DOI:10.1017/ilm.2023.59

INTRODUCTORY NOTE TO CASE C-632/20 P, SPAIN v. EUR. COMM'N (C.J.E.U.)

BY EVA KASSOTI*

[January 17, 2023]

Introduction

On January 17, 2023, the Grand Chamber of the Court of Justice of the European Union (CJEU) delivered its judgments in case C-632/20, P *Spain v. Commission* (Kosovo),[1] ruling that notwithstanding the European Union's non-recognition of Kosovo as a state, Kosovo may participate in an EU agency, namely the Body of European Regulators for Electronic Communications (BEREC). The judgment is significant for several reasons: (1) for the European Union's growing engagement with non-recognized territorial entities since it clarifies the meaning of the concept of "third country" and confirms that such entities may participate in EU agencies; (2) for the European Union's engagement with Kosovo—particularly in the light of Kosovo's 2022 bid for EU membership; and (3) more broadly, in the context of the burgeoning debate regarding the CJEU's approach to international law.

Background

The case is an appeal against the General Court's (GC) judgment of September 23, 2020.[2] At first instance, the GC rejected Spain's complaint to the effect that participation of Kosovo's National Regulatory Authority (NRA) in BEREC is precluded since the European Union has not recognized Kosovo as an independent state, and thus Kosovo does not constitute a "third country" within the meaning of EU secondary law—and, more particularly, Article 35 of the BEREC Regulation. The GC argued that the fact that the TFEU refers to both "third states" and "third countries" implies that the latter concept is broader, and thus that it is "clearly intended to pave the way for the conclusion of international agreements with entities 'other than States'."[3] Spain appealed the GC's judgment.

The Judgment

The CJEU began its analysis by highlighting the impossibility of determining the meaning of the concept of "third country" based on a literal interpretation of the Treaties. Noting that in some language version of the Treaties the terms are used synonymously, the CJEU reprimanded the GC for failing to take into account the relevant linguistic divergences, and thus to pay heed to settled case law to the effect that different language versions must be interpreted in a uniform manner and that no language version can be made to override others.

Against this backdrop, the CJEU continued by exploring whether the term "third countries" in Article 35 (2) of the BEREC Regulation could encompass Kosovo. The Court found that the principle of effectiveness entails that an entity not recognized as a sovereign state should be treated as a "third country" within the meaning of that provision "while not infringing international law."[4] As far as the latter is concerned, the Court referred to the Advisory Opinion on the Kosovo Declaration of Independence from the International Court of Justice (ICJ)[5] as proof that Kosovo's unilateral declaration of independence did not violate international law, UN Security Council Resolution 1244 (1999), or the applicable constitutional framework. Furthermore, the Court argued that this conclusion does not affect the individual positions of member states since the Commission's decision concerning the participation of the NRA of Kosovo in BEREC expressly states that the designation "Kosovo" is without prejudice to positions on status.[6]

The Court turned next to the interpretation of the concept of "third country" in the BEREC Regulation. It underscored the fact that the Union has entered several international agreements with Kosovo, "thus recognizing its capacity to conclude such agreements."[7] The Court highlighted the similarity in wording and context between Article 111 of the EU–Kosovo Stabilisation and Association Agreement (SAA) and other comparable provisions contained in other SAAs with countries of the Western Balkans—which have served as the requisite legal bases for the participation of the NRAs of those countries in the activities of BEREC. Thus, it concluded that Article 111 of the EU–Kosovo SAA must have also been adopted for the purpose of allowing the participation of the NRA of Kosovo in BEREC. The Court also rejected Spain's claim to the effect that the Commission's decision concerning the

*Eva Kassoti is Senior Researcher in International and European law at the TMC Asser Institute and the academic coordinator of the Centre for the Law of EU External Relations, The Hague, the Netherlands.

participation of the NRA of Kosovo in BEREC constitutes implicit recognition of Kosovo's statehood.[8] It stressed that the decision expressly states that the designation "Kosovo" is without prejudice to positions on status.[9]

Conclusion

It is important to note that the CJEU did not really invoke relevant international legal practice to substantiate the view that Article 35(2) of the BEREC Regulation should be interpreted as covering territorial entities that have not been recognized as "states" by the Union. At the same time, the treaty-practice of the Union itself with territorial entities that have not been recognized as sovereign states by the European Union—such as the PLO, Hong Kong, and Macao—attests to the proposition that entities other than states proper may also enjoy (limited) capacity to act on the international plane. Indeed, modern international law acknowledges that legal personality is a spectral concept: while states are actors that "possess the totality of international rights and duties recognized by international law,"[10] other actors (such as insurgent groups, national liberation movements, and non-self-governing territories) may enjoy a degree of legal personality that affords them the capacity to act on the international plane (including treaty-making capacity).[11] Moreover, the decision of the International Law Commission (ILC) to limit the Vienna Convention on the Law of Treaties (VCLT) to treaties between states implicitly acknowledged this. Article 3 VCLT excludes international agreements involving "other subjects of international law," thereby confirming that although such agreements do not fall within the scope of the VCLT, they do exist as a matter of international law. The Court of Justice's own case law also attests to this "spectral" understanding of international legal personality.[12]

Whether a particular entity possesses treaty-making capacity is a matter of recognition; other actors must recognize its treaty-making capacity. Thus, disengaging international legal personality from the capacity to act avoids the misleading dichotomy between "subjects" and "objects" of international law and allows the weight of inquiry to fall on the extent of the legal capacity enjoyed by a particular entity in each case. Several states, including Austria, Belgium, Luxembourg, and Turkey, have recognized Kosovo's treaty-making capacity.

Furthermore, the Court's only actual reference to international law in the judgment is rather cryptic. The Court stated that, on grounds of securing the effectiveness of the provision at hand, entities not recognized as sovereign states by the Union should be treated as "third countries" within the meaning of that provision "while not infringing international law."[13] It is unclear what the non-infringement of international law meant. The Court's subsequent reference to the ICJ's Advisory Opinion on the Kosovo Declaration of Independence presumably implies that Kosovo can be considered a "third country" since its declaration of independence does not violate international law.

This conclusion is not as straightforward as it may seem. According to Article 41(2) of the International Law Commission Articles on State Responsibility, there is an international law obligation bestowed upon third parties not to recognize, either formally or implicitly, an effective territorial situation created in breach of a *jus cogens* norm. However, the ICJ merely gave an affirmative answer to the considerably narrower question of the accordance of Kosovo's unilateral declaration of independence with international law without touching upon questions of statehood or recognition. Since a declaration of independence *in and of itself* does not create a state, or a new legal situation, it may be considered a legally neutral act.[14]

In reality, there was no need for the Court to make this particular reference to "infringements of international law." The case did not directly involve any questions of formal—and, more importantly, implicit—recognition by the Union of Kosovo as a state and hence no question of responsibility of the Union could technically arise here. Article 2 of the Kosovo SAA expressly states that the agreement does not constitute recognition of Kosovo's status as a state by the Union and, similarly, the Commission decision at hand expressly states that the designation Kosovo "is without prejudice to questions of status."

Still, the judgment is an important one. The Court clarified that the (rather artificial) distinction made by the GC between "third states" and "third countries" does not exist—at least as a matter of EU secondary law. Its implications for Kosovo's future relations with the European Union remain to be seen, particularly since the question of whether Kosovo constitutes a "state," as Article 49 TEU seems to require, remains open. Furthermore, the judgment underscored the EU's functional approach towards non-recognized entities; lack of official recognition does not prevent the Union from effectively engaging with entities whose international legal status remains unclear. At the same time, the Court clarified that this functional approach cannot be equated to implicit recognition.

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

ENDNOTES

1 Case C-632-20 P, Spain v. Commission (Kosovo), ECLI:EU:C:2023:28 (Jan. 23, 2023).

2 Case T-370/19, Spain v. Commission, ECLI:EU:T:220:440 (Sept. 23, 2023).

3 *Id.* ¶ 30.

4 Spain v. Commission (Kosovo), *supra* note 1, ¶ 50.

5 Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403 (July 22).

6 Spain v. Commission (Kosovo), *supra* note 1, ¶ 52.

7 *Id.* ¶ 55.

8 *Id.* ¶¶ 66–73.

9 *Id.* ¶ 70.

10 Reparations for Injuries suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174 (Apr. 11), p. 180.

11 Tom Grant, *Who Can Make Treaties? Other Subjects of International Law*, *in* THE OXFORD GUIDE TO TREATIES, (Duncan B. Hollis, ed., 2d ed. 2020), pp. 150–172.

12 Case C-363/18, Organisation juive européenne Vignoble Psagot Ltd v. Ministre de l'Économie et des Finances, ECLI:EU:C:2019:54 (Nov. 12, 2019), ¶¶ 29–31.

13 Spain v. Commission (Kosovo), *supra* note 1, ¶ 50.

14 Eva Kassoti, *The Sound of One Hand Clapping: Unilateral Declarations of Independence in International Law*, 17 GERMAN L.J. 215 (2016).

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

DOI:10.1017/ilm.2023.59

CASE C-632/20 P, SPAIN V. EUR. COMM'N (C.J.E.U.)*
[January 17, 2023]

JUDGMENT OF THE COURT (Grand Chamber)
17 January 2023 (**)

(Appeal – External relations – Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part – Electronic communications – Regulation (EU) 2018/1971 – Body of European Regulators for Electronic Communications (BEREC) – Article 35(2) – Participation of the regulatory authority of Kosovo in that body – Concepts of 'third country' and 'third State' – Competence of the European Commission)

In Case C-632/20 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 24 November 2020,

Kingdom of Spain, represented initially by S. Centeno Huerta, and subsequently by A. Gavela Llopis, acting as Agents,

appellant,

the other party to the proceedings being:

European Commission, represented by F. Castillo de la Torre, M. Kellerbauer and T. Ramopoulos, acting as Agents,

defendant at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Prechal, K. Jürimäe, C. Lycourgos and M. Safjan, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, T. von Danwitz, I. Jarukaitis, A. Kumin, N. Jääskinen (Rapporteur), M. Gavalec, Z. Csehi and O. Spineanu-Matei, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 16 June 2022, gives the following

Judgment

1 By its appeal, the Kingdom of Spain asks the Court of Justice to set aside the judgment of the General Court of the European Union of 23 September 2020, *Spain* v *Commission* (T-370/19, EU:T:2020:440; 'the judgment under appeal'), by which the General Court dismissed its application for annulment of the Commission Decision of 18 March 2019 on the participation of the National Regulatory Authority of Kosovo in the Body of European Regulators for Electronic Communications (OJ 2019 C 115, p. 26; 'the decision at issue').

*This text was reproduced and reformatted from the text available at the Court of Justice of the European Union website (visited December 18, 2023), https://curia.europa.eu/juris/document/document_print.jsf;jsessionid=807E7DEE81873DA5FB962F3800C6CEC9?mode=DOC&pageIndex=0&docid=269345&part=1&doclang=EN&text=&dir=&occ=first&cid=6824556.
**Language of the case: Spanish.

Legal context

THE KOSOVO SAA

2 The 17th recital of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part (OJ 2016 L 71, p. 3; 'the Kosovo SAA'), states that that agreement 'is without prejudice to positions on status, and is in line with [United Nations Security Council resolution 1244 (1999)] and the [International Court of Justice] Opinion on the Kosovo declaration of independence'.

3 Article 2 of that agreement provides:

> 'None of the terms, wording or definitions used in this Agreement, including the Annexes and Protocols thereto, constitute recognition of Kosovo by the EU as an independent State nor does it constitute recognition by individual Member States of Kosovo in that capacity where they have not taken such a step.'

4 Article 111 of that agreement, entitled 'Electronic communications networks and services', provides: 'Cooperation shall primarily focus on priority areas related to the EU *acquis* in this field.

> The Parties shall, in particular, strengthen cooperation in the area of electronic communications networks and electronic communications services, with the ultimate objective of the adoption by Kosovo of the EU *acquis* in the sector five years after the entry into force of this Agreement, paying particular attention to ensuring and strengthening the independence of the relevant regulatory authorities.'

REGULATION (EU) 2018/1971

5 Recitals 5, 13, 20, 22, 25, 29 and 34 of Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 (OJ 2018 L 321, p. 1), are worded as follows:

> '(5) [The Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office)] were established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council [of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (OJ 2009 L 337, p. 1)]. BEREC replaced the [European Regulators Group for Electronic Communications Networks and Services (ERG)] and was intended to contribute, on one hand, to the development and, on the other, to the better functioning, of the internal market for electronic communications networks and services by aiming to ensure the consistent implementation of the regulatory framework for electronic communications. BEREC acts as a forum for cooperation among [national regulatory authorities (NRAs)] and between NRAs and the [European] Commission in the exercise of the full range of their responsibilities under the Union regulatory framework. BEREC was established to provide expertise and to act independently and transparently.
>
> ...
>
> (13) BEREC should provide expertise and establish confidence by virtue of its independence, the quality of its advice and information, the transparency of its procedures and methods of operation, and its diligence in carrying out its tasks. BEREC's independence should not prevent its Board of Regulators from deliberating on the basis of drafts prepared by working groups.
>
> (20) BEREC should be entitled to establish working arrangements with competent Union bodies, offices, agencies and advisory groups, with competent authorities of third countries and with international organisations, which should not create legal obligations. The goal of such working arrangements could be, for instance, to develop cooperative relationships and exchange views on regulatory issues. The Commission should ensure that the necessary working arrangements are consistent with

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

Union policy and priorities, and that BEREC operates within its mandate and the existing institutional framework and is not seen as representing the Union position to an outside audience or as committing the Union to international obligations.

. . .

(22) BEREC should be able to act in the interests of the Union, independently from any external intervention, including political pressure or commercial interference. It is therefore important to ensure that the persons appointed to the Board of Regulators enjoy the highest guarantees of personal and functional independence. The head of an NRA, a member of its collegiate body, or the replacement of either of them, enjoy such a level of personal and functional independence. More specifically, they should act independently and objectively, should not seek or take instructions in the exercise of their functions, and should be protected against arbitrary dismissal. . . .

. . .

(25) Where appropriate and depending on the allocation of tasks to authorities in each Member State, the views of other competent authorities should be taken into consideration in the relevant working group, for example through consultation at national level or by inviting those other authorities to the relevant meetings where their expertise is needed. In any event, the independence of BEREC should be maintained.

. . .

(29) The Director should remain the representative of the BEREC Office with regard to legal and administrative matters. The Management Board should appoint the Director following an open and transparent selection procedure in order to guarantee a rigorous evaluation of the candidates and a high level of independence. . . .

. . .

(34) In order to further extend the consistent implementation of the regulatory framework for electronic communications, the Board of Regulators, the working groups and the Management Board should be open to the participation of regulatory authorities of third countries competent in the field of electronic communications where those third countries have entered into agreements with the Union to that effect, such as [European Economic Area (EEA) or European Free Trade Association (EFTA)] States and candidate countries.'

6 Article 3 of Regulation 2018/1971, entitled 'Objectives of BEREC', is worded as follows:

'1. BEREC shall act within the scope of Regulations (EU) No 531/2012 [of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (OJ 2012 L 172, p. 10)] and (EU) 2015/2120 [of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ 2015 L 310, p. 1)] and Directive (EU) 2018/1972 [of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ 2018 L 321, p. 36)].

2. BEREC shall pursue the objectives set out in Article 3 of Directive (EU) 2018/1972. In particular, BEREC shall aim to ensure the consistent implementation of the regulatory framework for electronic communications within the scope referred to in paragraph 1 of this Article.

3. BEREC shall carry out its tasks independently, impartially, transparently and in a timely manner.

4. BEREC shall draw upon the expertise available in the [NRAs].

. . .'

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

7 Article 4 of Regulation 2018/1971, entitled 'Regulatory tasks of BEREC', states in the first subparagraph of paragraph 4:

> 'Without prejudice to compliance with relevant Union law, NRAs and the Commission shall take the utmost account of any guideline, opinion, recommendation, common position and best practices adopted by BEREC with the aim of ensuring the consistent implementation of the regulatory framework for electronic communications within the scope referred to in Article 3(1).'

8 Article 8 of that regulation, entitled 'Independence of the Board of Regulators', provides:

> '1. When carrying out the tasks conferred upon it and without prejudice to its members acting on behalf of their respective NRA, the Board of Regulators shall act independently and objectively in the interests of the Union, regardless of any particular national or personal interests.
>
> 2. Without prejudice to coordination as referred to in Article 3(6), the members of the Board of Regulators and their alternates shall neither seek nor take instructions from any government, institution, person or body.'

9 Article 9 of that regulation, entitled 'Functions of the Board of Regulators', provides: 'The Board of Regulators shall have the following functions:

> . . .
>
> (i) to authorise, together with the Director, the conclusion of working arrangements with competent Union bodies, offices, agencies and advisory groups and with competent authorities of third countries and with international organisations in accordance with Article 35;
>
> . . .'

10 Article 15 of that regulation, entitled 'Composition of the Management Board', states in paragraph 3:

> 'The members of the Management Board and their alternates shall neither seek nor take instructions from any government, institution, person or body.'

11 Article 16 of Regulation 2018/1971, entitled 'Administrative Functions of the Management Board', provides in paragraph 1:

> 'The Management Board shall have the following administrative functions:
>
> . . .
>
> (m) to appoint an Accounting Officer, subject to the Staff Regulations and the Conditions of Employment of Other Servants, who shall be wholly independent in the performance of his or her duties;
>
> . . .'

12 Article 20 of that regulation, entitled 'Responsibilities of the Director', provides, in paragraphs 3 and 6:

> '3. Without prejudice to the powers of the Board of Regulators, the Management Board and the Commission, the Director shall be independent in the performance of his or her duties and shall neither seek nor take instructions from any government, institution, person or body.
>
> . . .
>
> 6. The Director shall be responsible for the implementation of the BEREC Office's tasks and following the guidance provided by the Board of Regulators and the Management Board. In particular, the Director shall be responsible for:
>
> . . .
>
> (m) authorising, together with the Board of Regulators, the conclusion of working arrangements with competent Union bodies, offices, agencies and advisory groups and with competent authorities of third countries and with international organisations in accordance with Article 35.'

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

13 Article 35 of that regulation, entitled 'Cooperation with Union bodies, third countries and international organisations', provides:

> '1. In so far as necessary in order to achieve the objectives set out in this Regulation and carry out its tasks, and without prejudice to the competences of the Member States and the institutions of the Union, BEREC and the BEREC Office may cooperate with competent Union bodies, offices, agencies and advisory groups, with competent authorities of third countries and with international organisations.
>
> To that end, BEREC and the BEREC Office may, subject to prior approval by the Commission, establish working arrangements. Those arrangements shall not create legal obligations.
>
> 2. The Board of Regulators, the working groups and the Management Board shall be open to the participation of regulatory authorities of third countries with primary responsibility in the field of electronic communications, where those third countries have entered into agreements with the Union to that effect.
>
> Under the relevant provisions of those agreements, working arrangements shall be developed specifying, in particular, the nature, extent and manner in which the regulatory authorities of the third countries concerned will participate without the right to vote in the work of BEREC and of the BEREC Office, including provisions relating to participation in the initiatives carried out by BEREC, financial contributions and staff to the BEREC Office. As regards staff matters, those arrangements shall, in any event, comply with the Staff Regulations.
>
> 3. As part of the annual work programme referred to in Article 21, the Board of Regulators shall adopt BEREC's strategy for relations with competent Union bodies, offices, agencies and advisory groups, with competent authorities of third countries and with international organisations concerning matters for which BEREC is competent. The Commission, BEREC and the BEREC Office shall conclude an appropriate working arrangement for the purpose of ensuring that BEREC and the BEREC Office operate within their mandate and the existing institutional framework.'

14 Article 42 of that regulation, entitled 'Declarations of interests', states:

> '1. Members of the Board of Regulators and the Management Board, the Director, seconded national experts and other staff not employed by the BEREC Office shall each make a written declaration indicating their commitments and the absence or presence of any direct or indirect interests that might be considered to prejudice their independence.C
>
> . . .
>
> 2. Members of the Board of Regulators, the Management Board and the working groups, and other participants in their meetings, the Director, seconded national experts and other staff not employed by the BEREC Office shall each accurately and completely declare, at the latest at the start of each meeting, any interest which might be considered to be prejudicial to their independence in relation to the items on the agenda, and shall abstain from participating in the discussion and the voting on, such points.
>
> . . .'

THE DECISION AT ISSUE

15 After referring, in recitals 1 to 3, respectively, to the provisions of Article 17(1) TEU, Article 35(2) of Regulation 2018/1971 and Article 111 of the Kosovo SAA, the decision at issue provides, in Article 1:

> 'The [NRA] of Kosovo with primary responsibility for overseeing the day-to-day operation of the markets for electronic communications networks and services may participate in the Board of Regulators and Working Groups of [BEREC] and the Management Board of the BEREC Office.
>
> The Terms of Reference for the participation of the [NRA] of Kosovo are set out in the Annex.'

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

Background to the dispute

16 The background to the dispute is set out in paragraphs 1 to 11 of the judgment under appeal and may, for the purposes of the present proceedings, be summarised as follows.

17 In the period between 2001 and 2015, the European Union signed stabilisation and association agreements with six countries of the Western Balkans, including Bosnia and Herzegovina and Kosovo.

18 By its Communication of 6 February 2018 to the European Parliament, the Council of the European Union, the European Economic and Social Committee and the Committee of the Regions, entitled 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans' (COM(2018) 65 final), the Commission recommended actions to develop the digital society and to align the legislation of those countries with EU legislation.

19 One of those actions involved incorporating the Western Balkans into existing regulatory bodies or expert groups, such as BEREC. Thus, according to section 8.3.1 of the Commission staff working document of 22 June 2018, entitled 'Measures in support of a Digital Agenda for the Western Balkans' (SWD(2018) 360 final), a 'closer relationship between EU and Western Balkans NRAs will help bring regulatory practice in the region closer to the Union … While four out of six Western Balkan economies are currently observers of BEREC, the BEREC Board agreed to work more closely with all six NRAs of the region. This will still be possible under the revised [Regulation No 1211/2009]'.

20 On 18 March 2019, the Commission adopted six decisions concerning the participation in BEREC of the NRAs of the countries of the Western Balkans. The six decisions in question, which are based, in particular, on Article 35(2) of Regulation 2018/1971, include the decision at issue, by which the Commission allowed the NRA of Kosovo to participate in the Board of Regulators and working groups of BEREC and the Management Board of the BEREC Office.

The procedure before the General Court and the judgment under appeal

21 By application lodged at the Registry of the General Court on 19 June 2019, the Kingdom of Spain brought an action for annulment of the decision at issue.

22 In support of its action, the Kingdom of Spain relied on three pleas in law alleging infringement of Article 35 of Regulation 2018/1971.

23 By the judgment under appeal, the General Court dismissed the action in its entirety.

24 By the first plea in law of its action, the Kingdom of Spain submitted that the decision at issue infringes Article 35 of Regulation 2018/1971 in.so far as Kosovo is not a 'third country' within the meaning of that provision. Having noted in paragraph 28 of the judgment under appeal that the concept of 'third country' is not defined in Regulation 2018/1971 or in the relevant EU legislation, the General Court pointed out, in paragraphs 29 and 30 of that judgment, that the FEU Treaty refers to both 'third countries' and 'third States'. In that regard, the General Court recalled that Part Five of the FEU Treaty, headed 'The Union's external action', Title III of which concerns cooperation 'with third countries' and Title VI of which concerns relations 'with international organisations and third countries', reflects the fact that international society is composed of various actors. The General Court inferred from this that the provisions of the FEU Treaty relating to 'third countries' are intended to enable the European Union to conclude international agreements with territorial entities, which are covered by the flexible concept of 'country', but which are not necessarily 'States' for the purposes of international law.

25 In paragraph 35 of the judgment under appeal, the General Court held that the concept of 'third country' referred to in EU primary law, particularly Articles 212 and 216 to 218 TFEU, cannot be construed differently when the same concept appears in a provision of secondary legislation. It inferred from this, in paragraph 36 of that judgment, that the concept of 'third country' within the meaning of Article 35(2) of Regulation 2018/1971 is not the same as that of 'third State', but has a broader scope which goes beyond sovereign States alone, without prejudice to the position of the European Union as regards the status of Kosovo as an independent State, which, as a 'third country', may also have public authorities, such as the NRA of Kosovo.

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

26 By the second plea in law of its action, the Kingdom of Spain submitted that Article 111 of the Kosovo SAA does not constitute an agreement concluded with the European Union to enable an NRA of a third country, within the meaning of Article 35(2) of Regulation 2018/1971, to participate in the bodies of BEREC. In that regard, the General Court held, in paragraphs 47 to 49 of the judgment under appeal, that the two conditions to which the participation of NRAs of third countries in the bodies of BEREC is subject under that provision were satisfied, the first of those being that there must be an 'agreement' between the third country concerned and the European Union and, the second, that the agreement must have been entered into 'to that effect'.

27 As regards, in particular, the second condition, the General Court made clear, in paragraph 53 of the judgment under appeal, that it is notably the participation, with limited rights, referred to in Article 35(2) of Regulation 2018/1971 that corresponds to the close cooperation envisaged in Article 111 of the Kosovo SAA, although it is not to be equated with 'incorporation' of the NRA of Kosovo into the structure of BEREC. Consequently, the General Court concluded, in paragraph 54 of the judgment under appeal, that Article 111 of the Kosovo SAA is an agreement 'to that effect', within the meaning of Article 35(2) of that regulation.

28 Lastly, as regards the third plea in law of the action, according to which the decision at issue infringed Article 35 of Regulation 2018/1971 in.so far as the Commission departed from the established procedure for the participation of NRAs of third countries in BEREC, the General Court essentially noted, in paragraphs 77 and 81 of the judgment under appeal, that neither Regulation 2018/1971 nor any other EU legislation expressly conferred on the BEREC Office or any other body the power to draw up working arrangements applying to the participation of NRAs of third countries, and that, despite its general nature, Article 17 TEU constitutes a sufficient legal basis for the adoption of the decision at issue. It inferred from this, in paragraph 82 of the judgment under appeal, that the Commission had the power, under that provision, to establish unilaterally in the decision at issue working arrangements within the meaning of the second subparagraph of Article 35(2) of Regulation 2018/1971.

Forms of order sought by the parties before the Court of Justice

29 By its appeal, the Kingdom of Spain claims that the Court should:

- set aside the judgment under appeal;
- rule on the action for annulment and annul the decision at issue; and
- order the Commission to pay the costs.

30 The Commission contends that the Court should:

- dismiss the appeal; and
- order the Kingdom of Spain to pay the costs.

The appeal

31 In support of its appeal, the Kingdom of Spain relies on five grounds of appeal, alleging (i) an error of law in the interpretation of the concept of 'third country' within the meaning of Article 35 of Regulation 2018/1971; (ii) an error of law in the interpretation and application of Article 111 of the Kosovo SAA, in conjunction with Article 35 of Regulation 2018/1971, in that the General Court misinterpreted the consequences of the lack of an EU position on the status of Kosovo under international law; (iii) an error of law in the interpretation of those provisions, in so far as the cooperation referred to does not include participation in BEREC and the Management Board of the BEREC Office; (iv) an error of law in so far as the judgment under appeal concluded that Article 17 TEU constituted a valid legal basis for adopting the decision at issue; and (v) an error of law in the interpretation of Article 35(2) of Regulation 2018/1971 in.so far as the judgment under appeal concluded that working arrangements may be established unilaterally by the Commission.

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

THE FIRST GROUND OF APPEAL

Arguments of the parties

32 By its first ground of appeal, the Kingdom of Spain claims that the General Court erred in law, in paragraph 36 of the judgment under appeal, in finding that the concept of 'third country', within the meaning of Article 35(2) of Regulation 2018/1971, has a broader scope than that of 'third State' as the former does not refer only to independent States. According to the Kingdom of Spain, that interpretation is not consistent with EU law or with international law.

33 The Kingdom of Spain criticises the General Court for having relied solely on the provisions of the FEU Treaty relating to 'third countries' to infer from this, without any further analysis, that those provisions are clearly intended to pave the way for the conclusion of international agreements with entities other than States. In so doing, the General Court did not identify anything in EU primary law or in international law that might differentiate the concept of 'third country' from that of 'third State'.

34 According to the Kingdom of Spain, the concepts of 'third country' and 'third State' are equivalent, although they reflect different degrees of legal formality. Thus, from the point of view of international law, the terms 'State' and 'country' each evoke a separate dimension of the same subject and have their own sphere of application. The term 'country' is not used to refer to the status of the subject in international law but to its physical dimension. The two words might sometimes be used interchangeably, depending on the context.

35 The Kingdom of Spain maintains that the term 'third country', as used in the Treaties and in Regulation 2018/1971, does not have a broader or different meaning from that of the term 'third State'. Any other interpretation would be likely to transform the concept of 'third country' into an autonomous category of EU law, with a meaning that differs from that which obtains in international law, while States are the key subjects of international relations.

36 The Commission rebuts those arguments as being unfounded and contends that the terms 'third country' and 'third State' are used differently in EU law. The Commission had been able to conclude international agreements with Kosovo as a 'third country', as referred to in Articles 212 and 216 to 218 TFEU, without recognising it as a State.

Findings of the Court

37 As a preliminary point, it should be noted that, in paragraphs 28 and 29 of the judgment under appeal, the General Court noted, first, that the concept of 'third country' is not defined in any way in Regulation 2018/1971 or in EU legislation on electronic communications, and, second, that the provisions of the FEU Treaty refer to both 'third countries' and 'third States', but that many provisions dealing with issues concerning external relations would use the term 'third countries'. In particular, the General Court stated that Part Five of the FEU Treaty, relating to the European Union's external action, contains Title III on cooperation 'with third countries', and Title VI on relations 'with international organisations and third countries', thus reflecting the fact that international society is composed of various actors.

38 In that regard, it appears that it is not possible to determine the meaning of the concept of 'third country' referred to in Article 35(2) of Regulation 2018/1971 on the basis of a literal interpretation of the Treaties, in particular Part Five of the FEU Treaty.

39 First, the terms 'third country' and 'third State' appear interchangeably in many provisions of the EU and FEU Treaties, without there appearing to be any particular justification for the use of either term.

40 Second, according to settled case-law, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions.

41 In that regard, as the Advocate General noted in points 50 to 52 of her Opinion, not all the language versions of the EU and FEU Treaties use the terms 'third State' and 'third country' together. In the Estonian, Latvian, Polish and Slovenian versions of those Treaties, in particular, the expression 'third State' is used. Furthermore, where both

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

terms are used in a single language version, their use is not always aligned with that of other language versions of those Treaties.

42 Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union and, where there is any divergence between those various versions, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part (see, to that effect, judgments of 26 January 2021, *Hessischer Rundfunk*, C-422/19 and C-423/19, EU:C:2021:63, paragraph 65 and the case-law cited, and of 14 July 2022, *Italy and Comune di Milano* v *Council (Seat of the European Medicines Agency)*, C-59/18 and C-182/18, EU:C:2022:567, paragraph 67 and the case-law cited).

43 In the present case, the General Court concluded, in paragraph 30 of the judgment under appeal, that the provisions of the FEU Treaty relating to 'third countries' pave the way for the conclusion of international agreements with entities 'other than States'. It is on that basis that the General Court held, in paragraph 35 of the judgment under appeal, that the concept of 'third country' used in EU primary law cannot be construed differently when the same concept appears in a provision of secondary legislation such as Article 35(2) of Regulation 2018/1971. It inferred from this, in paragraph 36 of the judgment under appeal, that the scope of the concept of 'third country', within the meaning of Article 35(2), goes beyond sovereign States alone.

44 The General Court established that premiss without taking into account the differences between the language versions of the EU and FEU Treaties, the wording of which does not support the conclusion that there is a difference in meaning between the words 'third country' and 'third State'.

45 Were such a difference in meaning to be established, it would, moreover, be at odds with the fact, noted in paragraph 39 of the present judgment, that in several language versions of those Treaties only the words 'third State' are used.

46 The same applies with regard to Regulation 2018/1971. As the Advocate General noted in point 63 of her Opinion, the words 'third country' do not appear in all the language versions of that regulation. In the Bulgarian, Estonian, Latvian, Lithuanian, Polish and Slovenian versions, only the equivalent of the term 'third State' is used.

47 It follows from the foregoing that the General Court's reasoning was thus vitiated by an error of law.

48 However, it must be borne in mind that if the grounds of a decision of the General Court reveal an infringement of EU law, but the operative part of that decision can be seen to be well founded on other legal grounds, that infringement is not capable of leading to the annulment of that decision and a substitution of grounds must be made (judgment of 6 October 2020, *Bank Refah Kargaran* v *Council*, C-134/19 P, EU:C:2020:793, paragraph 50 and the case-law cited).

49 In order to examine whether, in the present case, the operative part of the judgment under appeal is well founded on other legal grounds, it is necessary to examine whether the General Court was entitled to conclude, in paragraph 37 of the judgment under appeal, that the Commission did not infringe Article 35(2) of Regulation 2018/1971 by treating Kosovo in the same way as a 'third country' within the meaning of that provision.

50 In that regard, it should be noted that, for the purposes of ensuring the effectiveness of Article 35(2) of Regulation 2018/1971, a territorial entity situated outside the European Union which the European Union has not recognised as an independent State must be capable of being treated in the same way as a 'third country' within the meaning of that provision, while not infringing international law (see, to that effect, judgments of 24 November 1992, *Poulsen and Diva Navigation*, C-286/90, EU:C:1992:453, paragraph 9, and of 5 April 2022, *Commission* v *Council (International Maritime Organisation)*, C-161/20, EU:C:2022:260, paragraph 32).

51 As regards Kosovo, in its advisory opinion of 22 July 2010, Accordance with international law of the unilateral declaration of independence in respect of Kosovo (ICJ Reports 2010, p. 403), the International Court of Justice concluded that the adoption of the Kosovo declaration of independence of 17 February 2008 did not violate general international law, United Nations Security Council resolution 1244 (1999) or the applicable constitutional framework.

52 That treatment of Kosovo as a third country does not affect the individual positions of the Member States as to whether Kosovo has the status of an independent State that is claimed by its authorities, as the first footnote to the decision at issue indicates.

53 It follows from the foregoing that, contrary to what is claimed by the Kingdom of Spain, Kosovo may be treated in the same way as a 'third country', within the meaning of Article 35(2) of Regulation 2018/1971, without infringing international law.

54 Furthermore, as regards the integration of 'third countries' into the participation scheme provided for in Article 35(2) of Regulation 2018/1971, it must be recalled that, according to the first subparagraph of that provision, the participation of the NRAs of such countries is subject to two cumulative conditions. The first concerns the existence of an 'agreement' entered into with the European Union and, the second, the fact that that agreement was entered into 'to that effect'.

55 As the General Court noted in paragraph 32 of the judgment under appeal, the European Union has entered into several agreements with Kosovo, thus recognising its capacity to conclude such agreements. Those agreements include the Kosovo SAA, Article 111 of which, concerning electronic communications networks and services, provides that the cooperation established is primarily to focus on priority areas related to the EU *acquis* in that field, and that the parties are to strengthen that cooperation, with the ultimate objective of the adoption by Kosovo of that *acquis* five years after the entry into force of that agreement, paying particular attention to ensuring and strengthening the independence of the relevant regulatory authorities.

56 Furthermore, as is apparent from paragraph 49 of the judgment under appeal, Article 111 of the Kosovo SAA is similar, in its wording and context, to the provisions on strengthening cooperation in relation to electronic communications networks and services contained in other stabilisation and association agreements which the European Union has concluded with the countries of the Western Balkans that are candidates for accession, and on which the participation of the NRAs of those countries in the bodies of BEREC is based. While recital 34 of Regulation 2018/1971 refers in general terms to the agreements concluded with EEA/EFTA States and candidate countries, as the Advocate General observed in point 68 of her Opinion, the reference in that recital to candidate country status is made not in order to exclude from the scope of that cooperation countries which, like Kosovo, do not fall within those two categories, but only by way of illustration of agreements referred to in the first subparagraph of Article 35(2) of that regulation.

57 Consequently, the Kosovo SAA must also be regarded as having been concluded for the purposes of permitting such participation, within the meaning of that provision, in so far as Article 111 of that agreement expressly relates to the adoption of the EU *acquis* and to strengthening cooperation between the parties in the area of electronic communications networks and services.

58 That assessment cannot be called into question by the fact, emphasised by the Kingdom of Spain in the third ground of appeal, that Article 95 of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part (OJ 2004 L 84, p. 13), expressly provides for 'cooperation within European structures', which the General Court omitted to mention. The Kingdom of Spain submits, in that regard, that, unlike the aforementioned Article 95, Article 111 of the Kosovo SAA makes no reference to participation within an EU body such as BEREC.

59 However, such a difference is without prejudice to the fact, pointed out in paragraph 56 of the present judgment, that Article 111 of the Kosovo SAA is similar, in its wording and context, to the provisions on strengthening cooperation in relation to electronic communications networks and services contained in other stabilisation and association agreements which the European Union has concluded with the countries of the Western Balkans that are candidates for accession, on which the participation of the NRAs of those countries in the bodies of BEREC is based, agreements which, according to recital 34 of Regulation 2018/1971, were entered into 'to that effect', within the meaning of Article 35(2) of Regulation 2018/1971. Therefore, the fact that the terms of the Kosovo SAA are not identical to those of one of those agreements is irrelevant.

60 In addition, by referring, with regard to the participation of third-country authorities in BEREC, to the 'agreements [entered into] with the Union to that effect' and to the 'relevant provisions of those agreements', Article 35(2)

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

of Regulation 2018/1971 makes such participation subject to the existence of agreements establishing a framework for sectoral cooperation between the European Union and those countries in respect of electronic communications networks and services, without, however, requiring those agreements to make express provision for such participation.

61 As regards the purpose of Regulation 2018/1971, it should be noted that, in accordance with its objective of cooperation, Article 35(2) of that regulation opens up the Board of Regulators, the working groups and the Management Board of BEREC to the participation of NRAs of third countries with primary responsibility in the field of electronic communications.

62 Thus, it is apparent, first, from recital 20 of that regulation that BEREC should be entitled to establish working arrangements with competent authorities of third countries with the goal of developing cooperative relationships and exchanging views on regulatory issues. Second, recital 34 of that regulation states that the participation of competent regulatory authorities of third countries in BEREC bodies is intended further to extend the consistent implementation of the regulatory framework for electronic communications.

63 Article 111 of the Kosovo SAA is intended to strengthen cooperation in the field of electronic communications networks and services so that Kosovo can adopt the EU *acquis* in that field.

64 Consequently, in the light of all of the above, the General Court did not err in law when it concluded, in paragraph 37 of the judgment under appeal, that, by finding in essence in the decision at issue that Kosovo was to be treated as a 'third country' within the meaning of Article 35(2) of Regulation 2018/1971, the Commission did not infringe that provision.

65 The first ground of appeal must therefore be rejected as being unfounded.

THE SECOND GROUND OF APPEAL

Arguments of the parties

66 By its second ground of appeal, the Kingdom of Spain submits that, in paragraph 33 of the judgment under appeal, the General Court misinterpreted the consequences of the lack of an EU position on the status of Kosovo under international law, thereby infringing the combined provisions of Article 111 of the Kosovo SAA and Article 35 of Regulation 2018/1971.

67 The Kingdom of Spain maintains that, in the absence of recognition of Kosovo as a State by all the Member States, the Commission was not entitled, through the adoption of the decision at issue, to authorise the participation of the NRA of Kosovo in the network of independent authorities established between States. Such a decision entails the recognition by the European Union of an authority of a territory, Kosovo, in respect of which the European Union has no common position other than recognition that it is a *sui generis* case, allowing each Member State to determine the type of relationship it wishes to establish with that territory. The decision at issue thus involves, according to the Kingdom of Spain, a rapprochement which could result in practice in an implicit de facto recognition of Kosovo's statehood and, therefore, in the imposition of that recognition on the Member States of the European Union.

68 The Commission contends that the second ground of appeal is new and does not identify the rule of law that has allegedly been infringed by the General Court. It argues that that ground of appeal is therefore inadmissible and, in any event, lacking any foundation in law.

Findings of the Court

69 First, as has been noted in paragraph 52 of the present judgment, the decision at issue expressly indicates, in an initial footnote, that the designation of Kosovo in the title of that decision 'is without prejudice to positions on status, and is in line with [United Nations Security Council resolution 1244 (1999)] and the [International Court of Justice] Opinion on the Kosovo declaration of independence'. Similar statements were also included in the 17th recital and in Article 2 of the Kosovo SAA.

70 Second, it follows from the assessment in paragraphs 56 and 57 of the present judgment that, in the light of Article 111 of the Kosovo SAA, that agreement is intended, inter alia, to allow the participation of the NRA of

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

Kosovo in the bodies of BEREC, which is consistent with the objective of cooperation with third- country NRAs pursued by Article 35(2) of Regulation 2018/1971. In that regard, the Kingdom of Spain does not dispute either the lawfulness of that agreement and that regulation or the fact that there is an NRA, within the meaning of that regulation, in Kosovo.

71 It follows that the Kingdom of Spain cannot reasonably claim that merely because the decision at issue establishes cooperation with the NRA of Kosovo by implementing the Kosovo SAA and Regulation 2018/1971, that decision infringes those acts and entails recognition of Kosovo as a third State.

72 Therefore, the Commission's adoption of the decision at issue cannot be interpreted as entailing the implicit recognition by the European Union of Kosovo's status as an independent State.

73 It follows that the Kingdom of Spain's criticism concerning paragraph 33 of the judgment under appeal is based on a false premiss. Accordingly, the second ground of appeal must be rejected as being in any event unfounded, and there is no need to examine the plea of inadmissibility raised by the Commission.

THE THIRD GROUND OF APPEAL

Arguments of the parties

74 By its third ground of appeal, the Kingdom of Spain submits that the General Court erred in law in finding, in paragraphs 49 to 53 of the judgment under appeal, that the objective set out in Article 111 of the Kosovo SAA, namely the adoption of the EU *acquis* in the area of electronic communications, entails the participation of Kosovo in BEREC within the meaning of Article 35(2) of Regulation 2018/1971.

75 In the first place, the Kingdom of Spain maintains that Kosovo's participation in an EU body such as BEREC is precluded in the absence of any express reference to that effect in the Kosovo SAA. It relies, in support of that claim, on the arguments summarised in paragraph 58 of the present judgment.

76 In the second place, the Kingdom of Spain submits that the use of the term 'cooperation' in Article 111 of the Kosovo SAA does not necessarily require the participation of the NRA of Kosovo in BEREC under Article 35(2) of Regulation 2018/1971. That participation is, in principle, reserved to the Member States, the task of that body being to develop EU rules on electronic communications and to adopt positions which affect the decisions of national and EU bodies. To accept Kosovo's participation in that body would be to allow that country to participate in the development of the EU's sectoral rules, rather than adopt the EU *acquis*, which would not be consistent with the objective of Article 35(2) of Regulation 2018/1971.

77 The Kingdom of Spain disputes the General Court's finding, in paragraph 53 of the judgment under appeal, that the participation envisaged in Article 35(2) of Regulation 2018/1971 corresponds to the close cooperation envisaged in Article 111 of the Kosovo SAA, but is not to be equated with any kind of 'incorporation' of the NRA of Kosovo into the structure of BEREC. That finding, for which no reasons are given, misconstrues Article 111 of the Kosovo SAA, which does not provide for 'close' cooperation.

78 In the third place, the Kingdom of Spain argues that the General Court erred in law in its interpretation of Article 35 of Regulation 2018/1971 by finding that the participation of the NRA of Kosovo in BEREC was possible despite the absence of a common EU position on Kosovo's status.

79 The Commission challenges those arguments.

Findings of the Court

80 As regards, first, the claim that Kosovo's participation in an EU body such as BEREC is precluded in the absence of any express reference to that effect in the Kosovo SAA, this has been addressed in paragraphs 59 and 60 of the present judgment.

81 Second, the claim that the General Court erred, in paragraph 53 of the judgment under appeal, by finding that the participation envisaged in Article 35(2) of Regulation 2018/1971 corresponds to the close cooperation envisaged in Article 111 of the Kosovo SAA cannot succeed.

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

82 In that regard, it should be noted that Article 35 of Regulation 2018/1971 envisages various degrees and forms of cooperation. Paragraph 1 of that provision thus provides that BEREC and the BEREC Office may, subject to prior approval by the Commission, establish working arrangements, including with the competent authorities of third countries, and makes clear that those arrangements are not to create legal obligations. That form of cooperation is therefore less 'close' than the participation of the NRAs of third countries in BEREC, which is referred to in paragraph 2 of that provision and which contributes, as is apparent from paragraph 63 of the present judgment, to the cooperation referred to in Article 111 of the Kosovo SAA, which seeks, in particular, to guarantee and strengthen the independence of the participating regulatory authorities.

83 However, contrary to what is claimed by the Kingdom of Spain, that form of cooperation between the European Union and Kosovo is not such that the participation of the NRA of that third country in BEREC bodies can be equated with that NRA's incorporation into that EU body.

84 As the Advocate General observed in points 97 and 98 of her Opinion, when the representatives of the NRA of Kosovo participate in the work of the Board of Regulators, working groups and the Management Board of BEREC, they express their opinions independently and transparently, in accordance with recitals 5 and 13, Article 3(3), Article 8(2) and Article 15(3) of Regulation 2018/1971. Furthermore, the influence of the representatives of NRAs of third countries within BEREC is limited by the second subparagraph of Article 35(2) of Regulation 2018/1971, since the possibility of granting them a right to vote is expressly excluded by that provision.

85 Moreover, contrary to the Kingdom of Spain's contention, the participation of the NRA of Kosovo in BEREC does not allow Kosovo to participate in the development of EU sectoral legislation on electronic communications. Although, under Article 4(4) of Regulation 2018/1971, the NRAs and the Commission are to 'take the utmost account of any guideline, opinion, recommendation, common position and best practices adopted by BEREC', those acts are not legally binding and do not form part of a process of developing EU legislation on electronic communications. BEREC's sole function is to act as a forum for cooperation among NRAs and between NRAs and the Commission with a view to ensuring the consistent implementation of the regulatory framework for that area, as is apparent from Article 3(2) of Regulation 2018/1971, read in the light of recital 5 of that regulation.

86 Lastly, as regards, third, the claim of infringement of Article 35(2) of Regulation 2018/1971 on account of the lack of a common EU position on Kosovo's status as a State, that claim must, for the same reasons as those set out in paragraphs 69 to 73 of the present judgment, be rejected.

87 It follows that, in ruling, in paragraphs 53 and 54 of the judgment under appeal, that the cooperation resulting from Article 111 of the Kosovo SAA corresponds to the arrangements for the cooperation envisaged in Article 35(2) of Regulation 2018/1971 and that, therefore, Article 111 of the Kosovo SAA constitutes an agreement 'to that effect' within the meaning of Article 35(2) of that regulation, the General Court did not err in law.

88 The third ground of appeal must therefore be rejected in its entirety as being unfounded.

THE FIRST PART OF THE FOURTH GROUND OF APPEAL

Arguments of the parties

89 The fourth ground of appeal consists, in essence, of two parts. By the second part, the Kingdom of Spain disputes the Commission's power to adopt the decision at issue. That second part will be examined together with the fifth ground of appeal, with which it overlaps.

90 By the first part, the Kingdom of Spain submits that Article 111 of the Kosovo SAA does not constitute a sufficient legal basis for the adoption of the decision at issue. It disputes the General Court's finding, in paragraph 72 of the judgment under appeal, that the participation of a third country's NRA in BEREC does not require specific authorisation to have been established in an international agreement.

91 The Kingdom of Spain submits in that regard that the Kosovo SAA is a very general agreement which does not provide for the incorporation or participation of Kosovo in the structures of the European Union in any field,

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

including the field of telecommunications. It recalls that Article 111 of the Kosovo SAA refers not to the participation of that country in an EU body, but to cooperation between the parties to that agreement.

92 The Commission contends that that line of argument is unfounded.

Findings of the Court

93 It is apparent from the grounds set out in paragraphs 56 to 64 and in paragraphs 80 to 87 of the present judgment that Article 111 of the Kosovo SAA constitutes an agreement 'to that effect' within the meaning of Article 35(2) of Regulation 2018/1971, and that Article 111 of the Kosovo SAA thus constitutes a sufficient legal basis for the participation of the NRA of Kosovo in the work of BEREC and the BEREC Office.

94 In particular, such an agreement does not necessarily have to contain detailed provisions relating to participation in BEREC within the meaning of Article 35(2) of that regulation in order for it to constitute a sufficient legal basis. The fact that certain association agreements with countries that are candidates for accession or certain decisions on the participation of NRAs of EFTA Member States contain more detailed provisions than those of Article 111 of the Kosovo SAA is irrelevant in that regard.

95 Accordingly, the first part of the fourth ground of appeal must be rejected as unfounded.

The second part of the fourth ground of appeal, and the fifth ground of appeal

Arguments of the parties

96 By the second part of the fourth ground of appeal, the Kingdom of Spain disputes the Commission's power to adopt the decision at issue. It contends that Kosovo's participation in BEREC cannot be established by a decision based on Article 17 TEU alone, since, first, the Kosovo SAA does not provide for that possibility and, second, the European Union does not have a common position on the status of Kosovo. The Kingdom of Spain disputes the General Court's finding, in paragraph 77 of the judgment under appeal, that since Regulation 2018/1971 did not expressly confer on BEREC the power to draw up working arrangements applying to the participation of NRAs of third countries, including the NRA of Kosovo, that power lies with the Commission, in accordance with Article 17 TEU.

97 Furthermore, the Kingdom of Spain maintains that Kosovo's participation in BEREC does not respect the powers of the Council of the European Union and Article 16 TEU, read in conjunction with Article 21(3) TEU. It argues that it is for the Council to assess whether the participation of the NRA of Kosovo in BEREC is in the interests of the European Union and to reconcile the interests involved.

98 In that regard, the Kingdom of Spain recalls that the choice of legal basis is of particular significance in so far as it enables the powers of each institution to be preserved (judgment of 25 October 2017, *Commission* v *Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraphs 49 and 50) and that the conclusion of an international agreement requires an assessment to be made of the European Union's interests in the context of its relations with the third country, and the divergent interests arising in those relations to be reconciled (judgment of 28 July 2016, *Council* v *Commission*, C-660/13, EU:C:2016:616, paragraph 39).

99 By its fifth ground of appeal, the Kingdom of Spain claims that, in paragraphs 76 and 77 of the judgment under appeal, the General Court misinterpreted Article 35(2) of Regulation 2018/1971 when it held that the BEREC Office is a decentralised agency of the European Union and that the Commission must, by virtue of its executive functions and powers of external representation, assume all the powers which have not been expressly delegated to that agency, including the adoption of the working arrangements envisaged in that provision.

100 The Kingdom of Spain submits that the General Court was mistaken as to the nature and functions of BEREC, as is shown by the fact that paragraphs 76 and 77 of the judgment under appeal refer not to BEREC, the supreme decision-making body of which is the Board of Regulators, which does not have legal personality and is not a decentralised agency, but to the BEREC Office, a body whose role is to provide BEREC with administrative support.

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

101 The Kingdom of Spain states that the special status of BEREC derives from the obligation of independence of the regulators of which BEREC is composed. That obligation, combined with the fact that BEREC is not a decentralised agency, means that BEREC has powers that are broader than those of EU agencies.

102 Consequently, the Commission should confine itself to intervening in the cases expressly provided for by Regulation 2018/1971, as a literal, contextual and teleological interpretation of Article 35(2) of Regulation 2018/1971 shows. It therefore falls within the competence of BEREC and not of the Commission to adopt working arrangements.

103 The Commission contests those arguments. It contends that the second part of the fourth ground of appeal is, in part, manifestly inadmissible, since the argument relating to the Council's power to adopt the decision at issue, based on Article 16 TEU, was not raised at first instance. It further submits that the second part of the fourth ground of appeal is unfounded.

104 As regards the fifth ground of appeal, the Commission maintains that it follows from the wording of Article 35(2) of Regulation 2018/1971 that that provision does not determine which authority is competent to adopt working arrangements.

105 However, according to the Commission, powers which have not been expressly delegated to an agency of the European Union under a legislative act fall within the competence of the Commission. That interpretation is supported by the fact that Article 35(1) of Regulation 2018/1971 expressly delegates to BEREC and the BEREC Office the power to establish 'working arrangements', albeit subject to 'prior approval by the Commission'. In addition, it follows from a systematic analysis of that regulation that prior approval by the Commission is necessary for cooperation under Article 35(1) of that regulation but is not mentioned in Article 35(2) thereof because the detailed rules for cooperation under the latter provision are defined by the Commission.

106 Moreover, BEREC's independence in the context of its functions does not preclude specific powers being conferred on the Commission with regard to relations with third countries.

Findings of the Court

107 As a preliminary point, it should be noted that the Kingdom of Spain's claims in relation to the second part of the fourth ground of appeal concern, in essence, the error of law allegedly made by the General Court in finding that Article 17 TEU constitutes a valid legal basis for adopting the decision at issue. Consequently, while it is true that the Kingdom of Spain did not invoke the competence of the Council at first instance, the fact remains that the line of argument developed in the second part of the fourth ground of appeal in relation to Article 16 TEU seeks to criticise the grounds set out in paragraphs 74 to 82 of the judgment under appeal concerning the Commission's competence under Article 17 TEU. That line of argument is thus linked to the argument put forward by the Kingdom of Spain on the basis of the latter provision in its action at first instance and is therefore admissible since it does not alter the subject matter of the proceedings before the General Court.

108 Regarding the substance, it should be recalled that the second subparagraph of Article 35(2) of Regulation 2018/1971 states that, 'under the relevant provisions of [the agreements between the European Union and third countries which are referred to in the first subparagraph], working arrangements shall be developed specifying, in particular, the nature, extent and manner [of that participation] . . ., including provisions relating to participation in the initiatives carried out by BEREC, financial contributions and staff to the BEREC Office'.

109 In that regard, first, the General Court did not err in rejecting, in paragraph 70 of the judgment under appeal, the Kingdom of Spain's argument that it follows from the wording of the second subparagraph of Article 35(2) of Regulation 2018/1971 that only agreements providing for participation in BEREC should determine the detailed rules for establishing those 'working arrangements'. Such an interpretation would be difficult to reconcile with the effectiveness of that provision, the very purpose of which is to provide for the adoption of those working arrangements. Moreover, as is apparent from paragraph 60 of the present judgment, the words 'relevant provisions of [the] agreements', preceded by the word 'under', mean that the adoption of the 'working arrangements' must be consistent with the provisions of the agreements establishing a framework for sectoral cooperation between the European

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

Union and a third country and, in particular, with their ultimate objective which, in the case of Article 111 of the Kosovo SAA, is Kosovo's adoption of the EU *acquis* in the electronic communications sector.

110 That being so, the fact that the Kosovo SAA does not contain provisions for the conclusion of working arrangements under the second subparagraph of Article 35(2) of Regulation 2018/1971 cannot call into question, as the Kingdom of Spain claims, the finding that Article 111 of the Kosovo SAA constitutes a sufficient legal basis for allowing the NRA of Kosovo to participate in the work of BEREC and the BEREC Office, as is apparent from paragraphs 56 to 64 and 80 to 87 of the present judgment.

111 Second, it should be noted that although the second subparagraph of Article 35(2) of Regulation 2018/1971 provides for the establishment of 'working arrangements' to implement the participation of NRAs of third countries in the work of BEREC and the BEREC Office, it does not specify the procedure for adopting such arrangements.

112 In that regard, as the Advocate General observed in point 122 of her Opinion, the decision at issue could not be taken on the basis of Article 17 TEU by virtue of the Commission's executive or external representation functions. As regards, first, the executive functions, Article 290(1) and Article 291(2) TFEU require an express delegation of power to the Commission, which is lacking in the present case. As regards, second, functions relating to the European Union's external representation, it is sufficient to note that the establishment of 'working arrangements' to implement the participation of NRAs of third countries in the work of BEREC and the BEREC Office, within the meaning of the second subparagraph of Article 35(2) of Regulation 2018/1971, cannot be regarded as an act of external representation of the European Union. It is apparent from that provision that the purpose of such working arrangements is not that external representation as such, but specifying, in particular, the nature, extent and manner in which the regulatory authorities of third countries which have entered into agreements with the European Union to that effect will participate in the work of those EU bodies.

113 Furthermore, it is apparent from Article 9(i) and Article 20(6)(m) of Regulation 2018/1971, read in the light of recital 20 thereof, that that regulation determines which bodies may establish the working arrangements referred to in Article 35(2). First, recital 20 of that regulation states that BEREC should be entitled to establish working arrangements, in particular with the competent authorities of third countries. Second, Article 9(i) and Article 20(6)(m) of Regulation 2018/1971 specify that the Board of Regulators and the Director of the BEREC Office are together to authorise the conclusion of working arrangements with, inter alia, those authorities in accordance with Article 35 of that regulation.

114 It is, moreover, apparent from those provisions that the Commission is intended to exercise only a supervisory function in the context of the adoption of working arrangements. In that regard, recital 20 of that regulation states that the Commission 'should ensure that the necessary working arrangements are consistent with Union policy and priorities, and that BEREC operates within its mandate and the existing institutional framework'.

115 In addition, with regard specifically to cooperation with third countries, Article 35(1) of Regulation 2018/1971 provides that BEREC and the BEREC Office may, subject to prior approval by the Commission, establish working arrangements.

116 Contrary to what the General Court held in paragraphs 77 and 78 of the judgment under appeal, the fact that Article 35(2) of that regulation does not include such details does not mean, in the light of the provisions of that regulation, that the power to establish the working arrangements applicable to the participation of NRAs of third countries, including the NRA of Kosovo, lies with the Commission.

117 As the Advocate General observed in points 130 to 132 of her Opinion, the fact that only Article 35(1) of Regulation 2018/1971 expressly confers on BEREC and the BEREC Office the power to establish working arrangements, subject to prior approval by the Commission, does not mean that that power is to be distributed differently under Article 35(2) of that regulation, referring to the special case of cooperation with third countries in the form of participation by the NRAs of the countries concerned in the Board of Regulators and working groups of BEREC and in the Management Board of the BEREC Office. On the contrary, the rule laid down in Article 35(1) of that regulation, according to which BEREC and the BEREC Office may conclude working arrangements, subject to prior approval by the Commission, must be interpreted as a general rule which also applies in the specific context of

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

Article 35(2) of that regulation, in so far as the latter does not provide for any derogation from the principle laid down in Article 35(1) of Regulation 2018/1971.

118 As the Advocate General noted in point 133 of her Opinion, the fact that the participation in the work of BEREC and the BEREC Office provided for in Article 35(2) of Regulation 2018/1971 is a closer form of cooperation with the NRAs of third countries than that established under Article 35(1) of that regulation is not such as to call those findings into question. The participation of NRAs of third countries in BEREC was already confirmed by the agreement entered into to that effect as referred to in Article 35(2) of that regulation, namely, in this instance, Article 111 of the Kosovo SAA.

119 That interpretation is consistent with the system laid down by Regulation 2018/1971. In accordance with Article 3(3) and Article 8(1) of that regulation, read in the light of recitals 5 and 13 thereof, BEREC is to provide expertise and to act independently. According to recital 22 of that regulation, BEREC should be able to act in the interests of the European Union, independently from any external intervention, including political pressure or commercial interference. Likewise, as is apparent from recital 32 of that regulation, the BEREC Office has its own budget in order to guarantee its autonomy and independence. In that context, independence is also required of persons serving in BEREC, in particular the members of the Board of Regulators, as well as members of the Management Board and the Director of the BEREC Office, in accordance with Article 8(2), Article 16(1)(m), Article 20(3) and Article 42 of Regulation 2018/1971, read in the light of recitals 22, 25 and 29 thereof.

120 The fact that the Commission may unilaterally decide on certain working arrangements for participation in the work of BEREC and the BEREC Office, without their agreement, would not be compatible with BEREC's independence and would go beyond the supervisory function assigned to the Commission, in that context, by Regulation 2018/1971.

121 Consequently, by holding, in paragraph 77 of the judgment under appeal, that, since Regulation 2018/1971 did not expressly confer on the BEREC Office or any other body the power to draw up working arrangements applying to the participation of NRAs of third countries, including the NRA of Kosovo, that power lies with the Commission, the General Court failed to have regard both to the division of powers between, on the one hand, the Commission and, on the other hand, BEREC and the BEREC Office, and to the rules guaranteeing the independence of BEREC laid down by Regulation 2018/1971.

122 Finally, the objective of strengthening cooperation with the NRAs of third countries in the field of electronic communications networks and services pursued in particular by Article 35 of Regulation 2018/1971, requiring consultation with those third countries, supports the conclusion that the Commission cannot unilaterally adopt a decision establishing the working arrangements applying to the participation of those NRAs of third countries, contrary to what was held by the General Court in paragraph 82 of the judgment under appeal.

123 Subject to the Commission's prior approval, such arrangements should be agreed between BEREC and the BEREC Office, on the one hand, and the competent authorities of those third countries, on the other, and authorised jointly, as is apparent from Article 9(i) and Article 20(6)(m) of Regulation 2018/1971, by the Board of Regulators and the Director of the BEREC Office. The Commission cannot, therefore, have the power unilaterally to establish arrangements of that kind.

124 It follows that the General Court erred in law in finding, in paragraphs 77 and 82 of the judgment under appeal, that the power to draw up working arrangements applying to the participation of NRAs of third countries in BEREC, within the meaning of the second subparagraph of Article 35(2) of Regulation 2018/1971, lies unilaterally with the Commission under Article 17 TEU.

125 Nevertheless, in view of the considerations set out in paragraph 123 of the present judgment, the Kingdom of Spain's argument that the power to decide on the participation of the NRA of Kosovo in BEREC lies with the Council, subject to the Commission's approval, must be rejected.

126 In the light of the foregoing considerations, the second part of the fourth ground of appeal must be rejected as being unfounded. However, the fifth ground of appeal must be upheld and, consequently, the judgment under appeal must be set aside.

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

The action before the General Court

127 In accordance with the second sentence in the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

128 That is the position here.

129 As stated in paragraph 22 of the present judgment, the Kingdom of Spain raised three pleas in law in support of its action at first instance.

130 In the context of its third plea in law at first instance, the Kingdom of Spain claims that the decision at issue infringes Article 35 of Regulation 2018/1971 in.so far as the Commission departed from the procedure established by that provision for the participation of NRAs of third countries in BEREC.

131 For the reasons stated in paragraphs 112 to 124 of the present judgment, the Commission did not have the power to adopt the decision at issue. Accordingly, that third plea must be upheld, without there being any need for the other pleas in law of the action at first instance to be examined.

132 In view of the above, the form of order sought by the Kingdom of Spain must be granted, and the decision at issue, annulled.

Maintaining the effects of the decision at issue

133 It should be recalled that, as provided in the second paragraph of Article 264 TFEU, the Court of Justice may, if it considers this necessary, state which of the effects of an act which it has declared void are to be considered as definitive.

134 The Court has held that, on grounds of legal certainty, the effects of such an act may be maintained, in particular where the immediate effects of its annulment would give rise to serious negative consequences for the persons concerned and where the lawfulness of the act in question is contested, not because of its aim or content, but on grounds of lack of competence or infringement of an essential procedural requirement (judgment of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraph 175 and the case-law cited).

135 In the present case, the decision at issue has been annulled on grounds of lack of competence of the Commission.

136 Owing to the need for arrangements relating, in particular, to the financial contributions and staff to the BEREC Office of NRAs of third countries as referred to in the second subparagraph of Article 35(2) of Regulation 2018/1971, annulment of the decision at issue would be liable to jeopardise the participation of the NRA of Kosovo in BEREC if the effects of that decision were not maintained until its replacement by a new act.

137 In those circumstances, the effects of the decision at issue must be maintained until the entry into force, within a reasonable period, which may not exceed six months from the date of delivery of the present judgment, of any new working arrangements concluded pursuant to Article 35(2) of Regulation 2018/1971 between BEREC, the BEREC Office and the NRA of Kosovo.

Costs

138 Under Article 184(2) of its Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court is to make a decision as to the costs.

139 According to Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

140 In the present case, since the Kingdom of Spain has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs both of the present appeal and of the proceedings at first instance.

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press

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

1. **Sets aside the judgment of the General Court of 23 September 2020, *Spain* v *Commission* (T-370/19, EU:T:2020:440);**

2. **Annuls the Commission Decision of 18 March 2019 on the participation of the National Regulatory Authority of Kosovo in the Body of European Regulators for Electronic Communications;**

3. **Orders that the effects of the Commission Decision of 18 March 2019 on the participation of the National Regulatory Authority of Kosovo in the Body of European Regulators for Electronic Communications be maintained until the entry into force, within a reasonable period, which may not exceed six months from the date of delivery of the present judgment, of any new working arrangements concluded pursuant to Article 35(2) of Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, between the Body of European Regulators for Electronic Communications (BEREC), the Agency for Support for BEREC (BEREC Office) and the national regulatory authority of Kosovo;**

4. **Orders the European Commission to bear its own costs and to pay those incurred by the Kingdom of Spain in the present appeal and in the proceedings before the General Court of the European Union.**

[Signatures]

https://doi.org/10.1017/ilm.2023.59 Published online by Cambridge University Press