

⁷⁰ *ibid*, para 36.

furthermore applied strict reasoning regarding options for further use of the residual stone and stated that its potential use for embankment work or for the construction of harbours and breakwaters would require 'in most cases, potentially long-term storage operations which constitute a burden to the holder and are also potentially the cause of precisely the environmental pollution which Directive 75/442 seeks to reduce'.⁷¹ The Court concluded that 'the reuse [was] therefore not certain and [was] only foreseeable in the longer term', with the result that the leftover stone could not be classified as a by-product.⁷² The same approach was advocated by AG Jacobs, who delivered his opinion in this case.⁷³

This strict stance adopted by the Court in *Palin Granit* regarding the interpretation of the term 'waste' under Directive 75/442 was followed literally in *Commission v Croatia*, where Directive 2008/98/EC was applicable.⁷⁴ These judgments leave little room for substances which need to be deposited for a longer period while awaiting their further use to escape the classification of waste. It is important to note this for future cases.

Finally, an additional point should be mentioned. One of Croatia's lines of defence in its reply to the Commission's action seems to be the fact that under applicable national law the stone aggregate deposited in Biljane Donje constituted a mineral raw material owned by the state was relevant for the determination of whether it should be classified as a by-product. In its submission, the Commission pointed out that the classification of the substance at issue under national law is irrelevant for the purpose of determining whether it constituted a by-product within the meaning of Article 5(1) of the Directive and that it cannot be used for the purpose of circumventing the conditions prescribed by the Directive. The Court did not address this argument because it was based on facts which took place after the expiration of the deadline set by the reasoned opinion, but there is little doubt that it would have sided with the Commission. Ever since the landmark judgment in *Costa v ENEL*,⁷⁵ it has been well established that European law takes primacy over the national law of Member States, which is exactly what has been at issue here. In the later stages of the procedure before the Court, Croatia departed from its abovementioned position and claimed that the conditions under Article 5(1) were met in the present case, reasoning which is in line with the principle of primacy of Union law.

⁷¹ *ibid*, para 38.

⁷² *ibid*, para 38.

⁷³ Case C-9/00 *Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän hallitus* ECLI:EU:C:2002:24, Opinion of AG Jacobs 36.

⁷⁴ Interestingly, *Commission v Croatia* was the first case which confirmed the applicability of this reasoning to the Waste Framework Directive.

⁷⁵ Case 6-64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66.

b) Breach of Article 13

The second ground of the Commission's action against Croatia concerned a breach of Article 13 of Directive 2008/98, which prescribes the duty for Member States to

take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular: [...] without risk to water, air, soil, plants or animals; [...] without causing a nuisance through noise or odours; and [...] without adversely affecting the countryside or places of special interest.⁷⁶

Croatia's defence consisted of two separate arguments. The first was a rather formalistic one, according to which, if the substance at issue was to be classified as a by-product within the meaning of Article 5(1), it would not constitute waste and could therefore not lead to a violation of Article 13. As explained in the previous subsection, this argument was not well-founded, because Croatia's classification of the substance at issue as a by-product relied on factual circumstances which took place after the expiry of the deadline set by the reasoned opinion, and ran contrary to the well-established case law.

Croatia's second argument was based on a claim that the stone aggregate at issue had not had a negative effect on the quality of air or water and that therefore a breach of Article 13 had not occurred. The Commission and Croatia had opposing views on whether the stone aggregate deposited in Biljane Donje had a detrimental effect on the quality of the air and groundwater and both presented limited evidence in support of their claims. The Court approached this issue by first emphasising that even though Article 13 does not prescribe specific measures which have to be taken for its implementation, it nevertheless binds Member States regarding the aim which is to be achieved and leaves them a margin of appreciation regarding the necessity of the measures to be taken.⁷⁷ The Court then, relying on its previous judgment in *Commission v Spain*,⁷⁸ confirmed that the harm to the environment occurred due to the fact that waste had been deposited on a particular site, regardless of the nature of that waste.⁷⁹ As established in *Commission v Slovenia*,⁸⁰ the persistence of a situation which leads to a significant harm to the environment during a longer period and the absence of an intervention by state authorities may lead to the conclusion that a Member State has

⁷⁶ Article 13 of the Waste Framework Directive.

⁷⁷ *European Commission v Republic of Croatia* (n 32) para 54.

⁷⁸ Case C-563/15 *European Commission v Kingdom of Spain* ECLI:EU:C:2017:210, para 28.

⁷⁹ *European Commission v Republic of Croatia* (n 32) para 56.

⁸⁰ Case C-140/14 *European Commission v Republic of Slovenia* ECLI:EU:C:2015:501, para 69.

significantly overstepped the margin of appreciation granted by Article 13.⁸¹ By applying these criteria to the present situation, the Court established that by the expiration of the deadline set by the reasoned opinion, the stone aggregate had been deposited in Biljane Donje for almost seven years and that during that period Croatian authorities had not ensured that the stone aggregate was disposed of without endangering human health and harming the environment.⁸² The Court made it clear that the mere presence of waste harms the environment, and that the nature of the waste itself and its toxicity are irrelevant for that conclusion.⁸³ Such a conclusion leaves no scope for a Member State to plead that the waste meets national environmental standards and therefore does not endanger the environment.

In this judgment, the Court sent one further clear and strong message to Croatia and all other Member States. Croatia submitted that certain administrative obstacles prevented it from executing a ministerial order which obliged the possessor of the stone aggregate to remove that substance from the site. The Court, repeating its reasoning from *Commission v Spain*,⁸⁴ ruled that 'a Member State cannot rely on its internal difficulties in order to justify non-compliance with its obligations and deadlines stemming from Union law'.⁸⁵ During the pre-litigation period, the Commission showed a level of tolerance to the fact that national procedures for remedying the situation might take some time in order to provide results. However, once the case reaches the judicial stage, the Court's case law is far less forgiving and the only factor which matters is whether or not the Member State at issue has taken sufficient measures to achieve compliance with Union law. According to well-established jurisprudence, besides not being able to rely on 'practical or administrative difficulties' to justify non-compliance with a directive, Member States may also not invoke their financial difficulties, which it is up to them 'to overcome by adopting appropriate measures'.⁸⁶

c) Breach of Article 15(1)

The third and final ground of the Commission's action against Croatia was based on a breach of Article 15(1) of the Waste Framework Directive, pursuant to which Member States have an obligation to

⁸¹ *European Commission v Republic of Croatia* (n 32) para 55.

⁸² *ibid*, paras 59-60.

⁸³ *ibid*, para 62.

⁸⁴ *European Commission v Kingdom of Spain* (n 78) para 32.

⁸⁵ *European Commission v Republic of Croatia* (n 32) para 61 (translation of the author).

⁸⁶ Case C-301/10 *European Commission v United Kingdom of Great Britain and Northern Ireland* ECLI:EU:C:2012:633, para 66.

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 Commission claimed that the breach of Article 15(1) was evident from the fact that the stone aggregate had been unlawfully deposited in Biljane Donje for a longer period and from the fact that Croatia had not tried to prevent its disposal nor ensured that it was treated in line with Article 15(1), or in a way which would reduce its harmful effects on the environment. In its defence, Croatia submitted the same argument as regarding the second ground of the Commission's action – that the stone aggregate was to be classified as a by-product, and since it did not represent waste, its treatment could not lead to a breach of Article 15(1).

In line with its previous findings, the Court briefly established that the stone aggregate had been deposited in Biljane Donje from May 2010 until the expiry of the deadline set by the reasoned opinion without treatment which would have reduced its negative environmental effects.⁸⁷ The Court concluded that this could only have happened if Croatia had breached its obligations under Article 15(1).⁸⁸ The Court added that in order to ensure full effectiveness of Union law, Croatia should have adopted interim measures in order to remedy the situation at issue.⁸⁹ Furthermore, it reminded Croatia that the obligation stemming from Article 15(1) was also binding upon municipalities and that it was up to the Member States to adopt the necessary measures to ensure that municipalities fulfil those obligation regarding waste disposed on their territories.⁹⁰

3.1.3 *Post litigation period: return to the Grand Dutchy?*

The Court's judgment in *Commission v Croatia* was delivered on 2 May 2019 and attracted some attention from the local media.⁹¹ However, at the time of writing of this paper, not much seems to have changed in Biljane Donje. It is therefore not surprising that on 23 September 2021 the Commission announced that it had issued a letter of formal notice to Croatia concerning its compliance with the Court's judgment in the

⁸⁷ *European Commission v Republic of Croatia* (n 32) para 68.

⁸⁸ *ibid.*, para 69.

⁸⁹ *ibid.*, para 69.

⁹⁰ *ibid.*, para 70.

⁹¹ Jutarnji.hr, Presuda Suda Europske unije, Hrvatska nije poštovala obveze vezane uz 'crno brdo' u Biljanima Donjim, 9 May 2019 <www.jutarnji.hr/vijesti/hrvatska/presuda-suda-europske-unije-hrvatska-nije-postovala-obveze-vezane-uz-crno-brdo-u-biljanima-donjim-8841770> accessed 18 October 2021.

present case.⁹² The Commission claimed that 'Croatia [was] at the early planning stage of executing this Court judgement, with no concrete timeframe or detailed plan for rehabilitating the site'.⁹³

The Commission's recent letter of formal notice was issued on the basis of Article 260(2) TFEU, which serves as an enforcement tool for ensuring compliance with the Court's rulings. Pursuant to this Article, the Commission may initiate proceedings against a Member State if it considers that the Member State 'has not taken the necessary measures to comply with the judgment of the Court', and has the power to 'specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances'. After the entry into force of the Lisbon Treaty, this procedure has been shortened by eliminating the reasoned opinion from the pre-litigation stage, meaning that the Commission now only has to issue a letter of formal notice before once again referring a Member State to the Court.⁹⁴ However, before initiating the procedure before the Court the Commission must give the Member State an opportunity to submit its observations.

In other words, two years and four and a half months after Croatia lost its first case under Article 258 TFEU and has been found in violation of its obligations under the Waste Framework Directive, it received a stark warning that its first case under Article 260(2) TFEU might soon follow. Croatia has been given an opportunity to both respond to the Commission's letter of formal notice and to adopt the measures in order to comply with the Court's ruling, but no further details such as the deadline which Croatia has been given are publicly available.⁹⁵

The subject-matter of a potential new case against Croatia under Article 260(2) TFEU will be the objective fact whether Croatia has complied with the previous judgment decided on the basis of Article 258 TFEU. According to settled case law, the relevant timing for assessing Member State compliance is the deadline set by the letter of formal notice issued under Article 260(2) TFEU.⁹⁶

Since the 2019 judgment against Croatia established that Croatia had violated its obligations under Union law on all three action grounds, a potential new case would examine Croatia's progress in remedying all

⁹² Commission, Press Corner – September infringements package: key decisions <https://ec.europa.eu/commission/presscorner/detail/en/inf_21_4681> accessed 18 October 2021.

⁹³ *ibid.*

⁹⁴ Lenaerts, Maselis and Gutman (n 47) 209; Pal Weneras, 'Sanctions against Member States under Article 260 TFEU: Alive, But Not kicking?' (2012) 49 CMLR 145, 147.

⁹⁵ Commission, Press Corner – September infringements package: key decisions <https://ec.europa.eu/commission/presscorner/detail/en/inf_21_4681> accessed 18 October 2021.

⁹⁶ Case C-196/13 *European Commission v Italian Republic* ECLI:EU:C:2014:2407, para 45.

three violations. Croatia's defence might take shape in two strategies. The first might consist of proving that further use of the stone aggregate deposited in Biljane Donje is certain and that it should consequently be classified as a by-product within the meaning of Article 5(1) of the Directive. However, judging from the aforementioned strict criteria set by the case law, such argumentation is unlikely to succeed because Croatia would have to prove that the further use of the stone aggregate is imminent and does not require long-term storage. This line of argumentation would therefore not be well advised, because nothing indicates that such a claim has a factual background to support it. The second option would require Croatia to take swift action to ensure adequate treatment of the stone aggregate in any legally available way, even if it means that the state temporarily undertakes the treatment operation itself. Any other solution risks the imposition of financial sanctions against the state, making the entire project more burdensome for the state budget.

3.1.4 Reflection on the case

The aforementioned detailed description of the timeline and the facts of the present case, as well as of the arguments used by both parties, points to several conclusions.

Once the proceedings reached Luxembourg, Croatia had very little chance of securing a judgment in its favour. The simplicity of the case from the legal standpoint is witnessed by the fact that it was decided by a chamber of three judges, a composition of the Court which deals with legally unchallenging issues which often follow the Court's well-established jurisprudence. Further evidence of this stems from the absence of a written opinion of an advocate general, which also occurs only if the legal issue present in the case is relatively straightforward. In order to resolve the present case, the Court applied its previous case law, which set rigorous standards regarding the potential classification of a substance such as the stone aggregate at issue in the present case as a by-product within the meaning of Article 5(1), and regarding action which had to be taken in order for breaches of Article 13 and Article 15(1) to be avoided. These factors strongly suggest that the time for Croatia to act was well before the litigation stage of the procedure.

According to Article 258 TFEU, the Commission enjoys discretion on whether to initiate and continue pursuing an infringement procedure against a Member State.⁹⁷ However, it seems that the Commission is more likely to use that discretion in favour of a Member State in the pre-litigation stage of the procedure than during its later stages, when it

⁹⁷ See also Lenaerts, Maselis and Gutman (n 47) 197.

has already invested significant resources in proving an infringement by that Member State. This can be seen in the example of the present case. During the pre-litigation stage, the Commission showed a higher degree of tolerance to the scope of the problem Croatia was faced with. The Commission commenced proceedings before the Court against Croatia three years after it had first issued a letter of formal notice in this case, and informal communication had occurred even earlier. During the pre-litigation stage the Commission prolonged the original two-month deadline set in the reasoned opinion in order to accommodate Croatia's attempts to resolve the issue. However, on two important occasions Croatia did not fulfil its commitments by the agreed deadline. It failed to submit a waste management plan for Biljane Donje in June 2016 which prompted the Commission to issue a reasoned opinion, and in 2017 Croatia failed to inform the Commission of the progress made, which resulted in the case being referred to the Court. In addition, Croatia was very slow in making any real progress in response to the Commission's concerns about the ongoing breaches of the Waste Framework Directive, which altogether left the Commission with little choice but to continue with the judicial stage of the proceedings. Compliance with the deadlines set by the Commission, especially regarding the delivery of a waste management plan, might have secured Croatia some additional time for addressing the issue.

It should also be noted that the argumentation used by Croatia during both stages of the infringement procedure leaves room for improvement. As explained in the previous subsections, Croatia has not been very consistent in its claims, especially regarding the basis for the classification of the stone as a by-product. Given the factual circumstances of the case, Croatia has made use of the limited argumentation strategies that were at its disposal. However, the main argument that Croatia relied on, that further use of the stone aggregate was secured and that it therefore constituted a by-product, was based on factual evidence dated after the relevant period for examining whether Croatia had committed a breach of the Waste Framework Directive. Generally speaking, the element which seems to be missing in Croatia's argumentation is the use of case law. According to the information present in the Court's judgment, in its pleadings Croatia had not anticipated which case law would be applied to the legal issue before the Court and had not tried to distinguish the present situation from the case law which did not run in its favour. Good knowledge of the Court's case law is often indispensable for the application of Union law, as was demonstrated in the present case in which the rulings in *Commission v Slovenia*⁹⁸ and *Commission v*

⁹⁸ *European Commission v Republic of Slovenia* (n 80).

*Spain*⁹⁹ strongly influenced the interpretation of Article 13 of the Waste Framework Directive.

The situation that Croatia currently faces, having obtained a ruling which established it had failed to fulfil its obligations under the Waste Framework Directive and having received a letter of formal notice in the same case two years later with little progress being made to remedy the breach, is a rather unenviable one. Waste management issues are often complex and not prone to quick fixes. On the other hand, it can be expected that the Commission's response to the present situation will be swift and that the first case against Croatia under Article 260(2) might take place before the Court. An additional source of concern is that a factually very similar situation is taking place in Dugi Rat, where large quantities of stone aggregate from a similar factory of ferroalloy have been deposited over a longer period and are causing health concerns to the local population and the environment.¹⁰⁰

4 Conclusion

The Republic of Croatia has so far been successful in closing infringement cases before they reach the judicial stage of the procedure. Out of 139 closed infringement cases, 98 were closed before they reached the stage of the reasoned opinion, and 38 after having reached that stage, but before being referred to the Court.¹⁰¹ However, three of all the closed cases were closed only after the Commission filed an action before the Court under Article 258 TFEU and after the judicial proceedings had begun. All of these three cases have one factor in common – the Commission exercised its broad discretion in deciding on whether to continue pursuing a particular infringement in favour of Croatia. Since in all three cases Croatia rectified its violation of Union law only after the expiry of the deadline set by a reasoned opinion, those cases could have easily ended in judgments declaring that there was a breach of Croatia's duties under the Treaties. Similar discretion and benevolence by the Commission were demonstrated in six other cases in which a decision for referral to the Court had been made, but the cases never ended up in

⁹⁹ *European Commission v Kingdom of Spain* (n 78).

¹⁰⁰ HRT, *Vijesti -Dugi Rat protiv brda mljevene troske*, 26 September 2021 <<https://vijesti.hrt.hr/hrvatska/dugoracani-prosvjeduju-i-traze-sanaciju-zemljista-nekadasnje-tvornice-ferolegura-3028836>> accessed 18 October; Index.hr, *Mještani Dugog Rata: Obolijevamo od raka jer država nije u stanju sanirati tvornicu*, 10 September 2021 <www.index.hr/vijesti/clanak/mjestani-dugog-rata-obolijevamo-od-raka-jer-drzava-nije-u-stanju-sanirati-tvornicu/2303084.aspx> accessed 18 October 2021.

¹⁰¹ Data obtained through the European Commission's search engine at <https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en> accessed 18 October 2021.

Luxembourg since Croatia complied with its obligations before the Commission filed an action under Article 258 TFEU.

Croatia's statistics regarding infringement procedures is in line with the general statistics for this type of procedure – most infringement cases indeed never reach the Court.¹⁰² However, those that do have a very high chance of ending in the Commission's favour. For example, out of 26 infringement cases decided by the Court in 2020, only three cases were dismissed.¹⁰³ In 2019, three cases were dismissed out of 25, and in 2018 three cases out of 30.¹⁰⁴ In 2017, all 20 infringement cases which were decided ended in establishing that the Member State in question had violated its duties under Union law.¹⁰⁵ The figure for Croatia stands out from the general statistics is the ratio of cases in which the Commission filed an action against it, and cases which ended in a judgment declaring that it had committed a violation of its obligations under the Treaties. So far, there has been only one such case regarding Croatia – Case C-250/18 (Waste management in Biljane Donje).

Croatia's litigation experience in infringement proceedings brought by the Commission, which is therefore limited to only one case, already depicts the difficult legal position in which a Member State finds itself when faced with a case under Article 258 TFEU. Once it reaches the Court, the Commission's case is usually strong and the Court's case law regarding potential justifications for a Member State's non-compliance is not very forgiving.¹⁰⁶

Judging from the status of open infringement cases at the time of writing this paper, an increased litigation risk for Croatia comes from 37 active infringement cases which are non-communication cases. Pursuant to Article 260(3) TFEU, financial sanctions can be imposed upon a Member State which has failed to fulfil its transposition obligations regarding a directive in the same judgment in which the Court establishes that the Member State in question violated its obligations under the Treaties. Given the Commission's recent decision to speed up these types of cases and to demand the imposition of both a penalty payment and a lump sum when the Member State's violation still persists at the time of

¹⁰² For example, in 2020 the Commission opened 903 new infringement cases by sending letters of formal notice. In that same year, 12 infringement cases were referred to the Court. Commission, General Statistical Overview Accompanying the Document Report from the Commission Monitoring the application of European Union law – 2020 Annual Report, SWD(2021) 212 final 21, 24.

¹⁰³ Court of Justice of the European Union, Annual Report – Judicial Activity 2020, 218.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ *European Commission v Romania* (n 31) para 76.

the Court's decision,¹⁰⁷ it can be concluded that these cases might soon represent a burden for the state budget if the Member State, in this case Croatia, does not undertake decisive action to comply with its transposition obligations. Buying time for the belated transposition of directives can therefore come at a steep price.

An imminent litigation risk for Croatia under Article 258 TFEU might also derive from 15 open cases in which the Commission issued a reasoned opinion, which are therefore just one legal step away from being referred to the Court. In some of these cases the Commission seems to be exercising its discretion not to refer the case to the Court regardless of the fact that Croatia is in all likelihood not prepared to make concessions (case INFR(2014)2209 concerning the excise duty rate for small producers of distillates). Nevertheless, most of the cases which have reached the stage of a reasoned opinion are relatively new and seven of them are non-communication cases, in which further developments in one direction or the other are likely to follow soon.

The biggest litigation risk on the horizon for Croatia is easily the infringement case INFR(2015)4023, in which the Court already delivered a judgment under Article 258 TFEU in Case-250/18 (Waste management in Biljane Donje). The Commission has recently issued a letter of formal notice under Article 260(2) TFEU and it seems that Croatia has so far made little progress in remedying the situation in the field. This case might thus soon return to Luxemburg and, if it does, it might also be the first case in which financial sanctions are imposed on Croatia for its violation of Union law.



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¹⁰⁷ Commission (n 1) 6-7.